MEDIATION IN SMALL CLAIMS COURT: ACHIEVING COMPLIANCE THROUGH CONSENT

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In Maine defendants in small claims court are nearly twice as likely to comply fully with mediated outcomes as with judgments imposed by the court after adjudication. Some of the explanation can be attributed to specific features that are more common to mediated and negotiated settlements than to adjudicated outcomes. In addition, consensual processes lead to social psychological pressures for compliance that are not associated with authoritative judgments. Our findings point to the value of consent—the most central difference between mediation and adjudication—as an adjunct to command in promoting compliance with rules and orders.

I. INTRODUCTION

This article began as an effort to make sense of a striking finding from our research in Maine small claims courts (McEwen and Maiman, 1981). In a detailed comparison of small claims mediation and adjudication, we discovered a significant association between forum type and the likelihood that defendants would pay what they owed. The likelihood that mediation defendants would live up to the terms of their agreements was almost twice the likelihood that adjudication defendants would fully meet the obligations imposed upon them by the court.

How can one account for this difference in compliance rates? It cannot, as we shall show, be explained away by differences in defendant or case characteristics. The literature on mediation, access to justice, alternatives to courts, and the like, despite its richness, provided us with no consistent guidance (see, e.g., Witty, 1980; Cappelletti and Garth, 1978; Wahrhaftig, 1982; McGillis and Mullen, 1977; Abel, 1982b).

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Indeed, this body of work denies, ignores, or de-emphasizes what we have come to believe is the most significant difference between mediation and adjudication: the distinction between consent and command. Our conclusion that this is the crucial distinction has, in turn, led us to a broader examination of the institutional context in which mediation occurs and of the interplay between consent and command.

II. MEDIATION AS A CONSENSUAL PROCESS

The feature that distinguishes mediation from other forms of dispute settlement is the presence of a third party who encourages the contending parties to settle their dispute. The third party's role is, in essence, to facilitate a negotiation process (Gulliver, 1979: 3-7), for mediation like negotiation requires the consent of the parties. In contrast, adjudication (like arbitration) involves a third party who imposes a "solution" upon the disputants. It does not require consent but rests instead upon the command of an authority. This distinction between mediation and negotiation as ideal types and adjudication as an ideal type applies not just to final solutions but also to procedural matters and interim decisions about substance. In adjudication, "all these kinds of decisions, minor or more substantial, are made by the adjudicator. . . . In negotiation, each procedural and substantive issue must be resolved by the joint agreement of the parties through their interaction" (Gulliver, 1979: 7). Thus, mediation can be distinguished from adjudication by the degree to which the disputants can shape the settlement process and the need for them to consent to outcomes of the dispute.[1]

Not everyone emphasizes or even accepts the idea that the essence of mediation lies in third party facilitation of joint, consensual decision-making. The vision of mediation that has

[1] This definition of mediation and negotiation provides a measuring stick (actually two) against which various empirical processes may be judged. Although in the remainder of the paper we shall treat participation and consent as if they were discrete variables, either present or absent, they are in fact continuous variables. For example, it appears to us that the frequent or exclusive use of "shuttle diplomacy" reported in some mediation programs reduces participation by parties by limiting the flow of information back and forth between them, just as rules of evidence help limit the information flow, and thus party participation in trials. Lon Fuller (1978) argues that the distinguishing feature of adjudication is the participation of the parties in presenting proofs and arguments. Thus, adjudication too involves participation and by implication perhaps a limited sense of responsibility for the adjudicator's or arbitrator's decision. Nevertheless, when consent to the settlement is required, as in mediation, the parties' participation differs not just in degree but also in kind from that which occurs when the decision is imposed by a third party.

guided many of its proponents and critics draws most of its imagery from studies of dispute processing in small-scale societies. As a consequence, models of mediation have often incorporated conceptions of community; continuing relationships and interdependence among parties; neutrality of the mediator; accommodative as opposed to binary decisions; and informal, presumably noncoercive controls rather than formal coercion. Witty, for example, treats such features as defining characteristics of mediation (1980: 10-20). Other scholars have assumed such models in arguing over the viability of mediation in urban areas where the strength of community and informal control is in doubt (Felstiner, 1974; Danzig and Lowy, 1975). And some have attempted to refine the model in light of modern anthropology and bring it into closer accord with the reality of mediation as an instrument of political power and inequality in small-scale societies (Merry, 1982; Gulliver, 1979).

Our focus on small claims court, however, has led us to believe that features other than consent/command, even if they are more commonly associated with mediation than with adjudication, do not distinguish clearly between these forms of dispute processing. Neither the small claims court nor small claims mediation is rooted in a cohesive, self-identified community, and few of the parties to small claims disputes are locked together in continuing multiplex relationships. Perhaps for these reasons it is rare for either small claims adjudication or mediation to probe below the surface dispute in an effort to discover and resolve "underlying causes." Furthermore, small claims adjudication is typically informal and commonly accommodative, making it difficult to distinguish from mediation on these grounds. What remains is the distinction between consent and command, between joint decision-making by disputants and the imposition of a decision by a judge.

But how clear is the distinction between command and consent? Critics of informal justice and neighborhood justice mediation argue that informality merely disguises coercion (Abel, 1982a; Harrington, 1980). We need not reject this contention to maintain the distinction. Consent may be an element of decisions that are in some respects highly constrained. While there is a point at which constraints are so great that it makes no sense to speak of consent, there is room for considerable constraint before that point is reached.

The claim that mediation leaves responsibility for decisions to the parties does not, therefore, imply the naive view often

attributed to proponents of mediation that disputants face no pressure to reach an agreement. In mediation and negotiation, moral pressures and situational contingencies as well as power and resource differentials may affect the decisions of the parties. Mediators can and do at times represent their own interests or those of powerful people, and they invoke norms of fairness and urge them on one or both parties. Disputants consider their options, including the risk of loss in adjudication and the greater expenditure of time and resources it entails, before agreeing grudgingly to a settlement. In addition, weaker parties may simply give in to stronger ones.[2] Even in the extreme but probably not uncommon case where a weak party gives in to an "unfair" settlement under pressure generated in the mediation process, the party still bears some responsibility for that agreement. The distinguishing feature of consensual decision-making remains: one or both parties might have refused to agree to a settlement, and if they did agree, they did so with the knowledge that they could have said "no," however difficult that might have been.

The extent to which consent is in fact meaningfully involved in reaching an agreement can best be measured by the willingness of parties to reject tentative agreements. Operationally, that is, a forum in which parties do reject tentative agreements is one where consent is meaningfully available.

Mediation and negotiation appear similar in that in both the parties are able to shape agreements and must consent to them. This, our research suggests, is fundamental. Mediation and negotiation differ in that the former involves a third party whereas the latter does not. The presence of the third party makes it likely that the consensual process in mediation will differ in some respects from that in negotiation. A mediator, in order to understand the dispute, needs to have the disputants review and clarify their perceptions of facts, events, commitments, obligations, demands, and disagreements. In bilateral negotiations such a detailed review is neither as

[2] It is not necessarily the case that the same resources that advantage parties in court will also advantage them in mediation or negotiation, and, thus, definitions of strength and weakness must rest on the special requirements of these distinctive processes. For example, in small claims cases a stubborn party with few legal resources but available time may do well in negotiation or mediation against parties with considerable legal resources. It is cheaper for the "stronger" party to settle weak claims than to pursue them. This "advantage" in mediation or negotiation is produced in large part, however, by legal rules and procedures which equalize the parties enough to put in doubt the value of an adjudicated outcome.

necessary nor as likely. During the review and clarification process, a mediator often highlights points of agreement as well as issues in dispute, thus providing a kind of "reality-testing" that may be unavailable in negotiation. By proposing possible settlements, a mediator may also remove from the parties some of the psychological burden of initiating concessions. In addition, a mediator can encourage parties to think about the relative costs and advantages of choosing one or another course of action. Finally, the presence of a mediator makes a consensual commitment semi-public in character. The mediator witnesses the commitment, and he or she may formalize or ritualize interim and final agreements through devices such as the signing of a document or a handshake. Of course, the presence of a mediator does not ensure that these things will occur, nor does a mediator's absence preclude them.[3]

The conceptual distinction between mediation and adjudication does not preclude mediators from judging nor judges from mediating. Observations of courts and mediation sessions by ourselves and others demonstrate as much (e.g., Silbey and Merry, 1983). However such occasions blur the roles of judge and mediator, they do not obliterate the conceptual distinction between the processes. We can appreciate this only if we keep clear the distinction between institutions, such as courts, and the processes employed in them. The presence of judge-like actors in court-like surroundings has led some scholars to write as if adjudication—the imposition of judgment on contending parties—typically occurs in these settings. For example, Swartz (1966) describes consensual dispute processes in Benaland as "adjudication." However, it is the process and not the institution which is ultimately defining (e.g., Nader, 1969). Institutions like courts may accommodate various processes for dealing with disputes. The tasks faced by the

[3] In a general sense, skilled and experienced negotiators can do for themselves what a mediator helps less skilled and experienced negotiators do. Yet even skillful negotiators may find it difficult to agree, either because they are personally involved or because they feel they must posture as advocates for clients while working to find a reasonable settlement with the other side. Under these circumstances, too, a mediator can facilitate the negotiation process.

A more thorough description of negotiation and of the relationship between negotiation and mediation would separate negotiations conducted between the immediate parties and negotiations conducted through agents. Since our primary concern is with mediation, we shall not pursue the matter. While it appears that the distinctions between mediation and negotiation that we have identified are not ultimately crucial to compliance, the differences between the two processes deserve further examination, for negotiation is the most common way of settling formal legal disputes.

student of a particular dispute settlement institution are to identify and explain the various processes that are in use, the ways they may be combined, the behaviors they entail, and the consequences that follow.

One crucial question is whether anything substantial turns on the fact that consensual processes like mediation and negotiation, rather than authoritative processes like adjudication and arbitration, are used to deal with a dispute. We believe that the procedural choice is an important one, with implications for the extent of compliance with judgments or settlements and for the degree of legitimacy accorded legal institutions.

These conclusions follow, however, not from a theory of mediation and adjudication but from more general ideas concerning command and consent. Both are methods of defining a standard of appropriate conduct. But command and consent differ fundamentally—or appear to—as procedures for identifying such standards. In what follows, we use data from the small claims courts we studied to examine differences between consent and command in the degree to which parties act as if they are bound by decisions arrived at. In addition, we explore the reasons why disputants invoke consensual processes when adjudication is available and conclude with a general discussion of the relationship between consent and compliance.

III. COMMAND, CONSENT, AND COMPLIANCE IN SMALL CLAIMS COURT

Small Claims Mediation in Maine

A mediation program which began in the fall of 1977 in several small claims courts in Maine provides an opportunity to examine in depth the nature and consequences of consensual dispute resolution, especially as it compares to adjudication. The program grew out of an experiment in which a group of academic humanists who had received training in the rudiments of dispute resolution offered their services as mediators in the state's busiest small claims court. Subsequently, the program was expanded to include small claims cases in a number of less busy courts as well. Since 1979, the mediation service has been funded through the state's judicial budget.

At the time of our study, the small claims court in Maine had jurisdiction over civil disputes where the amount in

controversy was $800 or less.[4] The district court hears the cases, using a "simple, speedy and informal court procedure" (ME. REV. STAT., 1980). As in most small claims courts, a majority of cases end in default or dismissal. Some cases, however, are contested, and in these cases either mediation or adjudication is typically employed to achieve a settlement. In a small number of these cases, a settlement is negotiated by the parties outside the courtroom before the case is heard by a third party. Such negotiations are frequently initiated by the judge, who asks parties "to see if they can't work something out." In our sample of cases, negotiated settlements, like mediated ones, were officially entered as the judgment of the court.[5]

In those small claims courts where mediation services are regularly available, the judge usually explains briefly to the assembled litigants that mediators are present to help the parties resolve their dispute without a trial. Most judges emphasize that mediation is voluntary, but some judges routinely assign cases to mediation without first obtaining the assent of the parties. Litigants usually are advised that they will lose nothing by trying mediation and that unsuccessfully mediated cases will be given priority that day in the order of trials. This does not always prove to be the case, however; when time is short, such cases may be postponed until the next small claims court date.

Once their case has been assigned to a mediator, litigants are escorted to a room designated for mediation sessions. Attorneys (who represented 11 percent of the plaintiffs and 10 percent of the defendants) typically are allowed to join their clients in mediation. Most mediation sessions last between twenty and forty minutes and involve a substantial amount of give-and-take between parties. Only rarely do mediators caucus privately with parties, a strategy common to labor mediation and to many of the community mediation programs developed in recent years (e.g., Cook *et al.*, 1980; Felstiner and Williams, 1980). Small claims mediation in Maine is typically a face-to-face proceeding from start to finish.

If the parties agree on a resolution of their dispute, the mediator will write out the terms of settlement and have it

[4] Since our study was completed, that statutory limit has been raised to $1000.

[5] In 27% (103 cases) of our sample of cases the judge asked or told disputants to go out and try to settle the case on their own. A settlement was achieved in 21% (22 cases) of these cases. In another 11 cases a settlement was arrived at spontaneously by the parties without the judge's prodding.

signed by the parties. The written agreement is then reviewed by the judge. Once approved, as almost all agreements are, the settlement becomes the judgment of the court. However, in about 35 percent of the cases, mediation does not end with an agreement between the parties. Some mediators decide quickly that a case needs to be tried by a judge; others are more persistent in attempting to effect a resolution. When mediation does not resolve a dispute, that case is returned to the court for trial.

Research Design and Methods

In the spring of 1979, we undertook an intensive study of small claims mediation in Maine. Our major goal was to compare the processes of mediation and adjudication and assess their impact on litigants. Ideally, from a research point of view, cases would have been randomly assigned to one process or the other as they arrived at court. Differences in outcome or impact would then have been uncontaminated by factors that might channel one set of litigants to mediation and another to adjudication. Innovations within the legal system like the mediation program, however, are rarely designed for the convenience of researchers. The courts we studied did not use a random number table to assign cases, so we must treat the complex issue of equivalence in our analysis.

We chose six district courts of varying sizes and caseloads from which to collect cases. Once these sites were chosen, we proceeded with four major data collection techniques: interviews with litigants, observations of court and mediation sessions, analysis of docket book information, and analysis of state court mediation reports. In August of 1979, we began interviewing litigants involved in contested small claims cases roughly four to eight weeks after their cases had been tried or mediated. Two, and at times three, full-time interviewers continued this work until September 1, 1980. When the interviewing load grew heavy, we selected mediated and non-mediated cases randomly.[6] In total we drew 403 cases in our

[6] The one exception to random selection was the exclusion from our sample of cases in which we had interviewed one of the parties once or twice before. This resulted in underrepresentation of banks and utilities as plaintiffs in our samples of both mediated and adjudicated cases and thus eliminated from our sample a number of cases where the focus of mediation and adjudication was on setting a workable payment schedule rather than on resolving a substantive dispute. Our original sample was slightly larger, but we dropped five cases when we learned that they had not actually been heard in court. In three of these cases we completed one or both interviews, but we have not included them in the analysis. The sample constitutes roughly 70% of the cases that, according to the docket book entries, were contested in the six

sample and completed interviews with at least one party in 97 percent of these and with both parties in 75.2 percent. Of the 86 cases in which only one party was interviewed, the sole interviewee was the plaintiff in 65 (76 percent).

We conducted interviews in person whenever possible (86 percent of the completed interviews); the remainder were done by telephone. The interviews lasted from fifteen minutes to two hours, with thirty-five minutes the average time for completion of the thirty-one-page interview. Cooperation was excellent and refusals rare; most of our non-responses were caused by our inability to locate the litigant.

A second set of brief telephone interviews was conducted with a subsample of cases six to eighteen months after the completion of the case in court. This subsample was selected in order to follow up those cases in which full payment of a judgment or settlement had not been made by the time of our first interview. These interviews were done almost exclusively with plaintiffs and were completed in 82 percent of the applicable cases. This second set of interviews provides an updated measure of compliance, the focus of this article.

Our measure of compliance is based on the plaintiff's response to two questions asking whether the defendant had paid some, all, or none of the judgment or settlement, and whether any "other conditions" had or had not been met. In 12 percent of the cases it was necessary to use the defendant's response to parallel questions because we were unable to interview the plaintiff or because the defendant was interviewed several weeks after the plaintiff, and compliance had occurred between the two interviews. Where data were available from both the plaintiff and defendant, the measures were the same in 91 percent of the cases (n=242). Almost all of the disagreements could be explained by substantial differences in the timing of the two interviews. We have considerable confidence, therefore, in the accuracy of our measure of compliance.

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courts from June 1979 to June 1980. We did not include in our sampling frame any defaulted cases or cases withdrawn at the request of the plaintiff. These are the two most frequent small claims court dispositions, but they are arrived at without a contested hearing. We also excluded all cases where the docket book indicated that the defendant appeared in court and admitted a debt, but several such cases entered our sample nonetheless. In short, the cases in the sampling frame were only those in which we reasonably supposed that a full trial or mediation or both had actually occurred.

A Statistical Explanation of Compliance

Defendants who went to mediation were considerably more likely to pay their debts than those whose cases were adjudicated (see Table 1). By the time of the first interview, 72.8 percent of those mediation defendants who had agreed that they owed some money or other obligation to the plaintiff had fully met their commitment.[7] Another 8 percent had done so by the second interview. This strikingly high level of full compliance contrasts with the sharply lower rates of compliance among adjudication defendants who faced a judgment against them. Among these, 35 percent had satisfied the judgment against them by the time of the first interview and 44.5 percent by the time of the second. The failure to pay anything is about four times as likely in adjudicated as in mediated cases. Those cases in which mediation efforts failed and judgment against the defendant was later imposed by adjudication show intermediate levels of full compliance. Intermediate levels of compliance also appear in those cases in which the parties negotiated a settlement on their own while waiting for trial or mediation.

These cross-tabulations support the argument that consensual processes should be distinguished analytically from those relying on imposition of a judgment. While Table 1 appears to indicate that an additional distinction should be made between adjudicated cases in which mediation was first attempted and those where it was not, further analysis suggests otherwise.

Table 2 presents the same data as the first table partitioned into three 3×2 sub-tables. The first sub-table distinguishes cases resolved by consent (negotiated and mediated) from those resolved by command (all adjudicated cases). The second compares compliance rates between cases resolved by the two kinds of consensual processes: mediation and negotiation. The third compares compliance rates between those adjudicated cases preceded by a failed mediation and those without a prior effort at mediation. The first and second of these partitions contribute statistically significant chi-square values to Table 1 as a whole, while the latter partition is not

[7] Table 1 includes all cases in which a dollar settlement was agreed to and seven cases in which the defendant undertook some obligation other than the payment of money (for example, "return of some doors"). In six of these seven cases the outcomes were achieved through mediation; one was adjudicated.

Table 1. Percentage of Full Compliance, Partial Compliance, and Non-Compliance, by Type of Dispute Forum at Time of First and Follow-up Interviews (N = 316)

	FIRST INTERVIEW				FOLLOW-UP INTERVIEW			
	Negotiated Outcome (N=29)	Mediated Outcome (N=114)	Failed Mediation; Adjudicated Outcome (N=36)	Adjudicated Outcome (N=137)	Negotiated Outcome (N=29)	Mediated Outcome (N=114)	Failed Mediation; Adjudicated Outcome (N=36)	Adjudicated Outcome (N=137)
Non-Compliance	20.7	10.5	30.6	45.3	13.8	7.0	25.0	35.0
Partial Compliance	41.4	16.7	13.9	19.7	37.9	12.3	13.5	20.4
Full Compliance	37.9	72.8	55.6	35.0	48.3	80.7	61.1	44.5
	chi-square = 53.3 with 6 degrees of freedom; $p < .001$				chi-square = 46.8 with 6 degrees of freedom; $p < .001$			

Table 2. Percentage of Full, Partial, and Non-Compliance at Follow-Up Interview by Type of Dispute Forum (N=316)

	Mediated and Negotiated Cases (N=143)	Adjudicated Cases* (N=173)	Mediated Cases (N=114)	Negotiated Cases (N=29)	Adjudicated without Prior Mediation (N=137)	Adjudicated after Failed Mediation (N=36)
Non-Compliance	8.4	32.9	7.0	13.8	35.0	25.0
Partial Compliance	17.5	19.1	12.3	37.9	20.4	13.9
Full Compliance	74.1	48.0	80.7	48.3	44.5	61.1
	chi-square = 30.68 with 2 d.f.; $p < .001$		chi-square = 13.25 with 2 d.f.; $p = .001$		chi-square = 3.15 with 2 d.f.; $p = .2$	

* Includes failed mediations.

statistically significant. Partitioning thus reveals that it is the distinctions between consensual procedures and adjudication, and within the group of cases resolved by consensual procedures, between mediation and negotiation, that are statistically significant in their relationship to compliance level. Compliance with judgments preceded by a failed mediation does not differ significantly from compliance in cases that go directly to adjudication.

In fact, further analysis shows that much of the apparent difference between adjudication with or without a previous attempt at mediation can be accounted for by the overrepresentation in failed mediations of business defendants, who are especially prone to comply with small claims court decisions. This is obvious from Table 3, as is the fact that the experience of a failed mediation is not reliably associated with compliance to an adjudicatory order.

On the surface, at least, the findings reported thus far imply that the experience of mediation and, to a lesser extent, negotiation promotes compliance in ways that the experience of adjudication does not. But this conclusion rests on the questionable assumption that the cases entering mediation, negotiation, and adjudication are in relevant ways alike. Since it is reasonable to expect that personalities and problems will influence both preferred modes of dispute settlement and the likelihood of compliance, we must ascertain whether the relationship revealed by cross-tabulation persists when other variables are "held constant." If we find that the relationship does persist, we face a second analytic problem, which is to identify what it is about different dispute forums that enhances or depresses compliance. In order to address these analytic problems, we used LOGIT—a multivariate statistical technique appropriate for categorical dependent variables.[8] Before that analysis can be taken up in detail, however, the problem of self-selection must be addressed.

The Problem of Self-Selection

Unfortunately, the problem of self-selection into one dispute forum or another cannot be completely disposed of by the adoption of one or another method of multivariate statistical analysis. Such methods can "hold constant" relevant

[8] LOGIT analysis is described by Judge *et al.* (1980) and by Pindyck and Rubinfeld (1981). LIMDEP, a series of computer programs for analyzing limited dependent variables, was used for this data analysis. This program uses the Newton-Raphson algorithm for estimating the LOGIT model.

Table 3. Levels of Compliance at Follow-Up Interviews by Forum Type and By Status of Defendant (in percentages)

	Negotiation	Mediation	Adjudication After Failed Mediation	Adjudication
	Business Defendants (includes landlords, professionals, and government agencies)			
Non-Compliance	0	3.8	15.4	24.5
Partial Compliance	0	5.8	15.4	16.3
Full Compliance	100	90.4	69.2	59.2
	(N=4)	(N=52)	(N=26)	(N=49)
			In the 3 x 2 table with these two adjudication columns only, chi-square = .947 with 2 d.f.; p<.50.	
	For complete business defendant table, chi-square = 15.45 with 6 d.f., p=.02.			
		Individual Defendants		
Non-Compliance	16.0	9.7	50.0	40.0
Partial Compliance	44.0	17.7	10.0	22.7
Full Compliance	40.0	72.6	40.0	36.4
	(N=25)	(N=62)	(N=10)	(N=88)
			In the 3 x 2 table with these two adjudication columns only, chi-square = .830 with 2 d.f.; p<.60.	
	For complete individual defendant table, chi-square = 32.52 with 6 d.f.; p<.001.			

measured variables. However, if there are present relevant unmeasured variables that are not correlated with the variables we can measure, they will remain uncontrolled by our approach. To the degree that people freely and carefully select one method of resolving a dispute over another, important differences in disputes and disputants that we could not measure may exist since subtle differences in personality and the intricacies of disputes might influence these choices. Our observation of small claims courts in Maine, however, convinces us that the problems of self-selection into types of dispute forums are not so serious that they cannot be addressed by available statistical techniques.

It is clear from our observations that litigants did not always have a choice whether to go to mediation or to adjudication. Self-selection, thus, was not always available in courts where mediation was offered as an alternative to adjudication. Some days and times mediators were not present or were busy with other cases, and the judge adjudicated the dispute without giving the parties a choice about their forum. At other times, the judge assigned all contested cases to mediation without giving the parties any chance to express their preferences. For example, in June of 1979, one Portland judge told the assembled disputants at the opening of court: "This is the list of small claims cases. When your case is called, I ask that you come forward. If the case seems to need a hearing, I will refer you to a mediator." Furthermore, the choices given parties were not always completely free or open. Take, for example, the following "dialogue" between a judge and the contesting parties whose case he had called:

Judge:	I have mediators in the courtroom. You can talk it over with them.
Plaintiff:	(Nods in agreement and turns to leave courtroom.)
Defendant:	(Remains standing before the bench.)
Judge:	You can go with them. They will explain. You have nothing to lose. You can have a hearing when you come back if you can't settle it.

Similar pressures were placed on parties who were told by the judge to try to work out a settlement on their own. On other occasions the opportunity for adjudication was acknowledged but the costs were emphasized so that the parties were effectively channeled to mediators. For example, an Augusta judge told parties in a contested matter: "Would either of you be willing to discuss this with a mediator? This is voluntary. If

you want a contested hearing, you will have to come back on the fourth of August [over one month later]. If you are able to settle this by mediation, you will have a judgment today."

Even when litigants did make a choice, they were not always informed by a clear sense of what mediation (or adjudication) entailed. For example, a Portland judge opened his session with a clouded description of small claims court generally and of mediation in particular, using the words "mediation" and "arbitration" interchangeably:

Judge: I'm going to call small claims this morning. For the benefit of those with no counsel at the present time, small claims may be tried with or without an attorney. We have a group of men known as mediators present. We recommend mediation as a way for parties to reconcile their differences. You don't have to use the services of an arbitrator but we strongly urge it. . . .

It is important for laymen to know it is not incumbent upon the court to collect the debt. This is another step entirely. That is disclosure. You must come before the court and disclose your property. You could be held in contempt.

If a settlement is had with an arbitrator and approved by the court, it cannot be appealed. Any questions?

(There are none and the first case is called.)

Judge: Approach the bench, please. Is there any chance of arbitrating this?

Defendant: As far as I'm concerned, there is.

Judge: (To Plaintiff) And you?

Plaintiff: (Apparently does not understand.)

Judge: You sit down in a comfortable room, listen to both sides, and if you reach an agreement you submit it to me for approval.

Plaintiff: Can you come back?

Judge: Yes, if you can't agree, you have a hearing.

In our interviews of litigants, therefore, we asked them whether "the judge left the decision (about mediation or adjudication) pretty much up to you and the other party?" or "didn't really give you much choice but to go to mediation or to trial?" Of the 316 cases examined in this paper, in 59.2 percent the parties chose mediation, negotiation, or adjudication, and in 40.8 percent no choice among forums was available or

Table 4. Outcome of Mediation by the Parties' Reported Perception of Whether Mediation Was Chosen by Them or Required by the Court (in percentages)

	Mediation Chosen by Parties (N=94)	Mediation Required by Court (N=56)
Agreement on a Settlement	77.7	73.2
No Agreement on a Settlement	22.3	26.8
	chi-square = .380 with 1 d.f.; p < .60	

perceived. Furthermore, our field observations suggest that the former percentage substantially overstates the cases in which litigants in fact made free and informed choices to pursue mediation or adjudication. As a consequence, we conclude that in most cases the assignment to or choice of mediation, adjudication, or negotiation involved little self-selection or judicial screening.

Two further pieces of evidence reinforce our conclusion that self-selection does not substantially contaminate our data. First, as indicated in Table 4, the perception of having freely chosen mediation is not associated with the success of the process.[9] Although cases required to go to mediation were slightly less likely to be settled than those where mediation was selected by the parties, the difference is statistically insignificant. Thus, it does not appear that those who said they chose mediation were more pliable and compromise-oriented than those who felt they were required to participate in this procedure. It is of course possible that the judges chose to pressure parties to mediate in only certain kinds of cases. However, our observations suggest that time and caseload pressures more than case factors led judges to seek mediation.[10] To the extent that judges were selective, judicial

[9] Because we were measuring the parties' perceptions of choice, it was possible for plaintiffs and defendants to disagree. In 77% of the cases where both plaintiff and defendant reported their perception of the availability of a choice of forum type (n=167), there was agreement between the parties. In cases of disagreement the defendant's perception was used as the measure of the perception of choice. Only in cases where data were missing for the defendant did we use the plaintiff's perception (n=47) as our measure. In 89 cases, choice was not at issue because the court did not have a mediator available and thus the parties had to go to trial.

[10] At least three judges we observed made certain that all of the contested cases in their courts were first heard by mediators. Thus, for example, we

pressure for mediation is likely to have been in response to factors like those we capture in our variables. To the extent this is so, we can control for relevant differences between mediated and adjudicated cases in our statistical analyses.[11]

Table 5 presents further evidence that self-selection is not a serious threat. The perception of a choice appears unrelated to compliance levels for each forum type. For example, compliance patterns are nearly identical for those parties who had the choice of mediation but rejected it in favor of adjudication and those who thought their only choice was to go to trial. Partitioned chi-squares for this table indicate that there are no statistically significant relationships between forum choice and compliance level and that the most substantial relationship in the table is between forum type and the level of compliance.

The hypothesis that self-selection factors rather than forum type explain compliance was further tested in multivariate analysis. Separate LOGIT analyses were undertaken for cases settled through consent and cases resolved by command. In the first instance, all negotiated settlements and all mediated cases in which the parties chose mediation were distinguished from those cases which were assigned to mediation. This distinction was coded as a dummy variable indicating the perceived choice or non-choice of a consensual forum. In the instance of command, those adjudicated cases in which the parties "selected" adjudication either by refusing mediation or by failing to agree to a settlement during mediation were similarly distinguished from those cases in which the parties had no choice but adjudication. In neither consent cases nor command cases was the choice/no choice variable a statistically significant predictor of compliance. The multivariate analysis thus provides further evidence that self-selection does not threaten our results.[12]

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observed several court sessions in which the mediator called the docket in place of the judge, telling parties in contested cases that to be heard that day their case would have to be mediated. At other times these—and other—judges would place a case in the queue for a trial only after mediation had been attempted. While the mediation was taking place, they processed defaulted cases and took care of other court business.

[11] At least one judge we observed tried rather conscientiously to screen cases for mediation. In general, however, such screening could be done only after a very hurried reading of the complaint and was based upon variables we have measured—in particular, the type of dispute and the nature of the relationship between the parties.

[12] These LOGIT analyses are not reported here but are available upon request from the authors.

Table 5. Compliance Level (in percentages) by Forum Type and Whether the Parties Felt They Had a Choice of Forum (N=316)

	(1) Negotiated Outcome; Forum Chosen or Imposed[a] (N=29)	(2) Mediated Outcome; Forum Chosen (N=73)	(3) Mediated Outcome; Forum Imposed (N=41)	(4) Adjudicated Outcome after Failed Mediation (Mediation Chosen) (N=21)	(5) Adjudicated Outcome after Failed Mediation (Mediation Imposed) (N=15)	(6) Adjudicated Outcome; Mediation Rejected (N=64)	(7) Adjudicated Outcome; Forum Imposed (N=73)
Non-Compliance	13.8	5.5	9.8	23.8	26.7	34.4	35.6
Partial Compliance	37.9	12.3	12.2	19.0	6.7	20.3	20.5
Full Compliance	48.3	82.2	78.0	57.1	66.7	45.3	43.8

Chi-square for complete table = 48.04 with 12 d.f.; p<.001

Partitioned chi-squares

Columns 1, 2, 3: chi-square = 13.88 with 4 d.f.; p<.003
Cols. 2, 3 chi-square = .736 with 2 d.f.; p<.70
Cols. 1 vs. 2, 3 combined chi-square = 13.24 with 2 d.f.; p<.003

Columns 4, 5, 6, 7: chi-square = 4.07 with 6 d.f.; p<.667
Cols. 4, 5: chi-square = 1.12 with 2 d.f.; p<.57
Cols. 6, 7: chi-square = .035 with 2 d.f.; p<.98
Cols. 4, 5 combined vs. 6, 7 combined: chi-square = 3.15 with 2 d.f.; p<.20

Columns 1, 2, 3 combined vs. 4, 5, 6, and 7 combined: chi-square = 30.61 with 2 d.f.; p<.001

[a]Negotiation, too, was undertaken more or less freely. Some parties began negotiating on their own while others reported the judge "asked" them to settle and still others indicated the judge "told" them to negotiate. These reports came in response to an open-ended question about "what did the judge say to you?" Because the number of cases is low and our measure less precise, we have not separated "imposed" from "chosen" negotiations.

Variables Contributing to Compliance

Compliance with small claims judgments and settlements can usefully be conceptualized in terms of a continuous, latent variable—an individual's propensity to comply. When the value of this propensity-to-comply variable reaches a certain level, the individual will comply with the judgment or settlement. If the value does not reach that threshold, the individual will not comply. This latent variable framework for the binary choice regarding compliance makes LOGIT an appropriate statistical tool for examining the influence of defendant, case, forum, and settlement characteristics on the propensity to comply. Compliance with small claims judgments and settlements is not, however, simply an either-or matter. Some people comply only partially, paying off a portion of the money they owe but refusing or neglecting to pay it all. Compliance may also be stretched out, as when there is an agreement to pay a debt over time. Because we could not follow the cases in our sample for several years, our decision to define full compliance as full satisfaction of a judgment (settlement) may mean that, if time payments are involved, some cases of partial compliance are inappropriately coded. Both because full and partial compliance are different and because we could not follow all time payment schedules to their conclusion, it appeared useful to undertake two separate multivariate analyses of compliance. In one we look at what distinguishes cases resulting in non-compliance from cases resulting in at least partial compliance, and in the other we study the factors that distinguish cases with full from those with only partial compliance. In effect, therefore, we are examining two latent variables—the propensity to comply at least partially and the propensity to comply fully.

Variables were introduced into the analysis to reflect significant characteristics of the dispute, the defendant, the relationship and power or resource differentials between the plaintiff and defendant, the nature of the settlement, the defendant's perception of the outcome, and the forum used to resolve the dispute.[13] Table 6 provides a detailed listing.

[13] Forum is a dummy variable indicating whether the process eventuated in a consensual (negotiation and mediation) or authoritative judgment (adjudication, including adjudications preceded by failed mediation). Combining failed mediations with other adjudications would depress the compliance rate in adjudicated cases and overstate differences between consensual processes and adjudication if failed mediations were those in which the level of conflict was highest between parties and the likelihood of compliance the lowest. But, as Table 1 indicates, this is not the case. Compliance rates are slightly higher in unsuccessfully mediated cases, and so

Table 6. Independent Variables Reported in LOGIT Analysis

Dispute Characteristics	Variable Name	Mean Value
Whether defendant contested the claim against him/her (1=contested; 0=uncontested)	NO CONTEST	.09
Whether the dispute involved an unpaid bill to a business or professional (1=unpaid bill dispute; 0=other dispute)	BILL COLLECTION	.31
Whether the dispute involved a counterclaim for harm or loss by the defendant against the plaintiff (1=counterclaim; 0=no counterclaim)	COUNTERCLAIM	.44
Defendant Characteristics		
Whether defendant resides in the jurisdiction of Court 4—a place where compliance rates appeared to be lower (1=residence in Court 4 District; 0=residence in other district)	COURT 4	.10
Whether the defendant was a government/business or private individual (1=business, professional, or government; 0=individual)	BUSINESS DEFENDANT	.44
Individual defendant's income (6 categories of self-reported income)	INDIVIDUAL INCOME	4.96 (s=3.11)
Characteristics of Defendant/Plaintiff Relationship		
Length of the relationship between plaintiff and defendant (4 categories of length of relationship)	LENGTH OF RELATIONSHIP	1.90 (s=.88)
Whether the parties are personal acquaintances or relatives (1=friends or relatives; 2=acquaintances; 3=no relationship)	ACQUAINTANCE	2.72 (s=.58)
Defense lawyer present (1=present; 0=absent)	DEFENSE LAWYER	.13
Plaintiff lawyer present (1=present; 0=absent)	PLAINTIFF LAWYER	.10
Difference in self-reported educational levels between defendant and plaintiff (educational level measured in 4 categories; differences range from −3 to +3)	EDUCATIONAL ADVANTAGE TO DEFENDANT	−.06 (s=1.08)
Settlement Characteristics		
Dollar amount of settlement/judgment (in dollars)	AWARD SIZE	318 (s=223)
Dollar settlement/judgment as a proportion of the original claim[a]	PROPORTION	.45 (s=.33)

combining them with adjudicated cases actually increases compliance levels in the adjudicated category.

Whether time payments were arranged in settlement/judgment (1=time payments; 0=no time payments)	TIME PAYMENTS	.17
Whether immediate payment was arranged in settlement/judgment (1=immediate payment; 0=no immediate payment)	IMMEDIATE PAYMENT	.18
Whether the settlement/judgment imposed obligations on plaintiff as well as on defendant (1=plaintiff obligation; 0=no plaintiff obligation)	PLAINTIFF OBLIGATION	.04
Defendant's perception of outcome fairness (1=fair; 2=unfair; 1.42=missing data)	UNFAIR	1.42 (s=.44)
Forum		
Whether the dispute was settled through mediation/negotiation or by adjudication (0=mediation or negotiation; 1=adjudication)	FORUM	.60

[a]Neil Vidmar (1983) has suggested that the advantage of consensual processes in achieving compliance can largely be explained by the characteristics of small claims cases amenable to consensual resolution. He argues that cases in which the defendant agrees he owes a portion of what the plaintiff seeks are especially likely to be resolved before trial and that in such cases defendants may be "victorious" even if the outcome obligates them to pay some money, for the obligation may be for an amount that the defendant admits to owing. Vidmar concludes, therefore, that the proportion of the claim at issue that is paid better measures the defendant's relative success and, thus, the likelihood of compliance, than does the proportion of the total claim that is paid. This point is well taken. Unfortunately, we have no direct measure of the amount of the claim actually in dispute. Two of our indicators came close to measuring this variable, however. NO CONTEST is a dummy variable identifying those cases where the defendant admitted the debt. NO CONTEST appears to be unrelated to compliance. The PLAINTIFF OBLIGATION variable typically indicates not only that the plaintiff must carry out some obligation to the defendant but also that the full amount of the claim will be paid if that obligation is fulfilled. This variable is strongly related to compliance.

Ultimately, Vidmar's argument is that defendants pay when they believe the settlement to be a fair or just one and that many defendants who owe some money may concede that the debt is a legitimate one. Because we directly measure defendants' perceptions of UNFAIRNESS, we believe that we have incorporated Vidmar's insight into our analysis.

The results of the LOGIT analysis of the compliance/noncompliance dependent variable are summarized in Table 7.[14] We shall discuss those variables that were significant at the .10

[14] LOGIT coefficients, unlike ordinary regressions coefficients, have no intuitive interpretation. Therefore, we have included in Tables 7 and 9 a transformation of the coefficients as suggested by Pindyck and Rubinfeld (1981). The resulting number is the change in probability that a case will fall in a particular category of the dependent variable (here full or partial compliance) given a one unit change in the independent variable. Thus, in Table 7 we see that a dollar increase in the size of the settlement decreases the probability of compliance by .0002, while a change from a consensual process to adjudication decreases the probability of compliance by .11. Because the relationship between the dependent variable and the independent variables is not linear, these changes in probability themselves change across the values of the independent variables. The transformation in Tables 7 and 9 was done at the mean value of each independent variable.

Table 7. LOGIT Model of Factors Distinguishing Full or Partial Compliance From Non-Compliance[a]

Variable Name	Coefficient	$\frac{\hat{\beta}}{S_{\hat{\beta}}}$	Change in the Probability of Some Compliance Associated with a Unit Change in the Independent Variable[b]
AWARD SIZE	−.003	−2.40**	−.0002
NO CONTEST	−.24	−.40	−.02
BILL COLLECTION	−.08	− .21	.01
COUNTERCLAIM	.15	.39	.01
COURT 4	−.52	−1.11	−.04
BUSINESS DEFENDANT	1.70	3.83***	.14
INDIVIDUAL INCOME	.27	2.53**	.02
LENGTH OF RELATIONSHIP	.32	1.52	.03
ACQUAINTANCE	.14	0.46	.02
DEFENSE LAWYER	−.45	−.88	−.04
PLAINTIFF LAWYER	.72	1.35	.06
EDUCATIONAL ADVANTAGE	.30	1.84*	.02
PROPORTION	1.25	1.44	.10
TIME PAYMENTS	1.00	2.00**	.08
IMMEDIATE PAYMENT	1.86	2.53**	.15
PLAINTIFF OBLIGATION	11.05	.06	.88
UNFAIR	−.94	−2.32**	−.08
FORUM	−1.36	−3.39***	−.11
CONSTANT	1.11	.87	

[a]There is no agreement in the statistical literature about the best goodness of fit measure to use with LOGIT. The most intuitively appealing measure can be fashioned by using the LOGIT equation to compute from observed values for each case predicted probabilities of falling into one or the other category of the dependent variable. By selecting a minimum probability for assignment to one of the categories, one can classify each case based on the LOGIT equation. This classification can then be compared to the observed values for each case. We chose to let the actual distribution of cases into categories (69 no payment; 247 some payment) constrain our choice of minimum probability. Thus, the minimum predicted probability for no payment was selected so that 69 cases had predicted probabilities exceeding that value (.38). Using this criterion, 81.6% of the cases were correctly classified by the LOGIT equation reported in Table 7, an improvement over the 65.9% correct classifications that would be the average of many trials using random assignment.

[b]Evaluated at mean value of the independent variables.

* $p < .10$
** $p < .05$
*** $p < .01$

level or better.[15] In addition, we will examine one variable that appears substantively significant although statistically unreliable.

[15] The "ratio of the estimated coefficient to its estimated standard error follows a normal distribution" (Pindyck and Rubinfeld, 1981: 311). This ratio is reported in the second column of Tables 7 and 9, and values significant at the .10 level or better are marked by asterisks. For most variables we had predicted the direction of effects beforehand, so we are actually talking about significance levels of .05 or better using one-tailed tests. We did not, however, have expectations for the direction of effects in every case, so the use of one-tailed tests throughout would be inappropriate.

The dollar amount that the defendant is obligated to pay (AWARD SIZE) is related to the chance that he or she will comply with the settlement or judgment ($p<.05$). The smaller the amount of the settlement, the more likely that at least some compliance will result.

Whether the defendant is a business, government, or individual (BUSINESS DEFENDANT) also helps explain compliance ($p<.01$). A bivariate analysis of compliance and the defendant's status (reflected in Table 3) shows that 49 percent of defendants who are individuals fully pay their debts, compared to 73 percent of small businesses and landlords and 91 percent of large businesses, professionals, or government agencies. This pattern could reflect variations in defendants' resources or in attitudes toward legal liability. The former interpretation is made especially plausible by the statistical significance of the INDIVIDUAL INCOME variable in the equation ($p<.05$). Despite suggestions to the contrary in the literature (e.g., Abel 1982a: 295-301), it is the relatively more powerful, organizational defendants and more affluent individuals who are most likely to meet their obligations as specified by judgments or settlements. Furthermore, the statistical significance of the variable that measures defendants' EDUCATIONAL ADVANTAGE suggests that financial resources not only promote compliance directly but may also be indicators of unmeasured attitudes toward legal obligations. Those defendants who have the greatest educational advantage over plaintiffs are most likely to comply with court judgments and consensual settlements ($p <.10$), even while holding constant income and the defendant's status as an organization or person.

As we have noted earlier, the type of FORUM used to arrive at a settlement influences the likelihood of compliance even when other factors are held constant ($p <.01$). Consensual processes are more likely to move defendants across the compliance threshold than is adjudication. But what is it about consensual processes like mediation and negotiation that helps to achieve this result? Do the factors that promote compliance with consensual settlements also encourage compliance with imposed judgments?

Several of the statistically significant variables in this model provide information about the character of the settlement or judgment in each case. This suggests that consensual processes affect compliance in part because they

lead to settlements with features not commonly found in adjudicated outcomes. Yet, this is unlikely to be the whole story, for the FORUM variable is statistically significant when settlement arrangements are held constant. Thus, it appears that forum type indirectly affects compliance by affecting the characteristics of outcomes and also affects compliance in ways not attributable to this association.

We see from Table 7 that, other things being equal, the existence of special arrangements for the payment of a debt is related to compliance. We see from Table 8 that the existence of such arrangements varies greatly across forums. In most cases we studied (60 percent), no arrangements for payment were made, but in a substantial number (20 percent) time payments were scheduled. Plaintiffs in negotiation or mediation who were unwilling to settle for less than what was owed often granted defendants the concession of paying relatively small amounts stretched out over a long period of time. These sometimes involved as little as $5 per month and rarely required payments of more than $30 to $40 per month. On the other hand, in 21 percent of the cases defendants agreed to pay off their debt on the spot (or the same day), particularly when the claim was whittled down in negotiation or mediation. Arrangements for installments or immediate payments are found in 58 percent of the mediated and negotiated settlements but in only 27 percent of the adjudicated judgments.

When the hearing process leads directly and immediately to a transfer of money, some compliance is assured. Thus, the variable IMMEDIATE PAYMENT has a statistically significant relationship with compliance ($p<.05$). The TIME PAYMENT variable is also statistically significant ($p<.05$). Non-compliance is most probable, regardless of forum, when no specific conditions have been arranged for the fulfillment of the obligation. Thus, the presence of special payment arrangements appears to be a correlate of mediation and negotiation that helps explain their effectiveness in securing compliance.

Another aspect of the final outcome that appears to be a powerful predictor of compliance is the inclusion in the judgment or agreement of an obligation by the plaintiff to the defendant. For example, if a plaintiff suing for money due on a faulty swimming pool he had installed agrees to fix that pool, his chance of collecting on the judgment increases. An agreement or judgment that contains reciprocal obligations of

Table 8. Cases (in percentages) with Full, Partial, and Non-Compliance by Forum Type and Settlement Characteristics (n = 316)

	Adjudicated Cases (n = 173)				Mediated or Negotiated Cases (n = 143)			
Settlement Characteristics	All Adjudicated Cases	Full Compliance	Partial Compliance	Non-Compliance	All Mediated Cases	Full Compliance	Partial Compliance	Non-Compliance
Time Payments	17	54	11	35	22	31	53	16
No Time Payments	83	20	57	23	78	87	7	6
Immediate Payment	9	88	0	12	35	98	0	2
No Immediate Payment	91	44	21	35	65	61	27	12
Plaintiff Obligation	1	100	0	0	8	100	0	0
No Plaintiff Obligation	99	47	19	33	92	72	19	9
Defendant Perceives Fair Settlement	33	63	19	18	52	83	11	7
Defendant Perceives Unfair Settlement	46	46	14	40	28	75	18	8
Missing Information	21	28	31	42	20	50	36	14

Table 9. LOGIT Model of Factors Distinguishing Full From Partial Compliance[a]

Variable Name	Coefficient	$\frac{\hat{\beta}}{S_{\hat{\beta}}}$	Change in Probability of Compliance Associated with a Unit Change in the Independent Variable[b]
AWARD SIZE	− .004	−2.39**	−.00001
NO CONTEST	− .02	−0.02	−.00007
BILL COLLECTION	− .83	−1.68*	.002
COUNTERCLAIM	.43	0.83	.001
COURT 4	− .28	−0.40	−.0008
BUSINESS DEFENDANT	1.50	2.30**	.004
INDIVIDUAL INCOME	.22	1.52	.0007
LENGTH OF RELATIONSHIP	.63	1.96**	.002
ACQUAINTANCE	− .002	− .00	−.00005
DEFENSE LAWYER	− .15	− .16	−.0004
PLAINTIFF LAWYER	− .40	− .53	−.001
EDUCATIONAL ADVANTAGE TO PLAINTIFF	− .03	−0.12	−.0008
PROPORTION	− .02	−1.88*	−.0006
TIME PAYMENTS	−1.56	−2.68***	−.005
IMMEDIATE PAYMENT	13.41	0.06	.04
PLAINTIFF OBLIGATION	14.56	0.03	.04
UNFAIR	.07	0.12	.0002
FORUM	− .43	−0.86	−.001
CONSTANT	1.73	0.94	

[a]Using the method described in note a to Table 7, we find that this model correctly classifies 86.3% of the cases, an improvement over the average of 64% correct classifications that could be expected from many trials using random assignment.

[b]Evaluated at mean values of independent variables.

* $p < .10$
** $p < .05$
*** $p < .01$

this sort puts substantial pressure on the defendant to comply once the plaintiff has fulfilled his or her part of the bargain. In fact, in each of the fourteen such settlements in our sample there was full compliance by the defendant. Although the plaintiff obligation variable does not achieve statistical significance in our analysis, we attribute this to the infrequency of such settlements in our sample, with a consequent high standard error, and to the correlation between the presence of such an obligation and forum type.[16]

Finally, we added to our analysis a variable reflecting the way in which the defendant assessed the fairness of the settlement or judgment. This variable reflects the quality of

[16] Note that the change in probability of compliance associated with moving from *no* PLAINTIFF OBLIGATION to such an obligation is .88 in the LOGIT model.

the settlement as seen by the party upon whom the burden of compliance rests. The negative coefficient for UNFAIR indicates that compliance is more likely when the defendant believes the outcome to be fair than when the defendant views it as unfair ($p<.05$). Perceptions of fairness depend in part on the type of hearing one experiences. Defendants were about twice as likely to perceive the settlement as fair after consensual settlements as after adjudication.

Our next concern is to determine what factors distinguish partial from full compliance. Table 9 presents the LOGIT analysis of cases in which there is at least some compliance. This model shows that six variables contribute significantly to the explanation of full compliance. These variables have to do with the relationship between the parties, the nature of the dispute, and the character of the settlement.

First, the amount of money the defendant owes (AWARD SIZE)—the dollar cost of compliance—is inversely related to full compliance ($p<.05$), even holding constant the presence of arrangements for payment in installments. The greater the financial burden, the less likely that complying defendants will fully meet their obligations.

In addition, the amount of the settlement or judgment as a PROPORTION of the original claim is inversely related to full compliance ($p<.10$). This variable contributes significantly to the equation even when the dollar amount of the judgment/settlement is held constant. In other words, the more a claim is whittled away, either in a judgment or a consensual settlement, the greater the likelihood that compliance will be full rather than partial. Presumably, this pattern reflects in part the lesser burden such settlements impose on defendants, but the pattern exists when the amount of the settlement as well as the defendant's status and income are controlled. Something more is occurring. We believe that a concession by the plaintiff, whether agreed to or imposed, places additional pressure upon the defendant to reciprocate through compliance. It appears that mediation in particular conduces to such concessions, for mediated settlements average 55 percent of the claim, compared to 77 percent for negotiated settlements and 80 percent for adjudicated awards.

The presence of a TIME PAYMENT schedule in the judgment or settlement is also statistically significant ($p<.01$). Here the coefficient is negative, whereas when some payment was at issue, it was positive. To some extent the fact that time

payment schedules reduce the likelihood of full compliance among the group that partially complies is an artifact of the measurement process since we measured compliance in some cases before the last payment was due. But we suspect that this is not the whole explanation. We believe that full compliance is also less likely in the case of time payments because the payment of later installments must depend on the good will, memory, and solvency of the defendant weeks or months after the hearing. Moreover, factors that lead to initial payments, such as the proximity of the parties,[17] the legitimacy accorded the court process, and a defendant's sense of having received a concession may fade or change over time.

This interpretation is supported by the finding that the LENGTH OF RELATIONSHIP between the parties is related to full compliance ($p<.05$). Parties whose association has extended over long periods of time appear more likely to live up to their obligations fully, given that they live up to them at all, than those with short or no past relationships. In addition, we see once again that business and government defendants are more likely than individual defendants to pay in full ($p<.05$).

Finally, disputes involving BILL COLLECTION—typically by banks, oil companies, and department stores—were less likely to result in full compliance than were other types of disputes ($p<.10$). These cases usually involved fairly straightforward collections by businesses of well-documented debts. It may be that the rather impersonal collection efforts of these experienced plaintiffs alienated defendants and fostered resistance or that these kinds of disputes disproportionately involved defendants who were recalcitrant about meeting their obligations.

It is instructive to note some of the other ways in which the explanations of full and partial compliance differ. First, neither forum type nor the defendant's perceptions of outcome fairness helps distinguish full from partial compliance, although both were important predictors of some compliance. This suggests

[17] For example, we were less able to locate for interviews those defendants who had undertaken time payments than those who had not. We interviewed 63% of defendants whose settlements involved time payments, compared to 88% of those whose settlements did not. This may also reflect the fact that time payment schedules are more common with individual defendants than with business defendants. It is also the case that, to the extent that time payments induce people to pay who ordinarily would be poor risks for payment, the group of partial payers with time payment obligations may disproportionately include people whose expected compliance rate is, for reasons we cannot measure, particularly low.

that certain factors that lead to a propensity to comply exhaust themselves before full compliance is achieved. It may be, however, that these factors induce some compliance by people who are particularly poor prospects for payment for reasons we cannot measure. If so, a better controlled analysis might reveal that full compliance is greater when these factors are present than when they are absent. Unfortunately, our analysis is not fine grained enough to allow us to determine this. Also IMMEDIATE PAYMENT is not statistically significant when the distinction between full and partial payment is dependent. However, it, like the PLAINTIFF OBLIGATION variable, appears substantively important. In both instances the lack of statistical significance may be due to a small number of cases and a consequently high standard error. Finally, the sign on the PROPORTION variable, which is negative and significant when the distinction between full and partial compliance is dependent, was positive when we sought to predict at least some compliance. This suggests the possibility that outcomes close to the amount claimed are likely in cases where defendants regard the plaintiff's claims as legitimate. In the short run this leads to some compliance, but over the long run the disincentives of paying larger claims—especially through time payments—come to predominate. This possibility is consistent with the diminished importance of FORUM and UNFAIR when the distinction between full and partial compliance is dependent.

These empirical findings about the propensity to comply and the propensity to comply fully are summarized by the following set of general propositions:

> PROPOSITION 1: The greater the cost of compliance with judgments or settlements (AWARD SIZE), the less likely that partial or full compliance will occur.
>
> PROPOSITION 2: Obligated defendants with apparent power or resource advantages over plaintiffs are more likely than defendants without such advantages to comply at least in part (BUSINESS DEFENDANT, EDUCATIONAL ADVANTAGE, INDIVIDUAL INCOME) and to comply fully (BUSINESS DEFENDANT) with judgments or settlements.
>
> PROPOSITION 3: The more specific the terms of the settlement or judgment regarding payment arrangements (TIME PAYMENTS and IMMEDIATE PAYMENT), the more likely that at least partial compliance will occur.
>
> PROPOSITION 4: The more extended in time the terms of the payment arrangements (TIME

PAYMENT), the less likely that full compliance will occur given partial compliance.

PROPOSITION 5: Settlements or judgments that include reciprocal obligations or concessions by the parties (PLAINTIFF OBLIGATION, PROPORTION, TIME PAYMENT, IMMEDIATE PAYMENT) are more likely to be partially complied with than those that do not.

PROPOSITION 6: The more that the obligated party believes that the resolution of the dispute was fair (UNFAIR), the more likely that at least some compliance will occur.

PROPOSITION 7: Cases involving parties with longer past relationships (LENGTH) are more likely to result in full compliance than those involving parties with shorter past relationships.

PROPOSITION 8: A consensual method of arriving at an outcome (FORUM) is more likely to produce at least some compliance than is an imposed judgment.

PROPOSITION 9: Consensual processes are more likely than imposed judgments to promote specificity and reciprocity in agreements, and to produce a sense of fairness in the obligated party.

We now turn toward a fuller explanation of these empirically derived propositions.

IV. TOWARD A SOCIAL PSYCHOLOGY OF CONSENT AND COMPLIANCE

Participatory, consensual settlements of conflict differ substantially from adjudicated outcomes in both their character and underpinnings. The form of adjudication constrains both the information presented in court and the range of available solutions. Even without such constraints, people not only have reasons for acting that third parties cannot perceive and so cannot take into account, but the actors themselves may not appreciate their motives and the balance between them unless the decision-making process encourages self-realization. The adjudicator must reach closure on the basis of information presented in court and can do so because solutions can be imposed.

For consensual agreements the key to closure is litigant satisfaction. Even where satisfaction is contextually dependent in the sense that an outcome is satisfactory because it is "least undesirable," feelings of satisfaction are likely to respond to a range of considerations that will have little or no influence when solutions are imposed. These include values and norms embedded in non-legal institutions, tastes for risk, and the

idiosyncratic ways in which time, money, and aggravation can be relatively weighted. While settlements are no doubt shaped by the parties' shared expectations of what going to court means, the fact that so many variables may come into play creates substantial pressure to break the mold of traditional adjudicative outcomes. Thus, it is not surprising that mediation and negotiation produced six of the seven outcomes we observed in which the defendant was obliged to do something other than pay money to the plaintiff, and twelve of the fourteen in which the plaintiff undertook some obligation to the defendant.

Facilitating the free consideration of multiple variables is the fact that consensual settlements do not have to be explicitly justified. The legitimacy of a judge's decision depends on an explicit, reasoned connection between the result and a general rule, but an individual or group can explain a decision to settle on vague and general grounds—"it's fair" or "it's the best I could expect" (Fuller, 1978: 371).[18] When rationales do not have to be well articulated, decisions can more easily reflect idiosyncratic value preferences, feelings that are not easily identified, and inconsistencies that are hard to reconcile. By contrast, when a judge articulates a reason for a decision, he or she provides a clear target for dissatisfaction and criticism. This may happen even where it is possible to advance reasons that the disadvantaged party would accept, since the judge may not know which of the possible justifications for his or her decision are acceptable. The failure to articulate reasons provides no escape so long as the parties expect a decision accompanied by reasons.[19]

The consensual settlement process has an important interpersonal component as well, although this aspect of the process may vary substantially depending on the type and extent of participation allowed the parties to the dispute. In particular, interaction in mediation or negotiation often has a strong normative character (Eisenberg, 1976). Bargainers use norms as levers to persuade other parties to accept particular settlements (e.g., "Don't you think it's fair that you pay me

[18] For this reason, groups in conflict may find it more difficult to achieve consent than individuals in conflict. The representatives of a group must articulate reasons for accepting or rejecting a proposed outcome in order to convince the group to endorse a position. This process requires articulation of criteria by which an outcome can be judged and thus moves the decision process closer to adjudication.

[19] When a jury renders a verdict and in certain forms of arbitration, such as baseball salary arbitration, there is no expectation that the verdict will be accompanied by supporting reasons.

something for using my property?"). Bargainers also remind one another of the practical consequences of their decisions (e.g., "You can save time and aggravation."). Mediators similarly highlight relevant norms, mutual obligations, and the practical implications of choices, but they do it from the vantage point of a formally disinterested third party. They also provide a third party's view of the relative merits of the conflicting cases. This allows each party to make what may be a more realistic prediction of the likely results of adjudication and so may help induce a settlement. Conversely, by highlighting the merits of opponents' positions, mediators may lead both parties to exaggerate their risks of loss in adjudication. Where a pair of predictions is unrealistic in this way, the chance of settlement is high.

While the sense that an agreement is fair is one inducement to settle, it is by no means necessary. Participants in consensual processes are only slightly more likely than recipients of court judgments to assess outcomes as fair. The multiplicity of rationalizations that consensual processes allow neatly absorbs the wide range of inducements for settlement that affect the disputants in the interaction, and the fact that rationales do not have to be articulated helps avoid the impasse that could be created by the need to save face. The multidimensionality of consent is illustrated by a sampling of the reasons given by litigants for agreeing to mediated settlements that they later characterized as unfair:

> "I felt we still were going nowhere—the mediator, actually, I felt the mediator leaned toward them and the judge would have done the same." (plaintiff)
> "By then I was worn down; I was tired of it. I wanted to finish and get out of there, to get away from them." (plaintiff)
> "I felt I'd accomplished my goal. I'd let her know that she couldn't get away with it." (plaintiff)
> "Because it was proved I was partially wrong. I was happy to get it off my back." (defendant)
> "Best agreement we could expect to get." (defendant)
> "Time. I had to catch a plane. I knew that the judge might have hit me with the whole bill. I think the judge would've had a fit if we brought it to court for just a few dollars difference." (defendant)

The internal and interactional dynamics of consensual settlement processes combine to create pressures toward compliance that are largely lacking in adjudication. In the interactive process, opportunities exist for reciprocal obligations that provide powerful incentives for performing in

accordance with the agreement. Such reciprocation is clearest in cases where the plaintiff assumes an obligation to the defendant in return for payment. The establishment of payment schedules and the arrangement of immediate payment are less obvious examples of such concessions. In the former case, the defendant typically concedes a larger proportion of the debt in return for the opportunity to pay it off in relatively small amounts over a long period of time. Thus, we find that the consensual settlements as proportions of claims are higher, on the average, in cases where payment schedules are laid out than in cases where they are not (69 percent compared to 43 percent). It may be that there is on both sides a substantial amount of face-saving in such arrangements, for both parties may anticipate that only some of the scheduled payments will be made.

On the other hand, immediate payment of a debt is a substantial concession by the defendant and is purchased by the plaintiff through reduction of the claim. Consensual settlements are, on the average, only 39 percent of claims when immediate payment is arranged and 54 percent when it is not.[20] Overall, the pattern of compliance suggests strongly that we see the norm of reciprocity (Gouldner, 1960) at work.

Even when reciprocity is slight, the very act of choosing to accept a settlement that might have been rejected may generate pressures that favor compliance. Agreement may, in effect, reinstitutionalize legal norms at the personal level (Lempert, 1972), adding guarantees of personal honor to the formal guarantees of law. Also, pressures toward cognitive consistency, as suggested by a variety of social-psychological theories (e.g., Brehm, 1966; Feldman, 1966), may lead one to structure later behavior in accordance with prior commitments, as may the possibility of embarrassment (Goffman, 1967). These overlapping pressures presumably work independently

[20] In part because they are aware of this calculus, judges make similar trade-offs when they issue judgments involving either immediate payment or payments over time. In adjudication cases the amount of the judgment is a lower proportion of the claim (50%) when immediate payments are arranged than when they are not (63%) and a higher proportion of the claim (77%) when time payments are arranged than when they are not (58%). Although we have little direct evidence to demonstrate it, we suspect that the same combinations of settlement level and payment arrangements have different meanings if they are imposed than if they are arrived at through the give-and-take of bargaining. In particular, the imposition of such a "compromise" judgment carries with it none of the pressures for compliance generated by reciprocal concessions. Thus, the relationship between settlement size as a proportion of the claim and compliance is weaker for adjudicated cases than for those resolved consensually. There is a non-compliance rate of 6% in cases settled by consent for 45% or less of the claim as compared to 24% among comparable adjudicated cases.

of formal controls emanating from the courts.[21]

Compliance, of course, is not guaranteed either by commitments arrived at through consent or by obligations imposed by a legitimate authority. Considerations of self-interest may override the internal controls activated by consent or command. People motivated by self-interest have a substantial capacity to forget or reinterpret obligations. The less clearly defined the behavior required for compliance and the longer the obligation remains unfulfilled, the easier it becomes to justify non-compliance.[22]

Indeed, one might well ask why any small claims defendants meet their obligations at all. The power of the small claims court to enforce compliance is extremely limited. Self-interest seems to invite defiance, and defiance does occur, although considerably more often in adjudicated than in mediated or negotiated cases. But complete defiance, even in adjudication, is the exception rather than the rule. This suggests that losing litigants extend legitimacy to judicial judgments and/or that they exaggerate the likelihood of punishment should they fail to comply. When a judgment confirms a consensual settlement, these pressures toward compliance may be reinforced and are complemented by others we have identified.

Consent, unlike command, brings with it an assumption of responsibility for the settlement and for its implementation. This sense of responsibility, along with general normative pressures to live up to commitments (Lempert, 1972), can weigh heavily on disputants, even those who may regret having given consent in the heat of negotiation or mediation. The more explicit these pressures, the more effective they are. Our

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[21] The legitimacy that individuals may accord agreements ratified by a court can also contribute to compliance with settlements. Legitimacy, among other things, reflects the beliefs of individuals in the rightness and/or inevitability of institutionalized authority. People comply with commands in part because such behavior is consistent with belief in that authority. Obedience may occur because disobedience is difficult to contemplate or because it helps one maintain a consistent self-image as a good and loyal citizen. There is, however, no clear distinction between court-ratified settlements and judgments with respect to this source of legitimacy.

[22] Thus, the simpler, the more immediate, and the less ambiguous the commitment or judgment, the greater the likelihood of compliance. For example, a commitment to pay $100 within two weeks is clear and simple as compared with a promise never again to insult one's neighbor. In the latter case, one can justify a violation of the promise because the behavior constituting an insult is not clear (e.g., "I didn't really insult him; he just thinks I did."). In addition, when an agreement extends over time, one can often find in the other party's behavior a subjectively acceptable rationale for breaking an agreement. One may also develop substantial motives for doing so if changed conditions mean that compliance over time is more onerous than one anticipated.

data suggest that the personal and immediate commitments generated by consensual processes bind people more strongly to compliance than the relatively distant, impersonal obligations imposed by authorities. However, there may be an interaction effect such that personal commitments to honor legal obligations are powerful only when they are ratified by impersonal legal authority. We cannot examine this possibility within the framework of our study; but anyone listening to small claims cases will hear many cases that are in court only because earlier informal commitments to correct the matter were not honored.

V. CONCLUSION: THE MOBILIZATION OF CONSENT

Our portrait of compliance and litigant satisfaction is much like that which emerges in other studies of small claims mediation (Falkenstein, 1981), of custody mediation (Pearson and Thoennes, 1982), and of mediation of neighborhood and interpersonal disputes (Felstiner and Williams, 1980; Cook *et al.*, 1980; Davis *et al.*, 1980). Rates of compliance and satisfaction are quite high in mediated cases and seem consistently higher than those reported in comparable adjudicated cases, although problems of comparability abound. Taken together, these data appear generally consistent with the theoretical interpretation advanced here, but the apparent widespread success of mediation in securing compliance should not obscure its general failure to draw cases in off the street for hearing. Neighborhood justice centers, for example, have been criticized for their inability to attract "walk-ins" and their consequent tendency to take referrals directly from and to work closely with actors in the criminal justice system (e.g., Wahrhaftig, 1982: 77-85). Similarly, the Denver Custody Mediation Project found that divorcing couples were reluctant to come to them unless strongly urged to do so by their attorneys (Pearson, 1981).

Why, if mediation is so much more satisfactory than adjudication, do so few disputing parties choose it without first beginning court proceedings? The answer appears to lie in the nature of the consensual process and the limited circumstances under which it can operate. For most people and organizations, negotiation and bargaining are the preferable forms of dispute handling because they leave the parties to the dispute in control of the conflict and its resolution (Christie, 1977). To enter into bargaining or negotiation, both parties must perceive something of value to be gained from an agreement. In many

disputes, however, only one party has anything to gain. The advantaged party has no incentive to negotiate. The weaker party can induce negotiation, however, by imposing costs on the opponent. The imposition of costs can take many forms: threats, harassment, vandalism, theft, sabotage, rumors and gossip, a law suit, or a criminal complaint. The availability and use of such techniques depend in large part on the social and political organization of the community in which the dispute takes place and on the positions of the disputants in the community.

In modern Western societies, community pressures are often unavailable or ineffective in inducing bargaining, so formal criminal or civil complaints are commonly necessary to gain leverage with the other party. Invoking the formal legal system changes the terms of the conflict and imposes on the advantaged party both the financial costs of defense and the risk of loss if the dispute goes to judgment. Threatened use of formal legal processes thus provides a bargaining lever for one party against another and serves to mobilize "informal," consensual justice.

For this reason, informal community justice is unlikely to serve many disputants unless it is intimately connected to some formal legal agency. It follows that changes in access to formal institutions and in the substantive law defining rights, duties, and liabilities can have dramatic effects on the extent and character of consensual justice. Critics who imply that informal justice deprives parties of the rights they would have had in court ignore the symbiotic qualities of informal and formal justice (Auerbach, 1982). They also ignore the degree to which experienced and knowledgeable litigants rely upon negotiation and settlement (Macaulay, 1963). In fact, the most important cost of rules and procedures that deny the poor and weak access to adjudication may be that the disadvantaged are thus effectively denied the opportunity to settle claims informally. The expansion of legal rights and resources for disadvantaged parties enhances their ability to impose costs and risks and thus to bargain effectively.

Under some circumstances, however, inexperienced litigants find negotiation less accessible than formal adjudication. Some people initiate formal legal processes to vindicate their position without a clear understanding of the limits, costs, risks, and uncertainties involved. They start moving toward a court judgment without the experience or skills necessary to halt that process when it is in their interest

to do so. Furthermore, less experienced litigants may find it especially difficult to redefine a dispute that has been framed for an authoritative judgment in terms amenable to a consensual resolution (Mather and Yngvesson, 1980-81). From this perspective it appears that some "alternatives to courts" might be profitably viewed as part of an access-to-negotiation movement. Alternatives that involve negotiation or mediation have sprung up, not surprisingly, in small claims courts, where lawyers—the professional negotiators—are often absent; in divorce courts, where clients' emotions at times prevent attorneys from negotiating; and in criminal courts, where the state takes the place of the victim and precludes any direct negotiations between the original parties. In these and similar settings, inexperienced court users may find themselves caught in a process they cannot predict or control. Court-sponsored mediation or negotiation can be viewed as a mechanism for reestablishing control by the disputant over both the conflict and its resolution in the context of a new bargaining relationship defined by the potential for an adjudicated outcome.

Our data on small claims mediation and adjudication provide strong evidence that consent is a powerful adjunct to command in securing compliance with behavioral standards. Consent enlists a sense of personal obligation and honor in support of compliance, and consensual processes are more open than command to the establishment of reciprocal obligations and of detailed plans for carrying out the terms of an agreement. Consent may also be more likely than command to leave both parties—not just the winner—with the feeling that the outcome was fair or just. These characteristics of consent mean that consensual solutions are more likely to be complied with than those imposed by adjudication, at least when they are ratified by a court or backed up by the threat of adjudication.

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