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Open Letter

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Alternative dispute resolution is not new in the world of decision-making. In a manner of speaking, trial by battle and compurgation (the practice of clearing an accused person by the oaths of others testifying to his or her innocence) were early forms of alternative dispute resolution.[1] The Burr-Hamilton duel, resulting in the death of Alexander Hamilton in 1804, was also an early form of alternative dispute resolution.

Negotiated settlement is another example of alternative dispute resolution, albeit less colorful than those previously mentioned. In fact, the summary jury trial, a form of alternative dispute resolution, is, at best, a sophisticated tool to aid negotiation. The United States Court of Appeals for the Sixth Circuit recently held that litigants cannot be compelled to use summary jury trials.[2] Nevertheless, litigants may, if they desire, contract so that any reasonable program of alternative dispute resolution will be binding on them.[3]

The concept of alternative dispute resolution is receiving considerable attention in current legal writing. For instance, there is a move to have one form of alternative dispute resolution—court-annexed arbitration—become a mandatory pretrial procedure.[4]

I think that programs which make alternative dispute resolution mandatory are most unwise.[5] Arbitration is an extremely useful tool for the resolution of corporate or governmental litigation where the issues and the principals in such cases are governed by a purely objective standard, like money costs or money benefits. However, people are governed, not by objective standards alone, but by emotional factors as well, and those emotional factors are best satisfied by a jury system in which peers of the litigants resolve the issue. This is the unique value of the constitu-

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1. ARTHUR LYON CROSS, A SHORTER HISTORY OF ENGLAND AND GREATER BRITAIN 78 (MacMillian 1924). Trial by battle was not formally abolished in England until 1989 and compurgation not until 1833. *Id.*

2. *In re* NLO, Inc., 5 F.3d 154 (6th Cir. 1993).

3. Cincinnati Gas and Elec. Co. v. General Elec. Co., 854 F.2d 900 (6th Cir. 1988). *See also* Rhea v. Rhea, 7 F.3d 234, 1993 WL 375801 (6th Cir. (Tenn.)).

4. Court-annexed arbitration is a compulsory, nonbinding process which must be resorted to in some jurisdictions prior to going to court. Each party has the opportunity to present proofs and arguments at an arbitration hearing before a neutral third-party decision-maker. The hearing customarily is less formal procedurally than court adjudication. The decision-maker's award may be supported by an opinion. If the parties accept the award as a judgment, it is entered after the specified length of time to appeal has passed and the litigation is terminated. If one of the parties rejects the award and demands a trial de novo, nominal sanctions may be imposed on the requesting party if it does not improve upon its position at trial, usually in a predetermined percentage from the amount awarded in the arbitration hearing.

5. The Honorable G. Thomas Eisele, Senior District Judge for the Eastern District of Arkansas, has written a colorful and persuasive criticism of the use of mandatory arbitration. *See generally* Judge G. Thomas Eisele, *Differing Visions—Differing Values: A Comment on Judge Parker's Reformation Model for Federal District Courts*, 46 SMU L. REV. 1935 (1993).

tionally protected right to trial by jury. Burdensome, cumbersome, awkward as it may be, it has far greater societal value than any mandatory alternative dispute resolution system that has yet been developed.

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