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SUPPLEMENTS TO TRIAL: A COURT ADMINISTRATOR'S VIEW

PAUL NEJELSKI†

I. INTRODUCTION

Much of the traditional literature and programming, including the title of this symposium, incorrectly speak in terms of "alternatives" to court adjudication of disputes.

Many of the so-called "alternatives" to courts actually take place in or under the auspices of a court. Examples of such alternatives include the Philadelphia state and federal court annexed-arbitration programs1 and the summary jury trial developed by Judge Lambros in Cleveland.2 Both of these types of alternatives involve cases that have been filed in court and that take place in a courtroom or under court adopted rules.3 Most of the programs referred to as alternatives to courts are actually alternatives to full-scale trials.4 Thus, rather than a black or white choice of resolving a dispute in court or out of court, the scene should be viewed as existing with varying degrees of court involvement.

Before discussing the alternatives to courts, it is useful to more clearly delineate the role courts are expected to serve in contemporary society.5 For example, Professor Martin Shapiro has stated that "students of courts have generally employed an ideal type, or really a prototype, of courts involving (1) an independent judge applying (2) pre-existing legal norms after (3) adversary proceedings in order to

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3. For a discussion of how court-annexed arbitration works in the Eastern District of Pennsylvania, see Nejelski & Zeldin, supra note 1, at 801. For a discussion of the Lambros Summary Jury Trial, see Lambros, supra note 2, at 1373-78.

4. See, e.g., Doty, supra note 1; Lambros, supra note 2.

achieve (4) a dichotomous decision in which one of the parties was assigned the legal right and the other found wrong.” Professor Shapiro goes on to note that, contrary to popular wisdom, “if we examine what we generally call courts across the full range of contemporary and historical societies, the prototype fits almost none of them.” According to Shapiro, this is because in reality there are few if any societies in which courts are so clearly delineated as to create absolute boundaries between them and other aspects of the political system.8

My experience as a court administrator parallels Shapiro’s academic observation that judges and courts “are simply at one end of a spectrum rather than constituting an absolutely distinct entity.”9 A recent example of the compatibility of litigation and a “litigation alternative or supplement,” such as mediation, in the same dispute can be found in the resolution of the dispute between Franklin Computer Corporation and Apple Computer, Inc.10 Apple sued Franklin in 1982 for copyright infringement involving a look-alike version of Apple’s top-selling program. After the Court of Appeals for the Third Circuit decided that operative programs built into a computer chip were eligible for copyright protection, Franklin settled the case for $2.5 million. As part of the settlement agreement the parties agreed to use an independent mediation—rather than legal action—to resolve any future disputes.11

I prefer to view these so-called “alternatives” as supplements and complements to a full judicial resolution of the dispute. For example,

6. M. Shapiro, supra note 5, at 1.

7. Id.

8. Id. Shapiro has noted that the common law “consistently converts indivisible disputes, that is, disputes over injury to person and property and disputes over the fulfillment or nonfulfillment of obligations into disputes over sums of money.” Id. at 10. He also recognized that mediated solutions are always possible in disputes about money. Id. With respect to equitable remedies, Shapiro notes that Anglo-American law has developed equity as a means of resolving conflicts through remedies other than money damages, i.e., by ordering someone to do something rather than pay someone, and as such invokes the doctrine of “balancing of equities.” Id. For Shapiro, it is “below the facade of a dichotomous solution” presented by Anglo-American courts that the potential for mediation exists. Id.

9. Id. at 8. Shapiro suggests that while courts are clearly the least consensual and the most coercive of conflict resolving institutions, courts have unnecessarily been isolated from other styles of conflict resolution. Id. Shapiro attributes this misperception to the heavy emphasis on the conventional prototype of courts and on their coercive aspects. Id. In reality, according to Shapiro, courts are similar to other means of conflict resolution in that they all “share the need to elicit consent.” Id.


the title "court-annexed" arbitration\textsuperscript{12} emphasizes the supplemental nature of the program, rather than indicating an alternative to a court.\textsuperscript{13}

Too often, there has been an unfortunate competition in ideology, personalities, and funding involving persons "inside" the courts such as judges or family services directors versus persons "outside" such as academics and program directors. Each group attempts to improve its own image by putting down the other—e.g., "we need this alternative because the courts don't work" or "alternatives are illegal because they usurp the jurisdiction of the court." Each group treats these programs as though they are involved in a zero sum game—i.e., if they win, we lose. Such may be the case on occasion when both sides are competing for tax or foundation dollars. This article, however, will attempt to show that this ongoing struggle should end. The term "supplement" to trial has been selected as an attempt to find a middle ground.

The following remarks are intended to suggest that this basic difference in approach is more than a semantic one. The distinction between whether a program for dispute resolution is a supplement or an alternative to the existing legal framework will have an important impact on such areas as program funding, its philosophy, and how the client views the program.

In terms of funding, long term happiness for program directors will not be found in attempting to strengthen their position by denigrating the courts, but by having their programs become a line item in a state or federal government's annual budget—generally in the judicial branch itself.

Philosophically, these supplements often apply the rule of law—what a court would do in the same case. As Shapiro notes, both often apply a combination of law and equity. To the extent that participants are "bargaining in the shadow of the law,"\textsuperscript{14} they are close adjuncts of courts. There is, hopefully, a ripple effect—lawyers settle in, out, or on the fringes of courts based on how recent similar cases were resolved when tried to a court or a jury. Many of these supplements

\textsuperscript{12} See note 2 and accompanying text supra.

\textsuperscript{13} The term "court-annexed arbitration" apparently was conceived, or at least popularized, by Assistant Attorney General Daniel J. Meador in 1977. See Nejelski & Zeldin, supra note 1, at 787 n.2.

\textsuperscript{14} The phrase "bargaining in the shadow of the law" has been used to describe how the legal system, through entitlements created by law, the costs and risks of litigation, and the probable outcome in court if the case is litigated, affects negotiations held outside the courtroom. See Mnookin & Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 \textit{Yale L.J.} 950 (1979). For further discussion of this concept, see note 64 and accompanying text infra.
are really doomsday devices providing a mechanism or framework to induce settlement.\textsuperscript{15}

From the client's perspective, the use of the term "alternative" implies a second class system, designed to get the "junk" out of court. Are alternatives being created for "other people"—often non-white or poor? Serious due process and equal protection problems are raised when programs \textit{in fact} progress along a continuum from mediation and arbitration to "cheap adjudication,"\textsuperscript{16} becoming increasingly compulsory and binding on the parties, while \textit{in name} still sounding voluntary and nonbinding.

Court administrators have a special interest in supplements to courts and trial for several reasons. First, supplements are a force for innovation and change. For example, the Bronx juvenile project and the neighbor centers have demonstrated an ability to bring minorities in to supplement extended bureaucracies of all white males.\textsuperscript{17} Supplements provide competition with an often hard to change bureaucracy by providing services normally provided by the government. Second, once the courts have created supplements, there is an inherent obligation to provide for monitoring and review which may be performed, or at least paid for, by court administrators.\textsuperscript{18} Third, the office of court administrator is often a focal point for groups in and outside the judiciary, such as interest groups or legislators, seeking to start new programs or modify existing ones.\textsuperscript{19} Finally, supplements provide fresh insights in thinking about the form and content of courts.\textsuperscript{20}

While the focus in this article and the symposium is on civil cases, criminal cases are also important for at least three reasons. First, the emphasis in recent years on criminal cases exemplified by


\textsuperscript{16} M. Shapiro, supra note 5, at 5.

\textsuperscript{17} See generally R. Tomasic & M. Feeley, \textit{Neighborhood Justice: An Assessment of an Emerging Idea} (1982). Supplements also provide an opportunity to bring specialists into a system which is normally composed of generalist judges. For example, a fine arts expert may be appointed as an arbitrator or special master to determine the value of art work.


\textsuperscript{19} Nejelski, \textit{Judging in a Democracy: The Tension of Popular Participation}, 61 Judicature 166, 175 (1977). "The court administrator must deal simultaneously with the judiciary, executive, legislature, interest groups and the public. The administrator acts as a liaison for all. Serving as the judiciary's primary source of policy planning, the office of the administrator is the obvious place to press for reform." Id.

\textsuperscript{20} For a discussion of neighborhood justice centers as a type of fresh insight, see Wahrhaftig, \textit{Nonprofessional Conflict Resolution}, 29 Vill. L. Rev. 1463 (1984).
federal and state speedy trial legislation and constitutional decisions has put civil cases on the back burner for courts, increasing the delay inherent in noncriminal cases. Second, many of the same issues involved in civil dispute supplements, such as due process and administrative feasibility, were presented by diversion from criminal and juvenile courts in earlier decades. Finally, the dividing line between civil and criminal responses to the same problem may not be very clear; for example, neighborhood justice centers may handle both.

One warning: it is difficult to generalize about dispute resolution. For example, strategies and economics vary considerably from personal injury cases to antitrust enforcement to divorce settlements to consumer problems to arguments between neighbors. A strategy which works in one type of dispute resolution may accomplish little or even be counterproductive in another.

This article will address five propositions:

1. the disputes outnumber the judges;
2. supplements to trial have a long history;
3. jurisdiction has moved in both directions between courts and supplements;
4. economic considerations are important but often overlooked; and
5. court reform is a political issue.

II. THE DISPUTES OUTNUMBER THE JUDGES

The University of Wisconsin spent two million dollars on a civil litigation research project which began in 1978. That research found a large funnel of disputes that “narrowed precipitously before court action loomed:”

Only 1 in 10 people who started out with a grievance ever made it to a lawyer. (The remaining 9 in 10 either swallowed their problem or settled peacefully with the offending store manager, landlord or neighbor.) . . . Half of those who sought out a lawyer never actually filed suit—and of

22. See, e.g., R. TOMASIC & M. FEELEY, supra note 17, at 101 (neighborhood justice centers handle interpersonal disputes referred by criminal court officials and law enforcement officers, in addition to self-initiated civil cases).
those who did, 92 percent settled without a trial. . . . In short, only 1 in every 67 people with a grievance actually pressed it to a final judicial resolution.24

What strikes me about these figures is that there is enormous potential for business for courts and their alternatives/supplements. Only one of every ten grievances reaches the lawyer stage, only half of those reach the courts. Consequently, the potential for formal and informal dispute resolution clearly exceeds the present capacity. Many potential cases are kept from court because of cost and delay. Making the courts faster and cheaper will simply increase the volume of litigation. Based on this data, alternatives or supplements will not relieve the courts unless they resolve up to perhaps twenty times the number of grievances currently in the courts.

What would happen if the number of courts were doubled overnight? Would the judges have reduced caseloads? Perhaps not. To some extent courts may be similar to roads—double the number of lanes on the highway and you may simply double the number of cars on the road, not reduce the congestion.

Many programs have been sold on the basis that they will reduce the caseload of the courts—a proposition which the Wisconsin data suggest is doubtful. There are simply more sponges being added to soak up an increased number of disputes. These are disputes which can now be brought because of a lower cost of litigation, because no lawyers are involved and because the disputes are geographically more accessible. In these instances, the question is not whether the new program helps the courts (which will always be burdened), but whether the program provides better service to clients.

The Court of Appeals for the Third Circuit has seen filings increase 109% in the last ten years, with only a ten percent increase in the number of active judges. As a result of this increase there has also been a massive increase in the support staff in the United States Courts of Appeals.25

The court reformer's utopia has always been fast and inexpensive litigation. I have seen the future, which we have now to some extent

24. NEWSWEEK, supra note 23, at 98. Interpretations of this data vary. Columbia Law School Professor Maurice Rosenberg is quoted as commenting that the Wisconsin researchers say "litigation isn't so bad because only 10 per cent get to suit. It's just as easy for me to say that's a lot as for them to say it's a little." Id. at 99.

25. Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. REV. 4, 36 (1983).
in pro se petitions filed by prisoners, usually at no cost to themselves. This future does not work.

The number of these petitions is staggering; they have been the cause of a large proportion of the dramatic increase in federal court filings during the last two decades. Most of these suits are expensive therapy for the prisoners: expensive to society, not to the prisoner, who can simply file another suit as soon as—or even before—the last petition has been dismissed.

There are basically two types of prisoner cases. Some challenge the underlying conviction; others complain of the conditions of confinement. There have been a number of proposals to unify those which attack the conviction, but little progress has been made. At one time, there were hopes that mediation of prisoner complaints about the conditions of confinement might be a useful alternative. But several experiments have ended in failure. The answer may lie in charging the inmates for the privilege of bringing frivolous suits or in issuing injunctions.


27. One such attempt has been the Maryland Mediation Project, which provides for mediation services for prisoner complaints. See Reynolds & Tonry, Professional Mediation Services for Prisoners' Complaints, 67 A.B.A. J. 294 (1981). The project was developed to accommodate those prisoners' complaints which needed immediate attention, such as allegations of guard brutality or deprivation of medical care. Id. The goal of the program was the avoidance of the typical two year wait for trial of the complaint. Id.

28. One such experiment was conducted at the Federal Correctional Institution in Danbury, Connecticut, where inmates had access to a mediator. For a discussion of this experiment, see Cole, Hanson & Silbert, Mediation: Is It an Effective Alternative to Adjudication in Resolving Prisoner Complaints?, 65 JUDICATURE 481 (1982).

29. To discourage frivolous suits, one Illinois district court judge has set a rule requiring that inmates who file suits which allege civil rights violations pay four or five dollars as “upfront money.” N.Y. Times, Oct. 7, 1984, at 39, col. 1. In the past year, the number of lawsuits by inmates has decreased from about 400 to 233 as a result of this new rule, combined with a computer system that keeps closer track of the cases. Id. See generally T. Willging, Partial Payment of Filing Fees in Prisoner in Forma Pauperis Cases in Federal Courts: A Preliminary Report (1984) (available from Federal Judicial Center).

30. See In re Oliver, 682 F.2d 443 (3rd Cir. 1982). The Third Circuit has held that a court has the power to restrict an individual from filing complaints where the litigant files numerous repetitive, malicious or frivolous complaints. Id. at 445-46. See also Pavilonis v. King, 626 F.2d 1075 (1st Cir. 1980) (repetitive and vague complaints), cert. denied, 449 U.S. 829 (1980); Green v. Warden, 699 F.2d 364 (7th Cir. 1983); Green v. Carlson, 649 F.2d 285 (5th Cir. 1981), cert. denied, 454 U.S. 1087 (1981). However, access to the courts is a fundamental tenet of our judicial system, and thus mere litigiousness is not enough to support an injunction against the filing of further complaints. See Oliver, 682 F.2d at 446.
In short, the answer may be to reintroduce costs into the system. Free dispute resolution systems have been and will continue to be abused. If the courts have been wounded, much of the damage has been self-inflicted.\[^{31}\]

The large pool of disputes which can go to court (and to supplements) is important for several reasons which have particular immediacy to court administrators.

First, funds for courts are always in short supply. Other constituencies—business, labor, the poor—are larger and better organized than the courts. And they vote. As a consequence of the inherent hostility between branches of government, legislatures and executive agencies are stingy toward the courts. The courts are accused of meddling in politics. They declare statutes unconstitutional. School prayer, racial integration, abortion—the variety of issues on which the courts must rule ensures that virtually every segment of society is offended by the courts at one time or another. Consequently, they often seek retribution at budget time. The net effect is that courts are always behind. As a practical matter they will not grow to meet the needs of society; thus, increased service to the public will often come through supplements.

Second, there are inherent limits on size. One inherent problem of expansion is a loss of collegiality. Appellate courts of twenty and thirty judges are increasingly common. For example, the recent addition of five judicial positions brought to twenty-seven the number of active judges on the Ninth Circuit Court of Appeals.\[^{32}\] Efforts to add judges on the federal court of appeals level and the creation of more circuits will result in more conflicts among the circuits.\[^{33}\] Moreover, additional judges may lead to too many opinions. For example, the New Jersey Appellate Division in 1963 had three panels of nine judges. Twenty years later there are nine panels consisting of a total of twenty-seven judges. Do judges on such large appellate courts have time to read each other's opinions? More opinions are being made public due to growth of commercial and government services. This proliferation of opinions has caused a breakdown of the rule of law, because few judges have the time or resources to research and understand this avalanche of paper.

\[^{31}\] For a discussion of some of the implications of this situation, see Part V infra.


\[^{33}\] There has been a proposal for a fourth tier in the federal judiciary, namely an "intercircuit tribunal." Currently there are over 200 federal courts.
III. SUPPLEMENTS TO TRIAL HAVE A LONG HISTORY

Trials and their complements have existed since the earliest recorded times. For example, in fourth century B.C. Athens, both trials and arbitrations flourished side by side.\textsuperscript{34} In keeping with the participatory democracy of that time and place, every Athenian citizen at age fifty-nine spent—as a civic obligation—one year as an arbitrator.

We have always resolved disputes through arbitration, mutual friends, business associations, and church communities. Quotations from the diary of Moreau de St. Mery, a Frenchman who lived for several years in Philadelphia during the 1790’s, illustrate this theme: “There is a judge, but he only holds court for form’s sake so that the clerk, who is related to him, may earn a livelihood.”\textsuperscript{35} Moreau reminds us that one reason for instituting supplements or alternatives to trial is the unfortunate fact that those responsible for the formal justice system have generally been more concerned with living off the courts than with improving the system and making it responsive to society’s needs.

The harsh judgment of history on lawyers, judges and politicians is not confined to Moreau de St. Mery and the Eighteenth Century. The following quotation concerning conditions in England from 1440 to 1640 has been repeated throughout history and has a strikingly contemporary sound:

Lawyers have never been among the best loved members of any community. Yet in the two centuries which preceded the English Civil War, criticism of the legal profession was particularly acute. The long tradition of social comment (from More, Elyot and Starkey, through the great preachers of the mid-sixteenth century, like Latimer or Lever, to the moralists of Elizabeth’s reign and the early seventeenth century) anathematized the lawyers, while in more plebeian vein, common proverb and ancient saw testified to their unpopularity. The more cunning the lawyer, the higher his fee, and inevitably the poor came off worst; delay after delay ensured that the wealth of the client passed into the pocket

\textsuperscript{34} See D.M. MacDowell, \textit{The Law in Classical Athens} 203-11 (1978); Nejelski & Zeldin, \textit{supra} note 1, at 789 n.9.

of his lawyer; judges, counsel, attorneys and court officials could be corrupted by influence, intimidated by social pressure or, quite simply, bribed—accusations such as these were commonplace. The lawyer's calling was essentially that of a parasite. 36

One reason that courts have had relatively little business relative to the large number of disputes is that whenever possible, potential litigants have solved their problems elsewhere. One example from Moreau's diary is illustrative. In order to support himself and his family, Moreau became a bookseller, printer and stationer. A dispute arose between Moreau and his partner, Baron de la Roche, concerning the ownership of a printing press which had just arrived from England. The press was in the possession of the Baron, who was threatening to sell it to one of Moreau's competitors. Moreau was in despair. It might take months or even years to receive another press.

Did Moreau turn to the courts? No. The delay was intolerable. The cost of hiring a lawyer was prohibitive. The outcome was not clear in part because the popularity of a French alien was given to chance. Would the judge be a federalist and against the damned Jacobins? At the time of decision, might there be a surge of anti-French sentiment because of some action by the government in Paris or by its navy?

Though the Baron and Moreau came close to fighting a duel, a supplement to trial prevailed. "We have friends," the Baron said, "who can be our judges, and see that both of us fulfill our obligations!" 37 Moreau agreed, and within one month both sides accepted a settlement. 38

Historian Jerold S. Auerbach has traced the long tradition in this country of one subset of supplements/alternatives, namely, community-based experiments for dispute resolution without lawyers. 39 Auerbach finds that every society has a tension between formal legal institutions and their "alternatives": "It is important to understand that dispute-settlement preferences are not ultimate choices, but shifting commitments." 40

38. The partnership was dissolved, and the Baron was reimbursed for the printing press, which Moreau received shortly thereafter. Id. at 201.
40. J. Auerbach, supra note 39, at 7.
Historically, some methods for resolving disputes have been more truly alternatives, relatively unrelated to the courts and lawyers. Auerbach focuses on community-based systems which are self-defined by religious, geographical, ethnic or commercial criteria. The Puritan New England community of the seventeenth century was one such community. Because tolerance was not a virtue in these communities, the options were “enforced harmony and open schism. Either conflict was stifled or dissidents departed.” This is a reflection of the unified civil and religious community, the “Bible Commonwealth,” which the Puritans inhabited.

Auerbach cites with approval the widespread use of community-based arbitration and mediation to resolve disputes not only in colonial New England but also among Quakers in Pennsylvania and the Dutch in New Netherlands. In all these communities, the sanction for failure to abide by the decision of the group was banishment; for example, in Pennsylvania, one became an ex-Friend. In New York, dispute resolution was at the core of political power. Arbitration helped to consolidate Dutch rule during this time “by concentrating dispute settlement power in the hands of the Dutch elite who could control conflict before it erupted in acrimonious litigation.”

Auerbach laments factors which in later years caused the demise of these unified communities: the pursuit of power and wealth and “individualism.” The Enlightenment of the eighteenth century is seen as a particularly harmful force because it “sanctified” the inalienable individual rights of liberty and property, thereby insuring the ascendency of lawyers and the rule of law.

According to Auerbach, American individualism and materialistic greed make a permanent and growing commitment to litigation inevitable. “The problem,” Professor Auerbach explained, “goes beyond lawyers, who are creatures of American culture, not its cre-

41. Id. at 20.
42. Id. at 22. A 1640 dispute, involving the wife of a prominent Boston resident, is illustrative. See id. at 23-25. The dispute arose when she quarreled with a carpenter about his fee for work in her house. When the woman refused to accept the decision of several arbitrations, she was eventually excommunicated from the church community.
43. See id. at 28-31.
44. See id. at 31-32.
45. Id. at 2. By retaining control of arbitration, the Dutch preserved their cultural autonomy and self-government. Id.
46. Id. at 30.
47. Id. at 10.
48. Id. at 45.
49. Id. at 10.
It is, ultimately, a question of values, translated into social structure. Armed with the sword of litigation, Americans can wage ceaseless warfare against each other—and themselves.\(^{50}\)

In contrast, Jethro Lieberman provides the contemporary view that litigiousness is not a signal of failure but a clarion of social health:

For the willingness to go to court is a sign that we are not going to the streets—the court of last resort. . . . We have been a litigious nation as we have been an immigrant one. Indeed, the two are related. . . . The great revolution of the contentious American people has been the democratizing and deprofessionalizing of the judicial avenue of redress.\(^{51}\)

At least some of the unhappiness over the litigious tendencies of various groups in recent years springs from the realization that laws are being enforced through the courts. "During the 1960's and 1970's Congress began to entrust enforcement to private parties . . ., thus upsetting the tacit compromise between grand declaration of legal principle and silent failure to enforce."\(^{52}\)

Auerbach and Lieberman would agree that litigiousness is not a legal but a social phenomenon. As Leiberman has noted, "it is born of a breakdown in community, a breakdown that exacerbates and is exacerbated by the growth of law."\(^{53}\) Grant Gilmore succinctly pointed out that "the better the society, the less law there will be. In Heaven there will be no law. . . . In Hell there will be nothing but law, and due process will be meticulously observed."\(^{54}\)

According to Lieberman, the courts have become the final repositories of social trust, and they have sought to discharge their duty by holding accountable those whose trust was not merited.\(^{55}\) He suggests that the growing complexity of our life and the spread of specialist knowledge is making each of us more and more illiterate about the way the world works, thereby making the work of the courts more difficult.\(^{56}\)

Administrative law agencies and licensing are supplements which far overshadow the courts in terms of volume, especially in ar-
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In labor, workmen's compensation systems and the National Labor Relations Board created whole new courts with specially appointed prolabor adjudicators to supplant judges in traditional courts who had refused to apply the new laws. In other words, who administers the law may be just as important as the letter of the law.

Throughout history, the formal trial in a court of general jurisdiction has been more the exception than the rule. Arguably, more cases in the federal judicial system are resolved today by specialized supplemental tribunals, magistrates and forfeiture of collateral programs than by United States district judges. These specialized courts handle an impressive array and an enormous volume of cases. They include such diverse and important areas as bankruptcy, claims against the United States, international trade, military matters and taxes. Similarly, in the state courts, more citizens come in contact with traffic, divorce, juvenile, and small claims tribunals than with the court of general trial jurisdiction.57

Courts have certain advantages over most supplements/alternatives, such as visibility and accountability. The checks and balances inherent in the tension among the three branches of government provide a monitoring often lacking in supplemental programs.

Not all of these supplements have been viewed as positive contributions. Anything less than the consideration of a claim by a general jurisdiction court has been regarded by some clients as second class justice. In addition, supplemental dispute resolvers and their staffs want equality in pay, status, title and the other privileges enjoyed by judges and their staffs. As a result of these factors, there is a constant disequilibrium in creating supplements to the extent that they become courts. Finally, many of these alternatives/supplements raise due process and equal protection problems.58 They may be too removed from the protections of traditional courts. For example, there is the danger that administrative law judges in social security cases may be given

57. In this country, lawyers and law schools have traditionally overlooked these supplements. However, Harvard Law School, which frequently blazes the trail in legal education, has established courses on negotiation and dispute resolution. Under the guidance of professors such as Roger Fisher and Frank Sander, there is also an impressive program of applied research and dissemination through publication and workshops. See Negotiation Newsletter, Program on Negotiation at Harvard Law School, Fall 1983 (describing a score of workshops, visiting scholars, projects and publications).

quotas for denial of benefits based on the budgets and philosophies of those running the agency.

IV. JURISDICTION HAS MOVED IN BOTH DIRECTIONS BETWEEN COURTS AND SUPPLEMENTS

An example of this jurisdictional movement is the United States Tax Court, which was created as an administrative board in 1924, became a quasi-administrative agency, evolved into an independent article I court by 1969, and may eventually reach article III status. United States Magistrates were created as a separate tier in the federal hierarchy in 1968.\textsuperscript{59} Relegated to an almost steady diet of social security claims and prisoner petitions, they now insist on wearing black robes and being called “Your Honor.” Created as an alternative to increasing the number of article III district court judges, it is only a matter of time before magistrates lobby for and achieve the pay status and requisites of “real” judges. In one district in the Third Circuit, the magistrates were required by the district judges to wear gray robes—to separate them from the “real” judges. But they soon won the right to wear black robes.

At the state level, the creation of separate workmen’s compensation tribunals was intended to result in faster, more informal trials. But after two or three decades, they had the characteristics of courts of general jurisdiction: delay, formalism, rules of evidence, black robes for judges, etc.\textsuperscript{60}

The problem exists even where staff assistance may lead to the creation of quasi-judicial and then judicial positions. The growth of staff attorneys and settlement programs in the federal courts of appeals may lead to the creation of appellate magistrates. The evolution of commissioners in state supreme courts, such as in Kansas, into regular judges of the intermediate appellate court is one example of appellate level adjuncts becoming full time judges.

The line between hearing officer and judge is a fine one and has already been crossed in most federal administrative law systems. In immigration cases, the “special inquiry officer” in the last decade has become the “administrative law judge.”\textsuperscript{61}


\textsuperscript{60} Unfortunately, examples of the judicial caste system abound. Recent instances include the unsuccessful struggle of federal bankruptcy judges to improve their “inferior” status. See N.Y. Times, Mar. 2, 1984, at A16, col. 3.

\textsuperscript{61} Of course, the problems of status and the allegations that members of professions are more concerned with self interest than with service are not limited to the legal and judicial professions. Moreau discovered two examples of such self-ag-
An analogy to the availability of judicial alternatives is the extent to which individuals can use alternatives in the health care field. Patients can attempt to treat themselves or receive assistance from persons who are not licensed doctors, such as nurses or midwives, arguably substituting roughly equivalent services at less cost and greater convenience.

Many professions have begun using less formal or part-time supplements. The armed forces make extensive use of national guard or regular reservists whose numbers may exceed the soldiers or sailors on active duty. The Roman Catholic Church has experienced a growth in the role of the lay ministry, especially in the two decades since Vatican II. Lay persons participate in various aspects of the liturgy, educational programs and administration in ways unheard of twenty years ago.

Although there are obviously differences in the use of alternative or supplements in these professions, I would suggest that some similar problems arise. These include the threat to the status and infallibility of the professionals and the imposition of requirements that the lay people become "professionalized" through mandatory formal education requirements, training manuals, loyalty oaths, licensing and so forth. When the professionals are "successful," they will have produced an alternative delivery system which is just as expensive, inconvenient and resistant to change as the original doctor, bishop, general or judge.

A serious problem is how to keep supplements in a flexible position between the administrative formalism of a court and the creative freedom of the less organized supplements. Frank Sander has proposed a courthouse with many doors, with the hope that special pro-

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MOREAU DE ST. MERY'S AMERICAN JOURNEY, supra note 35, at 334.

One recent controversy in the medical profession involved a doctor who wrote a column for a Connecticut newspaper. In one such column he wrote:

The M.D. degree permits the bearer to become a member of the Club. Of course, once a doctor is a member of the Club, he has certain obligations: He must refer constantly to how little money he has, yet live in a large and well-manicured house; become pompous and arrogant but not speak badly about his colleagues; make sure that "his" hospital is run for the benefit of the doctors, not patients; not allow patient convenience to compromise his own, and never write newspaper columns that criticize The Club.

A basic question in dispute resolution is the use of coercion. If the dispute resolution program is voluntary, its probability of success is doubtful. Generally, one side has what it wants: for example, the property in question, physical custody of the child, the ability to play a stereo at full volume. Why even respond to a summons? Why follow the findings of the mediator or arbitrator?

The state's power in supplemental programs is generally present only in the background. The parties are told to take the dispute resolution system and this result, because something more inconvenient, expensive, and/or onerous will be forced on them. However, it should be noted that parties to a supplemental dispute resolution system often bargain in the shadow of the law, and do not merely select solutions randomly. In other words, "coercion" is allowed because

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62. See Address by Frank E.A. Sander, 70 F.R.D. 111 (delivered at the National Conference on the cause of Popular Dissatisfaction with the Administration of Justice, April 7-9, 1976). Sander suggests that by the year 2000, courthouses may be replaced by "Dispute Resolution Center[s]." Id. at 131. At the center, a complainant would initially go to a "screening clerk," who would then direct him to the process most appropriate to his case. Id. Sander suggests that the lobby directory might look as follows:

- Screening Clerk
- Mediation
- Arbitration
- Fact finding
- Malpractice Screening Panel
- Superior Court
- Ombudsman

Room 1

2

3

4

5

6

7

Id.

63. A refugee from the anarchy which characterized much of revolutionary France in the early 1790's, Moreau was acutely sensitive to situations where might makes right:

If we dared go out of Philadelphia and glance at those who live far in the country in sections that are remote, though in the same province, we would say that Americans who live there have neither justice nor public security. If a person buys land, one is apt to find that someone has already seized it and established himself upon it. If you try to make him abandon it, a gun-shot may stop you, and none will be interested in avenging you.

MOREAU DE ST. MERY'S AMERICAN JOURNEY, supra note 35, at 280-81.

64. A recent newspaper description of mediation of child custody cases in Pennsylvania illustrates the point. Chester County Custody Conciliator Bill Kraut described the process by which an independent therapist's report becomes part of the court record, and noted that "if [the parties] don't settle their differences, a judge will make the decision for them." Kraut called the process "conciliation by intimidation." See Phila. Inquirer, Jan. 29, 1984, at IW, col. 1. This coercion is allowed because Kraut and the attorneys know the "going rate" for various fact patterns, i.e., what happened in similar cases which either went before a judge or were resolved more informally.

65. See Mookin & Kornhauser, supra note 14, at 986. It has been suggested that lawyers negotiating settlements proceed in an adjudicatory manner in which "rules, precedents, and reasoned elaboration . . . may be expected to determine outcomes."
supplements of the court follow the rule of law and do not simply exercise their unbridled discretion.

What responsibilities do government, and in particular the courts, have for the resolution of disputes in society? Supplements are most acceptable if law is followed. As Lord Coke emphasized, the importance of the common law to society should be reflected by the measuring of individual obligations and rights "by the golden and straight mete-wand of the law, and not the uncertain and crooked cord of discretion." 66

The history of the Cuban popular tribunals from 1962 to the present strongly suggests that similar forces may be at work in other countries. 67 In the early years of the Cuban revolution, the traditional legal system was discredited and its participants exiled. Lawyers and judges had no institutionalized role in the newly created popular courts. The part-time judges were workers who were considered to have the right background and political orientation. These workers received rigorous training. The courts were created outside the Ministry of Justice and given broad jurisdiction, including minor torts and criminal offenses, health matters, juvenile delinquency, land distribution and personal quarrels. To maximize attendance, trials were held in the evenings and in public places. 68 Innovative sanctions were applied, such as sentences to attend neighborhood "study circles."

There were only thirty-five such courts in 1964, but by 1969 about 8,000 judges in more than 2,000 courts heard cases throughout the island. But forces for formalism had come early in the movement. By the fourth year of the popular courts, a judge's manual had been distributed. By 1973, regulations were enacted restricting places in which trials could be held and emphasizing the formality of judicial proceedings. Innovative sanctions gave way to more traditional fines. Members of the bar and the judiciary were required to be part of the panel. Courtrooms are now more formal and trials are no longer held in public places or work centers. The judges now wear suits and

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66. E.W. Ives, supra note 36, at 125.
68. The purpose of the trials was not primarily to determine guilt or innocence. Rather, they were "regarded as tools which through embarrassment and peer pressure helped rehabilitate offenders and deter others." Id. at 590-91. Spectators played a vital role in the educational process by participating and expressing their opinions. Id.
traditional robes instead of work clothes as before. Formerly a free-standing institution, the popular courts now find themselves at the bottom rung of a unified pyramid-shaped court system.

The current municipal courts in Cuba are certainly different from both their prerevolutionary counterparts and the popular courts of the 1960's. There is still considerably more lay participation in the panel of judges (two of the three members are currently lay persons). Some innovations in sanctioning remain (e.g., fines based on so many days of a defendant's earnings rather than a fixed sum). A new generation of legal professionals had been trained and indoctrinated: police, judges, lawyers, as well as lay judges.

But clearly, the left swing of the 1960's revolution had seen many Thermadorian, counterrevolutionary changes: manuals of procedure, published regulations and rules, formal procedures characterized by the wearing of robes, emphasis on factfinding as opposed to education and show trials, direct links to the next tier of courts in a structured hierarchal model of administration, and limited discretion in the judges, especially in sanctioning. 69

V. ECONOMIC CONSIDERATIONS: IMPORTANT BUT OFTEN OVERLOOKED

Economic issues of special interest to court administrators include these questions: Are supplements cost effective? Will supplements encourage cases for the wrong reasons? How much cost to litigants is acceptable? To what extent should courts be self-sustaining? Is cheaper necessarily inferior?

With more than ninety percent of litigation being withdrawn, decided, or settled before trial, serious questions are raised and should be answered concerning whether the cost of a new program outweighs the benefits derived. The problem is compounded by the fact that these costs and benefits are hard to measure and to compare. For example, is the cost to society of a court-annexed arbitration program justified when the same number of cases go to trial, but the cases which settle are resolved much earlier and at less cost to the litigants?

Supplements like the civil appeals management programs (CAMPS) in several federal courts of appeals may encourage a litigant to take an appeal which would not have been feasible before because of high cost and delay. Does society (or the parties) benefit

69. The initial success and later failure of the popular court experiment was closely tied to long-term economic and political goals of the communist government, and in particular, the need for an institutionalized bureaucratic cadre to operate the judicial system. Id. at 607.
from a quick, inexpensive review of a hard-won judgement at the trial level? The problem is particularly acute if the parajudge's role is only to "split the difference" or compromise the verdict, rather than to apply the rule of law.

At each stage of dispute resolution, economic costs are (or at least can be) placed on the parties. To what extent should these costs be manipulated to change the flow of litigation? For instance, should the filing fees required to commence a legal action be raised or lowered? Will legal assistance be provided to certain groups? Will "penalties" be assessed: for example, will attorney's fees be awarded? Society measures the economic pain which dispute resolution will cost the parties, and supplements are no exception.

Since Tumey v. Ohio, it has not been permissible for judges to receive their salaries directly from the litigants in the form of filing fees or fines. But every legislature (and consequently every court administrator) looks at the revenue produced by a court. To what extent does or should a court supply revenue to offset its expenses? These issues are also pertinent for supplements: to what extent can they be self-sustaining?

Another concern directly affecting the administration of these programs is the perception, real or imagined, that these supplements are in some ways inferior to the normal court processes. Some groups may oppose supplements because they are thought to be inferior or second class. The creators and administrators of these programs carry a special burden in insuring that supplements in fact meet the goals of effective justice.

Many citizens are denied access to the courts because of high costs. With partners in larger firms charging $200 per hour, it does not take long to make legal services and litigation beyond the reach of most Americans. But, paradoxically, there are too many lawyers—600,000 and growing. The pretrial discovery industry has blossomed. The going rate for handling a case through a jury trial in state court is $10,000; in federal court, the figure reaches $50,000.

Indeed, the costs of litigation can be staggering. In a celebrated antitrust case in the Eastern District of Pennsylvania, a district court

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70. 273 U.S. 510 (1927). In Tumey, the United States Supreme Court held that the defendant had been deprived of his constitutional right to due process when he was subjected to a trial by a mayor whose sole source of fees he could collect was the fine imposed on the defendant if convicted. Id. at 523.

71. Even in Moreau's day, he discovered that in Philadelphia, "[t]he outstanding men are lawyers whose profession is even more lucrative than in England. Their salaries are excessive." MOREAU DE ST. MERY'S AMERICAN JOURNEY, supra note 36, at 335.
judge cut attorneys’ fees from $20.2 million to $4.3 million. The district court’s 468 page opinion found the fees “grossly excessive.” After handling a civil rights case last year, Harvard Law Professor Lawrence Tribe submitted a bill to the state of Massachusetts for $332,441. In addition to his hourly fee of $275, Tribe gave himself a 50% bonus for winning. The district court awarded Professor Tribe over $176,000, but the First Circuit reduced the fee award to less than $82,000.

A former president of the New York Federal Bar Council, Peter Megargee Brown, summarized the problem recently. According to Brown, the American legal profession is declining because “professional success today is measured by profits. There is plain greed on the part of lawyers.” Brown concludes that “non-lawyers will increasingly fill voids in the legal system and take away larger portions of lawyers’ traditional rewards and perquisites.”

The bar has ambivalent feelings about some supplements, such as neighborhood justice centers. The central question is: do they reduce lawyer income? Supplements present important ethical considerations for lawyers, especially where the interests of a client and lawyer may diverge. For example, would a client be better off settling a case or using a low cost supplement rather than going through expensive litigation and trial, which may be very financially rewarding to the lawyer?

Other important economic problems include the positive aspect of litigation or dispute resolution expense: (1) fee shifting—does or should the loser deserve a “free ride”; and (2) do we really want a

72. See In re Fine Paper Antitrust Litig., 98 F.R.D. 48, 68 (E.D. Pa. 1983). The court also criticized counsel for “duplication, waste, and gross inefficiency,” and noted that the case had given substance to the criticism that class action suits are being manipulated by lawyers to generate fees. Id. at 83, 85.

73. Professor Tribe represented a restaurant seeking a liquor license in its challenge to a state statute giving nearby churches the right to veto such requests. See Larkin v. Grendel’s Den, Inc., 459 U.S. 116 (1982). Tribe, however, had kept few records. When questioned about his fees, Tribe called the need to substantiate the number of hours he claims to have spent “a stupid waste of time.” See N.Y. Times, Dec. 14, 1983, at A22, col. 1.


75. See Grendel’s Den, Inc. v. Larkin, 749 F.2d 945 (1st Cir. 1984).

76. N.Y. Times, Dec. 6, 1983, at A31, col. 1. Brown suggests that the law profession needs leadership, inspiration and a vigilant self-policing system to enforce its own codes and rules. Id. Even more importantly, according to Brown, young lawyers should be taught to serve public interests as well as private interests. Id.

77. Id.
no-cost-to-the-litigant system, such as we now have with prisoner
petitions?

Earlier this year, a United States district court judge in the
Southern District of New York assessed two plaintiffs $50 each and
their lawyer $19,000 in legal costs for filing a "meritless law suit."78
The suit charged that a nonprofit organization in Manhattan assist-
ing victims of crime had discriminated on racial basis in dismissing
two employees. After a hearing, the judge found that there was no
evidence of racial discrimination. The judge held that

where there is no substantiating evidence, a court is justified
in determining that the complaint is meritless and unre-
asonable . . . . The record amply demonstrates that counsel
is primarily responsible for the use of the judicial process
. . . . In bringing this baseless suit, [counsel] has wasted
my time and the time and money of the defendants.79

Counsel, however, claimed: "This decision threatens every public-in-
terest, legal services and civil liberties practitioner."80

Lawyers and the organized bar have attempted to monopolize
dispute resolution for their own personal gain. To the extent that
alternatives/supplements provide competition which lower the costs
to the consumer, they should be encouraged.

How long will the courts and the legal profession condone litiga-
tion abuses? The New York Times recently reported the following
scene from the asbestos litigation wars: "Yesterday, for the first time,
one of the workers afflicted with an asbestos-related disease appeared
in court in Manhattan to argue that the lawyers were really repre-
senting themselves—and no one was speaking for the workers."81

78. The agency successfully contended that the two were fired because they
were using drugs at work. See Santiago v. Victim Serv. Agency, (S.D.N.Y. Feb. 8,
1984), discussed in N.Y. Times, Feb. 9, 1984 at B9, col. 4, rev'd on other grounds,
No. 84-7558 (2d Cir. Jan. 11, 1985). The Second Circuit reversed the district court's fee
award on the ground that having dismissed the action, the court no longer had juris-
11, 1985).

79. Id.
80. Id.
81. N.Y. Times, Oct. 28, 1983, at D3, col. 5. The article noted that several
months previously, the attorneys for the asbestos claimants turned down a lump sum
settlement of $400 million (about $28,000 per claim) for pending claims. The law-
yers demanded over $700 million, the difference being approximately what it would
take to pay $400 million to the claimants and to give contingency fees to the lawyers.
Id.

A recent study by the Rand Corporation detailed the extent to which the asbes-
tos litigation process has benefited the attorneys more than plaintiffs. See J.
Kakalik, P. Ebener, W. Felstiner & M. Shanley, Costs of Asbestos Litiga-
Can it be any surprise that supplements to litigation are being developed to counter the Olympian appetites of American lawyers for their fellow citizens' gold?

Perhaps the most significant development in reducing legal fees and exploring supplements has been the creation of the Center for Public Resources in New York City by leading corporations and insurance companies. The Center has served as a clearinghouse and innovator in a time of general apathy by bench and bar. Perhaps serious reform can come only from clients who have been gouged once too often.

VI. COURT REFORM: A POLITICAL ISSUE

Ever since lawyers were outlawed in seventeenth century Massachusetts Bay Colony, how disputes get resolved in this country has been a classic political problem: who gets what, when, where and how.

The tensions between traditional courts and alternatives/supplements has hardly been limited to this country. Indeed, the creation of separate courts of equity or prerogative writs in England (and their eventual merger with law in this country) is a basic story of our Anglo-American legal history.

The utilization of separate courts (for example, the Crown's use of admiralty courts without juries to try smuggling cases just before the American revolution) and the creation of separate administrative agencies (for example, the NLRB for labor disputes) have been significant political strategies. The evolutionary relationship between such alternatives or supplements and the court of general jurisdiction appears as a continuous process when seen from a historical perspective.

A possible stabilizing factor may be the creation of special divisions of the court of general jurisdiction, a process fostered by the ABA Standards of Judicial Administration. The key decisionmakers are thereby kept in the mainstream of the judiciary. Separate procedural rules and training can be provided. A central question is whether judges can be rotated to and from these divisions (compare the isolated status of bankruptcy judges with the ideal of judges tem-

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82. See J. AUERBACH, supra note 37, at 27.
VII. CONCLUSION

Dispute resolution is big business. The "law industry" in 1983 had an income of $38 billion—compared to $30 billion for hotels, and $4 billion for movies. Salaries, prestige, schools—many people and institutions will rise or fall depending on the future of supplements to courts.

The Department of Commerce has forecast for the 1980's that by the end of the decade there will be a 30% increase in lawyers. Computer specialists will increase 61%. But at the top of the list are paralegals, which are expected to increase 118%. The question is whether the same trend will exist in dispute resolution: for every judge added to the judicial system, will there be four additional parajudges such as mediators, conciliators, and arbitrators?

87. See M. Shapiro, supra note 5, at 5. Professor Shapiro lamented recent developments:

Recently one of the favored tactics for relieving delay in the civil courts has been the adoption of systems of compulsory arbitration in which suits involving relatively small amounts of money are assigned to arbitrators rather than tried before a judge. Such a system is not really one of arbitration but one of cheap judging. The arbitrator is expected to arrived at the same decision under the same law as would a judge. The parties usually do not choose the arbitrator. He uses simpler procedures and carries a lower overhead of courtroom costs than a judge and thus handles more cases at smaller cost. Such systems thus allow the appointment of a great many temporary judges by avoiding constitutional, statutory, and budgetary limitations on formal judicial appointments.

Id. (emphasis added) (footnote omitted).