ALTERNATIVES IN DISPUTE PROCESSING: LITIGATION IN A SMALL CLAIMS COURT*

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INTRODUCTION

Social life is inevitably conflictual. Conflict occurs as individuals with different interests, goals, problems and perspectives seek to achieve a maximum share of the values which any society provides. Yet, the inevitability of conflict does not mean that its occurrence is welcomed. In fact, generally the opposite is true. Conflict, once it occurs, is difficult to end. Resolution is elusive because conflicts transform themselves almost as quickly as they can be defined and strategies for dealing with them developed.[1] Nevertheless, in every society there is a wide range of techniques and procedures available to deal with disputes.

Studies of the techniques and procedures employed in processing disputes typically begin by dividing them into those which require third party intervention and those which do not. The simplest and most frequently employed of these techniques do not entail third party intervention. People who are involved in conflict may take no remedial action; they may choose to "lump it" (Galanter, 1974:124-125 and Felstiner, 1974:50). Or, they may choose to "exit" from the situation in which the trouble occurs and seek new and less troubled relationships (Hirschman, 1970). Or, they may engage in direct self-help efforts. They may give "voice" to their problems, engaging the other in an effort to reach a mutually satisfactory solution.

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* An earlier version of this paper was presented at the 1975 annual meeting of the American Political Science Association. The initial idea was developed while I was a Russell Sage Fellow in Law and Social Science at Yale University. Financial support was provided by a Faculty Research Grant from Amherst College. For their comments on an earlier draft I wish to thank Larry Baum, Sheldon Goldman, Stephen Wasby, Marc Galanter, Beth Sarat and two anonymous reviewers.

1. It is wrong to think that people experiencing trouble in a relationship will seize every opportunity to end that trouble. It may be necessary to take action which appears to have "remedy potential" in order to appear faithful to the desire for tranquility, but there is some evidence that people are able to tolerate conflict and uncertainty for considerable periods of time and some may derive psychic pleasure from the stimulation and arousal provided by a troubled relationship (Sperlich, 1971). Furthermore, this ability to tolerate conflict provides one hint of why court decisions frequently do not terminate conflict or achieve their intended result (Wasby, 1970: chap. 2).

Generally, it is only after such dispute processing alternatives have failed that third parties are called in. The kind and characteristics of the third party help may vary depending on the kinds of parties who are involved in the conflict, the issues in conflict, and the relative costs and availability of different third party procedures (Collier, 1973). Third party procedures take several forms and may be described in many different ways (Sarat and Grossman, 1975: 14-18). Four dimensions seem particularly useful in capturing aspects of third party procedures encountered in this research.

First, third party alternatives vary in their level of *formality* (Felstiner, n.d.:33-39). Those which are formal tend to adhere to a regularized pattern of processing disputes, to rely on various rituals and to employ, exclusively and rigidly, a single style of decision making. Second, dispute processing alternatives vary in their degree of *openness*; some operate in public, others carry on their proceedings in private. Alternatives which are public require that disputants openly acknowledge and deal with the trouble that exists between them; those which are private allow disputants to limit the range of public knowledge about their problem and do not require disputants to work out their problem before an audience of strangers. A third dimension which can be used to differentiate dispute processing alternatives involves their conception of what is *relevant* to the dispute. Some procedures require that parties narrow and focus the definition of their conflict. They transform personal problems arising out of complex situations into disputes over questions of fact or competing interpretations of rights and rules. Other procedures allow the parties to present a broader view of their dispute. In such procedures an attempt is made to take into account more of the "biography" and context which, while not precisely caught up in the dispute, provide a sense of its history (compare Nader, 1969b and Levi, 1947). Finally, dispute processing alternatives differ in their *decisional* style; some typically render "all or nothing" decisions by determining whether a social norm has been violated and by assigning to one of the disputants causal or moral responsibility for the occurrence of the trouble;[2] others seek to

2. How third party remedy systems account for the emergence of trouble in a relationship also influences the way people will deal with that trouble. In most industrialized societies, those third parties who try to settle troubles by determining whether someone violated a social norm and by assigning causal or moral responsibility for the occurrence of trouble are not attractive to people with intricately joined life histories. Such people may be aware of greater ambivalence in their trouble than such a settlement procedure recognizes (Katz, n.d. and Felstiner, 1974:71). Again, focusing on the

"make a balance" between the parties through compromise decisions.

Among all of the third party alternatives which are available to process disputes, perhaps none are as visible and important as those provided by courts. Court procedures are, at least in the United States, generally, but not exclusively, formal, public, narrow in their conception of relevance and "all or nothing" in their style of decision making. Furthermore, courts are "reactive" (Black, 1973:128); their agendas are largely set by the actions and choices of individuals and groups having no formal ties to the judicial system.[3] Thus the choices which people make among dispute processing alternatives are important in determining the way in which society's dispute processing business is distributed.[4] These choices may be explicit and clearly recognizable or they may be implicit; they may require the assent of both parties or simply the action of one; they may commit the parties to abide by a result which cannot be anticipated when the choice is made or they may preserve the power of each party to decide what is or is not an acceptable solution.[5]

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question of who did what and who is at fault may exacerbate the trouble giving rise to the need for settlement. Relationships can best survive the trauma of an open declaration of trouble if the procedure invoked to deal with that trouble places it in the context of the complex moral histories of the parties' relationship and thus serves to obscure whatever particular incident gave rise to the present trouble (Collier, 1973: chap. 1).

3. Whether remedy systems are "reactive" or "proactive" affects the way people initially deal with their problems by influencing the way those problems are perceived and interpreted. For example, remedy systems which, like umpires at sporting events, are positioned in anticipation of conflict, facilitate both the perception of trouble, when it occurs, and its resolution. Should trouble occur, such remedy systems will have at hand information gathered in the course of normal monitoring activity to provide the basis for settlement. Furthermore, the very positioning of these monitoring devices expresses the expectation that trouble is a normal part of those situations (Katz, n.d.). The declaration of trouble by a party is legitimized in a way which is foreign to "reactive" settlement procedures such as those provided by the judicial system (Black, 1973). When parties have to seek out remedy systems, the significance of their declaration of trouble is magnified both in their minds and in the minds of others. Reactive procedures force the troubled party to come forward in a visible way, to step out of the normal course of the troubled relationship. They also impose costs special to each case by requiring the parties involved in a problem to describe and interpret the setting in which the problem developed. Courts thus deter the declaration of trouble by emphasizing its disruptive effects.

4. This is not to suggest that any particular choice of dispute processing alternative is final. In fact, any single choice is likely to be part of a series of attempts to deal with conflict. The choice of dispute processing alternatives is generally incremental, moving from one forum to another until an appropriate and satisfactory method of handling the problem is found.

5. When disputes are adjudicated, for example, parties are required to submit to verdicts over which they have no control (Eckhoff, 1966; Nonet, 1969: 232-40; Aubert, 1967). As a result, parties who desire to retain control over the ultimate resolution of their dispute

Insofar as the courts are concerned, it is often assumed that the most significant of these choices is the choice to file a lawsuit (Blankenburg, 1975:306). A growing body of research has begun to focus explicitly on this choice and to examine the motivations of those who bring lawsuits and the conditions under which litigation occurs (Hunting and Neuwirth, 1962; Grossman and Sarat, 1975; *Law & Society Review*, 1974 and 1975). This research, although important in increasing understanding of the social role of courts, suffers from two problems. First, most studies of litigation are not comparative, that is, they do not place litigation in the context of the full range of dispute processing alternatives which society provides. Few have inquired as to why disputants choose one alternative over others which might deal with their problem (exceptions are found in the work of Nader, 1965; Collier, 1973; Conard *et al.*, 1964; Lowy, n.d.; and Kawashima, 1963). One reason for this failure of comparison is the difficulty of identifying procedures which are both relevant and accessible, and, furthermore, of determining at what point a choice is made. This paper attempts to study, albeit within the confines of a single court, the choice of dispute processing alternatives when both the alternatives and the choices are clearly identifiable.

A second problem in research on litigation, particularly research on civil litigation, is that the act of filing a lawsuit is frequently assumed to signal the end of the process of choosing among dispute alternatives.[6] Data on civil and criminal litigation (Report of the Administrative Office of the Federal Courts, 1973) indicate that, in fact, filing a suit is rarely a definitive choice among such alternatives. Most lawsuits never reach the trial stage. The attrition or termination of lawsuits without judicial action is commonplace and indicates that filing is rarely the end of the process of choosing among dispute processing alternatives. Attrition occurs as other procedural opportunities arise (some prompted by litigation) and as other non-judicial remedies become available. Litigation is rarely an unequivocal call for judicial action; it is instead frequently intended only to promote out-of-court negotiations.[7] Furthermore, a number of

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are less likely to litigate than are those willing to risk an adverse decision.

6. Notable exceptions are Rosenberg (1964) and Glaser (1968).
7. On the other hand, once initiated, litigation has a momentum of its own. The parties to a dispute may come to identify themselves with the roles which litigants typically play; they may get caught up in acting out the parts assigned to them as plaintiff and defendant; they may, as it were, be transformed in an unintended manner and their litigation may acquire an importance which they had not anticipated.

courts provide internal alternatives to adjudication for cases which do not terminate by themselves (Kawashima, 1963:52 and Rosenberg, 1964). This means that litigants may be faced with choices among dispute processing techniques right up to the time their case comes to trial.[8] Finally, neither the initiation of a lawsuit, nor its termination, always puts an end to the trouble which gave rise to the suit. A decision or settlement in one forum may do no more than provide the occasion for moving the conflict into another forum in which the drama of seeking settlement can be repeated.

This paper presents a case study of litigation in a small claims court. Unlike other studies of litigation it takes the filing of lawsuits as the beginning point of investigation. It describes and analyzes the processing of cases as litigants continue to choose among dispute processing alternatives. This case study focuses on two points at which such choices take place. The first of these involves the choice of whether or not to appear when a case is scheduled for hearing and the second involves a choice between two different procedures for hearing cases. The first represents the major point of attrition between filing and judicial disposition of cases in Small Claims Court; the procedures available at the second point are adjudication and arbitration. In addition to describing and analyzing the choices made at these two points in the processing of litigation, this paper examines the results of cases handled by the dispute processing alternatives available in the small claims court. In each of these tasks, the paper builds on Galanter's argument (1974:97) that we can understand litigation by focusing on the characteristics of litigants. It does so by examining the way in which these characteristics affect choices among dispute processing alternatives and the results of these choices.

LITIGATION IN A SMALL CLAIMS COURT

The Small Claims Court of New York City (Manhattan) provides the setting for this research. The Small Claims Court of New York was, like other small claims courts, established to provide efficient means for individuals to carry out legal business where the amount of money at stake was not very great. However, unlike most other small claims courts, the New York court sought to achieve this efficiency not only by simplifying its pro-

8. Plea bargaining is perhaps the best known example of in-court choice of procedure. The accused may subject himself to a "negotiated" settlement of his dispute with the state or he may have his case tried by a judge and jury.

cedures, but also by providing an institutionalized alternative to adjudication. The alternative which it provides gives it flexibility in meeting its mandate and provides litigants an opportunity to employ procedures which seem best suited to their particular problem. As the language of its authorization puts it, the court conducts its business in a ". . . manner . . . best suited to discover the facts and determine the justice of the case." (Rule 2900.33 of the New York City Civil Court Rules).

The Small Claims Court is open for the use of any adult individual. Business partnerships, associations or corporations are forbidden from initiating lawsuits. (They are, however, allowed to appear as defendants.) This is an important restriction since it has prevented the colonization of the court by the commercial interests which have come to dominate other small claims courts (National Institute for Consumer Justice, 1972). Any kind of claim can be filed if it is for money damages (not, for example, for the return of goods) of up to $500 (Siegel and Atwood, 1971: Part III-3).

Initiating a small claims lawsuit is relatively simple. All that is required is that a claimant appear in person at the court and fill out one form with his name and address, the name and address of the prospective defendant, the amount of money in question and a brief statement of the cause of action. At the time the case is filed, it is assigned a trial date. This filing procedure is so easy, that some litigants appear to use filing itself as a tactical device in the process of conflict management. The ease of filing a lawsuit in small claims court is also reflected in the fact that approximately one third of all cases filed are dismissed because neither party appears when the case is called.[9]

"NO APPEARANCE" AS A PROCEDURAL ALTERNATIVE

In order to analyze this tactical function of litigation and to explain differences in patterns of case disposition in small

9. No appearance and disposition through arbitration or adjudication are the major dispositional points in the New York Small Claims Court. Although it is possible to withdraw a suit prior to its scheduled hearing date, it is rarely if ever done. The Clerk of the Court responded to inquiry about case withdrawals by saying that he could not recall any instance in which a case was actually withdrawn once it had been filed. A fourth dispositional point is settlement at the time of the hearing, that is, settlements worked out by the parties immediately prior to their court appearance. Unlike other small claims courts in which the parties are frequently "sent out in the hall" to work something out, settlements prior to final hearing rarely occur in New York. However, there is no way by reading court records to distinguish cases which were settled before the hearing from those in which the disposition occurred as a result of the hearing. No one in my sample of small claims litigants indicated that a settlement had been worked out before the hearing and merely certified by a judge or arbitrator.

claims court, a random sample of no appearance litigants was drawn from all of those cases filed in the Small Claims Court of New York (Manhattan), during 1974, which were dismissed when the plaintiff failed to appear to pursue his claim on his scheduled trial date.[10] Mail questionnaires were sent to both plaintiff and defendant in each case; 1,003 "usable" responses (out of 2,112 questionnaires) were obtained.[11] For purposes of this paper, however, only those cases (351) in which responses were received from both parties are included in the analysis. This matching, while it reduces the data base, allows examination of joint litigation experiences from the different perspectives of the initiator and the respondent.[12]

No appearance litigation occurs when the plaintiff is unwilling to prosecute his original claim. Each no appearance plaintiff was asked therefore to explain why he failed to appear for trial after having begun an action in Small Claims Court. As Table 1 indicates, responses fell into two major categories—categories which are labelled "settlement" and "no settlement."

Table 1
Reasons for Non-Appearance of Plaintiffs

	N	% of Category	% of Total
Settlement	191		54%
1—filing facilitated ongoing settlement activity	127	64%	36%
2—filing promoted new settlement activity	64	36%	18%
No Settlement	160		46%
3—litigation as "letting off steam"	61	38%	17%
4—going to trial would have been too much trouble	45	28%	13%
5—personal reasons	54	36%	16%

10. The sample was constructed by selecting every fifth no appearance dismissal. This yielded a sample of 1,056 cases and 2,112 respondents.

11. 570 of the responses were from plaintiffs, 433 from defendants. The overall response rate was 47% (57% for plaintiffs, 43% for defendants).

12. In order to increase the number of matched pairs of respondents, each questionnaire was numbered; matching numbers were assigned to the plaintiff and defendant in each case. Approximately one week after one of the parties to a case responded, a follow-up letter was sent to the other party if he had not returned his questionnaire. This letter reminded him of the "importance" of the study and urged a prompt response. If this letter did not elicit a return, a second letter was mailed repeating the same message and offering the respondent an "incentive" of one dollar for return of the questionnaire. Fifty-two additional responses followed this second solicitation. The final group of matched pairs is representative of the initial sample in terms of the type of cases filed, the amount of the initial claim and the "configuration of parties." However, commercial defendants were underrepresented.

More than half of the no appearance plaintiffs reported that after having begun their lawsuit they were able to reach an out of court settlement. Within this group, almost two thirds of those sampled reported that they had been engaged in some other kind of settlement activity before filing suit, activity which had failed to produce a satisfactory result. The effect, if not the intention, of the lawsuit was, for this group of people, to further that activity.

A second part of the settlement group obtained a settlement after filing, but had not been engaged in any other settlement activity prior to beginning their suits. For these people, initiation of the lawsuit itself became the vehicle for beginning out of court negotiations, negotiations which ultimately made adjudication unnecessary. As one man described this process,

> There was no way I could get him [a painter] to talk to me. I'd tried everything—letters, calls, you name it. Finally I got fed up, so I went to court. Couldn't have been more than a week later that he called me and told me that he would repaint the kitchen like I'd wanted him to do in the first place. I guess being sued scared the bastard. I am almost sorry he agreed to do the kitchen. He gave me so much trouble that I think it might have been nice to take him into court and prove what a bum he was.

Almost half the plaintiffs failed to appear even though no out of court settlement was reached. Of these, 38% indicated that they had never intended to go "all the way" with the case. They were upset and used litigation to express their feelings. One such person wrote,

> I was really angry. I'd been gypped and there was nothing I could do. I guess I knew that all along. I think that suing him (a door to door salesman) made me feel better. I guess I just did it to let off steam.

This litigant clearly believed that nothing could be gained as a result of litigation, but he filed nevertheless. By declaring his grievance in a public forum he derived enough psychic satisfaction so that following through with his lawsuit seemed to him as unnecessary as it appeared futile. Another, somewhat smaller group, derived neither psychic nor material satisfaction. These people failed to appear because they did not believe that they could win or that what they might win would be worth the effort required to secure the result. They filed suit intending to pursue it to its conclusion, but changed their minds in the interim between filing and their trial date. A final group of no appearance litigants failed to appear for a variety of personal reasons having nothing to do with the court or their case.

Employing litigation to induce settlement is, at least in the

Small Claims Court, characteristic of two types of no appearance litigants—those who had previous experience in using the court ("repeat players"), and those who retain a lawyer prior to the initiation of the suit. Previous experience in litigation gives an individual an insight into its uses and its pitfalls, insight which the novice does not possess.[13] This insight allows the repeat player to play the "litigation game" in distinctive and creative ways (Galanter, 1974:100). As Table 2 shows, previous experience is significantly associated with the patterning of no appearance litigation in the Small Claims Court. Less experienced

Table 2
Previous Experience of Plaintiff
and Reason for Non-Appearance

Plaintiff's Reason for Non-Appearance	Previous Experience of Plaintiff: No Previous Experience	1 Experience	2 Experiences	3 Experiences or More
Settlement				
1—filing facilitated ongoing settlement activity	24.8%	36.6%	40.4%	50.8%
2—filing promoted new settlement activity	17.1%	7.3%	25.8%	25.4%
No Settlement				
3—litigation as "letting off steam"	20.5%	22%	14.6%	7.9%
4—going to trial would have been too much trouble	14.5%	22%	7.9%	4.8%
5—personal reasons	23.1%	12.1%	11.3%	11.1%
N =	117	82	89	63

$r_s = -.205$ $x^2 = 40.8$ $p < .001$

plaintiffs fail to appear even though no out of court settlement occurs more frequently than do their experienced counterparts. Experienced litigants are, on the other hand, more effective in using litigation either to facilitate ongoing settlement activity or to initiate settlement efforts where none had occurred. Thus, repeat players are better able to use filing to promote and obtain a resolution of their trouble outside of court.

13. Previous experience was measured by asking each respondent if they had previously been involved in a small claims case and, if so, how many times and in what capacity (e.g. as plaintiff or defendant).

The ability of repeat players to use litigation in this way is further enhanced when they are opposed by a less experienced party. As Table 3 indicates, the percentage of no appearances accounted for by settlement is much higher when a more experi-

Table 3*

Previous Experience of *Both* Parties and Plaintiff's Reason for Non-Appearance

Plaintiff's Reason for Non-Appearance	Previous Experience of Both Parties: Plaintiff More than Defendant	Plaintiff Same as Defendant	Defendant More than Plaintiff
Settlement			
1—filing facilitated ongoing settlement activity	45.5%	36.8%	21.6%
2—filing promoted new settlement activity	24.7%	16.8%	10.8%
No Settlement			
3—litigation as "letting off steam"	11%	23.2%	20.6%
4—going to trial would have been too much trouble	6.5%	5.3%	29.4%
5—personal reasons	12.3%	17.9%	17.6%
N =	154	95	102

$r_c = .242$ $x^2 = 54.9$ $p < .001$

* The classification in this table was constructed by matching the litigation histories of both parties to each no appearance case.

enced plaintiff sues a less experienced defendant than it is in any other configuration of parties. It is smallest when the defendant has the advantage in experience. An edge in experience provides plaintiffs with a resource which facilitates out of court settlement; a similar edge for the defendant produces a pattern of no appearance litigation in which many suits are dropped even though no settlement is reached. Lawsuits involving individual plaintiffs and commercial organizations which are particularly likely to pit an inexperienced plaintiff against an experienced defendant,[14] often are expressive in their intent or not pursued

14. In my sample, individuals sue businesses or governmental bodies in about 56% of all cases.

to their conclusion owing to the pessimism of the original claimant.[15]

Patterns of no appearance litigation are also affected by the presence or absence of attorneys. The rules of the New York Small Claims Court do not, like some small claims courts, forbid the use of lawyers (National Institute for Consumer Justice, 1972:201-19). Any party who so desires can be represented by counsel. The only parties required to have such representation are corporations. Other research on small claims courts demonstrates that the presence or absence of an attorney makes a significant difference in the outcome of adjudication (Speal, 1975 and Jones, 1974), but there has been little attention to the role of lawyers in facilitating out of court settlements in non-criminal matters (for an exception see Ross, 1970). The expertise and skills of lawyers seem as useful in negotiations outside courts as they are in adjudication. Furthermore, retaining an attorney, especially in a small claims action, indicates a seriousness of purpose which should itself motivate informal settlement. Table 4 bears out these expectations. Seven out of ten no appearance plaintiffs who had retained counsel before filing suit obtain some

Table 4

Legal Representation of Plaintiff and Reason for Plaintiff's Non-Appearance

Plaintiff's Reason for Non-Appearance	Legal Representation of Plaintiff: Plaintiff Had a Lawyer	Plaintiff Did Not Have a Lawyer
Settlement		
1—filing facilitated ongoing settlement activity	46.2%	31%
2—filing promoted new settlement activity	25.2%	15.1%
No Settlement		
3—litigation as "letting off steam"	6.7%	22.4%
4—going to trial would have been too much trouble	10.9%	13.8%
5—personal reasons	11%	17.7%
	N = 119	232

$r_c = .199 \quad x^2 = 23.5 \quad p < .001$

15. By failing to pursue the action in the absence of a settlement such a litigant foregoes a reasonable chance of recovering at least part of his claim (see Tables 15 and 16). Having initially elected to employ the courts, his best hope of achieving at least a partially favorable result lies in persistence.

type of settlement as compared with four out of ten of those unrepresented by an attorney. Furthermore, the percentage of no appearance plaintiffs who settle their cases is even greater when they have legal representation and their opponent does not.

Table 5

Legal Representation of Both Parties and Reason for Plaintiff's Non-Appearance

Plaintiff's Reason for Non-Appearance	Legal Representation of Both Parties: Plaintiff—Yes Defendant—No	Plaintiff—Yes Defendant—Yes	Plaintiff—No Defendant—No	Plaintiff—No Defendant—Yes
Settlement				
1—filing facilitated on-going settlement activity	49.1%	40.5%	37.8%	14.6%
2—filing promoted new settlement activity	27.9%	20.5%	18.2%	7.4%
No Settlement				
3—litigation as "letting off steam"	3%	12.9%	14.3%	41%
4—going to trial would have been too much trouble	7.5%	17.1%	8.6%	24.1%
5—personal reasons	12.5%	8%	20.1%	12.9%
N =	71	48	158	74

$r_c = .304$ $x^2 = 71.1$ $p < .001$

It declines somewhat when the parties are evenly matched and is lowest when the defendant, but not the plaintiff, has an attorney. Inequality in legal representation works uniformly to the advantage of the party with legal counsel. For the plaintiff, having a lawyer increases the opportunities for settlement incident to bringing a lawsuit. For the defendant, having a lawyer enables him, especially when the plaintiff is unrepresented, to escape without suffering any loss.

However, the advantages of legal representation, even of an imbalance in representation, do not fall equally on all types of litigants. Table 6 shows that when we control for the prior experience of the parties, the relationship of legal representation and the results of no appearance litigation remain significant

Table 6

Legal Representation of *Both* Parties and Reason for Plaintiff's Non-Appearance by Previous Experience of Both Parties

Reason for Plaintiff's Non-Appearance

	Legal Representation of Both Parties			
I. Plaintiff More Experience				
	Plaintiff—Yes Defendant—No	Plaintiff—Yes Defendant—Yes	Plaintiff—No Defendant—No	Plaintiff—No Defendant—Yes
Settlement	79%	58%	73%	47%
No Settlement	21%	42%	27%	53%
N =	28	19	90	17
$r_c = .091$ $x^2 = 7.7$ n.s.				
II. Plaintiff Same as Defendant				
	Plaintiff—Yes Defendant—No	Plaintiff—Yes Defendant—Yes	Plaintiff—No Defendant—No	Plaintiff—No Defendant—Yes
Settlement	85%	67%	54%	17%
No Settlement	15%	33%	46%	83%
N =	20	15	37	23
$r_c = .501$ $x^2 = 21.6$ $p < .001$				
III. Defendant More Experience				
	Plaintiff—Yes Defendant—No	Plaintiff—Yes Defendant—Yes	Plaintiff—No Defendant—No	Plaintiff—No Defendant—Yes
Settlement	70%	64%	9%	12%
No Settlement	30%	36%	91%	88%
N =	23	14	31	34
$r_c = .522$ $x^2 = .29.6$ $p < .001$				

only when the parties have similar levels of experience or when the defendant is the more experienced party. For the plaintiff who is more experienced than his adversary, legal representation provides no added ability to induce settlement. The pattern of legal representation is associated with a higher than expected settlement rate in cases where the parties have had similar

amounts of court experience, and with a reduced settlement rate when the balance of experience favors the defendant.

No appearance litigation tells us much about the needs and desires of people in conflict. However, even though no appearance litigation accounts for approximately one third of the filings of the New York Small Claims Court, and even though it is a major way of disposing of cases, it cannot provide a complete picture of dispute processing in that court. Other aspects of that processing occur only when litigants appear for trial.

ADJUDICATION AND ARBITRATION IN SMALL CLAIMS COURT

At the beginning of each court session, the parties to all cases scheduled for that session assemble in a large courtroom. At this time the court clerk informs them that their cases can be heard by either a judge or an arbitrator. While the clerk's announcement occasionally varies in content and tone, it generally takes the following form:[16]

> It would be physically impossible for one judge sitting here tonight to try all the cases on the calendar; therefore, at the request of the court we have several arbitrators who possess the qualifications of a judge of this court to hear cases. You obtain an immediate trial if you go before the arbitrators. The only difference is that you will not be able to appeal from the arbitration award.

The names of the litigants on the calendar are then called and both parties are asked whether they want their case heard by a judge or in arbitration. When they disagree, the case is heard by a judge.[17] It is here that a second, more explicit and more clearly identifiable choice of procedure is made in the Small Claims Court. Despite the admonition that the ability to appeal is the only difference between adjudication and arbitration, there are other important differences—differences in the setting in which the proceedings occur, in the procedures employed and in the style of decision making.

The difference between adjudication and arbitration in the Small Claims Court may not appear, at first glance, to be very

16. The tone and content of this announcement have some impact on the alternatives litigants choose. If there is any implicit bias in the announcement that is generally made, it appears to be in a pro-arbitration direction. However, in three weeks of court observation no explicit admonition or suggestion was ever included in the clerk's announcement.

17. Disagreement is, in fact, infrequent. Each respondent was asked to indicate his preferred alternative as well as the alternative actually employed. In only eight cases was there incongruity between preference and the alternative employed. The analysis in this paper is concerned with the choice made in each *case* regardless of which party made the choice or whether or not there was disagreement.

great. One of the aims of the small claims movement was, in fact, to alter the character of adjudication, to make it more accessible and more flexible (Yngvesson and Hennessey, 1975:222). The role of the judge was a special target for reform. The small claims judge was to be active and inquisitorial; in search of substantive justice, he was to abandon the traditional passive, detached, umpire role (McFadgen, 1972). In New York as elsewhere this ideal of a small claims judge is rarely approximated. Judges in the court rotate; they regularly serve in the Civil Courts where the style of judging is more traditional both in theory and practice. When they sit as small claims judges they seldom abandon the traditional style; when they do become actively engaged in questioning the parties and suggesting possible settlements, they do so in a halting, awkward manner. Most of the time, the judge merely sits back, listens to the litigants tell their story and then makes a decision.[18] The reluctance of the judges to perform in a more active fashion, while it is at odds with the intention of the reformers, makes the availability of arbitration especially meaningful in a small claims context.

At any one session of Small Claims Court there are approximately ten arbitrators who hear cases. Arbitrators are lawyers who are selected by the Administrative Judge of the Civil Court from lists of volunteers submitted by the City Bar Association. They serve without pay about once a month. Their only training consists of a briefing by the Administrative Judge and a written manual on arbitration (Miles, 1972). Unlike the judges who rarely mix mediation and judgment, arbitrators in the Small Claims Court almost always engage in what William Felstiner (n.d.:24) calls "mixed adjudication"; while they possess the authority to make decisions without the concurrence of the parties, observation of their behavior indicates that they go to substantial lengths to try to work out mutually agreeable compromise solutions. Arbitrators in Small Claims Court act as ". . . active agents in eliciting the nature of the dispute and in bringing the parties toward a mutually acceptable solution. The process is meant to be therapeutic rather than judgmental, and with this in mind the parties to the dispute are encouraged to express their feelings as well as telling the facts of the matter in dispute. . . ."

18. The style of judging in small claims court varies by judge. However, out of seven judges observed in the course of this research only one judge consistently played an active role in helping the parties present their stories or in working out settlements. (Most judgments are not announced in court but are "reserved": litigants are notified of the decision by mail.) A similar style of judging is noted in Hollingsworth *et al* (1973) and Steadman and Rosenstein (1973).

(Yngvesson and Hennessey, 1975:260). When compromise fails, arbitration shifts from mediation to adjudication. Frequently, arbitrators use the threat of judgment to try to induce the parties to agree to settle their own troubles. From comments of litigants involved in arbitration, it would appear that this type of inducement and the mix of mediation and adjudication cause some confusion and resentment, resentment which Lon Fuller suggests is likely to occur whenever arbitrators first try to mediate and then impose judgments (Fuller, 1963:26).[19]

Adjudication and arbitration in the Small Claims Court differ in several other important ways. First, the former occurs in public while the latter generally takes place in private. Cases are heard by a judge in open court before an audience of strangers composed of assembled litigants and witnesses waiting to have their cases called. In most arbitration sessions, on the other hand, only the parties, and their witnesses and lawyers, are present.

In the New York Small Claims Court, adjudication is also more formal than arbitration.[20] Arbitration and adjudication in the New York court differ on several of the dimensions which Felstiner (n.d.:22-31) suggests define the level of formality of dispute settlement processes. The role of the third party "intervener," for example, is more specialized in adjudication.[21] Also, adjudication, which is carried on in a large courtroom, requires marked deference to the judge, deference institutionalized in his physical separation and elevation. Arbitration, in contrast, occurs in small, sparsely furnished offices adjacent to the courtroom. The parties and the arbitrator sit at a single table. The arbitrator wears no insignia such as a robe and is addressed as Mr. Thus, both the physical setting and the appearance of the arbitrator minimize deference and the "distance" which separates the disputants and the third party intervener.[22]

19. Many respondents who had their cases decided by arbitration wrote of their dissatisfaction with the result. This was true of both winners and losers. Several suggested that they could not understand why the final judgment differed from what the arbitrator suggested would have been an appropriate compromise.

20. To label one process as more formal than another is to make a composite judgment about adherence to pattern, reliance upon ritual and tendency to follow exclusively and rigidly one pattern of operation (Felstiner, n.d.).

21. Felstiner (n.d.:25) identifies "regular performance of role functions, economic support of role performance, general social labelling as role occupant . . . inhibition of other activities, specificity of selection and insignia of office" as the most important aspects of specialization.

22. This term is applied to third parties in dispute processing by Abel (1974:277).

The Small Claims Court in New York is a court of record, proceedings and testimony are transcribed. Arbitration, on the other hand, occurs without a record of the proceedings or the testimony. The only record kept is the docket card on which the arbitrator notes the settlement or his decision. In adjudication there is, in addition, a "ritualization of evidence"; evidence is presented in a regularized pattern with each party presenting his evidence sequentially. Discussion rather than testimony is more typical of an arbitration session. The parties and the arbitrator initially talk about the events which are associated with the outbreak of trouble. This discussion is less ritualized than is testimony in court; it departs from the immediate problem, frequently to a cathartic recounting of previous and unrelated events and occasionally to analysis of the prospects for future relationships. Arbitration allows a broad view of the issues in dispute. Rarely do arbitrators suggest that discussion is irrelevant. Parties are permitted, if not encouraged, to tell their stories in their own way. This is in sharp contrast to adjudicated cases in which judges frequently remind litigants and witnesses to stick to "pertinent" matters.

THE CHOICE OF PROCEDURE

What kinds of parties and disputes find their way into each process and what difference does the choice of procedure make to the outcome of disputes? In order to answer these questions, a separate sample was drawn from the files of the Small Claims Court of cases for which a judgment was entered. Questionnaires were sent to 2,210 litigants whose cases had been heard during 1974. The kind of matching procedure discussed previously produced 312 cases for analysis.[23]

I suggested above that the choice between adjudication and arbitration in Small Claims Court is a choice between privacy and publicity, between formality and informality and between a broader and a narrower view of "relevance."[24] In this section

23. 1,107 responses were received for a response rate of approximately 50%. (601 from plaintiffs; 506 from defendants.) See note 12 for a discussion of the matching procedure employed. Responses from the matched pairs were again representative of the original sample except for the continued underrepresentation of commercial defendants and a slight underrepresentation of arbitrated cases.

24. Implicit in this analysis is the assumption that litigants are aware of the difference between adjudication and arbitration prior to making their choice. In order to test this assumption I interviewed 150 litigants prior to the calling of the calendar. Most of those interviewed were aware of some of the differences between arbitration and adjudication. When asked if they knew of any differences in the way cases are handled by arbitrators and judges, approximately

I shall examine evidence which indicates that these alternatives may be differentiated not only structurally but also by the "clientele" they serve, the kind of disputes they deal with and the decisions they render.

A. Type of case.

In terms of simple frequency of use, arbitration, the more informal of the small claims procedures, was employed by 65% of the respondents, court trials by 35%. The explanation for this distribution of choices lies in the interaction of the characteristics of each alternative and the needs and attitudes of people using the Small Claims Court. We may begin to get a sense of this interaction by examining the choice of procedure in particular types of cases. Most case types find their way into arbitration between 50% and 80% of the time.[25] Overall there is a statistically significant relationship between case type and choice of legal procedure ($x^2 = 66.1 < .001$). Examining specific types of cases indicates that at the low end are cases arising from auto

Table 7

Percent Settle by Arbitration
by Type of Case

Case Type	% and Number of Each Case Type Settled by Arbitration
Property Damage—Auto	25% (12)
Recovery of Rent Deposit	40% (10)
Suit for Wages	50% (4)
Suit for Payment for Goods	55% (7)
Suit for Refund on Purchase	63% (14)
Property Damage—Non Auto	70% (7)
Unsatisfactory or Defective Goods	78% (28)
Services Not Performed or Performed Unsatisfactorily	78% (20)
Suit for Payment for Services	80% (24)
Repayment of Loan	82% (22)
Suit for Payment of Rent	93% (39)
Other	66% (16)

53% (80) said that cases handled by an arbitrator would be heard in private, 42% (64) said that cases heard by a judge would be dealt with in a strictly legal manner and another 30% (45) said that they thought one or another of the procedures would be quicker. As expected, knowledge of the differences between arbitration and adjudication was greater among more experienced litigants. Of the 44 respondents in this sample who had been to small claims court before 16% (7) said they knew of no difference between arbitration and adjudication; of those who had had no prior experience 30% (32) also knew of no differences. Thus even among first time litigants there is widespread knowledge of the differences between the alternatives provided in the New York Small Claims Court.

25. Three generic types of cases dominate the court's docket, cases involving property damage, consumer problems and the collection of debts.

accidents and cases in which a tenant is suing his former landlord for return of a rent deposit. Both of these types of cases arise out of distinctive kinds of social relationships; the auto accident itself is usually the sole contact between the parties and the conflict over a rent deposit is often the terminal event in a landlord/tenant relationship. At the high end, cases involving disputes over the repayment of loans and over the payment of rent, frequently arise out of relationships which are continuing.

B. "Relational Distance."

Several studies of dispute processing in industrial nations suggest that more or less formal alternatives are used by different kinds of people. Perhaps most important of all the differences associated with the choice between these alternatives is the nature of the relationship which exists between the parties to a dispute. Donald Black's research on the mobilization of law suggests that the way in which people deal with conflict is a function of the "relational distance" which exists between them. He argues (1973:134) that the greater the relational distance the more likely parties are to employ public, formal, narrow and "all or nothing" procedures to deal with disputes.[26] These types of remedies, because they focus narrowly on the particular instance of trouble which they are called upon to resolve, treat relationships as if they had no other context but the trouble itself. Where disputes do arise between strangers, or where relationships are ending, this approach is "appropriate." However, where there is more to a relationship than the dispute itself, where the troubled parties have an extended relational history and an expectation of continued relations in the future, a narrow focus typical of adjudication is disruptive (Macaulay, 1966:205 Bonn, 1972:573).[27] Those whose relations are long standing, and those who expect to continue their interaction, will, I believe, seek informal alternatives which allow them to deal with the present trouble without damaging their entire relationship.[28]

This choice of procedure hypothesis is confirmed by the data on small claims litigants. Each respondent was asked how long

26. Black (1973:134) suggests that "relational distance" can be measured by the duration of a relationship, ". . . the frequency of interaction, the intensity of interaction, the degree of interdependence between the parties and the number of dimensions along which interactions between the parties occur."

27. It may be surmised that a narrow focus on the dispute itself along with an either/or style of decision making has a disordering effect on relationships in which the context of interaction is complex and ambiguous.

28. See Kidder (1974) and Morrison (1974) for contrary evidence on litigation in India.

he had known the other party prior to their court case and whether, at the time the case began, he had expected their relationship to continue in the future.[29] These measures of the strength of interpersonal relations are not fully satisfactory because they measure duration rather than intensity, but, as the results presented in Table 8 indicate, the association of these indicators and the choice of procedure is strong and consistent with

Table 8

Relational History and Choice of Procedure
(% Choosing Adjudication) *

Anticipate Continuing Relations in the Future	Length of Prior Relationship				
	No Prior Relationship	Less Than 1 Year	1 - 2 Years	More Than 2 Years	
No	58.8% (68)	53.8% (52)	47.6% (21)	29.6% (27)	N = 168
Yes	0 (0)	21.1% (57)	17% (47)	7.5% (40)	N = 144

$r_c = .381$; $x^2 = 51.3$ $p < .001$

* The percentages in this Table are percentages of the total N for each cell.

the hypothesis. Of the cases involving parties who had known each other a long time prior to the dispute and who expected to continue their relationship, approximately 7% were decided by adjudication as opposed to 58.8% of those in which the parties had no prior or anticipated future relationship.[30] Furthermore, the expectation of continuity is itself associated, in every type of relationship, with an increase in the percentage of cases handled by arbitration.

C. The "Pre-history" of Litigation

Lawsuits do not develop simply or dramatically; their development is generally long and complex whether they involve

29. These two items were combined to form an indicator of relational history; this combination yielded eight relational types; those who had no prior nor anticipated future relationship, those with no prior relationship but who expected to develop one in the future, those who had known each other one year or less and who expected their relations to continue, those who had known each other one year or less and expected their relationship to end, those who had known each other one to two years and who expected their relationship to continue, those who had known each other one to two years and expected their relationship to end, those who had known each other more than two years and who expected their relationship to continue, and those who had known each other more than two years and who expected their relationship to end. No one in my sample fell into the second category. In cases where the two parties to a case disagreed as to the length of their prior relationship, responses were averaged. Where they disagreed about the future of their relationship, responses were coded as having no expected future.

30. This result is unchanged within case types.

strangers or friends, and there is no reason to assume that it is any less long and complex in the world of small claims (Yngvesson and Hennessey, 1975:226). The development of the lawsuits included in my sample of small claims litigants was quite varied. In order to trace this development each respondent was asked to indicate what, if anything, he had done to try to settle the dispute before coming to court. Approximately 20% responded that they had done nothing prior to the initiation of the suit. However, most of those involved in small claims litigation (80% of my sample) had first pursued some other kind of remedy; most had engaged initially in a (two-party) "voice" strategy, contacting the other party directly to inform him of the problem and to ask for redress. Three other pre-litigation patterns are also identifiable. Each involves "voice" directed to third parties. The first of these is the "alliance" strategy in which a party seeks to enlist allies to convince his opponent of the seriousness of the problem and to increase the pressure for settlement. The second, which might be called the "intermediary pattern," seeks to find a "neutral" third party, for example a religious leader or a mutual friend, to mediate and suggest solutions. The third pattern involves "complaint." Some of those involved in small claims litigation had contacted a variety of public and private agencies, e.g. the Better Business Bureau, local newspaper, or consumer organization, to complain about their problem. This pattern is designed to prod the opposition into settling in order to protect his "good name" (Lowy, n.d.).[31]

The pattern, or at least the frequency, of pre-litigation settlement activity varies, as one might expect, depending on the relational history of the litigants. As Table 9 indicates, those

Table 9

Settlement Activity and Relational History
(% Making More than 4 Attempts at Settlement) *

Anticipate Continuing Relations in the Future	Length of Prior Relationship				
	No Prior Relationship	Less Than 1 Year	1 - 2 Years	More Than 2 Years	
No	0 (68)	3.3% (52)	6.7% (21)	45% (27)	N = 168
Yes	0 (0)	6.7% (57)	13.3% (47)	48.1% (40)	N = 144

$r_c = .242$; $x^2 = 124.9$ $p < .001$

* The percentages in this Table are percentages of the total N for each cell.

31. 72% of the cases had been subject to self help activity; 30% had

litigants whose relations had a longer history prior to the initiation of the small claims case and who had also expected their relationship to continue in the future were most active in pre-litigation attempts to resolve their dispute.[32] Litigants whose relationship was characterized by neither a long history nor an expected future were much less active in trying to settle their dispute before going to court.[33] Overall, the relationship between relational history and settlement activity is consistent and in the expected direction.

The frequency of pre-litigation settlement activity is itself related to the choice of procedure which occurs after litigation has begun. Adjudication is the favored procedure in those cases in which the volume of pre-litigation settlement activity had been relatively low; arbitration, on the other hand, is favored in cases in which the settlement activity had been more extensive.[34] Furthermore, although the relationship is not consistent,

Table 10

Pre-litigation Settlement Activity and Choice of Procedure

	Amount of Pre-litigation Settlement Activity				
	No prior attempts at settlement	1 or 2 attempts	3 or 4 attempts	More than 4 attempts	
Adjudication	64.6%	33.5%	33.8%	27.9%	N = 109
Arbitration	35.4%	66.5%	66.2%	72.1%	N = 203
N =	65	120	82	45	

$r_c = 237$ $x^2 = 33.7$ $p < .001$

been subject to an alliance strategy, 19% to the intermediary pattern and 41% to "harassment or complaint." The percentages add up to more than 100% since employing one strategy does not preclude employing another.

32. The level of pre-litigation settlement activity was ascertained by asking respondents what they had done to deal with the problem which resulted in the small claims litigation. Responses were coded by counting as a separate activity each contact between the disputants and each third party contact intended to aid in prompting settlement or in working out the dispute.

33. Examination of the association of relational history and the *type* of prelitigation settlement strategy employed in a case reveals that parties with a longstanding relationship and an expectation of continuing relations in the future were less likely to have pursued a pre-litigation strategy of settlement which involved a third party than were those whose relations had little in the way of "historical depth" or expected future. A third party employed by disputants whose relations were "close," was more likely to appear as an intermediary rather than as an "ally" or as a vehicle to register complaints. The effect of relational history was to produce a pattern of settlement activity in which third parties played a reduced, if not inconsequential, role.

34. This result remains statistically significant when relational history is held constant.

the type of pre-litigation strategy employed in a case has some influence on the in-court choice of procedure. Adjudication is not only the favored choice in cases where no pre-litigation settlement activity has occurred, it is also favored in those cases in which complaint is the only form of activity employed (61% of those cases were adjudicated) or in which complaint is linked to an alliance strategy (54% of these cases were adjudicated). Arbitration, in contrast, is more likely to occur in cases in which pre-litigation settlement activity follows either the intermediary pattern or a combined intermediary/self help strategy (73% of the former and 66% of the latter ended up in arbitration).

D. The Impact of Legal Representation.

Of all the steps in the process by which disputes develop and settlement activity occurs, none is more significant than the decision to retain an attorney. Both the cost and psychological significance of this decision mark it as a significant qualitative departure from other events in the dispute process (Rosenthal, 1974:64). The importance of this choice is further magnified by the monetary limits of small claims.[35] These limitations insure that the small claims litigant who retains an attorney is particularly serious about his case. In fact, the decision to hire a lawyer may signify an investment of resources greater than the monetary value of the case. Given this investment and the adversarial skills and training of lawyers, I expected that the presence of an attorney would be associated with the choice of adjudication as the preferred settlement procedure.

The bi-variate correlation between the presence of counsel and the way in which cases are processed in Small Claims Court is .318 ($p < 001$); those cases in which either party was represented by an attorney are significantly more likely to be adjudicated than are those in which no lawyer is present. This difference is further accentuated when only one of the parties is represented. In those cases the represented party most often chooses the more adversarial adjudicative proceeding in which the lawyer's knowledge of law and procedure may be especially

35. Of the 150 respondents who were represented by counsel, 51 (34%) were corporations or other business defendants who are required to have a lawyer. Of the remainder, 64 indicated that they had hired a lawyer because they doubted their ability to handle their own case; 32 answered that they had retained counsel because winning the case was as important as the amount of money involved. The remaining 11 respondents indicated a scatter of other reasons for hiring a lawyer.

Table 11

Legal Representation of Both Parties and (% Choosing Adjudication)*

Defendant Represented	Plaintiff Represented: Yes	Plaintiff Represented: No	
Yes	17.9% (28)	61.7% (60)	N = 88
No	66.7% (42)	21.4% (182)	N = 224

$r_s = .318$; $x^2 = 48.8$ $p < .001$

* The percentages in this Table are percentages of the Total N for each cell.

advantageous against an unrepresented opponent. Where both parties or neither have representation, arbitration is favored.[36]

E. Attitudes Toward Adjudication.

Finally and not surprisingly, the choice of procedure in Small Claims Court is associated with litigant attitudes toward and perceptions of adjudication as a process. Respondents were presented with five statements describing various aspects of adjudication, and they were asked to indicate whether they agreed or disagreed with each one.[37] Respondents were scored and ranked

Table 12

Attitudes Toward Adjudication

1. Judges should only have to decide important cases.
   agree—55.4% don't know—12.6% disagree—32%
2. Court trials are so slow that it is better to find some other way to handle one's problems
   agree—60.5% don't know— 5.2% disagree—34.3%
3. Judges treat everyone equally.
   agree—29.4% don't know—19.8% disagree—50.8%
4. It is better for people to work out their problems in private than to have to deal with them publicly in court.
   agree—47% don't know—10.5% disagree—42.5%
5. Judges would do a better job if they were more willing to try to work out compromises and less set on saying who is right and who is wrong.
   agree—53.2% don't know—16.4% disagree—30.4%

on the basis of their responses to each of the five items.[38] The

36. This pattern is the same within each general type of case.
37. Since the questions were asked after the respondents had been in court, it is difficult to determine whether their attitudes preceded or resulted from their court experience.
38. Intercorrelations among the items were as follows:

ITEMS	1	2	3	4	5
1	-	.615	.359	.584	.478
2		-	.389	.601	.401
3			-	.515	.398
4				-	.462
5					-

Respondents' scores were ascertained by assigning two points for ev-

correlations between these scores and the choice of procedure is .347 (< .001), with those who are most positive in the judgments about adjudication being most likely to choose that procedure in dealing with their problem.

To this point, the choice of procedure has been analyzed through a series of single variable relationships. Four factors, relational history, prior settlement activity, the presence of lawyers and attitudes toward adjudication, have been found to be significantly related to the choice between adjudication and arbitration in Small Claims Court. By employing a stepwise discriminant analysis it is possible to assess the relative strength of these four variables. As Table 13 indicates, relational history is the most powerful of these four discriminating variables. Attitudes toward adjudication and prior settlement activity also display

Table 13

Discriminant Analysis—
Choice of Procedure and
Four Independent Variables

Variables	Standardized Discriminant Function Coefficients	F	Change In Rao's V	Significance Level
x_1—Relational History	.564	40.91	40.91	.000
x_2—Attitudes toward Adjudication	—.513	8.17	9.28	.002
x_3—Prior Settlement Activity	.312	3.87	4.53	.003
x_4—Presence of Lawyers	—.117	.60	.72	.395

significant independent discriminatory power. The presence of lawyers, however, does not appear significant when subject to this multi-variate treatment. Thus, the choice of remedy in a small claims context is more clearly a function of the relations, activities and attitudes of the litigants themselves rather than of their willingness and/or ability to employ lawyers to manage their claims.

CHOICE OF PROCEDURE AND THE OUTCOME OF LITIGATION

Settlement procedures vary not only in their procedures and their decisional styles; they also differ in the results which they

ery pro-adjudication response, zero for every don't know response, one for every anti-adjudication response and then adding the score on each question and dividing by five. Pro-adjudication attitudes were indicated by agreement with items 1 and 3 and disagreement with 2, 4 and 5.

produce. First, and perhaps most importantly, adjudication, even in a small claims context, more frequently than arbitration produces decisions clearly favoring one side to a dispute over the other. Judges bring to their service in the Small Claims Court decision-making habits developed in the course of their regular service on the Civil Court bench, habits which lead them to focus on questions of fault and lead to decisions either favoring or denying the claims of the plaintiff. Arbitrators, on the other hand, are charged, as part of their very limited training, with the task of helping the parties to a dispute to work out a compromise solution. As a result, the decisions of arbitrators frequently "split the difference" between the parties. Thus, arbitration typically recognizes the presumptive legitimacy of the plaintiff's claim and, at the same time, tempers this recognition with the knowledge that compromise solutions are "best for everyone concerned."

From the litigants' perspective, the most important immediate outcome is who wins. Winning can be expressed as a ratio of outcomes to expectations. For purposes of this research I have defined the outcomes of adjudication and arbitration as the percentage of the initial claim awarded to the plaintiff.[39] I have trichotomized outcomes into those in which the plaintiff receives two thirds or more of his original claim, those in which he receives between one third and two thirds and those in which he receives less than one third.

As expected, outcomes vary between adjudication and arbitration; 48% of the adjudicated settlements resulted in a judg-

Table 14

Outcomes by Choice of Procedure

Percentage of Original Claim Awarded to Plaintiff	Adjudication	Arbitration	
⅔ or more	47.7%	30%	N = 113
between ⅓ and ⅔	19.3%	48.3%	N = 119
less than ⅓	33%	21.7%	N = 80
	N = 109	203	

$r_c = -.053 \quad x^2 = 25.4 \quad p < .001$

39. While in general it is inadvisable to rely on the amount of the initial claim as an indicator of what is really sought in litigation, in small claims court the amount of the initial claim is a much more reliable indicator. Most litigants simply file for the amount of their loss.

ment of two thirds or more of the original claim as compared with only 30% of the arbitrated settlements. At the same time, adjudication more frequently than arbitration resulted in an award of less than one third of the amount of the suit. Awards of between one third and two thirds of that amount were two-and-a-half times more frequent in arbitration than in adjudicated

Table 15

Outcome and Experience of Parties —Adjudication

Percentage of Original Claim Awarded to Plaintiff	Experience of Parties: Plaintiff More than Defendant	Plaintiff Same as Defendant	Defendant More than Plaintiff	
⅔ or more	68.8%	50%	31.1%	N = 113
between ⅓ and ⅔	9.4%	25%	22.2%	N = 119
less than ⅓	21.8%	25%	46.7%	N = 80
	N = 32	32	45	

$r_c = .261$ $x^2 = 12.4$ $p < .015$

Table 16

Outcome and Experience of Parties —Arbitration

Percentage of Original Claim Awarded to Plaintiff	Experience of Parties: Plaintiff More than Defendant	Plaintiff Same as Defendant	Defendant More than Plaintiff	
⅔ or more	29.9%	27.8%	33.3%	N = 113
between ⅓ and ⅔	46.3%	49.4%	49.1%	N = 119
less than ⅓	23.8%	22.8%	17.6%	N = 80
	N = 67	78	58	

$r_c = .042$ $x^2 = 1.06$ n.s.

cases. Arbitration most often results in "settlements" in which the plaintiff recovers part of his claim but in which the loss suf-

Padding claims is discouraged by both the monetary limit imposed in small claims court and by the types of claims with which the court deals. Furthermore, the concept of punitive damages seldom found its way into the cases which I observed. Judges and arbitrators seek an accurate assessment of the real loss and base their decisions on that assessment.

fered by the defendant is kept well below the maximum. While this pattern of outcomes does not vary by type of case, characteristics of the parties do appear to have a significant impact.

Repeat players (RPs), those who have had previous experience as litigants, have, as I suggested earlier, several distinct advantages which are unavailable to those using the courts for the first time.[40] These advantages mean that those with previous litigation experience should do better in the settlement processes of Small Claims Court than those without such experience, especially when they are matched against a less experienced opponent. Tables 15 and 16 indicate that the ability of more experienced parties to benefit from their advantages is pronounced when cases are adjudicated but absent when they are arbitrated. Specifically, while 69% of the more experienced plaintiffs employing adjudication recover two thirds or more of their original claims, only 30% of a similar group achieve as favorable a result in arbitration. Similarly, more experienced defendants are better able to minimize their losses in cases decided by judges rather than arbitrators.[41] Thus, the advantages of experience appear to be diluted in the informal, compromise oriented atmosphere of arbitration and highlighted in processes of adjudication.[42] Previous experience in small claims court has an important, if uneven, impact on the outcome of litigation disposed of by either in-court procedure, as it did on the outcome of no-appearance cases. (In contrast to its impact on the outcome of litigation, experience had no significant effect on the litigants' choices between arbitration and adjudication.)

Outcomes in the New York Small Claims Court are also influenced by the presence or absence of attorneys and especially by the "oppositional relationships" in which attorneys are involved. Comparing adjudication and arbitration reveals that when neither party is represented by a lawyer, plaintiffs do much better in adjudicated cases than in cases decided by arbitration. When both parties have lawyers, the results of these procedures do not vary greatly. Inequality in representation is also similarly

40. Marc Galanter (1974:98-103) provides a list of those advantages; included are, the ability to structure transactions and build a record; expertise and ready access to specialists; economies of scale and low startup costs; opportunities to develop facilitative informal relations with institutional incumbents; and the ability to establish "commitment" to his bargaining position.

41. These results do not vary significantly within case types.

42. When the prior experience of the parties was specified as to whether previous cases had been adjudicated or arbitrated, the pattern of outcomes revealed in Tables 15 and 16 was not significantly altered.

Table 17

Outcome and Legal Representation of Parties —Adjudication

Percentage of Original Claim Awarded to Plaintiff	Legal Representation of Parties: Plaintiff—Yes Defendant—No	Plaintiff—Yes Defendant—Yes	Plaintiff—No Defendant—No	Plaintiff—No Defendant—Yes	
⅔ or more	71.4%	40%	64.1%	13.5%	N = 113
between ⅓ and ⅔	14.3%	40%	12.8%	27%	N = 119
less than ⅓	14.3%	20%	23.1%	59.5%	N = 80
N =	28	5	39	37	

$r_c = .399 \quad x^2 = 30.3 \quad p < .001$

Table 18

Outcome and Legal Representation of Parties —Arbitration

Percentage of Original Claim Awarded to Plaintiff	Legal Representation of Parties: Plaintiff—Yes Defendant—No	Plaintiff—Yes Defendant—Yes	Plaintiff—No Defendant—No	Plaintiff—No Defendant—Yes	
⅔ or more	57.1%	34.8%	30.1%	8.7%	N = 113
between ⅓ and ⅔	28.6%	39.1%	55.9%	21.7%	N = 119
less than ⅓	14.3%	26.1%	14%	69.6%	N = 80
N =	14	23	143	23	

$r_c = .199 \quad x^2 = 42.4 \quad p < .001$

reflected in adjudication and arbitration. When, for example, a represented defendant faces an unrepresented plaintiff, as most often happens when an individual sues a commercial organization, 59% of the adjudicated cases and 69% of those arbitrated are decided in favor of the defendant. When the advantage is reversed and a plaintiff with a lawyer sues a defendant without one, 72% of the adjudicated cases result in an award of two thirds or more for the plaintiff as opposed to 57% of similar cases subject to arbitration. In an almost exact mirror image, adjudication favors the represented plaintiff and arbitration the represented defendant when each faces unrepresented opponents. In adjudicated cases, the advantaged plaintiff is able to make a much stronger case since the judge is not predisposed to reach a com-

promise result. In arbitration, the advantaged defendant gains from his lawyer's ability to push the compromise predisposition of the arbitrator to its limits. As one arbitrator suggested to me, "Lawyers generally have a good sense of timing when it comes to taking losses. They are able to see when there is nothing more to be gained by refusing to give in. Your average lawyer is worth his money just because he knows enough not to let his client really take a beating."

Outcomes not only can be analyzed from the perspective of who wins and how much they win, but also in terms of their impact on the relationship of the parties to the conflict. The way conflict is managed and processed in various dispute processing forums may either help to restore harmony to a relationship or exert an additional disruptive influence on a relationship which already is troubled. To test the effect of adjudication and arbitration in the Small Claims Court, each respondent was asked, "How has your court experience affected your relations with the other party to your case?"[43] Of those responding, 42% indicated that their court experience had no effect on this relationship; they were strangers before the case and did not see each other after their court experience. For others, however, this response meant that what was, in fact, an ongoing relationship was unchanged. Another 20% of the small claims litigants reported that the court case had made it harder to get along with the other party. For an additional 12% the court experience marked the end of relations. A final 26% indicated that the effect of their having taken their problem to Small Claims Court was to strengthen their relationship. Getting the problem resolved, getting the dispute out of the way, seems, under some conditions, to facilitate relations rather than complicate them.

These effects varied significantly between adjudication and arbitration. Of the cases adjudicated, 22% were associated with the termination of a relationship as opposed to only 6% of the arbitrated cases. An additional 28% of the former and 16% of the latter had the effect of complicating, but not ending relations

43. Disagreement about the effect of court experience occurred in 14 cases. In each case the disagreement found one party maintaining that the experience had had no effect while the other indicated that it had facilitated, complicated or terminated the relationship. In each of these disagreements I coded "no effect." Since my original hypothesis predicted that both adjudication and arbitration would have an effect, this procedure was conservative in the sense that it made it more difficult to confirm the original hypothesis.

Table 19

The Effect of the Choice of Procedure on the Subsequent Relations of the Disputants

Effect on Subsequent Relations	Adjudication	Arbitration	
The relationship was terminated	22%	6.4%	N = 37
It became more difficult to get along	27.5%	16.3%	N = 63
It had no effect	41.3%	41.9%	N = 130
It became easier to get along	9.2%	35.5%	N = 82
	N = 109	203	

$r_c = .359$ $x^2 = 37.7$ $p < .001$

between the litigants. By way of contrast, almost four times as many of the arbitrated cases facilitated the continuance of the parties' relationship. The impact of the choice of procedure on the subsequent relations of the parties is not significantly altered when either relational history or case type is controlled. Even among litigants with a long prior relationship and an expectation of future relations, adjudication produces more frequent disruption than does arbitration. The choice of procedure thus appears to be highly consequential for the future interaction of the parties; formality, a narrow focus on the present instance of trouble and a tendency to decide for one side or the other make adjudication more disruptive and disordering than the informality, breadth and compromise found in arbitration in the New York Small Claims Court.

SUMMARY AND CONCLUSIONS

My research focused on a limited slice of the process of disputing and dispute processing as it occurred in a small claims court. Small claims litigation is not typical of other kinds of litigation, much less is it representative of any larger universe of disputes. Yet the setting of this research provided an unusual opportunity to study choice making among a small number of remedy procedures. Like any other kind of litigation, litigation in a small claims court is an extraordinary act. It means very different things to those who are engaged in it: for some it represents the first step in dealing with conflict, for some a continuation of that process and for others the culmination of it.

Filing cases in Small Claims Court is relatively easy and inexpensive. The ease of filing cases is one way in which small claims courts lower barriers to litigation and make judicial serv-

ices more accessible. One of the consequences of this attempt to facilitate use of the courts is to minimize the "seriousness" and finality which is attached to filing a lawsuit. In the New York Small Claims Court a substantial number of suits are filed which the plaintiff has no intention of pursuing or which are not pursued because of the availability of non-judicial remedies.[44] Post-filing attrition occurs in some cases after an out of court settlement is reached and, in many others, even though no such result is achieved. Attrition in cases in which no settlement is achieved is more likely when the defendant is more experienced in using the court than is the plaintiff and when the defendant but not the plaintiff is represented by legal counsel. The resources of experience and expertise which are beneficial in judicial proceedings are also advantageous in dispute processing which occurs outside the courtroom.

In the New York Small Claims Court, litigants who choose to follow through on their choice to use the court are provided with the opportunity to choose between a formal adjudication and a less formal arbitration process. In the New York court adjudication is the favored procedure,

(1) among litigants who do not have a long relational history nor an anticipation of continuing relations in the future,

(2) when there have been relatively few pre-litigation attempts at settlement,

(3) when one of the parties is represented by an attorney and the other is not, and

(4) when attitudes toward the efficiency, fairness and appropriateness of adjudication are positive.

In the Small Claims Court adjudicated settlements more frequently clearly favor one of the parties while arbitration produces compromise results. The outcomes produced by these different procedures vary considerably depending on the kind of parties involved and on representation by lawyers. Those with previous court experience fare better, as plaintiff or defendant, than those without such experience. They do especially well when matched against parties of lesser experience. Parties represented by attorneys receive more favorable outcomes in both adjudicated and arbitrated cases. Finally, and perhaps most importantly, the

44. This kind of litigation is by no means unique to small claims court. I suspect, although no research indicates it, that even though filing a lawsuit may be more difficult in other courts, the percentage of litigants intending to go all the way to a trial is not substantially greater than in small claims court.

kind of settlement procedure employed has a significant impact on the subsequent relationship of the disputants. Arbitration does less damage to these relationships than does adjudication. Thus the choice between arbitration and ajudication is important not only because of internal, stylistic or even output differences, but owing to the varying potential of adjudication and arbitration to contribute to the maintenance and persistence of social interaction.

Most, if not all, of the relationships examined in this paper involve the characteristics, experiences or relationships of litigants. My findings indicate the importance of these factors. However, Galanter (1975:360-361) has recently suggested that differences in the way in which parties use courts and in their ability to secure desired outcomes may result not from the characteristics of the parties themselves but instead from the selection of cases which different kind of parties bring to court. While my research does not provide a direct test of this hypothesis, the expectation that case characteristics would be important in explaining the way courts are used and the results of litigation receives no support from the findings of this study. In the analysis of "no appearance" litigation, the choice between adjudication and arbitration and the results associated with those procedures, I controlled for case type.[45] In no instance did I find a significant alteration in the original relationships.[46]

Conflicts, like those which are litigated in Small Claims Court, are "normal" in the sense that they are to be expected and in the sense that a relationship which never experienced conflict would probably be quite superficial. Nevertheless, its occurrence typically results in attempts to alleviate conflict. This response is, I think, a product of common socialization experiences which stress the desirability of order and instill a reflexive aversion to conflict. This aversion is as typical of social scientists as it is of others; as scholars we often appear to act as if civility required the absence of all disorder, conflict or trouble. Our anti-conflict biases are reflected in the questions we typically ask about social institutions, questions (like those asked in my own research) about how best to *settle* or *resolve* conflict, questions about the effectiveness of various procedures in restoring order,

45. Cases were divided into three general types—property damage, consumer and debt collection—and then each relationship was examined within each of these categories.

46. Perhaps a different division of cases would have altered the result. However, my efforts to examine the effects of varying combinations of cases produced no differences in the results obtained using the original procedure.

questions about the ability of different institutions to harmonize interpersonal relations. In addition, we often act as if there was one and only one way to manage any particular dispute.[47] Thus, social scientists tend to study adjudication (especially in the United States) as if it were a unique process of conflict resolution. We typically regard disputes which end up in court as if they were predestined for the kind of judgments which adjudication provides. As this research has shown, litigation need not represent a commitment to obtain such a judgment. In studying litigation as part of the dispute process, social scientists should acknowledge the ubiquity, functionality (Coser, 1956) and processual nature of conflict and focus on the choices which troubled individuals make between alternative techniques for managing their trouble (Kidder, 1975:389).

It is this perspective, perhaps more implicitly than explicitly, which has informed the present research. I have argued that for every instance of conflict there are a variety of alternative ways in which people may seek help. Furthermore, the choices which they make among these alternatives reflect an interaction between the nature of the alternatives, the history and needs of the troubled relationship and the characteristics of the disputants. The way in which people respond to conflict expresses their attitudes toward themselves, those with whom they are in conflict and the procedures available to them. Their action has meanings for them and for society as a whole which transcend the success or failure of the chosen alternative in limiting, managing or ending the conflict.[48]

Ultimately, of course, there is more to be studied than a series of dichotomous choices between dispute processing alternatives, or a series of statistical associations intended to explain

47. Generally, social science has ignored competition among alternative dispute processing institutions. There is, however, some research which suggests that formal dispute processing institutions evolve only as informal procedures prove "ineffective" (Schwartz, 1954) and that this evolution usually does not result in the displacement of the more informal procedures but rather in a complex system of "legal levels" (Pospisil, 1967) in which the more expensive and time consuming procedures of the more formal alternatives limit their utility (Felstiner, n.d.:35).

48. By choosing to employ different remedy systems the parties to a troubled relationship express different things about themselves and their interaction. People who employ alternatives which promote negotiation and compromise acknowledge some potential community of interest. Their choice implies that they recognize more to their relationship than the trouble itself. When the parties choose a third party alternative, they express their greater faith in the reasonableness of the third party and in his ability to make distinctions between them, than in their own ability to come to a mutually satisfactory agreement (Fuller, 1959; Arkes, 1974).

that choice or its consequences. Choosing how to handle conflict is a complex act with consequences both for those who choose and for society as a whole. Any single way of cutting into these choices inevitably produces an incomplete and somewhat distorted picture. Yet, given the importance of disputing even a flawed understanding of such a complex activity may be worthwhile.

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