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THE HIGHWAYS AND BYWAYS OF DISPUTE RESOLUTION

LAWRENCE H. COOKE*

Much has been said of the crisis of the courts, a crisis of overload.¹ Several causes immediately come to mind—a mushrooming population, a mobile society, commercial growth, an expansion of rights, an expansion of causes of action, pretrial mechanisms, and post-trial procedures.² Our experience and statistical analyses indicate that a voluminous amount of litigation must grind through our judicial machinery annually.³ Mountains exist and they must

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Although the stability of our increasingly complex society requires an effective dispute processing mechanism, see Bell, supra, at 8, the onerous demands on our judicial system make delays in the resolution process inevitable. E. JOHNSON, JR., PRELIMINARY ANALYSIS OF ALTERNATIVE STRATEGIES FOR PROCESSING CIVIL DISPUTES 2 (1978). Overloaded courts have been forced to adjust their processes, often adopting methods which threaten the integrity of the entire judicial process. See U.S. DEP'T OF JUSTICE, supra, at 3. Our failure to devise a lasting solution to this problem endangers the future of our judicial system. Miller, A PROGRAM FOR THE ELIMINATION OF THE HARDSHIPS OF LITIGATION DELAY, in COURT CONGESTION AND DELAY 2 (G. Miller ed. 1971).

² See Bell, supra note 1, at 4; Belli, supra note 1, at 17-20. Reasons for court congestion abound. The inefficient management of the court system by the judiciary and the procrastination of lawyers and judges have been proffered as additional causes of court delay. See id., at 18-20. Insufficient numbers of trial judges also have contributed to the litigation delay. See Miller, supra note 1, at 4-5.

be negotiated. Just as byways divert the flow of traffic from the highways, secondary systems of dispute resolution should be used to reduce the demands placed upon the traditional court system.

The conventional forum for dispute resolution, the court, has become a beleaguered institution. Consequently, the quality of justice is endangered. With crime rates soaring across the nation, civil litigation rocketing to new highs, and a tight economy in prospect for the eighties, the situation soon could deteriorate even further. No authority is needed for the proposition that overcrowded court dockets lead to delay, and a delay of justice is itself an injustice. The signposts of history display their warnings. The Magna Carta contained a pledge against it. Juvenal, the first century Roman satirical poet, cynically grieved that “the time is gone for hearing, and the tedious suit goes on.” Still earlier, the prophet Habakkuk complained of the benumbed nature of the law, noting that “justice is never in action, for evil men hamper the just till justice goes awry.”

We are proud of our government and cherish our way of life, but our appreciation will not register well unless a viable solution is devised and administered. As Woodrow Wilson once observed, “a constitutional government is as good as its courts; no better, no

matic increase in litigation over the past few years. See [1979] AD. OFFICE OF U.S. COURTS 4-7. During 1979, 154,666 civil cases were filed in the federal courts, a 77.1% increase over the number of civil cases filed in 1970. Id. Over the nine year period ending in 1979, the number of pending civil cases increased by 90.8%. Id.

Although the overload dilemma also has affected state courts, reforms instituted by the New York judiciary have been successful in reducing court congestion. See Cooke Reports Continued Drop in Backlog of Civil Actions, N.Y.L.J., July 29, 1981, at 1, col. 2.

* See U.S. DEP’T OF JUSTICE, supra note 1, at 3. Similar sentiments were expressed as early as 1958:

[D]elay and the choking congestion in the federal courts today have created a crucial problem for constitutional government in the United States. It is so chronically prevalent that it is compromising the quantity and quality of justice available to the individual citizen and, in so doing, it is leaving vulnerable . . . the reputation of the United States for protecting and securing [its citizens’] rights and remedies.


* See Bell, supra note 1, at 5. One commentator has stated that unless legislatures respond to the overload crisis, the judicial system may deteriorate to the point where “laymen will be tempted to circumvent the legal process entirely.” Bell, supra note 1, at 16.

* “To no one will we sell, to no one will we deny or delay right or justice.” MAGNA CARTA, cl. 40 (1215), reprinted in J.C. HOLT, MAGNA CARTA 327 (1969).

SATIRES XVI (Dryden translations).

Habakkuk 1:4.
Though our judicial system may well be the best ever contrived, it is presently incapable of satisfactorily meeting its assigned task. For too long, too many in the legal profession have myopically assumed that courts are the only forum for dispute resolution. We have been raised on the notion that our system of jurisprudence is the greatest ever devised, and so it is. Many in the legal profession are apprehensive that new prescriptions will be annoying to master and will threaten their economic status. Despite this apprehension, there has been movement beyond mere mechanical reliance upon the courts and toward alternative techniques of dispute resolution. Indeed, alternatives to conventional adjudicative methods must be developed if our structure of justice, erected on a court foundation, is to function effectively. Fortunately, approaches have been isolated by advanced scholars and studied by the likes of the Ford Foundation, the National Center for State Courts, the National Institute of Law Enforcement and Criminal Justice, and the American Bar Association. An old proverb instructs us that "[a]ll mankind is divided into three classes: those that are immovable, those that are moveable, and those that move." Similarly, the business of litigation may be classified into two broad categories: civil and criminal. Surprisingly to some, each category contains inviting options for alleviation.

The Civil System

Examining the civil areas which provide fertile ground for innovative implants to satisfy the appetite of a litigation hungry gen-

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1 W. Wilson, Constitutional Governments in the United States 17 (1908).
10 See Belli, supra note 1, at 16. For suggestions on lawyer participation in court reform, see Joiner, Lawyer Attitudes Toward Law and Procedural Reform, in Court Congestion and Delay 60-64 (G. Winters ed. 1971).
11 See Ford Foundation, New Approaches to Conflict Resolution (1978) [hereinafter cited as Ford Foundation].
12 See E. Johnson, Jr., V. Kantor & E. Schwartz, Outside the Courts: A Survey of Diversion Alternatives in Civil Cases (1977) (a publication of the National Center for State Courts) [hereinafter cited as Johnson & Kantor].
eration, one immediately discerns three distinct subcategories of alternatives: (1) legislative establishment of different modes of recovery for certain types of injury;\textsuperscript{15} (2) measures operating within the traditional court outline designed to eliminate or reduce court time;\textsuperscript{16} and (3) measures taken prior to resort to the courts and operating outside of them.\textsuperscript{17}

Legislative Changes in the Substantive Law

Legislatures can enact changes in the substantive law that will reduce court system pressures by either removing some disputes from the courts or simplifying court processing. The removal of disputes may best be illustrated by no-fault automobile insurance.\textsuperscript{18} With the advent of this type of compensation plan, an aggrieved party is granted relief without an adjudication of the underlying dispute.\textsuperscript{19} Pursuant to a contract with the insurance carrier, the injured party collects from his or her insurance company irrespective of fault. Thus, court intervention is rendered unnecessary.\textsuperscript{20}

\textsuperscript{15} See notes 18-36 and accompanying text infra.
\textsuperscript{16} See notes 37-53 and accompanying text infra.
\textsuperscript{17} See notes 54-71 and accompanying text infra.
\textsuperscript{19} See N.Y. INS. LAW §§ 671, 672 (McKinney Supp. 1980). The basic purposes of the New York no-fault insurance law are to compensate for economic loss without recourse to the courts and to provide that there is no duplicative compensation. State Farm Mut. Auto. Ins. Co. v. Brooks, 101 Misc. 2d 704, 709-10, 421 N.Y.S.2d 1010, 1014 (Sup. Ct. Monroe County 1979); cf. Estate of Nelson, 102 Misc. 2d 391, 393, 423 N.Y.S.2d 415, 417 (Sur. Ct. Bronx County 1979) (primary purpose of no-fault legislation was to ensure rapid payment of benefits without regard to fault and without necessity for retention of counsel). No-fault insurance plans have been upheld against constitutional attack. See Montgomery v. Daniels, 38 N.Y.2d 41, 45, 340 N.E.2d 444, 446, 378 N.Y.S.2d 1, 4 (1975).
\textsuperscript{20} No-fault automobile insurance systems have not abolished totally tort actions. Generally, most states employ a modified no-fault system which permits tort recovery for claims above a certain monetary threshold or for certain types of injuries. JOHNSON & KANTOR, supra note 12, at 12-13. In New York, for instance, injured parties may recover up to $50,000 without resort to the courts. N.Y. INS. LAW § 671 (McKinney Supp. 1980). Hawaii, on the other hand, provides for a floating threshold whereby the monetary threshold is adjusted annually. See HAWAII REV. STAT. §§ 294-6(a)(2), 294-10(b) (1976 & Supp. 1980); Yee, Tradition and the Political Process: The Evolution of No-Fault Legislation in the State of Hawaii, 10 FORUM 870, 875 (1975). See generally Henderson, No-Fault Insurance for Automobile Accidents: Status and Effect in the United States, 56 OR. L. REV. 287 (1977). Additionally, some right of subrogation still exists under most no-fault statutes. See, e.g., HAWAI.
No-fault compensation systems generally have proven effective in reducing court workloads. The theory underlying this system of compensation should be examined for possible expansion to include such fields as medical malpractice, products liability, and other appropriate species of common-law tort liability. New Zealand, for example, has adopted a comprehensive no-fault scheme which compensates for any economic injury regardless of its source. Automotive and occupational injuries, of course, are in-

REV. STAT. § 294-7 (Supp. 1980); N.Y. INS. LAW § 673 (McKinney Supp. 1980).


The negligence action is a form of lottery. In the case of industrial accidents it provides inconsistent solutions for less than one victim in every hundred. The Workers' Compensation Act provides meagre compensation for workers, but only if their injury occurred at their work. The Social Security Act will assist with the pressing needs of those who remain, provided they can meet the means test. All others are left to fend for themselves.

Such a fragmented and capricious response to a social problem which cries out for co-ordinated and comprehensive treatment cannot be good enough. . . . It is a situation which needs to be changed.

cluded within the New Zealand plan. Fault is irrelevant and compensation is based upon a percentage of weekly income and damage suits are not permitted. As the New Zealand scheme vividly illustrates, the no-fault concept can be transplanted successfully to other areas.

Probate administration is another area which has become the focal point of legislative reform. Significant portions of estate funds and court budgets are often consumed in a lengthy and costly probate process. Studies reveal that an outrageously long time may be required to close an estate. The National Conference of Commissioners on Uniform State Laws has instituted reform through the promulgation of its Uniform Probate Code (UPC). Under the UPC, the personal representative of the decedent administers the estate without court intervention.

\[\text{STAN. L. REV. 653 (1975).}\]


\[25\] The New Zealand plan was designed to provide income-related compensation for income loss. See Woodhouse Report, supra note 23, at 19-22.


\[27\] Johnson & Kantor, supra note 12, at 25.

\[28\] Johnson & Kantor, supra note 12, at 28.

\[29\] Johnson & Kantor, supra note 12, at 25.

\[30\] JOHNSON & KANTOR, supra note 12, at 28.


\[32\] Uniform Probate Code §§ 3-701 to -721 (duties and powers of personal representatives).

\[33\] Uniform Probate Code §§ 3-501 to -505 (supervised administration).

\[34\] Johnson & Kantor, supra note 12, at 28.
innovation which has simplified the process of probate administration is the summary disposition of small estates. Though the procedure varies among those states which have enacted this reform, its overall effect has been to alleviate the delay and overload encountered in the probate courts. Expansion of these procedures merits investigation.

No-fault divorce also has yielded savings in court time by reducing the need for professional assistance. In those states which have enacted no-fault divorce statutes, a party need not establish a fault ground to "justify" the granting of a divorce decree. With fewer issues in dispute, the divorce can be implemented in a shorter time and with less expense. This method of reducing court time could possibly be expanded to other areas of the law.

Alterations Within the Traditional Court Framework

Significant alterations also have been suggested within the traditional court system. These alterations are intended to relieve

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33 In addition to meeting the immediate needs of the family by providing a low cost, expeditious alternative, the summary settlement of small estates protects creditors, the state, and other interested persons by requiring a judicial proceeding. Sullivan & Hack, Streamlining Probate—A Proposal to Expand Summary Settlement, 51 MARQ. L. REV. 150, 153 (1968). A number of states have adopted summary administration procedures. See, e.g., MINN. STAT. ANN. § 525.51 (West 1975); N.Y. Surr. Ct. Proc. Act § 1304 (McKinney 1967 & Supp. 1980); TEX. PROB. CODE ANN. §§ 139-143 (Vernon 1980).

34 Summary administration of estates may be merely a grant of statutory authority to secure a property interest in the decedent's estate solely on the basis of a clerk-approved affidavit, see, e.g., N.Y. Surr. Ct. Proc. Act § 1304 (McKinney 1967 & Supp. 1980), or summary administration may involve formal judicial supervision with shorter and more simplified procedures. See, e.g., MINN. STAT. ANN. § 525.51 (West 1975). See also 1975 Legislation on Trusts and Estates, 11 REAL PROP. PROB. & TR. J. 99, 100 (1976).


36 Some states have retained traditional fault-oriented grounds but have added no-fault provisions. E.g., GA. CODE ANN. § 30-102 (1980); ME. REV. STAT. ANN. tit. 19, § 691 (1981). Cf. FLA. STAT. ANN. § 61.052 (West 1981) (sole grounds for divorce are that the marriage is irretrievably broken or that one of the parties is mentally incompetent). New York, however, requires a consensual separation for a statutorily-defined 1 year period. N.Y. DOM. REL. LAW § 170(6) (McKinney Supp. 1971). Cf. Comment, Oregon's No-Fault Marriage Dissolution Act, 51 OR. L. REV. 715, 717 (1972) ("irreconcilable differences" causing "irremediable breakdown" of marriage).

37 No-fault divorce statutes are premised on the belief that an inquiry into the causes of broken marriages does not necessarily serve the public interest. See JOHNSON & KANTOR, supra note 12, at 31-32.
the strain on the legal machinery by reducing or eliminating court time. Since courts must be both physically accessible and temporally affordable, these suggestions should be implemented.

Public policy has long favored the private settlement of disputes. Consequently, various procedures have been designed with built-in economic incentives to settle. A Michigan procedure combines mediation with economic inducement in tort cases where liability is not in issue. The procedure commences when a three-member panel reviews documentary evidence and recommends a settlement. If its proposal is rejected, attorneys’ fees and trial costs may be assessed based on the difference between the settlement recommendation and the actual award. Since a penalty may result from either party’s refusal of a reasonable settlement offer,

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39 MICH. GEN. CT. R. 501.1 enables the Michigan circuit courts to provide a mediation docket by court rule and requires the adoption of a procedure “for placing actions upon the pretrial calendar or mediation docket or otherwise assigning a time and place for pretrial hearing or mediation without necessity of a request therefor.” Though only applicable to the Wayne County Circuit Court, id., see MICH. GEN. CT. R. 316.1(b), subrule 501.1 has been in effect since 1971. Miller, Mediation in Michigan, 56 JUDICATURE 290, 293 (1973). 3D Cir. Local. R. 403 outlines the mediation procedure adopted pursuant to this rule-making authority. MICH. GEN. CT. R. 316.1(b). Despite its inherent limitations, the mediation system has been an effective weapon in the battle against docket congestion. Canham, A Judge Comments on Mediation’s Success, 56 JUDICATURE 290, 294 (1973).

Michigan’s general court rules recently were amended to allow courts outside of Wayne County to submit to mediation “any civil case in which the relief sought consists of money damages or division of property.” MICH. GEN. CT. R. 316.1(a). Although the mediation panel must be composed of three members, id. at 316.4(a), the selection procedures and minimum qualifications of its members are to be established by administrative order. Id. at 316.4(b). The mediation process is similar to the procedure employed in Wayne County. See notes 40-41 and accompanying text infra. Once a party rejects the panel’s evaluation, the case is tried in the usual manner. If the plaintiff rejects the evaluation, he must obtain a verdict which exceeds the evaluation by more than 10% or bear the defendant’s actual costs. MICH. GEN. CT. R. 316.7(b)(1). Attorney’s fees necessitated by the rejection are included within the calculation of actual costs. Id. at 316.8.

40 The Wayne County mediation system applies to automobile accident claims without complex legal or factual issues, and may be extended by stipulation to non-automobile cases. Miller, Mediation in Michigan, 56 JUDICATURE 290, 290 (1973). Documentary evidence is presented to a panel consisting of two attorneys and a judge. Id. at 290. Although no testimony is received in evidence at the hearing, the panel questions the parties in order to clarify the documentary evidence. Id. at 290-91.

41 Id. Regardless of the panel’s evaluation, either party may proceed to trial. Id. at 291. If a litigant rejects the evaluation and does not receive a final judgment at least 10% more favorable than the evaluation, he must pay his opponent’s costs, including his attorney’s fee. Id.
both parties share the risk.\textsuperscript{42} 

Under the English “Payment into Court System,” the defendant deposits a sum by way of a compromise offer.\textsuperscript{43} If the offer is refused and the ultimate award is greater than the tender, the plaintiff is entitled to the usual award of costs. Should the final award prove to be less than the amount tendered, the plaintiff must pay his own costs as well as those of the defendant from the date of deposit.\textsuperscript{44} The flaw here is that the carrot-and-stick ploy works exclusively on plaintiffs while defendants bear no risk. Formal court involvement, however, is eliminated from the actual adjustment process. Another suggestion, advanced by Earl Johnson, Professor of Law at the University of Southern California and Director of its Program for the Study of Dispute Resolution Policy, requires that both parties submit final binding offers to court.\textsuperscript{45} If there is no overlap, the case would proceed to trial and a penalty would be assessed against the party whose offer was least reasonable.\textsuperscript{46} In an attempt to balance advantages between parties, a greater penalty would be assessed against an institutional party.

The West German Stuttgart Model disposes of civil cases through a series of preliminary hearings designed to define and narrow the factual issues.\textsuperscript{47} Following an informal presentation without witnesses, a three-judge panel proffers a resolution and suggests a settlement.\textsuperscript{48} Rejection of their recommendation re-
quires a detailed explanation and, after a plenary evidentiary hearing, the court proposes final judgment. 49 Statistics reveal that the vast majority of cases do not proceed beyond the initial hearing. 50 Through constant interaction among the court, attorneys, and parties, this model fosters an understanding of the competing interests involved. Since the Stuttgart prototype requires the court to assume an active role in case development, it may not be appropriate in nations where the adversary mold prevails. A beneficial accommodation between the two systems would exalt the respective roles of the parties and the court in the conciliation process, thereby increasing the likelihood of amicable adjustment without full formal adjudication.

Court-annexed arbitration is available in many states as a preliminary alternative to traditional judicial resolution of disputes already in the system. 51 This process is mandatory for disputes within a jurisdictional ceiling and the arbitration decision is binding unless trial de novo is sought. 52 Where court-annexed arbitration is voluntarily chosen, the decision has an obligatory character without any de novo trial right. 53 The virtues of this procedure include accelerated case disposition and reduced litigation costs. 54 By

49 Id. at 33. The parties need not accept the initial settlement proposal. If they reject it, however, they must give detailed reasons for their rejection. Id. at 32. A rejection is followed by another hearing which results in a final proposed settlement. Id. at 33.

50 Id. at 33. Only one hearing is necessary in 85 to 90% of the civil cases. Id.


52 Pennsylvania, for example, requires arbitration for most civil cases in which the damages do not exceed $20,000. 42 PA. CONS. STAT. ANN. § 7361(a), (b) (Purdon Supp. 1981). A panel of three lawyers serve as arbitrators. Id. § 7361(a). Each party has the right to appeal for a trial de novo in the court, but that party must pay the costs of the arbitration. Id. § 7361(d). If neither party appeals, the judgment entered on the arbitrator's award is enforced. Id. See generally Rosenberg & Schubin, Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania, 74 HARV. L. REV. 448, 450-53 (1961).

53 In New York City, for example, parties in small claims court are given the choice of arbitration with no appeal. At the initial hearing, parties are encouraged to submit their case to an arbitrator, but they must agree to be bound by such arbitration. N.Y. CIV. CT. R. § 2900.33(0)(2). Although the decision to arbitrate theoretically is voluntary, it has been noted that court personnel pressure the parties to submit their controversy to arbitration. Determan, The Arbitration of Small Claims, 10 FORUM 831, 834-35 (1975). See Johnson & Kantor, supra note 12, at 44; E. Johnson, Jr., A Preliminary Analysis of Alternative Strategies for Processing Civil Disputes 58 (1978).

54 Under the California arbitration system, the average time spent on a personal injury case was 2.5 hours. An average of 3.3 days was required when a jury trial was demanded. CALIFORNIA JUDICIAL COUNCIL, A STUDY OF THE ROLE OF ARBITRATION IN THE JUDICIAL PROCESS 78 (1972). Under the Pennsylvania arbitration system, see note 50 supra, it is esti-
significantly alleviating the need for support personnel, arbitration decreases the fiscal outlays required by the court system. Thus, arbitration offers a viable alternative to traditional court adjudication.

Changes Outside the Traditional Court Framework

Certain practices may be employed outside the formal judicial structure prior to resort to the courts. Contractual arbitration, for instance, is encountered in commercial and labor settings and its parameters have been authoritatively delineated by a considerable body of case law. Moreover, in recent years, arbitration has been used to settle disputes involving insured motorists and their insurance carriers stemming from accidents with uninsured motorists. The benefits derived from arbitrating this type of dispute include the possibility of lower insurance premiums and speedier payment of claims.

Voluntary associations, such as those handling consumer complaints with the support of the Better Business Bureau, also estimated that an arbitrated dispute costs the system a total of $110, whereas a trial costs between $500 and $600 per day. Johnson & Kantor, supra note 12, at 45-46; see Rosenberg & Schubin, Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania, 74 Harv. L. Rev. 448, 458-64 (1961).


7 The advantages of arbitrating automobile accident disputes may include "cost reduction in premiums, greater distribution of loss payments, speedy payment of claims, reduction of court congestion, and lowering of the incidence of fraud." Aksen, Arbitration of Automobile Accident Cases, 1 Conn. L. Rev. 70, 71 (1968). Although some disagreement exists as to whether arbitration actually achieves all of these benefits, it does reduce the cost of premiums and fosters speedier payment of claims. Id. at 78-87.
ploy arbitration procedures to resolve disputes. These associations also have achieved a degree of success. Arbitration is not a new wonder; indeed, it was extolled by Aristotle. Its use can now be expanded with some degree of promise to other areas by agreement or statute, such as landlord-tenant disputes and medical malpractice. In the Housing Courts of the Civil Court of the City of New York, 100,000 cases were filed last year alone. Any significant portion of that number which could be diverted into arbitration would be a most welcome relief.

Another appealing technique which may eliminate unnecessary court backlog is the creation of specialized panels charged with the function of screening out weak claims. These panels provide a measure of relief in medical malpractice and other technical lawsuits. The modus operandi is that certain categories of claims

58 The Council of Better Business Bureaus has established a National Consumer Arbitration Program through its local office. Determin, The Arbitration of Small Claims, 10 FORUM 831, 835 (1975). Initially, the parties must agree in writing to be bound by the arbitration. Thereafter, they are allowed to choose the arbitrators from a pool of volunteers. Id. at 835-36. The average time from the request for arbitration until the award is 21 days. Id. at 836.

59 The unwillingness of merchants to be bound by arbitration and the consumers' mistrust of arbitration boards sponsored by the business community are the main obstacles to greater success with these associations. JOHNSON & KANTOR, supra note 12, at 52.


61 For several years, arbitration has been used to settle medical malpractice cases under state general rules of arbitration. Comment, Recent Medical Malpractice Legislation—A First Checkup, 50 Tul. L. REV. 655, 682 (1976). This is accomplished by the parties agreeing in their initial contract to submit all claims to arbitration. Henderson, Contractual Problems in the Enforcement of Agreements to Arbitrate Medical Malpractice, 59 VA. L. REV. 947, 948 (1972). At least four states, however, have enacted legislation which deals specifically with the arbitration of medical malpractice cases. CAL. CIV. PROC. CODE § 1295 (West Supp. 1981); LA. REV. STAT. ANN. § 9:4230-4236 (West Supp. 1980); MICH. COMP. LAWS § 600.5040-.5065 (Supp. 1981); OHIO REV. CODE ANN. §§ 2711.21-.24 (Page Supp. 1980). Ohio mandates submission with a right to appeal, see OHIO REV. CODE ANN. § 2711.21, whereas Michigan, California, and Louisiana permit voluntary binding arbitration. See CAL. CIV. PROC. CODE § 1295 (West Supp. 1981); MICH. COMP. LAWS § 600.5041-.5042 (Supp. 1981). See generally Recent Medical Malpractice Legislation—A First Checkup, supra, at 682-83.

62 1980 REPORT, OFFICE OF COURT ADMINISTRATION.

63 Screening panels differ from arbitration in many respects. The primary function of screening panels is to determine which claims should proceed to trial and which claims should be screened out as meritless. Comment, Recent Medical Malpractice Legislation—A First Checkup, 50 Tul. L. REV. 655, 679 (1976). Arbitration, on the other hand, resolves the dispute. Id.
initially are submitted to a panel. Although a plaintiff may sue even if the panel finds for the defendant, the plaintiff must post a bond which can be forfeited if he subsequently loses at trial. Conversely, a panel decision in a plaintiff's favor is likely to accelerate the defendant's settlement efforts.

Forums using conciliation, mediation, and arbitration present another appealing alternative. Complaints against governmental activities could be processed through an ombudsman who would make recommendations for action through a milieu of informal and speedy procedures. Consumer complaint mechanisms may exert persuasive economic and social pressures and foster cooperation. For example, private and governmental consumer protection agencies may handle complaints through a combination of persuasion,

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64 Under a Louisiana statute, a malpractice action may not be commenced until the case has been presented to a medical review panel. LA. REV. STAT. ANN. § 40:1299.47(B) (West 1977). The screening panel consists of a nonvoting attorney, a physician chosen by the plaintiff, a physician chosen by the defendant, and a physician selected by the two medical panelists. Id. § 40:1299.47(C) (West Supp. 1981). The medical panelists are not restricted to the testimony presented by the parties. See id. § 40:1299.47(F) (West 1977). The panelists may request the production of any necessary information and may even consult with other medical authorities. Id. All of the information must be made available to the parties. Id.

65 Screening procedures have been designed carefully to avoid constitutional challenges on the grounds of a denial of due process, equal protection or the right to a trial. Comment, Recent Medical Malpractice Legislation—A First Checkup, supra note 63, at 681; see Seoane v. Ortho Pharmaceuticals, Inc., 472 F. Supp. 468, 471-73 (E.D. La. 1979); Everett v. Goldman, 359 So. 2d 1256, 1265-69 (La. 1978); Halpern v. Gozan, 85 Misc. 2d 753, 758-61, 381 N.Y.S.2d 744, 748-49 (Sup. Ct. Queens County 1976). Allowing the plaintiff to proceed with a suit regardless of the panel's findings avoids constitutional issues while exposing frivolous claims and encouraging the settlement of valid claims. Comment, Recent Medical Malpractice Legislation—A First Checkup, supra note 63, at 681-82. One consequence of using screening panels is that it will be extremely difficult for the plaintiff to overcome the weight of an adverse panel decision if he proceeds to trial. Id. at 681. Panel decisions commonly are admissible as some evidence in subsequent malpractice actions. See, e.g., LA. REV. STAT. ANN. § 40:1299.47(H) (West 1977); N.Y. JUD. LAW § 148-a(8) (McKinney Supp. 1980) (panel members must concur on question of liability for recommendation to be admissible).

66 The ombudsman concept originated in Sweden. Frank, State Ombudsman Legislation in the United States, 29 U. MIAMI L. REV. 397, 397-98 (1975). The ombudsman is an “independent, high-level public official who receives complaints from aggrieved persons against governmental agencies, officials, and employees; conducts an investigation; and, if the complaints are justified, recommends corrective action.” Id. at 398. In Hawaii, for example, the ombudsman is given wide discretion in instituting and conducting investigations of governmental agencies and their employees. See HAWAI I REV. STAT. § 96-6(a) (1976) (ombudsman may investigate any complaint which he deems appropriate); § 96-6(b) (ombudsman may investigate on his own motion); 96-9(a) (ombudsman may make inquiries, obtain information, inspect without notice and hold private hearings); § 96-10(1) (ombudsman may compel by subpoena); § 96-10(2) (ombudsman may compel production of documents).
education, mediation, and litigation.67 After an initial investigation, a hearing officer may request that the offending firm undertake suggested remedial action.68 If this proves ineffective, the complaint may move to a mediation stage and ultimately to litigation.69 Such a process diverts potential claims from the courts while offering access to a system of redress for grievances that would not have reached the courts in any event.

Neighborhood Community Justice Centers occasionally may offer a more efficacious and accessible system of justice than that provided by the traditional legal system.70 Operating through the efforts of local community members, these centers can divert from the courts a significant portion of the more commonly encountered community disputes—intrafamilial conflicts, neighbor grievances, relatively minor property or monetary disagreements, landlord-tenant disputes, and even minor offenses.71 These centers can offer a variety of services including conciliation, mediation, and decisionmaking.72 Because community mores are an integral part of

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67 Companies such as Westinghouse, Whirlpool, Ford Motor Company, and Chrysler Motor Company have set up "hot lines" to handle consumer complaints. See JOHNSON & KANTOR, supra note 12, at 66. Similarly, trade associations and the Better Business Bureau have established panels to recommend solutions for consumer disputes. Id. at 66-67. Governmental consumer protection agencies generally are more effective than private agencies because they "are able to back up their 'suggestions' for resolution with potent sanctions such as injunctions and other orders." Id. at 67.

68 See Steele, Fraud, Dispute, and the Consumer: Responding to Consumer Complaints, 123 U. Pa. L. Rev. 1107, 1154 (1975). Frequently, the hearing officer recommends repair or replacement of the defective article. Id. A study of an Illinois consumer fraud bureau reveals that 38% of the complaints were closed after an initial screening by the hearing officer, 44% were closed after the seller's answer and 18% were scheduled for hearings. Id. at 1147.

69 See generally id. at 1156-68.

70 The model for Neighborhood Community Justice Centers originated with the Public Offices for Legal Information and Conciliation (ORA) in Hamburg, Germany. See FORD FOUNDATION, supra note 11, at 48. The ORA uses lawyers and judges to work on a voluntary basis in neighborhoods throughout Hamburg. Id. The ORA offers advice and mediates disputes involving poor and moderate income people. Id. at 49. Statistics indicate that the ORA handles about 3,000 complaints a year. Id.

71 Similar programs have been initiated in the United States. In New York City, for example, the civil court attempts to have landlord and tenant disputes mediated before trial. FORD FOUNDATION, supra note 11, at 51; see N.Y. City Civ. Ct. R. § 2900.20 (McKinney Supp. 1980). Hearing officers, who are familiar with the building industry, drastically reduce the number of cases which proceed to trial. FORD FOUNDATION, supra note 11, at 51.

72 The Community Justice Board Program in San Francisco offers conciliation and mediation for minor criminal matters, neighborhood disputes, and certain civil complaints. See FORD FOUNDATION, supra note 11, at 51. New York City uses paralegals to assist parties whose cases are scheduled for arbitration in small claims court. E. JOHNSON, JR., A PRELIMINARY ANALYSIS OF ALTERNATIVE STRATEGIES FOR PROCESSING CIVIL DISPUTES 62 (1978).
this informal process, resolution of these types of disputes in this fashion may be the better font of justice.

With respect to civil disputes, it is imperative that complex issues be eliminated from the litigation scheme, legal rights be simplified, and a greater number of disputes be diverted from the court system. Similarly, not all legal breakdowns require court involvement or the same degree of it. Those models selected as alternatives must be simple, inexpensive, and of a sufficiently high order to be acceptable channels for diversion. Initially, however, attitudes must change so as to embrace a willingness to accept novel alternatives. For example, the legal community must recognize that the role of an advocate need not always be filled by an attorney. Although some alternatives may offer a less precise form of justice, a less precise forum which maintains an equitable balance between adversaries is preferable to no forum at all.

The call is not necessarily for immediate full-scale implementation. Experimentation may well be more appropriate since many of the measures have been developed only recently. Nevertheless, action is essential if there is to be a reduction in delay and adequate access to forums of dispute resolution. "The debate is no longer whether we shall move, but what we shall do."73

THE CRIMINAL SYSTEM

Turning to the criminal field, we are confronted with rising crime rates and overcrowded detention facilities which cry out for alternatives to the conventional forms of processing and punishment.74 These stark realities cannot be wished away.

Mediation or Arbitration Alternatives

Various commentators have recommended that a mediation or arbitration model be incorporated into our criminal justice system to supplement the traditional adjudicative scheme.75 Under either

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program, a criminal offense would be viewed not only as a situation requiring the imposition of community sanctions but also as a dispute to be resolved between victim and offender.™ Moreover, mediation or arbitration offers greater flexibility in factfinding and discipline imposition as well as informality, speed, economy, and an opportunity to remedy the underlying difficulty.™ John Greacen, former Deputy Director of the National Institute for Law Enforcement and Criminal Justice, urges that certain types of offenses be processed without full criminal justice intervention except where accommodation between the parties proves impossible.™ By employing victim-offender negotiations to determine an appropriate response to the crime, this approach makes criminal offenders answerable to their victims. The agreement would be reviewed to ensure it is neither too severe nor too lenient and, if no agreement is reached, conventional guilt-and-sanction-determining procedures would be provided.™ This arbitration model could be applied to single victim cases, lesser offenses, and first nonviolent felony offenders.

Ohio employs a mediation plan in which law students assist the victim and offender to achieve resolution by conducting informal hearings relating to ordinance violations, misdemeanors, and minor felonies.™ For example, the parties can agree on repayment, City, 68 J. CRIM. L. & CRIMINOLOGY 252, 259 (1977) [hereinafter cited as Smith & Pollack].

™ The Institute for Mediation and Conflict Resolution conducts a program in Harlem which imposes community sanctions. See Smith and Pollack, supra note 75, at 259. See also Weisbrod, The Need for Diversion of Interpersonal Criminal Complaints: The IMCR Center (1977) (unpublished master's thesis in John Jay College). Criminal cases involving individuals who are known to each other are handled by arbitration. Referrals are made to the Institute by police officers. Smith and Pollack, supra note 75, at 259. Cases are heard by a panel of three community members trained in arbitration work. Solving the problem within the community avoids the need for criminal prosecutions. Id.


™ Greacen, supra note 75, at 13.

™ Id.


™ See Greacen, supra note 75, at 53; D. McGHILLIS AND J. MULLEN, NEIGHBORHOOD JUS-
compensation, or cessation of the offensive behavior. The success of the Ohio plan can be measured by contrasting the $20 cost per disposition with the $100 required when traditional criminal justice procedures are used. Additionally, only four percent of the matters proceed any further in the criminal justice system.

Arizona provides a diversion project for first felony offenders featuring restitution and victim-offender confrontation. Prosecutors screen cases and refer defendants to a diversion unit for a voluntary probation period ranging from 6 months to 1 year, with supervision by staff and community volunteers. When the diversion unit, the prosecutor, and the offender approve the probation agreement, prosecution is discontinued conditionally upon satisfactory completion of probation. It should be noted, however, that the victim must consent to the diversion process.

Community courts and mediation forums offer another avenue of dispute resolution for offenders diverted out of the traditional criminal justice system. Voluntary access to such forums could be

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TICE CENTERS: AN ANALYSIS OF POTENTIAL MODELS 108-21 (1977) [hereinafter cited as McGallis & Mullen]. The Columbus Night Prosecutor Program was established in 1971 through the joint efforts of the Capital University Law School and the Columbus Attorney's office. Id. at 108. Cases involving interpersonal disputes, bad checks, violations of city ordinances and consumer complaints are referred to the project by the prosecutor's office and project staff clerks. Id. Mutual agreement between disputants is achieved after an exploration of the causes underlying the problem. Each party is provided with an opportunity to present his version of the occurrence to the student hearing officer. Although the student hearing officers inform the parties of possible criminal sanctions, solutions typically are achieved after student questioning and commentary. Id. at 115.

See Greacen, supra note 75, at 53.

Id.

Id.

Id. Several types of diversion programs are available in Pima County, Arizona. Prosecutorial discretion is used to refer defendants to a program once certain criteria are met: (1) the victim must consent to the diversion; (2) the defendant must be a first time offender; and (3) the offense must be nonviolent in nature. Additionally, the approval of the arresting officer is requested. Telephone Conversation with Edward C. Nesbitt, Esq., Office of County Attorney, Pima County, Arizona (Aug. 27, 1981).

Greacen, supra note 75, at 53.

Id. A criminal charge will be dismissed without prejudice after the defendant completes 1 month in a diversion program. After successfully completing the entire program, the charge is dismissed with prejudice. Telephone Conversation with Edward C. Nesbitt, Esq., Office of County Attorney, Pima County, Arizona (Aug. 27, 1981).

See note 85 supra.

Community courts are nonofficial judicial bodies composed of members of a geographically or functionally defined group. See Comment, Community Courts: An Alternative to Conventional Criminal Adjudication, 24 Am. U.L. Rev. 1253, 1253 (1975). In addition to serving as a means to a more effective justice system, these courts serve as a cohesive factor in a community. Aaronsen, supra note 13, at 36.
secured through referrals from police departments, social service agencies, schools, and similar institutions. One of the advantages of these mediation and community bodies is their promotion of swifter and more personalized justice.

A practice known as pretrial intervention also has been scrutinized as an alternative to the full-fledged processing of criminal cases. Pretrial intervention occurs when the police or the prosecutor refer matters to social service, counseling, or rehabilitation centers in lieu of further prosecution. Since effective pretrial in-

Few examples of community courts currently exist in the United States. Id. at 34. The closest examples are found in specialized settings such as universities, prisons and labor unions. Id. These tribunals are concerned primarily with internal disciplinary matters. Comment, supra, at 1259. Arbitration programs currently in effect involve community participation in crime prevention. A community court, however, should be distinguished from an arbitration program because a community court has adjudicatory capacity and the ability to impose meaningful sanctions. Id. at 1286.

Not only may mediation, as an alternative to trial, produce insights and solutions to individual grievances, but it offers the potential for grasping the larger problem so often found in institutional settings where individual grievances tend to pile up and then burst into more serious problems or even major litigation. Cratsley, supra, at 16-17.


Pretrial intervention programs traditionally allow persons accused of crimes to have their prosecution suspended while they are placed in community-based rehabilitation programs. These programs generally require a presumption of guilt as a requirement for admission to the program. See Stulberg, A Civil Alternative to Criminal Prosecution, 39 ALB. L. REV. 359, 361 (1975). The typical program halts prosecution after arrest but prior to arraignment. Persons selected for pretrial diversion are offered counseling, education and rehabilitation. Prosecution may be dismissed upon successful completion of a program. Legal Issues
tervention requires the exercise of extreme care, coerced participation would be inappropriate. Eligibility criteria, of course, must be based on equal treatment. Finally, the accused must be accorded a meaningful opportunity to be heard and must be provided with access to legal advice.

Legislative Possibilities

Legislative decriminalization of certain conduct and reclassification of certain crimes would permit wider use of alternatives such as administrative treatment for traffic, ordinance, housing, and like violations. Just as certain offenders and classes of offenses are better suited to alternative methods of criminal adjudication, there are offenders and offenses better suited to unconventional forms of punishment. A study by the Southern Regional Office of the National Center for State Courts outlines a number of

and Characteristics of Pretrial Intervention Programs, supra, at 37. As in any criminal case, formal judicial action is required to dismiss the charge once a divertee has been formally charged with a crime. Id. at 54.

The potential benefits from participation in pretrial intervention programs are often overstated while the potential risks to an unsuccessful participant are often understated. AARONSON, supra note 13, at 25. One obvious criticism is that it is difficult to assess the individual's capacity for making a voluntary decision because of the pendency of criminal charges. Id. Program planners, however, can develop procedures for insuring voluntary participation. Id.

Various types of eligibility requirements for intervention programs give rise to equal protection challenges. See National Pretrial Intervention Service Center, Legal Issues and Characteristics of Pretrial Intervention Programs, 4 CAP. U.L. Rev. 37, 59 (1975). Eligibility criteria are not necessarily offensive if the selection process does not discriminate unreasonably by arbitrarily excluding certain classes of defendants. Id. at 59-68.

AARONSON, supra note 13, at 27. Judicial hearings, administrative hearings, administrative consideration of applications and peer review can be used to increase the procedural fairness of pretrial programs. Id. A study by the National Institute of Law Enforcement and Criminal Justice recommends that each intervention program subject its policy and procedures to independent legal review, including consideration of the eligibility requirements and intake procedures, the provisions for maintaining confidentiality, and the procedural safeguards for protecting the rights of participants. Id.

Decriminalization of victimless crimes is one method of relieving court congestion. See Smith & Pollack, supra note 75, at 259. A study by the National Institute of Law Enforcement and Criminal Justice lists three types of decriminalization. AARONSON, supra note 13, at 34. Decriminalization has not been widely adopted. See, e.g., NEv. REV. STAT. §§ 244.345 (1979) (prohibiting licensing of prostitution in counties with populations of 250,000 or more). Reclassification, however, has been given a more favorable reception. AARONSON, supra note 13, at 34; see N.J. REV. STAT. § 37-2(b) (Supp. 1981) (liberalizing gambling laws). The third approach is the substitution of a noncriminal response to certain conduct. AARONSON, supra note 13, at 34. In the District of Columbia, the nonpenal handling of alcoholics illustrates this approach. D.C. CODE ANN. §§ 24-522 to 24-530 (1973 & Supp. V 1978).
penal sanctions. Victim compensation can be employed as an alternative to ordinary incarceration and as part of a probation or conditional discharge program. Apart from granting institutional recognition to the victim of criminal conduct, such conditions allow the defendant to recognize the consequences of his antisocial behavior, thereby developing an awareness that his conduct injured another human being and not merely society as an abstraction.

"Shock" probation may be employed to require the observation of drunk drivers at a hospital emergency room or a detoxification center. Similarly, the short-term incarceration of less dangerous first time offenders is an alternative form of punishment which should be explored. Furthermore, a court could impose a condition of probation requiring the guilty offender to engage in community service or to participate in an approved program of medical or psychiatric treatment. The "day fine" used in the Scandinavian countries should also be considered.

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99 Id.
100 Id.
101 A "shock" program has been instituted at Rahway State Prison in New Jersey. Inmates confronted juvenile delinquents and explained prison life to them in graphic detail. 10:10 CORRECTIONS DIGEST 4 (May 11, 1979). Through cursing and shouting, the inmates inform the juvenile offenders of sexual assaults, beatings, and other prison experiences. D. GIBBONS, DELINQUENT BEHAVIOR 333 (3d ed. 1981).

Dr. Jerome Miller, head of the National Center on Institutions and Alternatives, has expressed criticism of the program because of the lack of evidence that the program reduces delinquency. See CORRECTIONS DIGEST, supra, at 4. Similarly, one commentator has observed that there are moral questions to be examined before exposing youths to shock programs of the Rahway variety. GIBBONS, supra at 33. While 57% of the exposed juvenile offenders were not charged with new offenses within six months, 78% of an unexposed control group also had not been charged. Id.


103 See AARONSON, supra note 13, at 14. The Swedish Penal Code provides day fines ranging from 1 to 120 days. The amount of the fine is determined on the basis of the defendant's income, wealth, obligations to dependants and other reasonable economic circumstances. The severity of the crime is also considered. 25 PENAL CODE OF SWEDEN § 2 (as amended Jan. 1, 1972), reprinted in THE AMERICAN SERIES OF FOREIGN PENAL CODES 79 (T. Sellin trans. 1972).

The Danish Criminal Code also imposes day fines. See DANISH CRIMINAL CODE § 51(1) (1930), reprinted in THE DANISH CRIMINAL CODE 36 (1958). A single daily fine corresponds proportionately to the income and living conditions of the defendant. Id. The gravity of the offense and the previous record of the defendant are also considered in fixing the amount of the day fine. DANISH CRIMINAL CODE § 80(1) (1930), reprinted in THE DANISH CRIMINAL
Alternative detention programs might be considered where imprisonment is either indicated by the circumstances or mandated by statute. Work release programs should be expanded beyond the traditional prison setting to include the utilization of residential facilities. Increased use should be made of intermittent incarceration, which permits a defendant to maintain employment and remain in the community mainstream. These options presently are authorized by statute in New York.\(^\text{104}\)

**CONCLUSION**

The list of alternatives is long and the opportunity for improvement should not be lost. My belief is that some of these alternatives will reduce crime. Certainly, they will free scarce resources for more economical and efficient resolution of disputes. Some of these techniques may improve the quality of justice by individualizing treatment at the adjudication and dispositional stages and by encouraging victim-offender participation in the process of resolution. Such techniques would lend greater legitimacy to the system as a whole. Expanded application of available options and the development of novel approaches toward the resolution of civil and criminal contests will better serve the interests of justice. While the major portion of the case flow should be directed through the

\(^{104}\) See, e.g., People v. Moretti, 60 App. Div. 2d 849, 849, 400 N.Y.S.2d 578, 578 (2d Dep't 1978); People v. Snyder, 50 App. Div. 2d 939, 939-40, 377 N.Y.S.2d 196, 196 (2d Dep't 1975). Loss of employment and financial harm are factors which a court will consider in determining whether intermittent incarceration is appropriate. People v. Warren, 79 Misc. 2d 777, 784, 360 N.Y.S.2d 961, 969 (Sup. Ct. Queens County 1974), aff'd on other grounds sub nom. People v. Apted, 51 App. Div. 2d 1024, 381 N.Y.S.2d 423 (2d Dep't 1976). \(^{105}\) See N.Y. PENAL LAW §§ 65.00, 65.05, 65.10, 85.00 (McKinney 1975 & Supp. 1980). New York provides for a sentence of probation which allows an offender to avoid institutional confinement. See N.Y. PENAL LAW § 65.00 (McKinney 1975 & Supp. 1980). The defendant is allowed to remain in the community while receiving guidance and supervision under a probation program. See People v. Warren, 79 Misc. 2d 777, 784, 360 N.Y.S.2d 961, 969 (Sup. Ct. Queens County 1974), aff'd on other grounds sub nom. People v. Apted, 51 App. Div. 2d 1024, 381 N.Y.S.2d 423 (2d Dep't 1976). When both probation and imprisonment are inappropriate, a sentence of conditional discharge is available for lesser offenses. See N.Y. PENAL LAW § 65.05 (McKinney 1975 & Supp. 1980). For both probation and conditional discharge, the law authorizes the imposition of conditions that are "reasonably necessary to insure the defendant will lead a law-abiding life or to assist him to do so." N.Y. PENAL LAW § 65.10 (McKinney 1975 & Supp. 1980). Another alternative available in New York is intermittent imprisonment through which a sentence can be served on specified days during a certain period. See N.Y. PENAL LAW § 85.00 (McKinney 1975). This alternative also allows an offender to remain employed while serving his sentence.
highway of the courts, reliance also should be placed upon the by-ways which have been developed to shoulder part of the burden.