Games, Dystopia, and ADR

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ABSTRACT

What's the difference between litigation and alternative dispute resolution (ADR)? Litigation is war. ADR is kumbaya by the campfire. Litigation favors the strong over the weak. ADR gives everyone a voice. Litigation is about competition and gameplay. ADR is about cooperation and problem-solving. Litigation is coercive. ADR is consensual. Litigation brings out the worst in people. ADR brings out the best. In short, litigation is dystopian, and ADR is utopian. This sanguine conception of ADR has been popular for decades but is hopelessly inadequate. Although a utopian-dystopian dynamic does indeed fuel much ADR scholarship, this dichotomy is not as simple as ADR-good, law-bad. Not only are there multiple utopian visions in ADR that are sometimes contradictory, the utopianism of ADR may actually make alternative processes more vulnerable to dystopian propensities than traditional legal processes. This article explores these paradoxes by examining the ways in which alternative processes respond to legal deficiencies, imagine different approaches to dispute resolution, and manage the ideological and practical challenges of effectuating positive social change. Understanding more about how ADR navigates between utopian and dystopian visions of sociopolitical life illuminates certain cultural assumptions around the possibilities and limits of dispute resolution while suggesting new directions for ADR theory.

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I. INTRODUCTION

Imagine the following: North America has been ravaged by wars and natural disasters, and the emergent social order consists of a Capitol (located on or around present-day Denver) and twelve Districts. The Capitol wrings every last resource out of the impoverished Districts, so much so that the Districts have unsuccessfully tried to revolt in the past. After crushing this rebellion and imposing martial law, the Capitol institutes the Hunger Games, a televised fight to the death between District children. Each year, the Capitol requires each District to send two children to participate in the Games; each year, only one child of the original twenty-four returns to the District. This gruesome exercise of state power demoralizes the Districts and provides an annual reminder of the Capitol's dominance.

This bleak scenario is the premise of *The Hunger Games* novels, a popular recent example of modern dystopian fiction.[1] Broadly put, dystopian works play out the terrible possible future consequences of present-day realities and provide an imaginative, if somewhat urgent and distorted, normative space for reexamining current assumptions and priorities.[2] Lawyers reading *The Hunger Games* might see a dystopian vision of modern litigation taken to its nightmarish extreme: a state-sponsored adversarial contest that prevents parties from taking matters into their own hands, protects existing power structures, and devastates participants, financially and personally, even if they prevail. Robert Cover's famous pronouncement that "[l]egal interpretation takes place on a field of pain and death" likewise connects law and violence, pointing out that the judicial opinion is more than just a textual construct because it has unavoidably real-life consequences for defendants, sometimes brutally depriving them of liberty, property, children, or even life itself.[3]

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[1] Suzanne Collins, a writer of television programs and novels directed at children and young adults, originally published *The Hunger Games* in 2008, followed by *Catching Fire* in 2009 and *Mockingjay* in 2010. The trilogy has been enormously popular with young adult (YA) and adult audiences alike. *See* Susan Dominus, *The Strange Fictions of Suzanne Collins*, N.Y. TIMES, Apr. 10, 2011, at MM30; Laura Miller, *Fresh Hell: What's Behind the Boom in Dystopian Fiction for Young Readers?*, NEW YORKER, June 14, 2010, at 132.

[2] In 1946, Huxley used the word "utopia" to describe the "bad place" in *Brave New World*; in 1952, J. Max Patrick coined the term "dystopia" to clarify "the distinction between the good place ... and its opposite." ERIKA GOTTLIEB, DYSTOPIAN FICTION EAST AND WEST: UNIVERSE OF TERROR AND TRIAL 4 (2001).

[3] Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

That the law might be just a game—if, at times, a deadly one—is a common articulation of the tension between legal institutions and social values. The same rules that protect us from arbitrary treatment in law courts, for example, can be "gamed" by practitioners and officials, subverting the idea that legal process delivers truth and justice.[4] On this view, the current popularity of dystopian works like the *Hunger Games* actually may reflect pervasive anxieties about modern legal and political institutions: the inhumanity of judicial-coercive machinery, the apparent unaccountability of state and corporate actors, the failure of political imagination despite the desperate need for political reform, and the threat (or promise) of social order imposed through state-sponsored, legally sanctioned violence.

How does alternative dispute resolution (ADR) fit into this picture? One might argue that ADR counteracts the dystopian tendencies of the law by providing malleable, party-driven approaches that transcend law-as-game dynamics.[5] Part of our fascination with ADR, after all, comes from what might be thought of as a dystopian critique of the law, a critique that imagines law's future as bad deals and unsatisfactory resolutions between parties who have little or no agency in the process and who are, in the final

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[4] Although Cover did not compare the law to a game, such a comparison may resonate with his recognition of the fundamental disconnect between legal institutions and social values. "The gulf between thought and action widens wherever serious violence is at issue, because for most of us, evolutionary, psychological, cultural and moral considerations inhibit the infliction of pain on other people." *Id.* at 1613. Complaints that lawyers treat the legal system like a game without regard for the values underpinning the system are commonplace. *See, e.g.*, Jeffrey Rosen, *Originalism, Precedent, and Judicial Restraint*, 34 HARV. J.L. & PUB. POL'Y 129, 135 (2011) ("[T]he public still needs to believe that judges are not on an ideological crusade, using clever chess moves to get their preferred results by any means necessary"); Susan Hayes Stephan, *Blowing the Whistle on Justice as Sport: 100 Years of Playing a Non-Zero Sum Game*, 30 HAMLINE L. REV. 588 (2007) (asserting that despite the inefficiency of "playing" litigation as a zero-sum game, the legal community continues to do so). Part of the issue, of course, is that there will always be a gap between the goals and capabilities of any complex system, legal or otherwise. *See, e.g.*, Jack M. Balkin, *Deconstruction's Legal Career*, 27 CARDOZO L. REV. 719, 739 (2005) ("A fundamental inadequacy always exists between the demands of justice and the products of culture, but we can only express this inadequacy through the cultural means at our disposal.").

[5] *See, e.g.*, Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. 63 (2002) (asserting the importance of problem-solving and related skills in ethical legal practice); Daniel J. Guttman, *For Better or Worse, Till ADR Do Us Part: Using Antenuptial Agreements to Compel Alternatives to Traditional Adversarial Litigation*, 12 OHIO ST. J. ON DISP. RESOL. 175 (1996) (promoting ADR as an alternative to litigation gamesmanship).

analysis, emotionally and financially bankrupted by lawyers and litigation. In response to this legal dystopia, ADR offers "alternatives" or process innovations that attempt to mitigate the dystopian effects of traditional law while moving participants toward more utopian visions of dispute resolution.[6]

The utopian promise of ADR has captured the imagination of the public and policymakers alike. Indeed, the past thirty years have seen tremendous growth and proliferation of alternative processes, inside and outside legal culture. Arbitration, court-annexed mediation, and early case management programs are moving traditional legal disputes, particularly between consumers and corporations, outside of the courthouse into more private, "informal" spaces that promise greater efficiency and accuracy in dispute resolution.[7] Developments in mediation, such as narrative mediation and transformative practice, have brought more focus to the subjectivity of the participants and the experiential value of the process itself. And the emergence of innovative processes—med-arb, hybrid consensus building, dispute systems design, ombuds offices, mass disaster mediation, class-wide settlements—have differentiated and expanded the dispute resolution landscape even further.[8]

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[6] There is, however, more than one ADR utopia. *See* discussion *infra* Part IV.A.

[7] *See, e.g.*, Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 NEV. L.J. 427 (2007) (discussing the evolving arbitration laws and how they apply to broader ADR processes); Carrie Menkel-Meadow, *Is the Adversary System Really Dead? Dilemmas of Legal Ethics as Legal Institutions and Roles Evolve*, 57 CURRENT LEGAL PROBS. 85, 87 (2005) ("We are now in a time of transition away from trial by the 'ordeal' of court, though it may not be quite clear that we are moving uniformly...toward 'private' trials or other legal events for the resolution of our disputes with each other"); *see also* Eric D. Green, *Corporate Alternative Dispute Resolution*, 1 OHIO ST. J. ON DISP. RESOL. 203 (1986) (discussing and analyzing the various dispute prevention, management, and resolution methods in use with corporations, including "private justice procedures.").

[8] *See, e.g.*, Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123 (2009) (listing various forms of alternative dispute resolution); Thomas J. Stipanowich, *ADR and the "Vanishing Trial:" The Growth and Impact of "Alternative Dispute Resolution,"* 1 J. EMPIRICAL LEGAL STUD. 843, 845 (2004) ("The first obstacle to an understanding of the role of ADR is the sheer breadth and diversity of activities to be taken into account, a breathtaking range of approaches and strategies that we lump under the heading of 'ADR' (an outmoded acronym that survives as a matter of convenience)"); Lela P. Love & Kimberlee K. Kovach, *ADR: An Eclectic Array of Processes, Rather than One Eclectic Process*, 2000 J. DISP. RESOL. 295, 306 (2000) ("Let one hundred flowers bloom!"), cited in Shana H. Khader, *Mediating Mediations: Protecting the Homeowner's Right to Self-Determination*

At first blush, these developments in ADR may seem like progress: more individualized processes, more party autonomy, quicker resolutions, more harmonious outcomes. The dystopian theorist, however, might see things differently. What tradeoffs take place when public adjudicatory functions go private? What sacrifices does a truly efficient dispute resolution system demand? "World peace" is the paradigmatic uncontroversial good, at least until one begins to imagine the various kinds of political apparatus that might bring about such peace. Ultimately, the utopianism of ADR—developed in response to dystopian law—has its own unavoidably dystopian implications. On this view, it is not at all clear whether alternative processes actually ameliorate the tensions inherent in legal institutions or simply replicate them in some other form. Could ADR be just another reflection of the Hunger Games?

This article argues that modern alternative processes are just as susceptible to the dystopian inclinations that afflict the legal system, if not more so. The notion that mediation, arbitration, and other ADR processes articulate (coherent, unitary) alternatives to (chaotic, conflicted) law may perpetuate the fallacy that ADR transcends the dystopian tendencies of the law, which may in turn make it difficult to see how alternative processes may actually undermine their own utopian aspirations. For both law and ADR, these dystopian tendencies often manifest as games—established procedures, rules, and roles that impose structure, reduce complexity, privilege particular norms and values, and provide for outcomes—that may be capable of becoming hideous caricatures of themselves.[9]

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in Foreclosure Mediation Programs, 44 COLUM. J.L. & SOC. PROBS. 109 (2010) (looking critically at new and hybrid developments in foreclosure mediation practice); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood*, 11 OHIO ST. J. ON DISP. RESOL. 297, 325–26 (1996) (examining the hybrid forms and new versions of dispute processing developed since Frank Sander's initial list of appropriate dispute resolution methods).

[9] There are limits to the "Hunger Games" metaphor. Collins's Hunger Games are not well-intentioned institutions gone awry, like law or ADR arguably might be; they were always intended as an oppressive tool. The reason why the Games work so well as oppressive tools, however, is that they take the form of a regular game (rules, competitors, arena, prizes, etc.) with the public in the passive role of spectator, relegated to watching and maybe even rooting for favorites but unable to interfere with the gameplay. Choosing a game format is key: the Capitol does not oppress the populace through ritual sacrifice or random execution of children or some other grisly show of force, but instead imposes a norm of passivity and helplessness onto the masses by harnessing their collective, internalized understanding around games and fairness. In this way, the Capitol warps and distorts a regular game into an oppressive/dystopian game—

Unpacking the utopian mythology of ADR provides a useful critical lens on alternative practices and their proliferation. As scholars have argued forcefully for decades, ADR practices can work serious (even if unintended) harm on participants and society. Informal or extralegal processes can divest disputants of procedural safeguards, replicate power imbalances, retard legal and social progress, and overextend state control.[10] Reconceptualizing ADR within a utopian/dystopian framework suggests that such harmful developments may be the byproducts of two powerful impulses in ADR scholarship and practice: one, a reaction against dystopian visions of conventional law; and two, a sometimes dogmatic utopianism reflecting an established set of ideological and process commitments. The combination of these two impulses—what might be called the "utopian/dystopian dynamic" of ADR—animates the creativity, the experimentalism, and the recklessness that often characterize modern alternative practice.

The article consists of three intersecting parts: games, dystopia, and ADR. Part One explores game metaphors in the law, with special emphasis on the work of Arthur Allen Leff. Professor Leff, who is perhaps best known for a series of articles about moral indeterminacy in legal thought, developed the "ludic metaphor" to explain why people gravitate toward games in law and legal scholarship. His work on game and game metaphors in law, within the larger context of his scholarship, provides the first theoretical beam for an inquiry into ADR processes and procedures.

Part Two introduces dystopian literature as a potentially useful instrument for evaluating the ludic tendencies of both law and ADR.[11]

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this distortion/warping is the sense in which I'm using the term "Hunger Game" in this article.

[10] *See* text accompanying notes *infra* at 150; *see also, e.g.*, Stephan Landsman, *ADR and the Cost of Compulsion*, 57 STAN. L. REV. 1593 (2005) (arguing that compulsory ADR may further disenfranchise structurally weak parties); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985) (setting out "the left critique of ADR.").

[11] As many scholars have argued, reading fiction and legal texts together can open an imaginative space for thinking through present political and legal choices. "'Law and literature' is more a group of heterogeneous movements than one all-encompassing, monolithic movement. People who do work in law and literature may focus on analyzing law as literature, law in literature, legal storytelling, or a variety of other areas. Roughly speaking, however, a common thread woven throughout law and literature studies is an interest in the interpretation and/or creation of narrative, or, in other words, an interest in story." Lenora Ledwon, *The Poetics of Evidence: Some Applications from Law & Literature*, 21 QUINNIPIAC L. REV. 1145, 1146 n.3 (2003). Early pathbreaking scholarship in the area includes RICHARD H. WEISBERG, POETHICS AND OTHER STRATEGIES OF LAW

Connecting games and "hunger games" is not just wordplay, but instead expresses the sociopolitical inversions at the center of so many dystopian works: supposedly benevolent institutions yield to oppressive interests, community norms are turned against individuals, and "doublethink"[12]—Orwell's term for selective remembering and forgetting—replaces critical thought. Dystopian literature often expresses these reversals (game to Hunger Game) through, appropriately enough, games and game metaphors within the narratives themselves. Studying these literary game structures has two analytical benefits: one, illuminating our love/hate response to games in the law; and two, providing additional interpretive tools for evaluating games in legal and alternative contexts.

Part Three explores implications of the foregoing analysis for alternative processes and appropriate dispute resolution. The market economy of alternative processes has produced a dizzying array of dispute resolution offerings. Whether these offerings represent actual progress or just additional "gaming of the system" is an important inquiry for ADR scholars to undertake.[13] Moreover, situating ADR studies and practice with respect to legal studies and practice requires deeper thinking about how utopian impulses and dystopian responses shape the development of the field. Such analysis provides more insight into some of the central puzzles of ADR and suggests additional avenues for research.

AND LITERATURE (1992); Robin L. West, *The Literary Lawyer*, 27 PAC. L.J. 1187 (1996); Ronald Dworkin, *Law as Interpretation*, 9 CRITICAL INQUIRY 179 (1982); James Boyd White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415 (1982). Dystopian literature is a common subject for literary-minded legal analyses. *See infra* note 74. Although the law and literature movement is expansive, and although ADR scholarship and pedagogy often use popular culture references as illustrations, there is no "ADR and Literature" movement, even as a submovement of Law and Literature. This may be, in part, because there are not many overt references to ADR in popular media. *See* James E. McGuire, *Mediation in Fiction: A Grail Quest*, DISP. RESOL. MAG. Summer 2007, at 24 (noting the difficulties in finding explicit references to mediation in literature and film); Jennifer L. Schulz, *The Mediator as Cook: Mediation Metaphors at the Movies*, 2007 J. DISP. RESOL. 455 (2007) (same).

[12] "*Doublethink* means the power of holding two contradictory beliefs in one's mind simultaneously, and accepting both of them." GEORGE ORWELL, NINETEEN EIGHTY-FOUR 223 (Peter Davison Alfred A. Knop ed., 1987) (1949).

[13] For an outstanding example of scholarship that critically examines process proliferation in ADR, see Amy Cohen, *Dispute Systems Design, Neoliberalism, and the Problem of Scale*, 14 HARV. NEGOT. L. REV. 51 (2009) (suggesting that scaling individual dispute resolution models to larger dispute and deal contexts may perpetuate existing social inequalities).

II. GAMES

Before considering the connection between ADR and *The Hunger Games*, it may be helpful to think through whether ADR is like a game at all.

Johan Huizinga observed that "[t]he great archetypal activities of human society are all permeated with play from the start;"[14] indeed, the predilection for playing games and recasting sociopolitical life into games and game metaphors remains a striking feature of contemporary society. Games are appealing analytical units because they are intellectually accessible and compact, providing quick traction for examinations into the structure, dynamics, and norms of interpersonal and organizational behaviors. This part first briefly considers the prevalence of game metaphors in modern legal culture, providing examples of how "ludism" (defined here as "incorporating games and gameplay") generally informs how we speak and think about the law. The part then turns to Arthur Allen Leff, a Yale law professor who set forth the "ludic metaphor" and suggested that an irresistible desire for determinacy may be what informs our predilection for games, recreational and otherwise. Finally, the part examines how ADR processes may be amenable to game metaphors and ludic thinking.

A. *Game Thinking and Legal Culture*

It's nothing new to say that Americans are obsessed with games, both as players and spectators,[15] and the law has followed suit. For lawyers, games

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[14] JOHAN HUIZINGA, HOMO LUDENS: A STUDY OF THE PLAY-ELEMENT IN CULTURE (Roy Publishers. 1950) (1938). Huizinga, a Dutch sociologist, referred to the "homo ludens" ("Man the Player") as a species whose society is characterized by games and play. Huizinga used the term "ludic factor" to describe the "non-seriousness" inherent in competition. *Id.* at 30–31. Huizinga and Roger Caillois are two of the most well-known foundational figures in sociological game studies. ROGER CAILLOIS, MAN, PLAY, AND GAMES (Meyer Barash trans., The Free Press of Glencoe, Inc.) (1961). One outgrowth of their scholarship can be seen in Nassim Taleb's work, which interrogates the human predilection to make meaning out of randomness. Taleb uses the term "ludic fallacy" to refer to the human tendency to mistakenly use games to understand and justify real-world conclusions. NASSIM N. TALEB, THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE 309 (2007).

[15] Abundant evidence exists that Americans love playing and watching games. *See, e.g.*, JOHN R. GERDY, SPORTS: THE ALL-AMERICAN ADDICTION (2002); Michael Hirschorn, *The Case for Reality TV*, The Atlantic, May 2007, http://www.theatlantic.com/magazine/archive/2007/05/the-case-for-reality-tv/5791/2/. In

and sports provide familiar shorthand for understanding and explaining how legal culture operates. Indeed, as a descriptive matter, litigation is easy to depict as a game: Players and umpires (lawyers and judges) conduct themselves according to substantive and procedural rules in pursuit of one or more well-defined goals.[16] As in Monopoly or rugby, the competition is

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2007, an American Medical Association report encouraged including "video game addiction" in the DSM-IV (the Diagnostic and Statistical Manual of Mental Disorders), noting that as many as 90% of American youth play video games. MOHAMED K. KHAN, EMOTIONAL AND BEHAVIORAL EFFECTS, INCLUDING ADDICTIVE POTENTIAL, OF VIDEO GAMES, CSAPH Report 12-A-07. This year, the Supreme Court upheld the First Amendment rights of video game purveyors, overturning a California law attempting to restrict sales of violent games to minors. Brown v. Entertainment Merchants Association, 131 S. Ct. 2729 (2011). The ensuing commentary has illuminated the simultaneous "ambivalence" and dependency that many Americans have around gaming culture. Virginia Heffernan, *How Games Steer Us Through Life*, N. Y. TIMES, July 2, 2011, *available at* http://opinionator.blogs.nytimes.com/2011/07/02/how-games-steer-us-through-life/; *see also* The Daily Show with Jon Stewart: Moral Kombat (Comedy Central television broadcast June 30, 2011), *available at* http://www.thedailyshow.com/watch/thu-june-30-2011/moral-kombat. Even when we are not playing or watching actual games, we are recasting our lives in ludic terms. Workplaces today are peopled with teams and coaches who navigate internal and external obstacles to reach whatever the end goal might be. *See, e.g.*, HANS WESTERBEEK & AARON SMITH, BUSINESS LEADERSHIP AND THE LESSONS FROM SPORT (2005) (applying "sport thinking" and game as a metaphor to teach business leadership; presents "the lessons for business leadership that can be found on the sporting field of play."). News channels pump out hours of political posturing and debates, moderated by pundits who serve as temporary referees on various issues, while politicians and think tanks routinely turn to game theory and sports metaphors to describe policy choices and political developments. *See, e.g.*, *Bush Runs White House with Sports Metaphors*, MSNBC July 15, 2007, *available at* http://www.msnbc.msn.com/id/19774480/ns/politics/. Legislatures formulate solutions to thorny problems using game-theoretic concepts and terminology: for example, reducing carbon emissions through "cap and trade," distributing FCC licenses through auctions, or promoting educational reform through increased competition by way of vouchers. Personal life presents a hotbed of strategic considerations (e.g., wait three days before calling or two?), *see, e.g.*, *Swingers* (Independent Pictures II 1996) ("[T]wo days is like industry standard."); and, as everyone knows, even the sacred family can devolve into power plays over rules, assignments, rewards, and penalties. *See, e.g.*, AMY CHUA, BATTLE HYMN OF THE TIGER MOTHER (2011) (detailing strategic approaches to child rearing).

[16] Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 WIS. WOMEN'S L.J. 225, 237, 239 (1995) ("Some sports metaphors, like war metaphors, have to do with roles. They portray trial lawyers as game players, boxers, team members, or forensic athletes. Judges, not surprisingly, are referees or umpires.") (citations omitted).

fierce but orderly, and although surprises can happen, all possible moves take place in carefully demarcated spaces and unfold within well-known procedural parameters. Most litigants drop out before making it to the finish line, of course,[17] but those who press forward will discover, conclusively and definitively, who has won and who has lost.[18]

Animating these structural similarities is a rich legal vocabulary filled with ludic imagery: personal jurisdiction determinations rest on considerations of "fair play and substantial justice;"[19] Supreme Court justices call "balls and strikes" from the bench;[20] vertical and horizontal choice of law considerations often implicate "forum" shopping, the "home field advantage," and related tactical concerns.[21] Within legal argument itself, Duncan Kennedy and others have demonstrated that the back-and-forth in legal rhetoric comprises matched pairings of "argument-bites," clusters, and support systems that exist within a structured (though not closed) linguistic space. These analyses parallel the structural comparisons of the law to a game, because they expose the moves and countermoves within legal rhetoric, along with the ideological or political goals that animate a given sequence or establish priorities.

The prevalence of game/sport mindsets in the law signals an intriguing

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[17] According to the most recent federal court reports, only 1.1% of federal civil cases filed went to trial. JAMES C. DUFF, *JUDICIAL BUSINESS OF THE UNITED STATES COURTS,* 2010 ANNUAL REPORT OF THE DIRECTOR, 168 (2010) *available at* http://www.uscourts.gov/Statistics.aspx. State courts reflect similar statistics showing that about 3% of civil cases are actually disposed of by trial. Lynn Langton & Thomas H. Cohen, *Civil Bench and Jury Trials in State Courts* (2008) *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cbjtsc05.pdf.

[18] *See* Thornburg, *supra* note 16, at 239, 243.

[19] *International Shoe* and its progeny made this term a bulwark of personal jurisdiction analysis.

[20] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States*, Before the Senate Comm. or the Judiciary, 109th Cong. (Statement of John A. Roberts, Jr., nominee to be Chief Justice of the United States, S. Hrg. 109-158 at 56 (Sept. 12-15, 2005) (Sept. 14, 2005) (likening a Supreme Court Justice to an umpire and assuring the Senate that he would "remember that it's my job to call balls and strikes, and not to pitch or bat").

[21] For commentary on forum shopping, see, e.g., Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011); Richard Maloy, *Forum Shopping? What's Wrong With That?*, 24 QUINNIPIAC L. REV. 25 (2005); Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under* International Shoe, 28 U.C. DAVIS L. REV. 769 (1995).

tension between the law's institutional viability and its normative commitments to justice and other weighty social values.[22] For all the eagerness to toss around sports metaphors when describing disputes and transactions, it is still not clear whether the law being like a game is, ultimately, a good thing. In her analysis of metaphors in the legal system, Elizabeth Thornburg points out that although courts and commentators commonly use game and sport metaphors to describe litigation, they often explicitly recognize that such comparisons are problematic because of the playful, arbitrary attributes of games.[23] Game metaphors can have multiple and sometimes conflicting uses in legal texts, standing in for both fair process (good) and nonserious, cynical tactics (bad).[24]

A cursory review of recent Supreme Court jurisprudence demonstrates this two-mindedness. Some opinions emphasize the difference between serious legal reasoning and recreational games by pointing out the arbitrary, childish qualities of games (e.g., "Statutory interpretation is not a game of

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[22] "The reason for the rules is not that litigation is a game, like golf, with arbitrary rules to test the skill of the players. Rather, litigation is a 'winnowing process,' and the procedures for preserving or waiving issues are part of the machinery by which courts narrow what remains to be decided." Poliquin v. Garden Way, Inc., 989 F.2d 527, 531 (1st Cir. 1993) (citation omitted).

[23] Thornburg, *supra* note 16, at 237. *See also* Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 739 (1906) ("If the law is a mere game, neither the players who take part in it nor the public who witness it can be expected to yield to its spirit when their interests are served by evading it."), quoted in Skylar Curtis, *All's Fair in Love and Procedural Vagueness?*, 41 MCGEORGE L. REV. 695, 701 n.1 (2010).

[24] This inconstancy is not necessarily a problem to fix, and indeed may be intrinsic to our legal system. Mikhail Bakhtin's concept of heteroglossia, the "internal differentiation, the stratification characteristic of any national language," captures the shifting definitional qualities of words and the inherent instability of language. MIKHAIL BAKHTIN, THE DIALOGIC IMAGINATION: FOUR ESSAYS, 67 (Michael Holquist ed. Caryl Emerson & Michael Holquist trans.) (1982). Following Bakhtin, Daniel Solove notes that the "plurality of consciousnesses" within a single work can be "combine[d]" but not "merged." The disparity between the differences ultimately allows for more profound understanding of the tensions and motivations within positions and postures. Daniel Solove, *Postures of Judging: An Exploration of Judicial Decisionmaking*, 9 CARDOZO STUD. L. & LITERATURE 173, 187 (1997) (citing MIKHAIL BAKHTIN, PROBLEMS OF DOSTOYEVSKY'S POETICS 6 (Caryl Emerson ed. and trans.) (5th ed. 1993). Here, the multiple connotation of games and game metaphors in the law prompts a sort of internal commentary on the legitimacy of the enterprise – the recognition that judicial decisions must conform at some level to public rules while also reflecting arbitrary or even morally objectionable policy choices.

blind man's bluff.").[25] Others criticize opposing positions for failing to be enough like a game in refusing to adhere to rules (e.g., "Like the chess player who tries to win by sweeping the opponent's pieces off the table, the Court simply shuts from its sight the formidable obstacles New Haven would have faced in defending against a disparate-impact suit.").[26] In both cases, the Court consciously uses game metaphors to make a normative point, even though the metaphor itself can, as Professor Thornburg points out, cut in either normative direction.[27]

Games are, accordingly, a sort of ubiquitous split metaphor in the law, offering an irreconcilable epistemological breach between fairness-as-system on the one hand and fairness-as-justice on the other—an instance of the familiar jurisprudential tension between utility and rights. The late Arthur Allen Leff described this tension as the "ludic metaphor,"[28] the powerful tendency to model legal processes and legitimacy on games and game norms. Leff's conclusion is straightforward enough—namely, that in a world of conflict and indeterminacy, games offer much-desired resolution and much-needed relief—but his reasoning is worth closer examination.

B. *The "Ludic Metaphor"*

Leff's essay starts with a fictional case study and then extrapolates observations about that fictional society to modern life, a progression

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[25] "Judges are free to consider statutory language in light of a statute's basic purposes." Dole Food Co. v. Patrickson, 538 U.S. 468, 484, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003) (Breyer, J., concurring in part and dissenting in part).

[26] Ricci v. DeStefano, 129 S. Ct. 2658, 2706 (2009).

[27] Additionally, game-related imagery continues to appear in the purely descriptive language of opinions. Thus, the Court will speak of "repeat players," Schwab v. Reilly, 130 S. Ct. 2652, 2677 n p.15 (2010) (Ginsburg, J., dissenting); or "alter[ing] the playing field," Morgan Stanley Capital Group Inc. v. Public Utility Dist. No. 1 of Snohomish County 554 U.S. 527 (2008); or "giv[ing] the game away" Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2718 (2010), to describe the factual or legal landscape of a particular situation, apparently without intending any additional normative subtext.

[28] Arthur Allen Leff, *Law And*, 87 YALE L.J. 989 (1978) [hereinafter *Law And*]. Leff's essay begins, appropriately enough, with some wordplay. The title, "Law And," is a disconnected conjunction, an abruptly snapped-off reference to the increasing interdisciplinary approaches emerging in or around the 1970s—the "law and" schools, such as law and economics, law and literature, law and psychology—without focusing on one particular methodology. The title foregrounds the existence of legal interdisciplinary studies while simultaneously erasing the explanatory power of any one of those disciplines.

apparently modeled on law and anthropology.[29] This structure allows Leff to make some general remarks about social ordering, many of which resonate within the larger body of Leff's scholarship, before proposing the "ludic metaphor" as an alternative organizing principle.

Leff's pseudo-anthropological case study is the "Jondo," a fictional tribe with elaborate rules about hunting, gathering, sharing, and compensating:

> This tribe is so primitive that it has divided itself into only two moieties, or subgroups, totemically specified as the Fish-Jondo and the Maize-Jondo ... . On two occasions, however, all the Jondo come together. One jointure occurs "when the Great Cod enters the Maize Ear," that is, when the moon rises full in a particular constellation of stars that the Jondo call the "Maize Ear." This celestial event normally occurs in early autumn, and when the sky so arranges itself, all the Fish-Jondo cross to the Maize-Jondo side of the village, help with the maize harvest, and celebrate with a big post-gleaning party.[30]

Some years the moonrise does not correspond with the growing season, and when that happens, part of the harvest unfortunately is lost. But if "heaven and earth are too much out of phase" and "it begins to look as if *all* of a particular harvest might be lost," the Jondo "declare the moon 'bewitched,' and order the temporary merger of all the Jondo" to reap the remaining maize, despite the Maize Ear's nonappearance.[31] In this way, the Jondo retain some semblance of cosmological integrity while making sure they do not starve.[32]

From this description, Leff concludes that human activity generally does not insist on the rigors of metaphysics or cosmology, preferring instead to track religious doctrines rather loosely and take detours when certain economic constraints come into play. Likewise, human activity is not fully explainable through efficiency, since people sometimes choose to do things for religious reasons, even though those choices may not maximize welfare.

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[29] For a similarly pitched introduction to anthropological analysis of modern America, see Horace Miner, *Body Ritual Among the Nacirema*, 58 AMERICAN ANTHROPOLOGIST 503 (1956). Many thanks to Michelle McKinley for this reference.

[30] *Law And*, *supra* note 28, at 989–90.

[31] *Id.* at 990.

[32] It is much more complicated than this. Leff also documents the Jondo's fishing rituals, their food storage conventions, the society's tort claims against food thieves, and the "Sacred Hermaphrodite," the Jondo's chief judicial officer and the overseer of the tribe's dispute resolution. *Id.* at 989–93.

Put another way, many people will give up some economic efficiencies to "preserve the elegance of their cosmic vision" but also will not take an extreme hard line on religion if doing so will bring them to the point of physical discomfort.[33] Leff notes that the Jondo, like people generally, do not examine the tension between these competing worldviews and will not admit that their primary way of seeing the world, whether cosmological or efficiency-based, may be subject to change.[34]

After analyzing the Jondo's primary rituals, Leff then turns to "the workings of a real society," as demonstrated by the "Usa" tribe. The Usa are much more complex than the Jondo, with "countless classes" of citizens and "a vast network of distribution, allocation, production, and exchange." To resolve disputes among these diverse constituencies within this complex array of transaction and exchange, the Usa have come up with the Usa Trial, an ornate pageant of Champions and Judges and Helpers, complete with "peculiar costume[s]," "archaic honorifics," "large and imposing" rooms, and "elaborate deference ceremonies." Though the process is intricate, the outcomes are rather enervated. "For instance, if the dispute involves the proper understanding of complex communications between two parties over time, the Judge and his helpers will likely behave as if the only interpretations available are (a) contract or (b) no contract."[35]

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[33] *Id.* at 993.

[34] Exploring the tension between worldviews was one of the hallmarks of Leff's scholarship, which often expressed considerable doubt as to whether we can identify or assemble an external moral foundation for the law, whether through positivism or efficiency or imaginative liberal reforms. In a series of provocative articles, Leff pointed out that our desire for (and fear of) "complete, transcendent, and immanent set of propositions about right and wrong" is understandable but nonetheless doomed: "The so-called death of God turns out not to have been just *His* funeral; it also seems to have effected the total elimination of any coherent or even more-than-momentarily convincing, ethical or legal system dependent upon finally authoritative, extrasystematic premises." Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1229, 1232 (1979) [hereinafter *Unspeakable Ethics*] (emphasis in original). Because no extrasystematic authority exists or can be proved to exist, any normative statement is irrevocably compromised by the fact that the speaker is unable to validate the premises of his normative statement outside the confines of his own experience and existence. At the end of the day, any normative or moral command—do this, don't do that—cannot overcome the ultimate rejoinder: "sez who?" *Id.* at 1230; *see also* Arthur Allen Leff, *Memorandum*, 29 STAN. L. REV. 879 (1977).

[35] *Law And*, *supra* note 28, at 997. *See also* Carrie Menkel-Meadow, *When Litigation is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering*, 10 WASH. U. J.L. & POL'Y 37, 39–42 (2002) (discussing the shortcomings of adversarial adjudication); Harry T. Edwards, *Hopes and Fears for Alternative Dispute*

Simplifying infinitely complex disputes may seem incompatible with individual justice yet such simplification is one of the primary mechanisms for dispensing justice among the Usa. In this way, Leff argues, the Trial is most easily understood, not through efficiency rationales or cosmology, but through the 'ludic metaphor'—that is, as a game.[36] Games have rules, boundaries, and clearly demarcated roles; what's more, games create a closed system that yields a particular subset of possible results: "it is a joy independent of victory to be engaged in an activity that allows for a determinate result. Even clearly losing may, at least some of the time, be a pleasant alternative to a lifetime of never knowing."[37] Such a view is consonant with the findings of procedural justice studies that suggest that people are more concerned with the process than with the result.[38] Without God around to make decisions and resolve disputes, legal "games" provide a sort of local option for determining who should win a given encounter.

To create this determinate space in an indeterminate world, the Usa must reduce the insuperable complexities of conflict into roles, processes, and outcomes. In the Trial, as in all games, the determinacy of outcomes exists within the framework of the exercise. Arbitrary decisions or impermissible moves within a rule-bound process do not lead to determinate outcomes, regardless of who is making the moves. The rules themselves are "absolutely binding during any play thereof. They are not open to question in any nongame terms—justness, for instance, or legitimacy or efficiency—for they do not so much regulate the activity as constitute it."[39] Such determinacy is especially important in trials because "the Trial actually allocates things of material and emotional value" and determinacy helps preserve a sense of fairness and legitimacy, without which the participants may lose respect for

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Resolution, 21 WILLAMETTE L. REV. 425, 426 (1985) (addressing the inadequacies of the judicial system and adjudication by trial); Warren E. Burger, *Isn't There a Better Way?* 68 A.B.A. J. 274 (1982) (discussing the shortfalls of litigation and encouraging non-adversarial decisionmaking).

[36] As Leff puts it: "A game is an activity in terms of which you can know with some precision what you did and how you came out." *Law And*, *supra* note 28, at 1000.

[37] *Id.* at 1001.

[38] *See, e.g.*, E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988) (finding that people are more interested in issues of process than in issues of outcome); *see also* Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473 (2008).

[39] *Law And*, *supra* note 28, at 1000.

and confidence in the process.[40] Reducing complex human affairs to a game satisfies our cosmological leanings by appealing to cultural norms and values (e.g., fairness and merit) while attending to economic concerns, say, by applying competitive processes for resource allocation.[41]

Leff's ludic metaphor is a useful theoretical construct because it encompasses three separate but interrelated angles on games in the law. First, as a descriptive matter, Leff's metaphor captures the structural similarities between recreational games and litigation. Both games and the legal system use rules, roles, and processes to identify winners and losers. Although the law is not just a game, as Leff says, it is "not not a game either";[42] its legitimacy comes, in large part, from the game-like constraints that govern legal actors and procedures.

Second, the ludic metaphor provides insight into why society would choose to fashion its legal system as a high-stakes game. As Leff points out, people want certainty and finality, and those needs are especially pressing with respect to institutions that are supposed to deliver justice to disputants. Accordingly, the legal system cannot be conflicted and indecisive, but must dispense substantive outcomes that have at least procedural integrity. Casting dispute resolution processes as games provides for this procedural integrity (i.e., if rules are not followed, outcomes are not valid) and supplies definitive outcomes, even if those outcomes do not feel wholly satisfactory.

Third, and relatedly, Leff characterizes the ludic metaphor as an alternative epistemological framework to other possible frameworks, such as the Usa's efficiency analyses or the Jondo's cosmology. Put another way, games are strategic or contingent, but not definitional or essential, concepts. In fact, Leff concludes his essay with the modest suggestion that we are captive to the ideological and experiential forces in which we find ourselves and that, in the final analysis, the ludic metaphor is merely the tip of the iceberg, one of an "infinity more" competing teleologies, as "mysteriously generated and interpenetrated" as the ludic and material planes, interconnected with each other in a "composite of webs" creating an

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[40] *Id.* at 1005.

[41] "It is, after all, inherently implausible that an epistemological inquiry in the form of an agonistic game maximizes thoroughness and accuracy of factual determination [that is, efficiency]." *Id.* at 1003–04. *See also, e.g.*, Grant Gilmore, *Products Liability: A Commentary*, 38 U. CHI. L. REV. 103 (1970) (arguing that economic analysis is inadequate in and of itself to describe liability law).

[42] *Law And*, *supra* note 28, at 1005.

"enormous crystal lattice" of meaning.[43] "[A]ll we can understand, and that not very well, are the games we ourselves generate and eventually, but predictably, lose." For Leff, not only is the trial a game, but legal scholarship and indeed all attempts at epistemological order are games, with scholars engaged in the endless project of imagining and reimagining the structure and logic of legal institutions through game metaphors and the terminology of rules, roles, processes, and outcomes.[44]

C. *Using Leff's Gameframe in Alternative Contexts*

Arthur Allen Leff is not known for his dystopian theory or for scholarship on alternative processes.[45] His essay on the ludic metaphor in the law, however, provides a useful foundation for an analysis of dystopian themes in the modern ADR landscape.

Law, like the wider culture, has come to rely upon and even celebrate games as a way to explain itself to itself and others. In contrast, the idea of "ADR as game" is not immediately intuitive and to some may be repugnant. Although many ADR practitioners and scholars would readily admit that a structured process governs alternative dispute resolution, they might not agree that these process elements constitute a game. This is because part of the ADR ethos is an earnestness about the problem-solving venture, a commitment to taking a more enlightened view of dispute resolution that allows for creativity and outside-the-box thinking that would not be permissible in a traditional litigation format.[46] Additionally, ADR

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[43] *Id.* at 1010–11. "And even that would be a simplifying lie, for it would share with the one-web metaphor, and with my two-plane redaction, the same mendacious tendency (which, I suppose, is the defining falsehood of all scholarship): to see all that is as in theory understandable. In effect, scholarship represents the ludic move raised to its highest power by acting as if reality itself can actually be played to a determinate conclusion." *Id.*

[44] *See also* Arthur A. Leff, *Afterword*, 90 YALE L.J. 1296 (1981) ("[T]o have crafted, on occasion, something true and truly put—whatever the devil else legal scholarship is, is from, or is for, it's the joy of that too.").

[45] Leff did, however, propose the use of an impartial "referee" in negotiations and refer to it as mediation. Arthur A. Leff, *Injury, Ignorance, and Spite—The Dynamics of Coercive Collection*, 80 YALE L.J. 1, 44 (1970). It was a passing reference and he sounded dubious whether it would work.

[46] *See, e.g.*, Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 795 (1984) ("Although litigants typically ask for relief in the form of damages, this relief is actually a proxy for more basic needs or objectives. By attempting to uncover those underlying needs, the

practitioners are typically not advocates but are neutrals or designers; roles that attempt to resist the ideological capture or partisanship that contributes to ludic dynamics in the legal system. Finally, because ADR structures are more flexible and because self-determination is such an important theoretical element of ADR processes, the idea that there are bounded spaces, restrictive procedures, and highly scripted or formalized roles is not as resonant in an ADR context. Put another way, ADR is special because it is not a game, specifically not the game of litigation; it is the antithesis of that game at both ideological and practical levels. Calling ADR a game would, for many ADR proponents, devalue their commitment to the ideals of the profession and simply would not ring true in the same way that "the law is a game" does.

Leff's ludism, however, does not require the game itself to think of itself as a game. The Jondo, after all, were perfectly content to exist in the borderland between cosmology and efficiency, and did not seek categorical purity in any event. ADR may be a game in spite of itself, not because of its goals, but because of its institutionality. As in legal games, ADR processes have roles, rules, and objectives. Additionally, as in legal games, ADR processes attempt to provide some measure of determinacy to participants. Unlike legal games, which invariably end in winners and losers, many alternative approaches vaunt a win-win framework that attempts to transcend zero-sum thinking and outcomes. Nevertheless, even this twist on traditional ludic endings is itself a ludic ending.

Take mediation, for example. Mediation "involves the intervention of an acceptable, impartial, and neutral third party who has no authoritative decision-making power to assist contending parties in voluntarily reaching

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problem-solving model presents opportunities for discovering greater numbers of and better quality solutions."). Some commentators, however, have pointed out increasing game-oriented approaches in ADR practice. *See, e.g.*, J. Thomas Presby, *Practice Ideas for Mediators Who Focus on Commercial Disputes*, ALTERNATIVES TO THE HIGH COST OF LITIGATION, Apr. 2003, at 69 ("The parties and their lawyers often will use the mediator to bluff the other side with artificial positions, demands, and threats to withdraw. This sort of gamesmanship is something that the mediator must recognize. . . ."); Karen M. Goodman, *Ethics in Settlement: Lawyer Gamesmanship and Misrepresentations During Negotiations* 1 (2001), *available at* http://www.bnabooks.com/ababna/rnr/2001/goodman.doc ("[S]ettlement negotiations, including structured ADR proceedings, frequently resemble WWF wrestling matches in terms of gamesmanship, misrepresentation and coercive tactics."); John W. Cooley, *Mediation Magic: Its Use and Abuse*, 29 LOY. U. CHI. L.J. 1, 5–6 (1997) ("It is rare that caucused mediation, a type of informational game, occurs without the use of deception by the parties, by their lawyers, and/or by mediators in some form. . . . The confluence of the[] initially unaligned strategies, tactics, and goals creates an environment rich in gamesmanship and intrigue.").

their own mutually acceptable settlement of issues in dispute."[47] In mediation, participants attempt to work through their issues in the presence of a neutral who guides the process, gives everyone a chance to speak and encourages everyone to listen, recasts charged emotional language into neutral language, assists participants in working through differences, and facilitates problem solving and dispute resolution.[48] This process maps directly onto Leff's ludic metaphor. Like legal games, the mediation process has familiar "moves"—among them the mediator's introductory statement, the uninterrupted time for each participant to speak, the development of interests and perhaps of a "focusing question," caucuses, and the creation of the final agreement, if one is reached—and defined roles for the participants. As a formal matter, Leff's definition of "game" is quite elastic, and so transposing mediation's process elements onto that definition is not difficult.

More challenging, perhaps, is seeing the relationship between mediation and Leff's assertion that games simplify disputes to promote greater certainty and determinacy. Mediation, after all, is not confined to issues of legal relevance but instead may encompass a breadth of possible concerns, such as the way people treat one another outside the mediation. Moreover, as a voluntary process, mediation emphasizes the participation and contribution of everyone involved. This means cultivating an environment that can tolerate multiple conflicting perspectives without needing to endorse, from a process perspective, one interpretation over another.[49] Finally, the mediated outcome is, ideally, the joint product of the parties' own problem-solving. Because the parties know their own resources and interests better than anyone else, they can customize their outcome to their particular situations.[50]

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[47] CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 6 (1986); *see also* Michael L. Moffitt, *Schmediation and the Dimensions of Definition*, 10 HARV. NEGOT. L. REV. 69, 79–81 (2005) (demonstrating the multiple and sometimes incommensurate descriptive and prescriptive notions that inform definitions of "mediation").

[48] *See* MOORE, *supra* note 47, at 25–26 (detailing general and specific mediator moves).

[49] In fact, some mediation approaches explicitly recognize the validity of each participant's own multiple and conflicting narratives. *See* JOHN WINSLADE & GERALD MONK, PRACTICING NARRATIVE MEDIATION: LOOSENING THE GRIP OF CONFLICT 7 (2008) ("[P]eople are always situated within multiple story lines . . . . We do not have a bias in favor of *integrating* a person's multiple story lines into a singular or congruent whole, as some psychologies would argue one should.").

[50] Mediation thus redefines the process with respect to the parties themselves, not to generic process-to-dispute matching in the aggregate. Writing in the context of whether private negotiated settlements are preferable to public adjudicated results, Carrie Menkel-

In these ways, mediation resists the reductive determinacy that litigation promises; rather, mediation is supposed to be a creative, pluralistic process that facilitates agreement without imposing outcomes.

Yet, it is also in these same ways that mediation ultimately creates its own determinate space. Arguably the role of the mediator is to help convert the infinite and overdetermined chaotic mass of data informing the actual relationship and conflict into something more manageable and ultimately determinate. This can happen in a variety of ways: through the imposition of a process that models a particular kind of problem solving;[51] through restating questions and assertions; through recasting charged language into neutral terms that help explain or investigate the comment's substance and emotional overtones.[52] Even though this conversion may not be as drastically limiting as in legal games, it is necessarily limiting. What's more, these intentional limits and process determinacy are there by design; no one would find mediation useful without some definition and management of the disputes at hand.

In fact, one might argue that mediation actually offers more potential determinacy than the Trial: instead of a dissatisfying "contract/no contract"-type outcome that ignores the situational complexities of the dispute, mediation presents an opportunity for a holistic, wide-ranging solution that may incorporate multiple interests into an elegant, creative agreement or may lay the groundwork for a transformative experience around the relationship between the parties.[53] The romantic mystique of mediation, after all, is that it addresses multiple layers of personal and interpersonal concerns, including

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Meadow states, "For me, the question is not 'for or against' settlement (since settlement has become the 'norm' for our system), but when, how, and under what circumstances should cases be settled? When do our legal system, our citizenry, and the parties in particular disputes need formal legal adjudication, and when are their respective interests served by settlement, whether public or private?" Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2664–65 (1995) (internal citation omitted) (emphasis omitted).

[51] For example, even some facilitative mediation styles feature the "focusing question," in which the mediator attempts to synthesize the parties' issues into one proposition for analysis.

[52] *See, e.g.*, MOORE, *supra* note 47, at 130 (recommending that mediators can manage "unproductive venting" by "encourag[ing] or suggest[ing] ways that disputants can express the same concerns in a less volatile manner").

[53] *See* WINSLADE & MONK, *supra* note 49; *see also* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION 29 (1994) ("The goal is a world in which people are not just better off but better: more human and more humane.").

but not limited to the precise issues at hand, through the guidance of the mediator:

> [O]ne sees a figure sitting with the parties, her hands reaching towards each of them as if to support them in telling their tale or to caution them in listening to each other to weigh the matter more carefully. . . .The figure is not alone or aloof. Her outstretched arms form a bridge between the parties, so that communication and positive energy can flow again. ... The mediator's features are hazy, since the focus and light remains on the disputing parties. Her presence, however, exudes optimism, respect, and confidence in the parties' capacity. She brings an energetic and urgent sense that justice can be done by the parties' own hands.[54]

These comments are admittedly idealized but nonetheless familiar background strains in mediation and alternative processes generally. Indeed, alternative processes often make the psychospiritual and social aspects of dispute resolution (such as peace building, active listening, empathy, assertiveness, cooperation, and so on) primary focuses of the process. To a postmodern Western audience, the idea of "alternative dispute resolution" may bring to mind comforting utopian visions of dispute resolution characterized by peaceful exchange, self-expression, empathy, self-determination, process control and impartiality, autonomy, tailor-made solutions, choice, and consent.[55] These are the same familiar desires that make legal ludism as prevalent and inescapable as Leff describes.

Mediation, therefore, is a game. And it is not hard to imagine how other forms of ADR correspond to the formal elements (rules, roles, processes) and purpose (providing psychospiritual comfort in the face of radical indeterminacy) of games. The ludic nature of mediation and ADR, however, is not as apparent as that of the legal system, because the formal elements are often more malleable and the potential determinacy benefits are much more

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[54] Lela P. Love, *Images of Justice*, 1 PEPP. DISP. RESOL. L.J. 29, 31–32 (2000).

[55] Recent innovations in transformative and narrative mediation are not to the contrary. These efforts underscore the commitment to determinacy by providing a more nuanced view of process that appreciates the irreconcilable complexities of the multiple discourages preceding and then coming out of the mediation. What these approaches do, at a meta level, is synthesize these complexities into a "story" or narrative that stitches together the incommensurate disputes into a sort of tapestry. This is not "resolution" at the micro level, but is the installation of a way of perceiving conflict. WINSLADE & MONK, *supra* note 49, at 32 ("The path forward may feature a range of possible outcomes. . . . Our focus is therefore on the creation of a sustainable, forward-moving narrative.").

profound. As a result, ADR may not seem like a game but as something more than a game, which may make it more difficult to conceptualize and assess.

Yet, merely pointing out that ADR is a game does not, ultimately, get us very far. Leff's ludic metaphor does not provide any normative guidance on the emergence of institutional games of dispute resolution, legal or otherwise. Although the imaginative pseudo-anthropological narrative structure of "Law And" encourages the reader to reconsider the assumptions and motivations that animate modern legal and ADR games, and although comparing legal scholarship to a game suggests that professors should not take themselves too seriously, the essay does not go much farther than that. Leff's work resonates more on the personal level, and the concentric circles that he draws—from the fictional Jondo, to the "Usa" tribe, to the "tribe of scholars"—are not so much a social critique as an inwardly directed extrapolation, a meditation on mind and identity.

As the next Part explains, the dystopian project has similar game-oriented imaginings, but turns these devices outward to engage the historical moment, often with an explicitly normative cast. In this way, perhaps, dystopian "game theory" supplies the externally-focused, normative dimension missing from Leff's essay.

III. GAMES AND DYSTOPIA

Alternative processes may be games, but how could they ever be hunger games? Even the most ardent detractor of ADR would likely not describe alternative processes as a grisly deathmatch between weapon-toting children. Before considering whether the term "Hunger Games" has any useful application in alternative contexts, then, we must first consider what it means.

To that end, this part examines the intersection between dystopianism and legal games. Not all games are bad, and not all dystopian fiction is about the law. At the juncture of dystopian stories and legal games, however, are the bad games, the "Hunger Games"—the futuristic legal and political structures that oppress society through familiar game norms and constructs, such as institutional settings and spaces, established roles, and procedural rules. Seeing how these bad games emerge in dystopian literature about law provides an interpretive context for thinking through dystopian possibilities in alternative practice.

Like the previous part, this part begins with a brief overview of the relevant theory within the context of legal culture. Dystopian imagery and allusions are familiar and culturally resonant rhetorical moves in legal

argument, because they—much like games themselves—pull abstractions into high, ultra-real relief, apparently exposing both the internal dynamics of a given situation along with potential outcomes. The part then looks more closely at the game-oriented dimension of dystopian stories, as a formal and normative matter, and then examines how these stories illuminate persistent legal problems using games. Finally, the part suggests an analytical entry point to assessing the possible dystopian implications of the proliferation of alternative dispute resolution processes. By engaging present concerns and reorienting the analysis around future bad outcomes, dystopianism establishes both normative and kinetic dimensions for Leff's ludic metaphor. As a kinetic matter, dystopian imaginings about the future may provide the rationale for changing from one game to the next; as a normative matter, dystopianism acts as a lens through which to evaluate this change.

A. *Dystopian Rhetoric in the Law*

Most are familiar with basic dystopian rhetoric. Any argument that plays out the possible bad effects of a course of action is, at a broad level, dystopian. Moreover, most recognize popular dystopian references—for example, BIG BROTHER IS WATCHING YOU[56]—that evoke the deep, collective anxieties about excessive governmental (or corporate) control, loss of privacy, ascendancy of technology, and diminished individuality that are so often the themes of dystopian works. Dystopian fiction like *The Hunger Games* offers futuristic critiques of current realities, often identifying technology and political "progress" (typically, capitalist or totalitarian utopian visions) as present-day seeds of dangerous future developments.[57]

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[56] ORWELL, *supra* note 12, at 3.

[57] *See, e.g.*, THEODORE DALRYMPLE, OUR CULTURE, WHAT'S LEFT OF IT: THE MANDARINS AND THE MASSES 104 (2005) ("[T]he dystopians' purpose is moral and political. They are not crystal gazing but anxiously—despairingly—commenting on the present. The dystopias—depicting journeys to imaginary worlds, removed more in time than in space, whose most salient characteristics are exaggerations of what their authors take to be significant social trends—are the *reductio ad absurdum* (or *ad nauseam*) of received ideas of progress and sensitive indicators of the anxieties of their age, which is still so close to our own."); *see also* Gorman Beauchamp, *Zamiatin's We*, *in* NO PLACE ELSE: EXPLORATIONS IN UTOPIAN AND DYSTOPIAN FICTION 56, 56 (Eric S. Rabkin et al. eds., 1983) ("The dystopian novel, in formulating its warning about the future, fuses two modern fears: the fear of utopia and the fear of technology."). What makes "utopian ideations" so ominous now is that they are "not only possible, but perhaps inevitable, given the increasing array of techniques for social control made available by our science." *Id.*

Typically at stake are liberal values such as personal freedom, choice, and consent; in many imagined dystopian futures, state or corporate tyrants perfect their power by transforming people into cogs within the state or corporate apparatus.[58]

Part of what makes dystopian rhetoric so effective is the dystopian "technique of defamiliarization" or "cognitive estrangement," through which dystopian novelists exaggerate and distort familiar structures and settings to provide "fresh perspectives on problematic social and political practices that might otherwise be taken for granted or considered natural or inevitable."[59] In Zamyatin's totalitarian United States in *We*, for example, citizens follow a detailed daily itinerary that includes activities for every hour of the day, including the special "pink check" time during which a person can schedule any other person for sexual relations.[60] Organizing one's time around productive activities seems like a productive, mostly benign goal until the schedule itself begins to transform the schedulees into interchangeable, deindividuated subjects. Likewise, Takami's absurdly violent *Battle Royale* transfers a set of junior high school students—all experiencing the typical anxieties and resentments associated with the pre-teen years, but unfortunately living within a brutally repressive futuristic Japan—onto a weapon-stocked deserted island, with predictably grisly results.[61] For its part,

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[58] *See* EUGENE ZAMYATIN, WE 6 (1924) ("Then the thought came: why beautiful? Why is the dance beautiful? Answer: because it is an *unfree* movement."); *see also* Thomas P. Dunn & Richard D. Erlich, *A Vision of Dystopia, Beehives and Mechanization*, 33 J. OF GEN. EDUC. 45, 57 (1981) (arguing that the dystopian society promotes "stability and rational order" through the "triumph of the mechanical hive" and the destruction of personal freedom).

[59] M. KEITH BOOKER, THE DYSTOPIAN IMPULSE IN MODERN LITERATURE: FICTION AS SOCIAL CRITICISM 19 (1994).

[60] ZAMYATIN, *supra* note 58, at 22 (explaining the 300-year-old *Lex Sexualis*: "A Number may obtain a license to use any other Number as a sexual product.").

[61] KOUSHUN TAKAMI, BATTLE ROYALE (1999). The movie version, directed by legendary Japanese filmmaker Kinji Fukasaku, was quite controversial in Japan and has not yet been released in the United States. Robert Ito, *Lesson Plan: Kill or Be Killed*, N.Y. TIMES, July 9, 2006, *available at* http://www.nytimes.com/2006/07/09/movies/09ito.html. The film has attracted critical attention and gained cult status and critical acclaim since its Japanese release in 2000. *See, e.g.*, Frédéric Neyrat, *A Sovereign Game: On Kinji Fukasaku's Battle Royale* (2001), *in* TRANSLATION, BIOPOLITICS, COLONIAL DIFFERENCE (Naoki Sakai & Jon Solomon eds., 2006) (analyzing the narrative with respect to the "void of Japanese institutions incapable of achieving the very goals that bring them to life"); Linda Hoaglund, *Battle Royale: Kinji Fukasaku's cautionary allegory*, 2 PERSIMMON 48–55 (Winter 2002) (describing

The Hunger Games uses reality television, a staple of modern TV fare, as the strategic centerpiece of post-technological state oppression. It is the grotesque refashioning of the familiar that attracts and then alarms the reader of dystopian fiction, who at some point breaks away from the story and thinks: Wait, could this really happen?

Legal argumentation also draws on dystopian pathos through cognitive estrangement, most notably through the "parade of horribles." The parade of horribles is a rhetorical device that imagines the awful consequences of a particular course of action.[62] In *Alli v. United States*,[63] for example, landlord plaintiffs sued the United States for breach of contract when the Department for Housing and Urban Development (HUD) suspended and terminated the plaintiffs' housing assistance payment for failing to maintain acceptable residential conditions. Finding for the defendant, Judge Allegra vividly described the plaintiffs' rental properties:

> Picture again these unpleasant images. A bathroom with an umbrella hanging upsidedown to catch water leaking through a gaping hole in the ceiling. Other erstwhile bathrooms with exposed and deteriorating floor boards; buckled, molded and mildewed tiling, some with empty holes where plumbing once existed. Kitchens with broken and missing counters, cabinetry with no doors (some dangling from the walls), roach-infested and rusted refrigerators, and other nonfunctional appliances. Plastered walls and tiled ceilings in dimly-lit hallways, so dilapidated, water-damaged and partially-collapsed as to appear cave-like. Outside doors left off their hinges, cracked masonry, and roofs and flashing no longer impermeable, all exposing residents to the elements. A basement filled with feces and vermin, the latter an army so plentiful that those who enter unprotected

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how the experience of subtitling the film provided insight into competing impulses in Japanese culture with respect to social revolution).

[62] The "parade of horribles" is a rhetorical device meant to highlight the unavoidably awful implications of a particular course of action. The device provides critical distance on the instant question, not on the central metaphors of law itself:

> Commentators have used numerous different metaphors to refer to arguments that have this rough form. For example, people have called such arguments "wedge" or "thin edge of the wedge," "camel's nose" or "camel's nose in the tent," "parade of horrors" or "parade of horribles," "domino," and "this could snowball" arguments. All of these metaphors suggest that allowing one practice or policy could lead us to allow a series of other practices or policies.

Eric Lode, *Slippery Slope Arguments and Legal Reasoning*, 87 CAL. L. REV. 1469, 1470–71 (1999) (citations omitted).

[63] Alli v. United States, 83 Fed. Cl. 250 (Fed. Cl. 2008).

> immediately become infested. And, at least on one January day, elderly and little children huddled in coats and blankets around open ovens trying to keep warm in subfreezing temperatures. Scenes from a dystopian novel about a post apocalyptic world? No, we now know that these graphic pictures are of the dwellings at issue in this case.[64]

Judge Allegra's parade of horribles (here, not an imagined list but rather a description of actual photographic exhibits)[65] and reference to "a dystopian novel" at the end of the passage connect the present-day situation of the Allis' unfortunate tenants with the fictional future oppressed who appear in dystopian stories. Such rhetoric ripples outward, from the initial justification of the judgment for defendants to the legal and moral rebuke of the plaintiffs to the more general broadcast to the public that in some places the present situation has become unacceptable and change must happen.

Along with the parade of horribles and similar dystopian devices, judicial opinions draw on the cultural currency of particular dystopian works. The works of George Orwell, Aldous Huxley, Ray Bradbury, Franz Kafka, and Margaret Atwood have provided persuasive levers in judicial writing. Like the parade of horribles, dystopian literary allusions in judicial opinions have internal/case-specific and external/society-specific acoustics[66] in describing encroachments of technology,[67] "Orwellian" invasions of privacy,[68] the

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[64] *Id.* at 278.

[65] *Id.* at 252.

[66] For more on the assertion that an opinion might have different and possibly conflicting acoustic properties depending on intended audiences, see Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

[67] *See, e.g.*, State v. Martin, 955 A.2d 1144, 1154 (Vt. 2008) ("A few opinions lend support to defendants' argument, envisioning an inexorable march from DNA databases like Vermont's to a dystopian future of eugenics, gene-based discrimination, and other horribles worthy of Aldous Huxley") (citing U.S. v. Kincade, 379 F.3d 813, 847, 851 (9th Cir. 2004) (Reinhardt, J., dissenting) (stating that "we all have reason to fear that the nightmarish worlds depicted in films such as *Minority Report* [in which genetically altered 'precognitives' are able to see into the future] and *Gattaca* [in which the protagonist purchases a superior genetic identity in order to be chosen for a mission to Saturn] will become realities" (quotation and citation omitted)) (alterations in original)); Banks v. U.S., 490 F.3d 1178, 1180 (10th Cir. 2007) (stating that some characterize federal DNA statutes as a "police state reminiscent of ... *1984*.").

[68] *See, e.g.*, Turnage v. Kasper, 307 Ga. App. 172, 173 (2010).

constraint of personal freedoms,[69] the arbitrariness of law enforcement,[70] the loss of transparency in the public sphere,[71] worst case scenarios and perverse incentives in public and private ordering,[72] and procedural anomalies that lead to "Kafka-esque" situations featuring hapless citizens caught in the soulless machinery of the legal system.[73] These opinions use dystopian references as a literary device, a rhetorical flourish that defends (or worries about) the decision in the instant case while giving voice to the fears that attend new developments of modern social and political life.[74]

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[69] *See, e.g.*, Kuvin v. City of Coral Gables, 45 So.3d 836, 858 (Fla. App. 3d Dist. 2010) (Cortiñas, J., dissenting) ("The majority would allow governments to regulate the types of personal-use vehicles their citizens drive simply based on their outward appearance. Such a holding embraces George Orwell's dystopia, where personal rights are subverted by the government.").

[70] *See, e.g.*, *In re* L.G.T., 214 P.3d 1, 18–19 (Or. App. 2009).

[71] *See, e.g.*, State v. Moralez, 242 P.3d 223, 248 (Kan. App. 2010) (Atcheson, J., dissenting) ("We did not form a society that permits those possessed of guns and badges to randomly or selectively detain citizens upon caprice or chimera. In that society, law enforcement would trade upon tactics we customarily ascribe to antidemocratic juntas or Orwellian dystopias.").

[72] This is not to say that the court is always convinced by dystopian arguments. *See, e.g.*, *In re* Katrina Canal Breaches Consol. Litig., 2009 WL 1046016, at *4 (E.D. 2009) ("[T]his Court is not persuaded by Defendants' dystopian conjecture [that allowing assignments of insurance claims would create perverse incentives].").

[73] *See, e.g.*, Blanca P. v. Superior Court, 45 Cal. App. 4th 1738, 1752–53 (1996) ("[I]t cannot be denied that it is an outrageous injustice to use the fact parents deny they have committed a horrible act as proof that they did it. That really is Kafkaesque."); *see also* Parker B. Potter, Jr., *Ordeal by Trial: Judicial References to the Nightmare World of Franz Kafka*, 3 PIERCE L. REV. 195, 195 (2005) (surveying how judges use Kafka to "criticize bureaucratic absurdity [and] unfair tribunals of all sorts. . .and to empathize with litigants").

[74] Legal scholarship, too, uses both dystopian imagery and allusions to illuminate and emphasize arguments. *See, e.g.*, Mariel L. Belanger, *Amazon.com's Orwellian Gaffe: The Legal Implications of Sending E-Books Down the Memory Hole*, 41 SETON HALL L. REV. 361 (2011) (using *1984*'s "memory hole" as a metaphor to describe what happened when Amazon.com deleted certain books from Kindles); Reza Banakar, *In Search of Heimat: A Note on Franz Kafka's Concept of Law*, 22 LAW& LITERATURE 463 (2010) (incorporating Kafka's fiction, rhetoric, and other writings to analyze the concept of "heimat" (homeland, native place) in law and human condition); Bob Barr, *Aldous Huxley's Brave New World— Still a Chilling Vision After All These Years*, 108 MICH. L. REV. 847 (2010) (exploring parallels between Huxley's dystopian future and post-9/11 America); D. Gordon Smith, *Response: The Dystopian Potential of Corporate Law*, 57 EMORY L.J. 985 (2008) (using Edward Bellamy's utopian novel *Looking Backward* to discuss options for corporate decision-making); Keith Aoki, *One Hundred Light Years of*

Legal dystopianism, then, enables judges and scholars to reposition their subjects as being about more than just the immediate issue at hand. A little goes a long way; however, the typical response to the parade of horribles is to pronounce it a "parade of horribles," defusing the effectiveness of the device simply by pointing out its rhetorical nature. All the same, drawing on the dystopian tradition allows jurists to appeal to common cultural knowledge and thereby frame arguments that are more emotionally evocative and persuasive. Such arguments reframe current practices as part of a general or particular dystopian narrative, which (because we know how these stories turn out) leaves the reader with the distinct impression that the current practices are dangerous.

B. *Dystopian Versions of Legal Games*

The affinity between the law and dystopianism goes farther than rhetorical imagery and allusions, however. For both legal culture and dystopian stories, games figure prominently as metaphors and models. Indeed, R.E. Foust has argued that "[d]ystopian novelists have used the metaphor of the game extensively because they view humanity *sub specie ludi*; that is, as inescapably engaged in the existential game, the serious play, of history."[75] Foust argues that classic dystopian novels "scrupulously and repeatedly remind[] the reader of the illusion, the playfulness, of the imaginary experience" through "a complex verbal game of strategies conducted on several levels."[76] Accordingly, dystopian novelists usually arrange their narratives as an agonistic game—"the typical dystopian plot takes the form of a hunt"—and then embed different kinds of games at different analytical and interpretive levels throughout the story.[77] Many

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Solitude: The Alternative Futures of LatCrit Theory, 54 RUTGERS L. REV. 1031 (2002) (examining jurisprudential biases through lens of science fiction); *see also* Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985) (using Kafka's characters to argue that consent is not as autonomous as Posner suggests, but instead is related to submission to authority).

[75] R.E. Foust, *A Limited Perfection: Dystopia as Logos Game*, XV/3 MOSAIC 79, 87 ("Dystopia, then, is a logos game, a fiction which takes language for its subject and which reminds the reader of the consequences of mistaking desire for reality, fiction for fact.") (internal quotation marks omitted).

[76] *Id.* at 83.

[77] Foust identifies four kinds of games in dystopian literature: the structural game (overall plot is typically some version of individual versus the state), *id.* at 83; the thematic game (characters in the story actually play games), *id.* at 84; the logos game (the

dystopian plots, as in *The Hunger Games*, feature actual games and contests between characters; additionally, most dystopian fiction contains a "Grand Inquisitor" scene in which the state, through a highly-placed representative, verbally spars with the protagonist over whose values and vision for society are superior.[78] Through these interlocking games, the author engages the reader in a meta-game or "anagogic game," a dialogue about the perilous implications of society's present course that ideally leads to the reader's recognition that "mankind's political fictions are just that—fictive" and therefore political change may still, at least theoretically, be possible.[79]

On this view, a dystopian analysis takes the sociopolitical game structures of the present moment—how the rules work, how the roles are assigned, who the officials are, what the institutional goals might be—and then considers the possible future implications of these structures. Dystopian storylines about the law often repurpose familiar legal games and structures into tools of domination and control.

Consider, for example, Kafka's short prose parable, "Before the Law." A man approaches the threshold "to the Law" and, seeing that the gate beyond stands open, seeks admittance from a doorkeeper. The doorkeeper bids the man to wait. The man then looks past the doorkeeper down the hall, at which point the doorkeeper warns the man that there are three fearsome doorkeepers beyond the gate. So the man waits, occasionally asking to enter or offering bribes, but never receiving the permission that he believes he needs to go forward. Finally, enfeebled and near death, the man approaches the doorkeeper one last time:

> "Everyone strives to reach the Law," says the man, "so how does it happen that for all these many years no one but myself has ever begged for

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focus in dystopian stories on control through language and language games), *id.* at 85–6; and the anagogic game (the "serious game conducted between the absent author and present reader" by which the author reminds the reader to "rediscover. . .that utopia is a mental place, a vision of perfection that is ideal only in the imagination"), *id.* at 86–87.

[78] *Id.* at 86; *see also* Douglas W. Texter, "*A Funny Thing Happened on the Way to the Dystopia": The Culture Industry's Neutralization of Stephen King's* The Running Man, 18.1 UTOPIAN STUD. 43, 53 (2007). *Catching Fire*, the second installment of the Hunger Games, starts with a Grand Inquisitor scene in which the evil President Snow tells Katniss that her actions during the Hunger Games have created social upheaval and she must comply with the Capitol's strategy for quelling the discontent. "Whatever problems anyone may have with the Capitol, believe me when I say that if it released its grip on the districts for even a short time, the entire system would collapse." SUZANNE COLLINS, CATCHING FIRE 21 (2009).

[79] Foust, *supra* note 75, at 86.

> admittance?" The doorkeeper recognizes that the man has reached his end, and to let his failing senses catch the words, roars in his ear: "No one else could ever be admitted here, since this gate was made only for you. I am now going to shut it."

Kafka's dystopian parable illustrates, as does *The Trial*, the frightening "judicial indifference"[80] to individual rights that attends the development of modern legal processes and institutions. The doorkeeper who does not open but instead blocks the door seems like a pretty straightforward representation of the various obstacles, both institutional and human, to modern justice. The hard part of the story is the ending: was the man ultimately responsible for his own failure to go through the door, or is the doorkeeper twisting the knife one last time?

Kafka's parable can support multiple interpretations, but here is one possibility: the man follows the rules and observes the authority of institutional roles without really understanding how these rules and roles work within the larger justice system; as such, he quietly sacrifices access, autonomy, and self-reliance so that he can follow what appear to be the rules and roles of the game.[81] It is easy to focus on the doorkeeper's sinister influence, but that influence is entirely predicated on the man's own preexisting schemas around game norms, particularly those norms developed within and alongside institutional law. At the end, the ludic metaphor no longer describes the law but replaces it, leaving the man unable to do anything other than follow the arbitrary dictates of a malevolent, though likely powerless, doorkeeper.

The man in Kafka's parable has internalized the law's game structures so completely that he is unable to assert any rights to or claims on the legal system. In dystopian literature, this disempowerment typically extends past the individual to the larger community. ADR proponents are often sympathetic to this line of thinking, considering that justifications for ADR have prominently featured the empowerment and enfranchisement of rights-holders in disputes. With that in mind, and before moving on from the

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[80] Potter, *supra* note 73, at 197.

[81] Steven Winter has argued that game metaphors, specifically an "ethic of spectatorship," may explain the relative passivity of many Americans during the Bush-Gore recount and subsequent litigation. *See* Steven L. Winter, *When Self-Governance Is a Game*, 67 BROOK. L. REV. 1171, 1204 (2002) ("[O]ne can hardly expect fundamental values of democracy and self-rule to trump the expectations of the game metaphor when, in both social spheres, we have internalized a passive ethic of spectatorship and consumerism.").

examination of the intersection between dystopianism and legal games, let's take one more look at *The Hunger Games*.

1. *Internalizing Roles and Rules:* The Hunger Games

The first book of *The Hunger Games* opens on the day of the Reaping, when each District chooses one girl and one boy to send to the Capitol. These twenty-four children will fight to the death while their families and friends watch them (watching is mandated by law) on television. Sixteen-year-old protagonist Katniss Everdeen, from the poor Seam section of District 12, describes the scene in the town square:

> People file in silently and sign in. The reaping is a good opportunity for the Capitol to keep tabs on the population as well. Twelve- through eighteen-year-olds are herded into roped areas marked off by ages, the oldest in the front, the young ones, like Prim [Katniss's sister], toward the back. Family members line up around the perimeter, holding tightly to one another's hands. But there are others, too, who have no one they love at stake, or who no longer care, who slip among the crowd, taking bets on the two kids whose names will be drawn. Odds are given on their ages, whether they're Seam or merchant, if they will break down and weep. Most refuse dealing with the racketeers, but carefully, carefully. These same people tend to be informers, and who hasn't broken the law?[82]

When her younger sister is chosen as the girl Tribute for their District, Katniss immediately volunteers to take her place.

The Reaping scene recalls Shirley Jackson's classic anti-utopian fable *The Lottery*[83] and the novel's overall premise (social oppression through entertainment) situates *The Hunger Games* within a familiar strain of dystopian fiction and movies, including *The Running Man*, *Rollerball*, and *Death Race*, and perhaps, to a lesser extent, *The Truman Show*.[84] In all these

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[82] SUZANNE COLLINS, THE HUNGER GAMES 16-17 (2008).

[83] SHIRLEY JACKSON, THE LOTTERY AND OTHER STORIES 281 (Penguin Books 2009) (1949).

[84] STEPHEN KING, The Running Man, *in* THE BACHMAN BOOKS 531, 691-92 (New American Library 1985) (1982); *Rollerball* (United Artists 1975) (futuristic violent game meant to control populace by demonstrating futility of individuality); *Death Race* (Universal Pictures 2008) (evil corporation makes money from televising prisoners forced to compete in deadly road race); *The Truman Show* (Paramount Pictures 1998) (millions glued to a television show portraying the daily activities of a person who does not know he is being filmed). This subgenre is particularly interesting because it

works, the state oppresses its citizens not (only) through raw militaristic strength, but also through the production and dissemination of graphic entertainment that depicts and continually replays the subjugation of the constituent peoples.[85] Viewing violent games with the state's imprimatur becomes, on this view, a form of public ritual that reinforces hierarchies of state power through sensory and cognitive manipulation. When Panem citizens watch a heavily edited television show featuring death matches between state-chosen participants taking place inside an elaborate state-built arena, they are convinced not only of the devastatingly all-encompassing power of the state, but also that the contest participants should, following the logic of games and contests, be responsible for finding their own way out—and, should they fail to overcome their opponents, may even deserve their fate.[86] In fact, through the act of watching, the spectators become complicit in the exercise of state power: the television show not only distracts them from monitoring (and perhaps protesting) state activities more closely, but also drains away their autonomy and reconstitutes them as passive supporters of state decisionmaking and control, as evidenced by their inability to turn away from the show.[87]

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highlights exploitative spectatorship of gratuitous violence as a key component of social degradation and control—making the reader/watcher complicit in such spectatorship. *See also Series 7: The Contenders* (Blow Up Pictures 2001) (six people picked at random from mandatory national lottery are given guns and forced to hunt and kill one another on a television show); *The Tournament* (Buzzfilms 2009) (thirty deadly assassins who fight to the death to entertain the world's richest people).

[85] The oppressor in classic dystopian works is usually the state; in later postmodern dystopian fiction, transnational capital and corporations. Texter, *supra* note 77, at 53. This Article will use "state" to refer to both kinds of oppressors.

[86] Indeed, the poor and disenfranchised are typically the ones who end up in the arena in these stories, thus solidifying political power in the wealthier classes and perpetuating social disconnections between the poor and the rich. *See, e.g.*, *id.* at 55 (pointing out that the televised persecution of poor contestants in *The Running Man* both "entertain[s]" the middle class and "assure[s it] that it is not in danger" because those contestants are always caught and killed by paramilitary actors).

[87] Cover asserts that the infamous Milgram experiments from the 1960s demonstrated that the individual's ability to react and respond "autonomously" (as opposed to "agentically," or in compliance with authority) tracks with the relative degree of spectatorship involved. People watching judicially-imposed violence are more likely to accept the violence as legitimate than they would if the violent acts lacked the state's imprimatur. Cover, *supra* note 3, at 1614–15. When researchers replicated the Milgram experiments in 2008, more than forty years after the original tests took place, the same results held: seventy percent of participants were willing to administer apparently painful shocks (more than 150 volts) on the instruction of the "authority figure" running the

Spectatorship and passivity are important elements of the modern ludic metaphor within the legal context, presenting difficult problems for democratic governance and civic identity. As Cover points out, when the public observes the judge performing an interpretive (and thus violent) act, it not only receives the judge's "understanding of the normative world" but also "loses its capacity to think and act autonomously."[88] This is because the audience, following game norms, is relegated to the role of passive spectator and therefore cannot interfere in ongoing gameplay. In terms of oppressive schemes, this is creative and effective: convince the mass of people that ludic norms dictate that they refrain from intervening in violence. Such learned passivity weakens social norms around engagement, activism, and democracy.[89] The dystopian state preserves its power by making sure that the mass of people believe that they can do nothing about the state's choices.[90]

Indeed, the television audience is the primary focus of the Gamemakers. When once Katniss and Peeta, the other Tribute from District 12, arrive at the Capitol, they meet the "prep team" who scrub, polish, and costume the contestants. Before the Games begin, the Tributes parade through a series of pageants and interviews in a frenzied media build-up to the main event. All this hoopla has given rise to some critical grumbling; as one commentator put it, "[a]s a tool of practical propaganda, the [G]ames don't make much

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experiment. Adam Cohen, *Four Decades After Milgram, We're Still Willing To Inflict Pain*, N.Y. TIMES, Dec. 28, 2008, at A24.

[88] Cover, *supra* note 3, at 1615.

[89] *See* Winter, *supra* note 81, at 1202–05 (arguing that game metaphors in the political sphere may encourage passive spectatorship that harms democracy and other civic values). For a parallel critique within the law school context, see DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY 34 (1983) (asserting that law schools model particular post-graduate professional hierarchies that prevent students from assuming alternative professional and personal identities). *But cf.* Ronald J. Krotoszynski, Jr., *The New Legal Process: Games People Play and the Quest for Legitimate Judicial Decision Making*, 77 WASH. U. L.REV. 993, 997 (1999) (arguing "in favor of a new legal process jurisprudence, analogizing the legitimacy of such an approach to the process theory that undergirds the legitimacy of contemporary athletics"). Whatever the take on ludic thinking in legal contexts, the creation of a ludic "schema" will have lasting effects on legal practice and pedagogy. *See, e.g.*, Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimating Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1 (2004) (arguing that the legitimacy of institutions, outcomes, policies, and laws come about through the illusive effects of schemas and scripts).

[90] In *Nineteen Eighty-Four*, for example, the Party works tirelessly to distract the proles with football and gambling and meaningless entertainment, "because only there, in those swarming disregarded masses, 85 per cent of the population of Oceania, could the force to destroy the Party ever be generated." ORWELL, *supra* note 12, at 72.

sense . . . . You don't demoralize and dehumanize a subject people by turning them into celebrities and coaching them on how to craft an appealing persona for a mass audience."[91] It is not the Tributes, however, who are the intended subjects of the state's far-reaching oppression (they are, after all, already trapped in the arena); rather, it is the viewing audience that concerns the Capitol. If the Capitol can forge a relationship between the viewers and the participants, if it can create a stake in the Games for the audience, the Capitol will be able to transform the spectacle from a bloodbath into something with more emotional resonance and catharsis, a theater of loss that ultimately forecloses any actual dissatisfaction, social unrest, or political change.

Transforming the public into an audience also encourages complicity with state objectives and actions. In *The Running Man*, a dystopian narrative set in 2025, protagonist Ben Richards finds himself in need of money to buy medicine for his baby daughter, and like many from the urban underclass (then and now), decides to audition for a spot reality television show. Reality TV in 2025, however, has taken a decidedly violent turn:

> For example, contestants on "Treadmill to Bucks" (only chronic heart, liver, and lung patients participate) run until they have heart attacks. The activity on "Swim the Crocodiles" needs no explanation; contestants blast each other on "Run for Your Guns." Eventually, Richards lands a spot on "The Running Man.". . ."The Running Man" features a nationwide televised and armed manhunt for the contestant, who is staked to forty-eight hours' worth of seed money and given a twelve-hour head start.[92]

Unlike the Hunger Games, there is no arena for this television show. Three paid bounty hunters and local law enforcement pursue Richards through actual towns and cities. If Richards can stay alive for a month, he will win an enormous cash prize; additionally, his family receives money for each hour that Richards stays alive and for each police officer who Richards kills. Viewers of "The Running Man" also have the opportunity to win money for providing any information that leads to the capture of whomever is currently the Running Man; many eagerly participate in the hunt.

Both *The Running Man* and *The Hunger Games* situate the audience at the center of the action, because it is the audience that needs manipulation by the powers that be. Both novels convert the public into agentic and not autonomous beings, following Cover and Milgram; the difference is that *The Running Man* recasts the audience as an accomplice and rewards it for

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[91] Miller, *supra* note 1, at 135.

[92] Texter, *supra* note 78, at 46.

cooperation, while *The Hunger Games* relegates the audience to a powerless, passive spectator role.[93] Either way, just as Kafka's man was unable to deviate from internalized norms around games and the law, the mass of people are controlled through the mechanism of game roles, formal rules, and outside authority. The ludic metaphor keeps the audience behaving within the confines of certain prescribed behavior, be it active or passive, through the invocation and recognition of ludic norms.

2. *Change the Rules, Change the Game?*

Is it possible for characters in dystopian literature to escape these psychological and physical constraints on freedom? Typically, the answer is no. Dystopian works are fundamentally pessimistic and often end badly, although sometimes so badly that the reader might suspect the author's overt nihilism as strategic rhetoric in the service of social reform. Indeed, Foust conceptualizes dystopian projects as pyramiding games into which the dystopian author pulls the reader before exposing the game as a game, so that the reader has new perspective on the capacity for social change and the dangers of complacency. Foust asserts that in this way, dystopian game structures provide toeholds for reconsidering sociopolitical realities.[94]

This is a qualified optimism, and in dystopian fiction for young adults, such optimism may have more narrative presence and impact than in more fatalistic adult-audience dystopian works.[95] At the midpoint of *The Hunger Games*, for example, the Gamemakers dramatically announce to the contestants and to the audience that they have changed the rules to allow two Tributes from the same District to team up and win together. Rule changes are unheard of in Panem, and in the wake of the announcement, Katniss realizes that the audience can change the game:

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[93] According to Texter, King's novel:

> Uses the techniques of war reporting and game shows in service of assuaging the nation's fears about urban crime. The show allows middle-class viewers to forge an identity, one presuming and actually creating a working-class, dangerous Other. Simultaneously, the show destroys the symbols of poverty and crime in "this dark and broken time."

Id. at 49.

[94] *See* Foust, *supra* note 76, at 86.

[95] *See* Miller, *supra* note 1, at 132–33.

> The star-crossed lovers . . . Peeta must have been playing that angle all along. Why else would the Gamemakers have made this unprecedented change in the rules? For two tributes to have a shot at winning, our "romance" must be so popular with the audience that condemning it would jeopardize the success of the Games.[96]

Once Katniss and Peeta are the final Tributes standing, however, the Gamemakers revoke the change without explanation. Faced with the prospect of killing one another, Peeta valiantly offers to take the fall, but Katniss realizes that the Gamemakers have made a strategic mistake:

> [T]hey have to have a victor. Without a victor, the whole thing would blow up in the Gamemakers' faces. They'd have failed the Capitol. Might possibly even be executed, slowly and painfully while the cameras broadcast it through every screen in the country.
> If Peeta and I were both to die, or they thought we were . . . .[97]

Without a winner, the spectators will have no cathartic release from the tragic contest they have been watching, which may lead to dissatisfaction with the Capitol's handling of the Games or, even worse, questions about the institutional machinery and judgment that put such a system into place. This is especially true for the District viewers, whose continued acquiescence to participating in the Games relies, in large part, on the chance that one of their Tributes will return home victorious. If the Games do not lead to a Victor, then the Districts may refuse Capitol directives and resist Capitol predations. When Katniss realizes the Capitol's predicament, she offers to split deadly poison berries with Peeta. They stand back to back, counting down to three, all of Panem glued to the set. The Gamemakers hastily reinstate the rule change, and Katniss and Peeta become the first double Victors in Panem history.[98]

The inability of the Capitol to dictate arbitrary rule changes is telling, because it speaks to the double-edged nature of games as instruments of state power. Even the totalitarian state cannot fool around with the rules too much

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[96] COLLINS, *supra* note 82, at 247.

[97] *Id.* at 344.

[98] Richards is not so lucky. After killing the bounty hunters and refusing an offer to become the Chief Hunter on future episodes of "The Running Man," Richards flies an airplane into the Games Commission Building, killing himself and everyone associated with the show's production. *See* KING, *supra* note 84, at 691–92. This ending is actually a little more upbeat than most classic dystopian endings, which typically feature the utter subjugation and defeat of the protagonist.

without angering the very subjects it attempts to oppress.[99] Importantly, this anger is not directed toward state cruelty or excess but instead comes from the spectator's strong interest in maintaining the internal consistency of a self-executing, definitionally finite, rule-bound system. Rule changes that appear inconsistent, contrary, or arbitrary, however, create widespread dissatisfaction that, in dystopian fiction at least, is counterproductive to the state's oppressive objectives.

For lawyers, this psycho-structural aspect of games suggests broad and appealing analogies with legal philosophy and the possibility of institutional reform. That Katniss could "win" the game by using the rules of the game ("there must be a winner") against the state recalls the enduring cultural paradigm of the reformist lawyer who changes the legal system from within, without revolution, and to extents not dreamed possible before the reforms occurred.[100] Relatedly, the popular appeal of "originalism" may come, at least in part, from psychological tendencies favoring the apparent fairness of rules that remain the same over time.[101] The Bill of Middlesex and other common law legal fictions are evidence of a system rooted in the belief that any change must happen within the context of the rules themselves, as a function of common law judging or legislative product or executive order, lest the public institutional credibility of the law evaporate.[102] The principle of "equal justice under law" presumes, as Leff noted, an almost visceral belief that just outcomes flow from rules, not the other way around.

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[99] *See Law And*, *supra* note 28, at 1000–01.

[100] Take, for example, the life and legal victories procured by Justice Thurgood Marshall, the U.S. Supreme Court's first African-American Justice. Prior to assuming his station on the Supreme Court, Marshall was best known as "an architect of much of the nation's civil rights history," culminating in Brown v. Bd. of Educ., 347 U.S. 483 (1954). Neil A. Lewis, *A Slave's Great-Grandson Who Used Law To Lead the Rights Revolution*, N.Y. TIMES, June 28, 1991, *available at* http://www.nytimes.com/1991/06/28/us/a-slave-s-great-grandson-who-used-law-to-lead-the-rights-revolution.html?pagewanted=all&src=pm.

[101] Studies show that procedural fairness greatly influences perspectives on overall fairness. Kees van den Bos et al., *The Psychology of Procedural and Distributive Justice Viewed from the Perspective of Fairness Heuristic Theory*, *in* JUSTICE IN THE WORKPLACE 49 (2001) (discussing heuristic theory of fairness and recent studies on procedural and distributive fairness standards).

[102] The Bill of Middlesex allowed the King's Bench to have jurisdiction where it otherwise would not by claiming that the defendant committed trespass in the county of Middlesex. Nancy J. Knauer, *Legal Fictions and Juristic Truths*, ST. THOMAS L. REV. 1, 9 (2010); *see also* LON L. FULLER, LEGAL FICTIONS (1967).

Still, dystopian stories generally do not admit the possibility of positive change, and certainly do not valorize incremental changes within the system. Katniss's clever play against the Capitol backfires, as she and her family become targets of the state. Attempting to steer social development and legal culture through game-embedded rule changes implicates too many unknown variables and too much susceptibility to ideological capture ever to work as cleanly as planned. Moreover, the idea that one effectuates social change by preserving the underlying game but changing the top-level rules seems to suffer from a failure of imagination.[103] What if—as many dystopian authors and ADR theorists have pointed out, in one form or another—the game itself is the problem?

C. *Questions that Dystopian Games Pose for ADR*

At first, the idea of pairing Leff's ludic metaphor with Collins's *The Hunger Games* may sound like one of those surrealist party games in which players are supposed to make meaning out of randomly matched sentences. Leff and Collins are not writing for the same audiences, certainly, and they are not part of the same intellectual communities or historical moments. Moreover, *The Hunger Games* is not obviously about the legal system (as is, for example, Kafka's *The Trial*) but instead spins a made-for-the-movies fable about teen angst and oppression. Even broadening the comparison beyond *The Hunger Games* to encompass dystopian literature and theory generally does not make the connection to Leff more immediately apparent. The exaggerated pessimism of dystopian themes and storylines seems, at least at first, incommensurate with Leff's simple tale of the Jondo, the Usa, and the tribe of scholars.

Yet the pairing has useful analytical synergy. Common to both legal games and dystopianism is the recognition that people long for determinacy and closure. What Leff would call "desire for determinacy" shows up in dystopian stories as "desire for utopia," the complex of sociopolitical and psychoanalytical fantasies around individual wholeness and societal coherence within an environment free of trauma, disruption, and uncertainty.[104] Utopian yearnings and fantasies are a primary subject of

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[103] *See* Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007) (discussing the simultaneous role of law as both the exclusive authority in society and the only engine for social change).

[104] The seductive appeal of utopia—a society "in which life is uncomplicated, more equitable, and where an ideal moral, social, and political climate is to be found" has long

critique in dystopian literature because they can empower would-be tyrants with inordinate psychic control over members of society. As Professor Morson writes:

> Many modern anti-utopias, especially dystopias, are concerned not only with the untenability of claims to certainty, but also with the strength of the epistemological yearning that leads to such claims. The imaginary societies they describe are frequently based on the satisfaction of that yearning. . . . Believing that people cannot be happy so long as they doubt, the founders and rulers of some modern dystopias (e.g., *We* and *Brave New World*) knowingly preside over the falsehood that there are no more unanswered questions.[105]

To the extent that legal structures are also trying to promote coherence and determinacy, then, they become possible subjects within the narrative domain of dystopian fiction. Leff did not overtly recognize this possibility, but merely pointed out that the desire for determinacy led to ludism in political and legal institutions, because the rule-boundedness of games permit the formal equality of roles and the conclusive outcomes that appear to track with notions of justice. Dystopian theorists recognize this human need but take the additional step of pointing to the danger posed by would-be oppressors who may exploit this pervasive psychic need.

At the intersection of legal games and dystopian theory, then, are two competing impulses: the desire for and the distrust of utopian ambitions in the law. Games or structures emerge as a way to institutionalize these ambitions, but in turn are susceptible to becoming tools of oppression. Yet

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resonated in the West, even before Sir Thomas More published his famous essay in 1516. E.D.S. Sullivan, *Place in No Place: Examples of the Ordered Society in Literature*, *in* THE UTOPIAN VISION 29 (E.D.S. Sullivan ed., 1983). Dystopian or anti-utopian literature is a response to utopian hegemony over thought and behavior, demonstrating how "the controlled society—no matter how benevolent originally—can be twisted and manipulated for thoroughly irrational and, ultimately, completely unhappy ends." *Id.* at 42. Professor Morson explains that "'dystopia' [is] a type of anti-utopia that discredits utopias by portraying the likely effects of their realization," and so is properly understood as a reaction to utopian visions of social ordering and control, even though those visions are supposed to lead to happiness. GARY SAUL MORSON, THE BOUNDARIES OF GENRE 115–16 (1981). Additionally, dystopian works may play out imagined ramifications of present-day political and social arrangements gone wrong. "Indeed, dystopian fictions are typically set in places or times far distant from the author's own, but it is usually clear that the real referents of dystopian fictions are generally quite concrete and near-at-hand." BOOKER, *supra* note 59, at 19.

[105] MORSON, *supra* note 104, at 125–26.

even after games become evidently oppressive, the internalized norms and values around games legitimize the oppression. This push-pull forms the backdrop for examining the proliferation of alternative or appropriate dispute resolution (ADR) processes. The skeptical Leff did not envision an alternative process that would be superior to the Trial, and would likely have rejected the notion that one game is "better" than another. How, then, would ADR fit into Leff's model of the Usa's dispute resolution landscape? If ADR is a game, if only because of the definitional elasticity of the word "game," then is it just another game that we are destined to lose? Or are ADR games just an outgrowth of legal ludism, providing an existential palliative creating the pleasant illusion of control? If so, are there social costs externalized through the proliferation of ADR processes that are not taken into account? Dystopianism does not answer these questions, but instead provides a more aggressive investigatory stance from which to evaluate them.

IV. GAMES, DYSTOPIA, AND ADR

Consider the following passages:

> Most experts agree that courts are ill-equipped to handle interdisciplinary issues present in divorce cases. Courts can address legal issues that arise when a marriage is terminated, but are unable to also ameliorate the psychological and emotional fallout. Litigant-specific results that fit particular family situations are often unavailable because statutory restrictions on judicial authority are imposed. Judicial labor is reduced when orders fall within parameters adopted by the legislature that make specific fact-finding unnecessary. It is more expedient for judges to follow guidelines that provide a one-size-fits-all solution rather than tailor orders to meet individual family needs. Consequently, easing the trauma suffered by a family falls outside judicial purview.[106]

> We live longer and better than any other citizens in the history of the world. And it's thanks in large part to the Matching System, which produces physically and emotionally healthy offspring . . . . The goal of Matching is twofold: to provide the healthiest possible future citizens for our Society and to provide the best chances for interested citizens to experience successful Family Life. It is of the utmost importance to the Society that the

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[106] Elena B. Langan, *"We Can Work It Out": Using Cooperative Mediation – A Blend of Collaborative Law and Traditional Mediation – To Resolve Divorce Disputes*, 30 REV. LITIG. 245, 246–47 (2011).

> Matches be as optimal as possible.[107]

Both excerpts start from the same premise: that existing state mechanisms for promoting healthy family life are inadequate because they do not provide for the unique challenges that can emerge in marriage, childrearing, and other family-specific situations. Both excerpts make similar promises: creative sociopolitical and legal reforms are necessary to improve the overall welfare of individuals in families. Moreover, as a stylistic matter, both excerpts have an analytical, technocratic affect that gives the impression that whatever problems exist, they are understandable and solvable. Of course, the actual contexts and policy prescriptions of both pieces are quite different. The first is a scholarly article recommending cooperative mediation ("a blend of collaborative law and traditional mediation") in divorce cases; the second is a fictional account of a futuristic society that has foreclosed marital discord and familial strife through sophisticated "matching" technology that assigns spouses within a restrictive legal framework that apparently does not permit divorce. Even so, the progressive dynamic that underlies both pieces—the certainty that the conventional way of doing things is broken, the optimism that a superior approach is available, and the confidence in assembling existing and new system components into an innovative technological solution—is the same.

For the ADR theorist, this sameness is instructive. As noted in the previous section, a central subject of most dystopian literature is the exploitative potential of the utopian state. Utopias, in seeking to promote happy harmonious existence, often limit available choices to "good" ones in developing sociopolitical frameworks that ensure peaceful lives for every member of society. Dystopian literature reveals these imagined societies as dangerous traps for individuals whose desire for determinacy, commonly paired with an aversion to conflict and an overreliance on notions of progress and technology, make them susceptible to subjugation. Underneath the apparent "utopian" contentedness of dystopian society rumbles the heavy machinery of state and/or corporate interests, which maintain the illusion of happiness and harmony through the systematic and often violent elimination of conflict, choice, and consent. As Orwell describes:

> It was terribly dangerous to let your thoughts wander when you were in any public place or within range of a telescreen. The smallest thing could give you away. A nervous tic, an unconscious look of anxiety, a habit of

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[107] ALLY CONDIE, MATCHED 19, 44 (2010).

> muttering to yourself---anything that carried with it the suggestion of abnormality, of having something to hide. In any case, to wear an improper expression on your face (to look incredulous when a victory was announced, for example) was itself a punishable offense. There was even a word for it in Newspeak: *facecrime*, it was called.[108]

What Orwell and other dystopian authors suggest is that the inability to predict and/or resist tyrannical predations is a product not only of external power structures but also of our strong psychosocial longings for determinacy, wholeness, and peace—to appear and to be peaceful and calm, suffused with "quiet optimism" and completely self-actualized.[109] Utopian visions speak to these desires and so make possible these dangers.

To the extent that alternative processes are a utopian response to perceived inadequacies in existing legal and alternative frameworks, then, they become interesting candidates for dystopian analysis. Up to this point, the focus has been on the dystopian resonance of legal games. Now, the analysis naturally turns to ADR, as offering perhaps utopian alternatives to legal games that seek to avoid the dystopian tendencies of the law. This analysis seeks not only to critique but also to appreciate utopianism in ADR, and attempts to recognize the dystopian downsides of utopian ADR thinking along with the transformative benefits that ADR practitioners and participants may at times actually recognize.

The part starts with ADR utopianism. Closer examination of the ever-growing list of ADR processes and contexts indicates that there is not a single utopian vision animating alternative practice; rather, there are multiple and sometimes conflicting utopian ideals in play, and understanding how this epistemological economy works (and does not work) in ADR is important in the dystopian analysis. The part then returns to the original metaphor of the hunger games, at last reaching the question of how ADR games can turn into ADR hunger games—that is, how innovative alternative processes can end up replicating the very problems that they were designed to avoid. Finally, this part considers implications for scholars and practitioners.

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[108] ORWELL, *supra* note 12, at 65.

[109] *Id.* at 6 ("Winston turned round abruptly. He had set his features into the expression of quiet optimism which it was advisable to wear when facing the telescreen.").

A. *Modern ADR Utopianism*

Early utopian thinkers "regarded litigation, quarrels and disputes as a symptom of imperfect human relationships; their aim was to eliminate them."[110] These traditional utopianists were ambitious and optimistic, promulgating a wide variety of possible solutions to social problems. Even amid this process disparity, however, "their goals display[ed] a remarkable affinity: the advancement of knowledge, the control of nature, the relief of poverty, the elimination of disputes and the atainment [sic] of universal peace and harmony."[111]

For many ADR proponents, this ambitious can-do attitude and affiliated goals still resonate. The "alternative" in ADR is commonly understood to mean "alternative to conventional litigation," and may include such diverse procedures[112] as arbitration, mediation, negotiation, litigotiation,[113] mini-trials and early neutral evaluation,[114] rent-a-judge,[115] reg-neg,[116]

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[110] Keith Thomas, *The Utopian Impulse in Seventeenth-Century England, in* BETWEEN DREAM AND NATURE: ESSAYS ON UTOPIA AND DYSTOPIA 20, 38 (Dominic Baker-Smith & C.C. Barfoot eds., 1987).

[111] *Id.* at 41.

[112] Stephen Goldberg, Eric Green, and Frank Sander compiled and delineated these categories in the first major ADR casebook, *Dispute Resolution.* STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION 7–10 (1985).

[113] Litigotiation is the "strategic pursuit of a settlement through mobilizing the court process." Marc Galanter, *Worlds of Deals: Using Negotiation to Teach about Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984).

[114] Mini-trials and early neutral evaluation are examples of "so-called mixed processes, which combine elements of more than one basic dispute resolution process [that is, negotiation, mediation, and arbitration]." LEONARD L. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS ABRIDGED EDITION 14 (3d ed. 2006). In both the mini-trial and early neutral evaluation, a knowledgeable neutral advises the parties on how a "real" trial might turn out, should the parties decide to litigate. *Id.* at 14-15.

[115] Rent-a-judges are state-sanctioned (usually by statute) and privately hired arbitrators or judges. For more information on the background and history of the practice, see Anne S. Kim, *Rent-a-Judges and the Cost of Selling Justice*, 44 DUKE L.J. 166, 168 (1994); Robert Gnaizda, *Secret Justice for the Privileged Few*, 66 JUDICATURE 6, 11 (1982) (arguing against the practice as exclusionary); Robert Coulson, *Private Settlement for the Public Good*, 66 JUDICATURE 7, 8 (1982) (promoting rent-a-judges as a "special, statutory form of arbitration").

[116] "Reg-neg" describes regulatory negotiation sessions in which interested parties negotiate regulations with an agency or rule-making body. *See, e.g.*, Patricia M. Wald, *ADR and the Courts: An Update*, 46 DUKE L.J. 1445, 1457–58 (1997).

collaborative law,[117] dispute systems design,[118] case management,[119] multiparty consensus building,[120] online dispute resolution,[121] ombuds,[122]

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[117] Collaborative law practice seeks to capitalize on the benefits of legal representatives without the encumbrances of legal strategizing and gameplay. In a collaborative law scenario, the parties agree to limit the scope of legal representation to creative problem solving and mutually agreeable negotiated outcomes. Should one or both of the parties decide to pursue litigation, both attorneys (pursuant to the initial agreement) are disqualified and the parties must engage new counsel. PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 9 (2d. ed. 2008). Concerns that collaborative practice may conflict with the lawyer's ethical duties have proven mostly speculative at this point. *See* Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289, 311–24 (2008). Should collaborative law become a more prominent process choice outside of the marriage dissolution context, however, it may begin to receive more critical scrutiny.

[118] *See generally* CATHY A. COSTANTINO & CHRISTINA SICKLES-MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS (1996); WILLIAM URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT (1988).

[119] Case management describes the role of judges before and during trial; in addition to their traditional adjudicatory role, judges are also actively involved in promoting settlement and clearing dockets. *See generally* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982); *see also* Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669 (2010) (exploring the criticisms and benefits of modern pretrial case management).

[120] *See generally* LAWRENCE SUSSKIND ET AL., THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT (1999); *but see also* Lawrence Susskind, *Consensus Building and ADR: Why They Are Not the Same Thing, in* THE HANDBOOK OF DISPUTE RESOLUTION 358, 367–69 (Michael L. Moffitt & Robert C. Bordone, eds., 2005) (differentiating between multiparty consensus-building and court-connected alternative processes).

[121] Online dispute resolution refers both to the use of internet and similar technologies to assist in dispute processing and to the resolution of disputes that happen online, such as buyer-seller disputes on eBay. *See, e.g.*, COLIN RULE, ONLINE DISPUTE RESOLUTION FOR BUSINESS: B2B, E-COMMERCE, CONSUMER, EMPLOYMENT, INSURANCE, AND OTHER COMMERCIAL CONFLICTS (2002). The field is in its early, and somewhat intriguing, stages. *See, e.g.*, David Allen Larson, *Artificial Intelligence: Robots, Avatars, and the Demise of the Human Mediator*, 25 OHIO ST. J. ON DISP. RESOL. 105, 163 (2010) ("There is a generation quickly moving to adulthood that spends significant time interacting with avatars in cyberspace.. . .They will search for, and will not hesitate to use, artificial intelligence devices to assist them in dispute resolution and problem solving. They are able to interact with avatars, robots, and other forms of relational agents easily and will expect and demand dispute resolvers and problem solvers to be similarly prepared.").

and cooperative process.[123] These processes (or "games") can vary widely, in terms of parties, processes, purposes, contexts, and typical outcomes. Adhesive arbitration between a credit card company and a customer is different from a mediation between neighbors at a community mediation services office. Negotiating one's promotion package is different from building a dispute resolution process to handle sexual harassment grievances at a university. Even processes that sound like the same thing can be different depending on the context and participants: as Laura Nader and others have pointed out, private mediation in an American city between white businessmen may not resemble—as a matter of process, of substantive results, or of broader sociopolitical import—private mediation imported into African communities that replaces local forms of dispute resolution and displaces formal adjudicatory processes.[124]

Cutting across these different forms are various renditions of traditional ADR chapter and verse that reenvision traditional utopian ideals within a more economically aware context: to provide straightforward, sensible procedures that lead to mutually beneficial outcomes, whether in the context of dispute resolution or dealmaking.[125] Generally speaking, regardless of the type of ADR, and regardless of the political motivation underlying the process, this dual emphasis on procedural clarity and substantive welfare

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[122] An ombudsman is typically an organizational representative who addresses complaints from a particular group, such as employees or consumers, and provides constructive feedback to the organization. *See, e.g.*, Philip J. Harter, *Ombuds: A Voice for the People*, 11 NO. 2 DISP. RESOL. MAG. 5 (2005) (giving a general overview of the history, types, and roles of ombuds).

[123] Cooperative process or cooperative negotiation is similar to collaborative law but without the disqualification agreement. Parties agree "to negotiate in good faith, provide relevant documentation, and use joint experts as appropriate." John Lande, *A Recent Innovation, 'Cooperative' Negotiation Can Promote Early and Efficient Settlement Through Joint Case Management*, 27 ALTERNATIVES TO HIGH COST LITIG. 117, 117 (2009); *see also* John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280, 284 (2004).

[124] *See* Laura Nader & Elisabetta Grande, *Current Illusions and Delusions about Conflict Management — In Africa and Elsewhere*, 27 LAW & SOC. INQUIRY 573, 587 (2002).

[125] In addition to dispute resolution and dealmaking, there are also negotiated arrangements having to do with group dynamics, working relationships, and other organizational or relational concerns. DANNY ERTEL & MARK GORDON, THE POINT OF THE DEAL: HOW TO NEGOTIATE WHEN YES IS NOT ENOUGH, 14–15 (2007).

persists,[126] usually with respect to imagined alternatives, typically litigation. One of the similarities between consumer arbitration, organizational dispute systems, and neighbor-to-neighbor mediation, for example, is that they are all happening in the "shadow of the law," an evocative phrase that suggests both the hulking monolithic presence of legal institutions nearby as well as the private, hidden nature of many alternative processes.[127] The law's shadow not only determines the bargaining entitlements that participants have (thus providing a benchmark for determining the value of particular proposals),[128] it also heightens the contrast between the alternative and primary processes, which may bolster and sustain participation.

Additionally, many modern alternative processes have their intellectual provenance in the canon of interest-based or "principled" negotiation as described by Roger Fisher and William Ury in *Getting to Yes*.[129] Fisher and Ury's familiar four tenets include focusing on interests instead of positions, separating the people from the problem, using objective criteria, and generating options for mutual gain.[130] Proponents of interest-based processes assert that such processes add value by allowing for the possibility of integrative solutions to apparently zero-sum situations.[131] By sharing information, such as the parties' interests or available resources, participants attempt to build Pareto-optimal packages through value-creating trades that leave both parties better off than they would have been without negotiating, or only negotiating on a single distributive issue. Interest-based process advocates also stress the importance of finding value through differences—including differences in time horizons, risk preferences, valuations and priorities, and resources—that facilitate trading for mutual gain and enhance the value of final agreements.[132] Even ADR processes and scholarship that do not mention *Getting to Yes* or its progeny almost always assume one or

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[126] Here, the term "welfare" does not have a redistributive connotation but instead refers to social utility in the aggregate. So an ADR process may lead to greater social utility even though it disproportionately benefits one party over another.

[127] *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968–69 (1979).

[128] *Id.* at 968.

[129] ROGER FISHER & WILLIAM URY, GETTING TO YES NEGOTIATING AGREEMENT WITHOUT GIVING IN 10–11 (1981) (hereinafter GETTING TO YES).

[130] *Id.* at 73.

[131] *See id.*; *see also* ROBERT H. MNOOKIN ET AL., BEYOND WINNING 11-43 (2000); WILLIAM URY, GETTING PAST NO 159–171 (1991).

[132] *See* MNOOKIN ET AL., *supra* note 131, at 14–15.

more of these ideas in whatever theoretical foundation they end up developing.[133]

The idea of developing innovative cures to social problems and creating a private, harmonious space peopled with autonomous beings recalls More's Utopia, a "distant island" far removed from the corruption and injustice of political society, an alternative approach, the world "as it should be."[134] ADR culture internalizes similar aspirations and develops processes meant to correct for the shortcomings of existing processes while promoting holistic visions of community and individual justice.[135]

The wide range of available processes and their underlying aspirational justifications are suggestive of the modern utopian sensibilities in ADR. Austin Sarat observed that the exercise of defining processes ("essentialism") and matching them to disputes revives elements of nineteenth-century legal formalism in ways that are "not politically neutral."[136] Matching disputes to formats is arguably a strongly game-like activity; indeed, the idea of ADR as a sort of matching game maps well onto Sarat's observations about the neoformalism of the field. In a 1988 review of the first definitive dispute resolution casebook (Goldberg, Green, and Sander's *Dispute Resolution*), Sarat pointed out some foundational assumptions in alternative practice that echo traditional utopian values and persist today:

> The new formalism . . . also contains the ideal of effective resolution, which holds that given the right match of dispute and dispute processing technique, harmony can be restored and problems can have resolutions that satisfy the disputants and are therefore likely to be final . . . . This emphasis on resolution suggests a preference for an image of social life in which harmony prevails; conflicts are idiosyncratic; and mediation, arbitration, adjudication and other dispute processing techniques work to resolve problems.[137]

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[133] As Bob Bordone has drolly observed, many "new" advances in ADR often seem like nothing more than *Getting to Yes* "put in a blender, mixed up for a bit, and then poured back out." E-mail from Robert C. Bordone, Thaddeus R. Beal Clinical Professor of Law, Harvard Law School, to Jennifer Reynolds, Assistant Professor of Law, University of Oregon School of Law (June 30, 2011) (on file with author).

[134] GOTTLIEB, *supra* note 2, at 26.

[135] *See, e.g.*, BUSH & FOLGER, *supra* note 53, at 259 (describing the possibility of a "different, relational society" as a kind of realizable utopia).

[136] Austin Sarat, *The "New Formalism" in Disputing and Dispute Processing*, 21 LAW & SOC'Y REV. 695, 697, 705 (1988).

[137] *Id.* at 698.

Sarat notes that "[t]he escape to the private realm of agreement, to a restored and harmonious consensus, is to be preferred to the public realm with its compulsions, divisions, zero-sum decisions, and shattering social effects."[138] Although he did not mean this as a compliment (he goes on to explain how these priorities may curtail or limit greater sociological understanding around dispute processing), this description nonetheless sounds very much like the sorts of justifications commonly offered by ADR specialists for alternative processes.

Of course, ADR scholars and practitioners are aware of the aspirational and sometimes utopian overtones of much ADR literature.[139] Moreover, most ADR specialists realize that utopian goals are not as dreamily coherent as they sound. The utopian impulse may be widespread without necessarily giving rise to identical utopian prescriptions.[140] As Donna Shestowsky has pointed out in the early case management context, two traditional ADR "utopias"—self-determination and institutional efficiency—often work at cross purposes, making provision of justice difficult.[141] Likewise, in adhesive arbitration scenarios, the utopian ADR goals of autonomy and institutional efficiency are in conflict and cannot work together without, perversely, the legal fiction of consent provided by contract law.[142] These tensions notwithstanding, utopian predilections continue to inform conventional ADR

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[138] *Id.* at 705.

[139] Michael Moffitt's term "ADR evangelists" aptly describes both the subgroup of ADR scholars and practitioners who are "true believers" as well as the widespread presumption within ADR communities favoring alternative processes. *See* Michael L. Moffitt, *Three Things To Be Against ("Settlement" Not Included)*, 78 FORDHAM L. REV. 1203, 1204 (2009).

[140] "A utopia to one reader can be a totalitarian hell to another and quite a boring place to a third.. . .It can consequently exist only at an individual level, but then an individual utopia is, strictly speaking, no utopia at all since the concept is ultimately founded on the idea of complete consensus." PIA MARIA AHLBÄCK, ENERGY HETEROTOPIA DYSTOPIA: GEORGE ORWELL, MICHEL FOUCAULT AND THE TWENTIETH CENTURY ENVIRONMENTAL IMAGINATION 161 (2001).

[141] Donna Shestowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549, 551 (2008).

[142] *See, e.g.*, Clark Freshman, *Tweaking the Market for Autonomy: A Problem-Solving Perspective to Informed Consent in Arbitration*, 56 U. MIAMI L. REV. 909, 910 (2002) (thinking through incentives and barriers to offering greater actual autonomy in arbitration contexts).

responses to the drawbacks of traditional litigation and to the promise of process innovations.

B. *ADR Hunger Games*

As an example of utopianism in ADR scholarship, consider this introduction from a recent piece on early case management (early case management is a set of innovative ADR processes designed to facilitate upstream resolution of court cases more efficiently):

> Thomas Hobbes famously described human life as "nasty, brutish, and short." No doubt, many litigants would give the same description of litigation, except they see it as "nasty, brutish, and long." . . . Being in a dispute in an adversarial disputing culture is enough to bring out the brute in many people. Even though many parties and lawyers are not generally nasty, they may act that way in response to their perception of nastiness by the other side. This can lead to a cycle of escalating conflict, which prolongs the agony. The last thing that some people want to do in this situation is to work cooperatively with (what they perceive as) the brute on the other side.[143]

It is useful to note that in Hobbes's view, what makes life nasty, brutish, and short is not the "Leviathan" of formal structured government; on the contrary, the Leviathan prevents society from devolving into the ultimate dystopia: constant violence and war.[144] Governments, and by extension legal institutions, are therefore necessary evils that individuals jointly accept in order to create and preserve minimum standards of existence. By calling on

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[143] John Lande, *The Movement Toward Early Case Handling in Courts and Private Dispute Resolution*, 24 OHIO ST. J. ON DISP. RESOL. 81, 81–82 (2008).

[144] THOMAS HOBBES, LEVIATHAN 227 (Penguin Books 1985) (1651) ("This is more than Consent, or Concord; it is a reall Unitie of them all, in one and the same Person, made by Covenant of every man with every man, in such manner, as if every man should say to every man, *I Authorise and give up my Right of Governing my selfe, to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his Actions in like manner* ... This is the Generation of that great LEVIATHAN, or rather (to speake more reverently) of that *Mortall God*, to which wee owe under the Immortall God, our peace and *defence*."). Interestingly, Leff also sometimes referred to the legal system as a Leviathan. *See* Arthur Allen Leff, *Injury, Ignorance and Spite—The Dynamics of Coercive Collection*, 80 YALE L.J. 1, 8 (1970) (comparing the "judicial-coercive process" to a costly Leviathan that moves "to its own arcane principles").

this tradition of political philosophy, the author recasts the conventional legal system in the undesirable "state of nature" role—a role that, in fact, is even worse than Hobbes's state of nature, which at least was mercifully short. Suggesting that the modern legal system transforms people into mindless brutes[145] has strong cultural significance, because it implies that the social contract, which was supposed to prevent people from becoming brutes, has failed.

As an alternative, the author states that early case management offers substantive and procedural improvements over litigation that (although no "silver bullet") promise "in theory . . . *few or no* disadvantages"[146] and provide larger individual and social benefits of "increased cooperation between lawyers and parties, increased and strategic focus on the most critical issues in the conflict, reduction in unproductive conflict, and improvement of relationships."[147] These suggested benefits resonate with the model of the social contract and provide a modest demonstration of the utopian/dystopian dynamic at work in ADR scholarship: the juxtaposition of the irreparably failed/failing current process with the normatively superior, substantially more beneficial proposed process.

Of course, framing an argument in dystopian and utopian valences is a familiar rhetorical move, in ADR and other types of legal scholarship. What might be less familiar is how this kind of utopian/dystopian interpretive stance fuels much of the intellectual and practical innovation in ADR culture, not just as an attention-getter but as a substantive justification for major changes to or departures from public institutions. Indeed, one hallmark of ADR-driven reforms (either of traditional legal processes or of existing alternative processes) is the explicit and often exaggerated dualism between innovative and existing processes as good/bad or utopian/dystopian. This dualism is often atmospheric, more of an undercurrent than a supporting pillar of the argument.

Put another way, ADR specialists often evoke the specter of dystopian society—the hunger games, in various permutations—to validate utopian overhauls of the legal system.[148] In the Hobbes excerpt above, a dystopian

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[145] *See* Lande, *supra* note 143, at 84 (differentiating between people who "intentionally exercise responsibility" [using early case management] from those who "passively allow[] the case to run its course" [in litigation]).

[146] *Id.* at 86, 87 (emphasis added).

[147] *Id.* at 93.

[148] Comparing ADR utopia with legal dystopia is common and problematic. "As many critics of ADR note, proponents of ADR often engage in false comparisons: an ideal of ADR versus an imperfect reality of litigation." Freshman, *supra* note 140, at 943

vision of litigation warranted significant procedural changes in how civil cases proceed in the early stages. The assertion prompts the question: has early case management actually mitigated the dystopian effects of traditional litigation? One prominent restorative justice scholar, referring to early case management as itself an "ADR dystopia," clearly does not think so:

> [C]ivil law ADR [which includes early case management] . . . is likely to fail when it is under the hegemony of lawyering for three reasons. First, the lawyer's reform instinct is to narrow the issues—a turn in the wrong direction. Second, the lawyer's practice instinct is to scheme to corrupt the narrowing so it conceals from the light of truth any bad aspects of her client's case. Third, lawyer domination of ADR means that ADR is used tactically and cynically to extract as much truth as possible from any noncynical truthful engagement by the other side while communicating deceptively to them in an attempt to put them on the wrong scent. Nontruth and nonreconciliation are the most likely results when the culture of adversarial lawyering captures both the convening of ADR and the presentation by both sides of the facts to be mediated.[149]

According to this scholar, the integration of alternative processes within traditional litigation frameworks cannot work because the participants—namely, lawyers—are only able to play one kind of game. The article goes on to argue that ADR processes:

> should not be convened by lawyers, should not normally hear from lawyers, should reject legal discourse of a sort that narrows the issues to the legally relevant, should resist domination by courts that instruct it to do so, and should attempt to outflank such legal domination by a preference for bottom-up face-to-face dialogue among a plurality of stakeholders before any lawyers start collecting fees.[150]

(citing Robert A. Baruch Bush, *'What Do We Need a Mediator For?:' Mediation's Value-Added for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 6 (1996)); *see also* Richard L. Abel, *Introduction*, *in* THE POLITICS OF INFORMAL JUSTICE 9 (Richard L. Abel ed., 1982).

149 JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION 249 (2002).

150 *Id.* at 250. Braithwaite does mention, however, that lawyers trained in collaborative law might be all right; *see id.* (stating that collaborative law paradigms "might give pause to my earlier reservations about lawyers speaking during restorative justice processes").

The author's dystopian vision of early case management and similar efforts is marked by the fundamental disconnect between the normative aspirations of ADR and the actual priorities and practices of lawyers involved in such "top-down" alternatives. On this view, early case management and other forms of "legal ADR" are "dystopia[n]" and even "pathological"[151] in that both subvert the philosophy and intentions of alternative processes by mapping alternative processes onto adversarial lawyering, a sort of subroutine of the primary game of the Trial.

Here, then, we have our first example of an ADR hunger game: an innovation—here, early case management, which promises to restore human dignity to dispute resolution processes that have become brutish and inhumane—that, ultimately, does not just fall short of the mark but actually harms participants by exposing them to litigation-level risks without giving them the protections afforded by the civil system and, as a result, retards the progress of social justice. Early case management, itself sold as a utopian upgrade of traditional litigation, creates—in Braithwaite's view—the worst of all worlds, a dystopia of sharp lawyers running roughshod over helpless disputants.

Characterizing early case management in such a dystopian manner recalls other similar critiques of ADR in other contexts, notably feminist and race-based analyses of power differentials in mediation and other alternative processes.[152] In these critiques, as in the above critique of early case management, ADR's utopian ideals of consent, autonomy, self-

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[151] *Id.* at 248, 253. Note that the language of pathology and cure echoes the reformist ambitions (i.e., "we can fix this") of the early utopians.

[152] *See, e.g.*, Bobbi McAdoo & Nancy Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L.J. 399 (2004–05); Susan Silbey, *The Emperor's New Clothes: Mediation Mythology and Markets*, 2002 J. DISP. RESOL. 171, 174 (2002) ("Mediation is ideological because it masks its institutionalized exercises of power within claims about justice"); Eric Yamamoto, *ADR: Where Have All the Critics Gone?*, 36 SANTA CLARA L. REV. 1055 (1996); Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement To Reform Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993); Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991) (claiming that mandatory mediation "often imposes a rigid orthodoxy as to how they should speak, make decisions, and be. This orthodoxy is imposed through subtle and not-so-subtle messages about appropriate conduct and about what may be said in mediation. It is an orthodoxy that often excludes the possibility of the parties' speaking with their authentic voices"); Richard Delgado et al., *supra* note 10; Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

determination, and peace become coercive state instruments that vaunt efficiency over self-determination and peace over justice, even though (as in the case of court-connected early processes) the efficiency benefits are routinely overstated.[153]

One might argue, however, that this particular hunger game is not a good example. Early case management, after all, is a close cousin of civil litigation, which arguably may have contaminated an otherwise well-intentioned process. Braithwaite, who criticized early case management as dystopian, is a proponent of restorative justice; let us turn our attention there.[154] In Braithwaite's view, restorative justice, unlike the process tweaking of early case management, claims to offer "a restorative and responsive transformation of the entire legal system."[155] By cultivating shared values throughout society (among them fairness, justice, nondomination, deliberation, and public accountability)[156] and by "caus[ing] the organizational sector of the economy to internalize most of the current public costs of civil disputing,"[157] an innovative restorative justice approach that is simultaneously grassroots and subsidized by private institutions may answer the needs of individual and social justice:

> [A] rule of law that grows from the impulses bubbled up from the restorative justice of the people, a legal system where the justice of the law has a conduit for filtering down to the justice of the people and vice versa, will be a more democratic rule of law than one shaped by legal entrepreneurs who work only in the service of the rich and powerful . . . . It is not that the "balance" between restorative justice and state justice has been got right, it is that the one is constantly enriching and checking the other.[158]

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[153] *See* Shestowsky, *supra* note 139, at 551 ("Courts often subordinate disputants' needs to the desires of the bench (as well as the bar) to clear dockets and reduce the institutional costs of disputes even though empirical studies of court-connected programs suggest that they often fail to meet these institutional goals.").

[154] Restorative justice is "a movement in criminal law in which criminal justice and criminal sentencing are carried out by the community, the victim, and the offender in a collaborative process." RISKIN ET AL., *supra* note 114, at 537.

[155] BRAITHWAITE, *supra* note 149, at 264.

[156] *Id.* at 264.

[157] *Id.* at 265. Here, Braithwaite is advancing Christine Parker's ideas about organizational involvement in dispute prevention and resolution. *See id.* at 254–57.

[158] *Id.* at 265.

This theoretical structure (which he claims is "not as utopian as it seems") aims to "transform the place of regulation and law in sustaining the economy, managing relationships between nations, reinventing education and building a richer democracy."[159]

Whatever one thinks about the substantive merits of these proposed restorative justice reforms (or of early case management, for that matter), it is undeniable that his proposal sounds utopian, for at least two reasons: one, the valorization of uniformly shared social values that presupposes a common understanding of things like "fairness" and "justice"; and two, the optimistic assertion that an organization's "internalization of the costs of disputing" not only will expand access to justice for the disadvantaged but will foster more "dispute prevention rather than dispute resolution."[160] As before, the utopian/dystopian dynamic is in play. The earlier piece starts with the dystopian ("brutish") nature of traditional litigation and proposes, in response, early case management. The following piece starts with the dystopian ("dystopian" and "pathological") nature of early case management and proposes, in response, ambitious restorative justice reforms. In both cases, the scholars are careful not to claim that their proposals will lead to "utopian" results but nevertheless incorporate utopian subtexts into their scholarship, promising significant substantive, socially transformative, and individually beneficial results.

For all the utopian rhetoric of restorative justice, it does not take much imagination to play out possible dystopian implications of the restorative justice proposal. Scholars have already pointed out that the mythic, romanticized language of the field tends to privilege some voices while silencing others.[161] What of the disputant who does not share the same

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[159] *Id.* at 266. This is the conclusion of Braithwaite's book, which accounts in part for some of the aspirational tone.

[160] *Id.* at 255.

[161] *See, e.g.*, Kathleen Daly, *Restorative Justice: The Real Story*, 4 PUNISHMENT & SOC'Y 55, 62–63 (2002), *available at* http://pun.sagepub.com/content/4/1/55 (noting that restorative justice scholars often "construct[] origin myths" of indigenous dispute resolution practices as the basis for arguments that "superior justice form[s]" exist, and that romanticizing these practices leads to, among other things, convenient omissions and problematic gendering of restorative justice concepts (e.g., justice as male and care as female)); *see also* Anne Cossins, *Restorative Justice and Child Sex Offences: The Theory and the Practice*, 48 BRIT. J. CRIMINOL. 359, 371–72 (2008) (arguing that restorative justice programs have not been able to sufficiently even out the power disparities between victims and offenders and so should not be used in cases involving the sexual assault of a child). In a response to Cossins's article, Daly noted that Cossins's analysis

understanding of the values that "bubble up" from the "indigenous deliberation of disputes" by the "people"?[162] Who is to say that widespread or even universally-held custom necessarily has any moral value?[163] And why is the prevention of disputes by corporate interests something that necessarily tracks the ends of restorative justice? Following Kafka, one could imagine the Ombuds, a silky-voiced character who manipulates the hapless, underresourced Employee or Consumer through various cognitive heuristics into willingly foregoing meritorious claims, thus protecting the organization from shouldering costs associated with investigation, procedure, and possible impacts on human resources.[164]

Indeed, one of the most trenchant ADR critiques is that alternative processes tend to divest disputes of any inherent rightness/wrongness and instead recast them as neutral, interest-based processes that support

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provided useful critique but "innovation" in particular contexts of sexual violence was still required.

[162] BRAITHWAITE, *supra* note 149, at 265.

[163] The attempt to universalize subjective, contingent values as "universal" was a common concern of Leff's work as well. *See Memorandum*, *supra* note 34, at 885 ("[If] one discovered that it was part of the nature of humans frequently to enslave each other and occasionally to drop flaming napalm on newborn babes. . .[it accordingly would be quite difficult to accept] man as the measure of goodness").

[164] The ombuds phenomenon is interesting in part because it is almost universally lauded, *see supra* note 120, with scant critical review of the role. *See, e.g.*, Mary Rowe, *An Organizational Ombuds Office in a System for Dealing with Conflict and Learning from Conflict, or "Conflict Management System"*, 14 HARV. NEGOT. L. REV. 279 (2009) (describing the complimentary role of an ombuds office within a conflict management system); Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. DISP. RESOL. 1 (2007) (discussing how ombuds offices can effectuate systemic change and shape public norms); D. Leah Meltzer, *The Federal Workplace Ombuds*, 13 OHIO ST. J. ON DISP. RESOL. 549 (1998) (evaluating federal agency ombuds case studies and providing recommendations for effective ombuds offices); Shirley A. Wiegand, *A Just and Lasting Peace: Supplanting Mediation with the Ombuds Model*, 12 OHIO ST. J. ON DISP. RESOL. 95 (1996) (advocating for an ombuds model to support and possibly supplant mediation). Further research on how ombuds actually interact with constituents and sponsors would be helpful. Additionally, it would be interesting to see how many dispute systems design models recommend the creation of an ombuds office, which may perhaps suggest that actual system changes are insufficient without installing a skilled person to operate the levers of organizational dispute processing. *See, e.g.*, Carol S. Houk & Lauren M. Edelstein, *Beyond Apology to Early Non-Judicial Resolution: The MedicOm Program as a Patient-Safety Focused Alternative to Malpractice Litigation*, 29 HAMLINE J. PUB. L. & POL'Y 411 (2008) (advocating within dispute systems design context for the use of medical ombuds/mediator programs to resolve patient and provider disputes and medical malpractice claims in a non-adversarial way).

essentially capitalist values.[165] Dumping toxic waste into a waterway becomes, on this view, not "evil" but rather an "option" that might be more or less attractive, given other interests and other options. This nonjudgmental stance is, in many ways, what makes ADR work; at the same time, it perhaps has also become what makes ADR problematic for those who would seek justice.[166]

To be clear, an ADR dystopia does not occur when designers try out a new innovation and fail, for whatever reason. ADR dystopias occur when alternative processes deliver strikingly opposite results to stated goals, as in Braithwaite's description of early case management; or leave participants dissatisfied but unable to determine or articulate whether the outcome is just, as in Grillo's analysis of the gendered dimension of divorce mediation; or, relatedly, provide participants with a heady dose of apparently procedural justice (for example, being treated with courtesy and respect in the presence of a self-described neutral) without giving them any "actual" justice, as in Silbey's critique of the "neutral" valence of mediation; or vilify conflict while overemphasizing, as a normative matter, the importance of getting along. ADR dystopias convince participants to lay down their arms and then abandon those participants, stripped of formal protections and hidden from public view, to the vagaries and predations of coercive corporate and state interests.

C. *Implications for ADR Scholars and Practitioners*

The utopian/dystopian dynamic—a dynamic that encompasses both how ADR evokes hunger games as an instrument of change and how ADR is susceptible to becoming a hunger game—is a typical trajectory for ADR-

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[165] *See generally* Cohen, *supra* note 13; *see also* Amy Guttman, *How Not To Resolve Moral Conflicts in Politics*, 15 OHIO ST. J. ON DISP. RESOL. 1, 6–7 (1999) (noting, among other things, that interest-based dispute resolution processes do not necessarily lead to moral results).

[166] *See, e.g.*, Kevin Avruch, *Toward an Expanded "Canon" of Negotiation Theory: Identity, Ideological, and Values-Based Conflict and the Need for a New Heuristic*, 89 MARQ. L. REV. 567, 578–82 (2006). Stanford Law School has recently launched an international human rights clinic that attempts to link human rights work and conflict resolution practices. *See* International Human Rights and Conflict Resolution Clinic, http://www.law.stanford.edu/program/clinics/ihrcr/ (last visited Apr. 30, 2012). The clinic's faculty leads, Jim Cavallaro and Stephan Sonnenberg, noted that the two fields have significant philosophical disconnects when it comes to assessing "good v. evil" kinds of questions. James Cavallaro & Stephan Sonnenberg, Presentation at the Washington University Roundtable on New Directions in Negotiation (Dec. 2, 2011).

based scholarship and policy games: a strongly articulated dichotomy between existing and proposed processes that invokes neoliberal fears (e.g., lack of choice and consent) and appeals to neoliberal values (e.g., autonomy and self-determination).[167] Certainly such rhetorical dualism exists in other areas of sociolegal culture and scholarship—for example, one of the politician's main weapons is to spin out the parade of horribles that may follow a proposed course of action or nonaction; and scholars make their livings from dismantling and rebuilding mousetraps—but in ADR, this dualism is particularly acute.

There are at least two reasons for this. One, ADR promotes a culture of problem-solving and creativity, which in turn encourages ADR scholars and practitioners to develop "outside the box" solutions that need not track with previous approaches. Unlike legal reforms, which are often much less sweeping and ambitious, ADR proposals have an appealing intellectual and practical freedom that is bounded only by the experience of practitioners and, perhaps, the dystopian critiques of other scholars. Because of this, the tendency to propose more radical innovations and wholesale changes may be more pronounced in ADR scholarship, which could mean that "making the case" for these radical changes requires more utopian promises and more dystopian critique.

Two, and as mentioned above, ADR theories and practices often explicitly refer to and incorporate the aspirational values that undergird the field, as well as focus on the personal and interpersonal aspects of conflict and conflict resolution. As everyone associated with ADR knows, this "touchy-feely" dimension of ADR attracts many people and repels many others. Beyond this attraction/repulsion, the touchy-feely dimension may make it more difficult to analyze the semiotic valence of a particular innovation, to see the innovation as circumscribed and constituted by its cultural predicates, to generate critical distance on the device without rhetorical distortion from the utopian/dystopian dynamic. In other words, whereas the law can recognize its own utopian/dystopian dynamic through the "parade of horribles" device, ADR may not have the same self-critical

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[167] As Carrie Menkel-Meadow writes, "our field of conflict resolution has little in the way of generalizable propositions that work (explain, describe, predict, and prescribe) across all domains." Carrie Menkel-Meadow, *Correspondences and Contradictions in International and Domestic Conflict Resolution: Lessons from General Theory and Varied Contexts*, 2003 J. DISP. RESOL. 319, 320 (2003). In describing the utopian/dystopian dynamic in ADR, this article does not mean to set forth an essentializing or simplifying proposition, but instead to provide a theoretical basis for thinking through a recurrent dichotomy in ADR scholarship and practice.

distance on its own ideological and rhetorical excesses. At best, this myopia may make it more difficult to evaluate process innovations; at worst, it may result in a moralistic complacency that alienates non-ADR people, stymies productive development and innovation, and rejects existing political and legal structures too quickly.[168]

The conditions exist now for ADR dystopia. ADR values are well-established, even dogmatic and sometimes orthodox, suggesting an ideological consistency and priority of values belied by the constant flux and growth of alternative processes.[169] Moreover, the popularity of ADR among organizations and government agencies can be troubling at times, considering that private individuals do not seem to share the enthusiasm for alternative practice. As many scholars have pointed out, the failure of private individuals to embrace ADR in dispute resolution suggests a legitimacy concern with the very constituents that ADR attempts to serve.[170] Accordingly, more work needs to be done around interrogating the processes and outcomes within alternative practice.

All this said, ADR practitioners and participants sometimes report what might sound like utopian experiences—those real-life transcendent, transformative interactions of forgiveness and resolution. These experiences are important to keep in mind and incorporate into this theoretical structure, if only because they offer some direction, however contingent and overdetermined, to approaching conflict. For people who spend their lives studying and working with conflict situations, this is no small benefit.

One possible area for future research along these lines is the "heterotopia"—the "other" space, and often defined alongside utopias and dystopias—a Foucauldian theoretical construct[171] that has become popular in

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[168] This brings us back to Leff and the endless search for determinate answers. Valorizing alternative processes as more enlightened, more moral, more utopian, more spiritual/mindful, is perhaps nothing more than an effort to supply external guidance and extrasystematic metrics where none exist.

[169] For example, compulsory processes in ADR are increasingly common. "It is perhaps the central irony of the recent success of ADR that it is built on the sort of mandatory approach that ADR rejected throughout most of its history." Landsman, *supra* note 10, at 1600.

[170] *See, e.g.*, Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 988 (2000) ("Institutional support [for ADR] is visibly high, but voluntary usage remains low and is marked both by a pervasive sense of silent skepticism by ADR outsiders and by mounting disappointment and disillusionment from ADR insiders.").

[171] Michel Foucault, *Of Other Spaces*, 16 DIACRITICS 22, 24 (1986), *available at* http://foucault.info/documents/heteroTopia/foucault.heteroTopia.en.html.

urban planning and in some pockets of legal scholarship.[172] Heterotopias are "effectively enacted utopias," highly constructed and demarcated spaces that effectuate some aspect of utopian vision.[173] For ADR theorists, the idea of heterotopia may provide important new insights into how ADR ideologies, actual practices, and physical settings contribute to dispute processing and resolution, and even why utopian goals apparently can be realized at times.[174]

Finally, it is important to remember that, pedestrian though it may sound and as counter-dystopian as it might be, positive change may require utopian,

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[172] *See, e.g.*, Julie E. Cohen, *Cyberspace as/and Space*, 107 COLUM. L. REV. 210, 214 (2007) (using heterotopia to interrogate conceptions of space and place on the web); Kevin Douglas Kuswa, *Suburbification, Segregation and the Consolidation of the Highway Machine*, 3 J.L. SOC'Y 31, 63–64 (2002) (examining suburbs and highways as examples of heterotopias); Boaventura de Sousa Santos, *Three Metaphors for a New Conception of Law: The Frontier, the Baroque, and the South*, 29 LAW & SOC'Y REV. 569, 573 (1995) (positing heterotopia as theoretical vehicle for reimagining metaphors for the law: the South, the baroque, and the frontier).

[173] Foucault offered the mirror as an example of a heterotopia: an actual and not-imaged space (because you are seeing yourself in it) that is nonetheless inaccessible; both real and virtual all at once. Prisons, psychiatric hospitals, and military schools are all heterotopias in that they preserve mainstream normalcy by sequestering and possibly reforming deviants. The museum, the garden, and the cemetery are all heterotopias in that they establish dominance and (beautiful) order over what is otherwise chaotic, namely the passage of time and erosive, uncontrollable nature. Colonies and brothels are two other instructive instances of heterotopias, spaces that offer meticulous order (in contrast to the untidiness of everyday life) or illusions made real (in contrast to the drab reality of everyday life).

[174] In an upcoming project, I am going to examine the question "where does ADR happen?" This is not an easy question to answer, in part because of the plurality of processes available within different contexts and for different kinds of disputes or dealmaking situations; in part because of the private and/or extralegal character of many of these processes; in part because ADR encompasses not just "formal" processes like arbitration but also more upstream dispute resolution and prevention efforts, as envisioned by ombuds programs and organizational ADR training and community intervention efforts. Justice centers, school cafeterias, human resource offices, conference rooms, churches, coffee shops, the internet and the telephone, museums, streets and sidewalks, and homes are all possible sites for alternative processes. This fluidity of possible locations for alternative processes stands in stark contrast with the relative inflexibility of space choices within a litigation process sited within a federal system as traditionally marked by territorial boundaries as ours.[174] How ADR operates within these multiple places that are geographically and temporally diverse yet supposedly "neutral" is an important inquiry that may illuminate our understanding of how we experience context-bound "utopian" outcomes in alternative practice.

aspirational language. As Daly points out in her critique of restorative justice myths:

> In the political arena, telling the mythical true story of restorative justice may be an effective means of reforming parts of the justice system. It may inspire legislatures to pass new laws and it may provide openings to experiment with alternative justice forms. All of this can be a good thing. Perhaps, in fact, the politics of selling justice ideas may *require* people to tell mythical true stories.[175]

Indeed, Thomas also notes that the "tireless" efforts of the early utopians laid the groundwork for far-reaching social reforms that many Western societies enjoy today, including public libraries and universal education.[176] These examples caution that although dystopian narratives can be an important check on utopian overreaching or reckless change, they should not paralyze decisionmakers and process innovators.

V. CONCLUSION

This article began with the observation of two rising trends: one, the increasing popularity of dystopian rhetoric in law, politics, and culture; and two, the proliferation of alternative dispute resolution processes.[177] These trends may not look related, but they are. Generally speaking, the same dissatisfaction with present institutions undergirds both developments. The same fears about the future prompts critiques of the current systems and hyperbolic prophecies about what will happen if things remain the same. Moreover, much modern dystopianism and the proliferation of ADR have a largely instrumental orientation: because the present does not satisfy the ends of justice and as a result the future is in jeopardy, and because we have the power to change our destiny through different rules and institutions and practices and processes, we should make the choice to do so.

The rise of dystopianism and of extralegal processes presents an

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[175] Daly, *supra* note 161, at 72.

[176] Thomas, *supra* note 110, at 46.

[177] Kenji Yoshino's article on the resurgence of productions of Shakespeare's *Titus Andronicus* served as an inspiration and model for my own critical stance here. Yoshino argues that "our fascination with the revenge tragedy" of *Titus* and similar works "arises in part out of our anxiety about the rule of law" and about the deficiencies and overreachings of the modern regulatory state. Kenji Yoshino, *Revenge as Revenant: Titus Andronicus and the Rule of Law*, 21 YALE J.L. & HUMAN. 203, 224–25 (2009).

opportunity to reflect on policy choices regarding these processes, both as products of dystopian thinking and as subjects of dystopian analysis. Perhaps new alternative processes are actually substantive improvements on existing systems; or perhaps they are the embodiment of society's larger anxieties about the adequacy of law to meet increasingly complicated needs; or perhaps they are the instrument of corporations attempting to evade oversight and regulation through private ordering of dispute resolution; or perhaps they occupy multiple or different positions altogether. This article has sought to examine these trends together and more closely, with an eye toward better understanding why and how we develop alternative processes in modern dispute contexts. Such an examination does not provide normative guidance or concrete answers, but merely provides greater conceptual breadth for thinking through the limits of law and of the process innovations that we might devise.