SMALL CLAIMS, COMPLEX DISPUTES: A REVIEW OF THE SMALL CLAIMS LITERATURE

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> We take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference . . . The idea that procedure must of necessity be wholly contentious disfigures our administration of justice at every point.
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> Pound, 1906:404-5

> The possibility that any given problem might be handled in more than one way does not constitute a liability. Rather, it is a form of competition among, for instance, means of settling a dispute . . . . Each method of dispute settlement constitutes a different product—of differing utility to different consumers—some clearly more suitable than others for certain situations. The Justice Industry has an obligation, not simply continuously to refine one product—but to deliver new and competing products to serve the varied needs of the consumer.
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> Cahn & Cahn, 1966:947-48

INTRODUCTION

In 1967, a Washington, D.C. judge described the small claims branch of the District of Columbia Court of General Sessions as "The Forgotten Court." His comment was echoed in the most comprehensive study of small claims courts to date, where it was noted (NICJ *Report* 1972:5) that in spite of the interest in small claims litigation during the earlier years of this century, after 1940 reformers and society in general turned to other concerns. "By 1970 the small claims court could rightly be called the 'forgotten court'."

While small claims was still a relatively obscure topic for research and comment in 1970[1], this is no longer the case today. In February 1971, President Nixon (*Cong. Q.W. Rep.*, 1971:485;

1. While a considerable number of descriptive articles on small claims procedure were available prior to 1970, no problem-oriented research on small claims courts was conducted prior to 1950. (See Part I for a discussion of the early literature). After 1950, descriptive articles continued (*e.g.* Myers, 1953; Currie, 1956; Boden, 1963; Fowks, 1968), but articles also began to appear which questioned small claims operations. The most significant of these came after 1964: Pagter, *et al.*, 1964; Murphy, 1967; *Colum. J.L.* and *Soc. Prob.*, 1969; Moulton, 1969; *S. Cal. Law Rev.*, 1969. Of these critical articles, only those by Pagter *et al.* (1964) and Moulton (1969) were based on careful empirical research in the courts (see discussion of this in Part II).

Eovaldi and Gestrin, 1971:282) requested that "a thorough study of the adequacy of existing procedures for resolving disputes arising out of consumer transactions" be undertaken. In response to this, the National Institute for Consumer Justice, a nonprofit private corporation, was established, and in 1972 published a *Report on Small Claims Courts* in the United States. Another nationwide study was carried out by the Small Claims Court Study Group (SCCSG), a Nader-inspired research group. In addition, at least ten empirical studies of the court have been carried out within the past four years, three of these during the 1973-74 period alone. Beyond this work researching, describing and analyzing the court, two bills have been introduced in Congress (*Consumer Claims Court Assistance Act*, S. 1602, 1971; *Consumer Controversies Resolution Act*, S. 2928, 1974), and there has been a good deal of grass roots activity by citizen action groups and others aimed at informing the public about the court and reforming court statutes at the state level. One of the major tangible results of this interest and activity has been the Harlem Small Claims Court, which was organized in 1971 and incorporates many of the reform measures advocated by consumer groups and others interested in small claims reform.

Small claims is in fact the least forgotten of the lower courts today. No other lower court has received such widespread attention from lawyers, social scientists and the concerned public in the past decade. As yet, however, there has been no review and discussion of the small claims literature itself. It is the aim of this article to (1) examine the small claims movement critically, as it developed from the activities of scholars and activists in the first two decades of this century, through the '40s and '50s when little notice was taken of the court, to the present upsurge of renewed interest; and (2) to review and discuss the small claims literature.

The paper is divided into four parts. Part One examines critically the goals of the early small claims reformers. Part Two reviews empirical studies of the court with a view to answering the questions: How does the court operate, and how does it function as a dispute resolving agency? (Who uses it? how are the cases handled? what are some of the major problems in the way the court is functioning?) Reliability of the data collected, and usefulness of the criticisms raised in these studies, will also be considered. In Part Three, a study is discussed which analyzes in detail the premises on which small claim courts are operating. Part Four examines reform proposals, and views the movement

for small claims reform in the context of more general proposals for change in our system of administering justice.

I

THE EARLY LITERATURE (1906-1950)

During the early 20th century there was much discussion among lawyers and legal scholars regarding the inability of our system of justice to cope with the volume and type of litigation produced by the rapidly growing American cities. Suggestions for reform of the organization of justice and improvements in legal procedure were debated in bar and other professional associations at this time and are prominent in professional journals of the period (*e.g.*, Pound, 1906, 1913; *J.A.J.S.*, 1918; Harley, 1919, 1920; Scott, 1923; *Columbia L. Rev.*, 1934). The most comprehensive discussion and analysis of problems and reform measures is presented in Reginald Heber Smith's book *Justice and the Poor* (1919).

The major problem was seen to be the procedural technicality involved in the administration of justice. This caused delays and high costs: in lost work time, court fees, and expense of counsel needed to wade through the procedural maze. Elihu Root (1916: 358) noted in his Presidential Address to the American Bar Association that "There is no country in the world in which the doing of justice is burdened by such heavy overhead charges or in which so great a force is maintained for a given amount of litigation. The delays of litigation, the badly adjusted machinery, and the technicalities of procedure cause an enormous waste of time."

Significantly, while the basic problem was identified as being due to cumbersome judicial machinery, it was the unequal ability of rich and poor to use this machinery, not the machinery itself, which was the focus of reform action. Smith (1919:15-16) noted that the cause of unrest and dissatisfaction (as against the roots of the problem which he identified as delay and expense) was "the wide disparity between the ability of the richer and poorer classes to utilize the machinery of law." He worried (1919:11) that inability to obtain justice through law on the part of the poor—in particular unpaid laborers—would turn these people into "incipient anarchists" who would threaten our social and judicial system. By "poor" Smith (1919:42) and others of this period (Edholm, 1915; Harley, 1919; *J.A.J.S.*, 1921; *Colum. L. Rev.*, 1934; Cayton, 1939) meant "plain, honest men," such as small tradespeople, lodging housekeepers and wage-earners. It was em-

phasized (*J.A.J.S.*, 1921:163) that "by 'poor' we understand not the indigent, but the great majority of all people, those who find it hard to get through each year without debt, and so cannot endure the extravagance of litigation."

Several reforms were instituted to make the judicial system more accessible to this group. Conciliation and arbitration were among the chief procedural reforms; domestic relations courts, administrative tribunals, tribunals for the arbitration of trade disputes, and small claims courts were created as alternate legal institutions; and counsel for the poor was provided through the creation of public defenders and legal aid organizations. Commenting on the procedural reforms, Smith (1919:70) asserted that the use of arbitration

> delivered a body blow to that legal Cerberus of pleading, procedure and evidence by proving that justice can be faithfully, more satisfactorily to the parties, and more quickly administered, even as to claims as large as one hundred and fifty thousand dollars, through an informal tribunal which has found no necessity for technical pleadings, or for a predetermined procedure, or for excluding the kind of logical evidence that all the world, except the courts, uses in making its decisions.

Experiments with conciliation, based on Norwegian and Danish model conciliation tribunals, a compulsory first step in all civil litigation in Norway and Denmark, were praised (Smith, 1919: 66) for simplicity, effectiveness and low cost: "The attorney is eliminated because conciliation depends for its effect on bringing the parties together, on smoothing out irrelevancies by confrontation, and then proceeding to a direct, business-like, personal adjustment of the real issue."[2]

Small claims procedure was conceived along these lines. It was to be a simplified and streamlined version of due process, with a view to self-representation by the litigants. There was to be a minimum of formality, delay and expense, and litigants should be "assured of a prompt decision according to law—'a judgment in time to enjoy it," (Clayton, 1939:59). As the name of the courts suggests, only claims of small amounts[3] were to be handled in this way.

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2. For a discussion of experiments with conciliation procedures during this period, and problems of adapting them to the U.S. legal system, see *Journal of the American Judicature Society*, 1918; Smith, 1919: Ch. 9; *New York Law Review*, 1925; Lauer, 1918; McFadgen, 1972:76-89.

3. The first small claims court, opened in Cleveland in 1913, had a jurisdictional limit of $35 (*Journal of the American Judicature Society*, 1918:3). An article in the *Columbia Law Rev.* (1934:834) states that the jurisdictional limit at that time varied between $20 and $200. Since that time, jurisdictional limits have been raised. The Institute of Judicial Administration (1955; 1959) cites a range of $20 to $500, with New Mexico's limit of $2000 a marked exception. The National Institute for Consumer Justice (1972:37) notes that "generally the jurisdictional limits range between $300 and $1500."

Concern with mechanisms of redress for poor men's causes has a considerable history in Anglo-American law. In England, a small debt court was created by statute in 1606; this was followed by local courts of request in the 18th century and the new county courts in 1846 (*Colum. L. Rev.*, 1934:933). Britain's influence in this regard can be noted in other areas, such as India, where small cause courts were set up in the mid-eighteenth century (*J. Ind. L. Inst.*, 1974). In the U.S., early attempts to provide simplified justice for minor claims led to rural justice of the peace courts, which were later transplanted to the cities. Special magistrates were also created to deal with minor claims. Both of these institutions failed, due at least in part to the insulation of the justices and magistrates from the controls of the regular court system, and their tendency to ally themselves with local interest groups (Olsen, 1910; Harley, 1915; Smith, 1919:42). In contrast, the movement for small claims courts (also known as small debtors' courts and conciliation courts) sought to establish tribunals which were part of, or closely linked to, the regular court system, and were staffed by qualified judges. Several features of the courts were noteworthy:

1) In most courts, the adversary model for litigation was the norm, but the judge was described as an investigator, not an umpire (*J.A.J.S.*, 1924:251). This meant that even in cases which deviated from the average "simple" claim brought to the courts, lawyers should be unnecessary, and they were in fact excluded from many courts.[4] This served to reduce procedural formalities and costs. The clerk replaced the lawyer as an aid in case preparation (*J.A.J.S.*, 1924:253; Smith, 1919:56; *Colum. L. Rev.*, 1934:934).

2) In most courts, only the general outlines of procedure were specified, and the details were left to the discretion of the judge. In particular, judges were not to be bound by formal rules of evidence, although decisions were to be reached on the basis of substantive law (*J.A.J.S.*, 1924:250-51).

3) Other procedural reforms included simplified pleadings, elimination of pre-trial procedures, waiver of a jury trial by the plaintiff and the curtailment of appeal rights (*J.A.J.S.*, 1924:248-50; *Colum. L. Rev.*, 1934:936-943).

4. Attorneys are barred in California, Idaho, Oregon, Washington, Colorado and Oklahoma. In Ohio the claimant is allowed an attorney only if the defendant hires one; Nevada denied attorneys fees in small claims court; Alaska and D.C. limit fees to a minimal amount (Institute of Judicial Administration, 1955:13 ff; 1959:2). See also *Journal of the American Judicature Society*, 1924: 252 which suggests attorneys should not "commonly appear" in the court.

4) Court costs were reduced to a minimum (Smith, 1919:56).

5) The judge was empowered to stay the entry of judgment or the issue of execution. This enabled him to decide how a claim should be paid, and made it possible for him to take into consideration the defendant's economic circumstances and ability to pay (Smith, 1919:57; Fowks, 1968:172; *Colum. L. Rev.*, 1934:944).

6) In a few small claims courts, conciliation of claims was an alternative to adjudication.[5] This required that both parties agree upon a settlement of the claim, and actively consent to a judgment, if one were entered.

The earliest small claims courts in this country were the small debtors' court created by the Kansas legislature in 1912 (*Am. Pol. Sci. Rev.*, 1914: 635ff; Edholm, 1915: 22ff) and the conciliation branch of the Cleveland Municipal Court, opened in 1913 (Levine, 1918: 10ff). The movement spread rapidly: By 1923 five states (Massachusetts, South Dakota, California, Nevada, and Idaho) had statewide small claims systems; three (Minnesota, North Dakota and Iowa) had statewide conciliation tribunals (on the Norwegian model) in which a range of claims, small and large, could be handled; and small claims courts were operating in 12 major cities. In 1920 Herbert Harley (1920:76), Secretary of the American Judicature Society, noted that "these new courts represent the only new and promising advance in the administration of justice in this country in seventy years. They are the laboratories in which the new procedure is being evolved. On them depends the future of our jurisprudence." By 1939, nine more states and the District of Columbia had set up either municipal or statewide small claims systems, provoking Judge Nathan Cayton (1939:57) of the Washington, D.C. Municipal Court to comment that "Today there is probably no movement in the legal field that has experienced so wide, rapid, and striking a growth as that of the small claims and conciliation courts." While the rapid expansion which marked the small claims movement of the 20's and 30's abated somewhat after 1940, new courts continued to be set up and are still being organized today. A 1972 study noted, however, that small claims courts are still absent in nine states, and in rural areas of eight others (NICJ *Report*, 1972: 6).[6]

5. Conciliation procedures were available in Cleveland (Levine, 1918), Minneapolis (Vance, 1918), New York (Lauer, 1918), St. Paul, Stillwater, Duluth and Philadelphia (*Journal of the American Judicature Society*, 1924: 254), by 1921. A later experiment with conciliation was attempted in Washington, D.C. in 1939 (Cayton, 1939).

6. For a history of the small claims movement in the U.S.A. 1913-1959, see: Smith, 1919; *Journal of the American Judicature Society*, 1924; *Colum. L. Rev.*, 1934; Institute of Judicial Administration, 1955; 1959;

A review of the small claims literature up to 1950 reveals, with one significant exception,[7] no substantial criticism. Cayton's (1939:59) comment that "Today we find this plan operating successfully in practically every section of the country, in the largest and the smallest cities, in agricultural as well as industrial areas" is characteristic of the optimism and general satisfaction with the courts voiced during this period. Yet a careful reading of this literature, and particularly of early articles discussing the dissatisfaction which produced the small claims movement, points to critical problems in the way the courts were conceived (specifically with respect to whom they were meant to serve) and how a "small claim" was defined.

Austin Scott (1923:457), professor of law at Harvard and one of the early advocates of small claims courts, discussed the need for the courts in an influential article entitled "Small Causes and Poor Litigants":

> There are two classes of controversies in particular in which our ordinary legal procedure has broken down to such an extent that it may fairly be said that the result has frequently been a denial of justice: First, those cases in which the amount in controversy is small; and second, those in which one of the parties is so poor that he cannot afford to wage a legal battle. The ordinary procedure has proved too cumbersome as a method of enforcing small claims. The necessity for written pleadings and a formal issue of fact, necessarily means a considerable expense, an expense which is entirely disproportionate to the amount involved in the litigation of small causes . . . . What is needed in the case of small causes is . . . a determination in the first instance by a properly qualified tribunal, proceeding in a more summary method than that employed in larger causes.

The assumption underlying Scott's argument is that a claim for a small amount is a simple claim (it is never specified who defines "small," but presumably it is the court or the legal profession, not the plaintiff or defendant) and thus can be disposed of quickly (*i.e.*, inexpensively). This assumption runs throughout the early (and some of the recent) literature (see for example

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Information on history of the courts is also available in Fowks, 1968; McFadgen, 1972:7-26; National Institute for Consumer Justice, 1972: 3-5.

7. An article by Nehemkis (1933) is exceptional: (1) in its careful examination and analysis of court proceedings, using observation and case materials and (2) in the questions posed, such as: Who is served by the court? How large are the debts? How effective is the court for creditors and debtors? While this court is not a small claims court, strictly speaking, it has many similarities to small claims in terms of goals, procedure and type of cases handled. No other study of which we are aware, during the period up to ca. 1950, and certainly no other study in the 1930's, subjects the small claims or debtor's courts to this rigorous an analysis. It is noteworthy that criticisms levelled at the Debtors' Court by Nehemkis, and his suggestions for reform, bear many similarities to criticisms later directed at small claims courts, when their operations were subjected to careful scrutiny. In particular, note his discussion of problems in Nehemkis, 1933: 586-90.

J.A.J.S., 1918:3, 4 and 10-13; *J.A.J.S.*, 1924:247-48, 252-53 *Colum. L. Rev.*, 1934:932; Cayton, 1939:57; Bradway, 1940: 19)[8]. Linked to the assumption of simplicity is the assumption that claims will be ligitimate, or at least that illegitimate claims will be eliminated at the time of filing (Edholm, 1915:29-30; Smith, 1919:42 and 56-57; *J.A.J.S.*, 1924:250; *Colum. L. Rev.*, 1934:936, 943). It was assumed that these were straightforward cases of non-payment of a legitimate debt, and little or no allowance was made for the possibility that the economic relationship might involve deceptive sales practices or systematic exploitation of consumer by merchant. Thus the court was conceived and structured as a "plaintiff's court;" the principal protection afforded the defendant was provision for a stay of execution. In reporting the Massachusetts law, for example, the *Colum. L. Rev.* (1934:944) notes that "Provision is made for staying execution so long as the defendant continues to pay the installments. Such measures are also beneficial to the plaintiff, *for the defendant will be more likely to confuss judgment if* he is permitted to pay at intervals" (emphasis added).

More disturbing is the assumption (*e.g. J.A.J.S.*, 1924:253-54) that claims *by the poor* are simple Presumably, since the poor have little money they cannot become involved in complex claims (Hostetler, 1965:177). Scott (1923:457) points to this problem in noting "the situation of the poverty-stricken litigant who has a large cause," but suggests that while in such cases "it may be impossible to do summary justice," the more complicated judicial machinery can and should be much simplified. The *Colum. L. Rev.* 1934:939) asserts the desirability of avoiding a jury trial for small claims (which, it is noted, are usually brought by the poor). It is suggested that if constitutional rights to trial by jury are guaranteed for all civil cases, irrespective of amount, an amendment may be "the only remedy."

Perhaps the clearest—certainly the least subtle—explanation for linking small cases, and specifically cases brought by those of low income, to simple procedure, and for the strong support and enthusiasm expressed by members of the bar for small claims courts,[9] is the observation (*J.A.J.S.*, 1918:28) that

8. McFadgen (1972:49-57) and the National Institute for Consumer Justice (1972:37-42) also consider the problems of linking simplicity and amount of claim. Robinson links speedy handling to amount of claim, but notes later that "pleadings should be as simple as is consistent with the cause of action" in cases up to $1000 (1963:423-28). Cayton (1939):60-61) and the *Colum. L. Rev.* (1934:946) suggest that informal procedure should be applicable to larger cases as well, but the idea is not pursued.

9. It is noteworthy that throughout the period covered in this review

> In most instances participation in little trials by the lawyer is a dead loss to somebody, and often it is a loss to the lawyer himself. Even for those lawyers who are dependent upon all the little fees which can be picked up in magistrates' courts there would be direct gain through expeditious trials, for earnings are based on results obtained quite as much as upon time spent. Trials consuming half an hour each will net the lawyer just as much as those requiring a day.

(See also Bradway, 1940:18; Currie, 1956:33; Robinson, 1963: 421-22).

Whether arguments stressing the economic needs of lawyers, or those stressing the needs of the low-income wage-earner, are accepted as underlying the movement to develop small claims courts, the consequence was a court the main purpose of which was to make our legal system accessible to a large urban group which could not afford to make use of the regular system: the 'reputable poor' in Matza's (1966) terms. It was *not* intended, as Harley (1920:76) optimistically suggested, and Cayton (1939: 64) reiterated, as a "laboratory" in which a more widely applicable procedure was being evolved, nor was it intended as a mechanism through which the "indigent" or "disreputable poor" could be provided with a political voice (*S. Cal. L. Rev.*, 1969: 494-495). Because of this limited concept of the court's function, and particularly because of the built-in assumptions that (1) the claims of the plaintiff would be straight-forward, simple and legitimate and (2) the relationship between plaintiff and defendant was politically neutral, the court bore within it the seeds for its gradual transformation. It could develop, from a forum in which the "average man" could recover a legitimate claim, to a forum in which businessmen and landlords (some "average" but others both politically and economically powerful) would bring claims to be dealt with (in their favor) in a summary manner. This was predicted in some of the early literature (Smith, 1919:54) but was dismissed as "readily controllable."[10] Yet research in the courts since the early 50's suggests that in fact the small claims court has become a forum where many of today's "average men"—both low and middle income—are exploited.

(1906-1974) most of the major planning for and criticism of small claims courts has been carried out by lawyers. The only exception of which we are aware is The Small Claims Court Study Group (1972a; 1972b) which included lawyers and non-lawyers.

10. Pound (1940:264) pointed out that simple procedure is attractive to a range of litigants, and that those with larger (money value) cases, will tend to "take over" the court. Robinson (1963:424) notes that "clerks and judges cannot be expected to pay the same attention to individual litigants as to the claimant who is before the court day after day . . . Busy men must be hurried out. . . ."

In sum, the small claims movement of the 20's must be viewed as a minor, and sloppily devised, adjustment in our judicial system, created by the legal profession to fulfill certain narrowly defined needs of low-income wage-earners and tradespeople who could not afford to use their services but whose political allegiance was of sufficient importance that measures were taken to prevent their alienation. No basic premises were questioned, no established interests were disturbed. The fundamental problems of a system of civil justice built almost exclusively on a "battle" model, in which justice is linked to the strict observance of procedural technicalities (Packer, 1969:149-173), and is available only to those who can afford either a specialist in that procedure or an alternative to the system, remained unchanged. Small claims procedure, as a streamlined version of the battle model without any of the due process protections, was potentially even more problematic. The goal of determining and enforcing "with reasonable speed and at reasonable expense, the substantive rights of the parties" (Scott, 1923:455) remained as elusive as ever, whether the claim was minor or major.

II

THE EMPIRICAL STUDIES

In the past 25 years many articles about small claims courts have appeared in legal and popular journals. Most of these focus on a particular (*e.g.*, Los Angeles, or the state of Texas) court and are based on research in small claims statutes or court records, although some involve observation and interviews with litigants. The articles range from a simple explanation of procedure to a detailed analysis and critique of court operations. In contrast to earlier articles (reviewed in the previous section) which were generally laudatory, many of the articles are critical of the small claims process.

Judge Milton Kronheim's (1951) article is notable in that it was the first to suggest that small claims courts were being used to the disadvantage of the poor. Kronheim (1951:115) notes that small claims court is an "arena in which are *encouraged* to appear the more . . . substantial components of our population pitted against their opposites" and points to the high number of default judgments. While Kronheim's only suggested remedy for this situation is that court statutes be changed to provide greater protection for the (mostly poor) defendants (*.e.g* installment payment of judgments), his article is significant in that it points to three of the major issues raised in subsequent cri-

tiques: heavy use of the court by business plaintiffs; the high proportion of individual (poor) defendants; and the high number of defaults.

A series of articles in law journals followed during the next two decades, reporting on the litigation of small claims in California (*Stan. L. Rev.*, 1952; Pagter *et al.*, 1964; Moulton, 1969; *S. Cal Law Rev.*, 1969), Florida (Currie, 1956), Illinois (Robinson, 1963; Fox, 1970; Minton and Steffenson, 1972), Indiana (Coats *et al.*, 1969), Kansas (Fowks, 1968), North Carolina (Stephens, 1971; Haemmel, 1973), Ohio (Hollingsworth *et al.*, 1973), Pennsylvania (Steadman and Rosenstein, 1973), Texas (Sanders, 1954), Washington D.C. (Murphy, 1967), West Virginia (Silverstein, 1956) and Wisconsin (Boden, 1963). Several other (unpublished) studies were conducted in courts in California (Yngvesson, 1965; Dellinger, 1972), Massachusetts (Hennessey, 1973), Illinois (Smith, 1970) and New York (Siegel and Atwood, 1971; Blumenfeld, 1972; Special Committee on Consumer Protection, 1974; Jones, 1974). Two articles (Consumer Council, 1970; Ison, 1972) discuss the litigation of small claims in England.

The first report on small claims courts nationwide was published in 1955 by the Institute of Judicial Administration, and presents basic information on each court then in existence (*e.g.*, jurisdictional amount, appeals, limitations on attorneys, etc.). A more summary description of methods and procedures in U.S. small claims courts is provided by Fowks (1968). Discussion and analysis of problems in the litigation of small claims, beyond the jurisdiction of one particular court, are provided in studies by the *Colum. J.L. & Soc. Prob.* (1969), the Consumer Council, (1970), Klein (1971), McFadgen (1972), the National Institute for Consumer Justice (1972), and the Small Claims Court Study Group (1972a).

In spite of the large volume of literature on small claims courts, only a few studies undertake an analysis of small claims operations based on careful empirical research. Of particular value, in this respect, are the studies by Pagter *et al.* (1964), Dellinger (1972), Hollingsworth *et al.* (1973) and Jones (1974). Several articles simply describe current or proposed small claims legislation (*e.g.*, Sanders, 1954; Silverstein, 1956; Currie, 1956; Fowks, 1968; Coats *et al.*, 1969). Others, which discuss small claims practice, are impressionistic, providing little or no information on how data were gathered, how many hearings were attended or cases reviewed, or how conclusions were drawn (*e.g.*, *Stan. L. Rev.*, 1952; Klein, 1971; Blumenfeld, 1972; Minton and

Steffenson, 1972; Haemmel, 1973). With one exception (Blumenfeld, 1972, which contains information on the Harlem court) these more descriptive and impressionistic articles will not be discussed in this review.

The more general reports reflect the weaknesses of local studies on which they are based. *Little Injustices*, the two-volume, 770 page report by the Small Claims Court Study Group (SCCSG) contains hundreds of pages of descriptive material on small claims statutes, nationwide, and presents data based on docket research and a questionnaire survey of plaintiffs, for three Massachusetts courts. Much of this material is unanalyzed, however, and as the authors note, only limited conclusions can be drawn from it due to the incomplete nature of the court records and the small number of questionnaire respondents. In spite of these limitations, the authors attempt a more general discussion of problems in small claims litigation, based on their own research and that of a few others. The report also includes an excellent bibliography of small claims research. The report written by David Gould for the National Institute for Consumer Justice (NICJ *Report*) is much better organized than *Little Injustices*, but suffers from similar problems. It provides well-considered analyses of several small claims problem areas, and excellent proposals for reform; but one seeks in vain in the body of the report for a presentation and critical analysis of the data collected by its own researchers, or by others, on which its proposals are based.

Less ambitious attempts at a general analysis of small claims problem areas are provided in articles by the *Colum. J.L. & Soc. Probs.* (1969) and the Consumer Council (1970). Both of these are well-written and provide intelligent and concise discussions of the main issues raised at much greater length in the NICJ *Report* and *Little Injustices*. Once again however, the empirical work on which discussion is based is not questioned or evaluated. The one more general study which avoids some of these pitfalls, Terrence McFadgen's excellent analysis of the theoretical premises underlying small claims courts as dispute settlement mechanisms, will be considered in detail in Part III of this paper.

In the following pages we will discuss fourteen studies in which the results of empirical research in small claims courts are analyzed and presented. The main features of these studies are summarized in Table 1.

TABLE 1: MAJOR STUDIES OF SMALL CLAIMS COURTS

STUDY	LOCATION	DATA	ISSUES RAISED
Pagter *et al.* (1964)	Alameda Cty., California	Court dockets, FY 1963: random sample of 386 cases.	Users of court, types of claims, disposition. Emphasis on large number of corporate, group claims; defaults; venue.
Moulton (1969)	4 rural cities, California	1. Court dockets, CY 1968: random sample of 400 cases 2. Interviews. 3. observation of one session in each court	Problems confronted by the low-income defendant in small claims court: experienced business plaintiiffs, alien atmosphere, lack of counsel, judicial indifference.
Consumer Council (1970)	New York City, Washington, D.C. Philadelphia	Observation	Basic information (hours, location, how to file); advantages and disadvantages of counsel; problems confronted by inexperienced individual defendants.
Smith (1970)	Champaign Cty., Illinois	1. Court dockets Jan. 1964-March 1968. 4651 cases; random sample of 500 cases. 2. Interviews. 3. Observation of 50 hearings.	Replication of Pagter *et al.* (1964). Further, investigates relationship between: type of claim, amount of claim, and presence or absence of attorney; case complexity, personality of judge, and disposition; type of plaintiff and age of claim. Analysis of way claims by Black plaintiffs and defendants handled.
Siegel and Atwood (1971)	New York City (Manhattan court)	1. Court dockets. Sept. 1970: 1073 cases. 2. Plaintiff interviews.	Is the court simple and effective for laymen? Analysis of types of claims, types of litigants, dispositions, collection problems. Discussion of judge/arbitrator differences.
Blumenfeld (1972)	New York City (Harlem and Manhattan courts)	1. Court dockets Jan-June 1972: 1321 cases 2. 398 complaint reports from community advocates 3. Interviews with court personnel 4. Observation	Functioning of small claims court in a low-income neighborhood. Discusses types of claims, users, disposition, publicity.

TABLE I: (Cont'd.) MAJOR STUDIES OF SMALL CLAIMS COURTS

STUDY	LOCATION	DATA	ISSUES RAISED
Dellinger (1972)	Los Angeles, California	1. Observation for 100 hours (600 cases) during Jan-April, 1972 2. Interviews of court personnel 3. Questionnaire to plaintiffs	Small claims court from the litigant's perspective; demeanor of judge and litigants; small claims court as "supermarket justice."
McFadgen (1972)	Middlesex Cty., Massachusetts	Observation of 100 defended cases during Sept.-Dec. 1971. Published literature to date.	Problems of dealing effectively with contested small claims cases, with particular attention to role of judge and role of counsel. Comparison of alternative procedures for dealing with small claims: adjudication, conciliation, arbitration.
NICJ *Report* (1972)		1. Published literature to date. 2. Five sub-contract reports.	A detailed discussion of every facet of small claims operations, using results from available and commissioned reports. Focus of study is on function of the court to help the individual litigant prosecute his claim. Defines features that hinder this and suggests reforms.
NICJ Sub-Contracts: SCCSG (1972b)	Roxbury and Boston, Mass.	1. Roxbury: Court dockets July 1, 1970-Dec 23, 1971 (consumer plaintiffs only): 173 cases. Interviews with plaintiffs. 2. Boston: Court dockets for FY 1971: 1313 cases. Interviews with plaintiffs. 3. Some observation.	Basic information on court. Analysis of cases in terms of identity of parties, cause of action, amount, disposition, ± lawyer, collection, satisfaction.
Clute and Hain	Detroit, Michigan	1. Court dockets for 3 mos 1971: 325 cases ("individual" plaintiff only). 2. Observation of 15 proceedings.	Basic information on court. Analysis of cases in terms of identity of parties, type of claim, amount, disposition, time from filing to disposition.

TABLE 1: (Cont'd.) MAJOR STUDIES OF SMALL CLAIMS COURTS

STUDY	LOCATION	DATA	ISSUES RAISED
Binder and Airey	Los Angeles, California	1. Court dockets for 3 mos., 1972: 624 cases (consumer plaintiffs only). 2. Questionnaires. 3. Interviews with court personnel. 4. Observation.	Basic information on court. Analysis of cases in terms of identity of parties, type of claim, amount of claim, continuances, disposition, satisfaction.
Ann Arbor Study	Ann Arbor, Michigan	Court dockets for CY 1969: 230 cases.	Basic information on court. Analysis of cases in terms of identity of parties, amount, disposition, time from filing to disposition.
SCCSG (1972a)	Some nationwide data, but principally Boston, Cambridge, Worcester, Mass.	1. Boston: Court dockets for FY 1971 (1314 cases). Plaintiff interviews. 2. Cambridge: Court dockets for CY 1970 (1578 cases). Plaintiff interviews. 3. Worcester: Court dockets July 1970-April 1971 (random sample of 125 cases). Plaintiff interviews. 4. Observation.	Basic information on small claims court nationwide (venue, jurisdiction, filing procedure, etc). Discussion of problems such as access, service, publicity alternative procedures, formality, counsel, role of judge. Results of empirical research on users, amounts, type of claim. Reform proposals. Aim of study is to find out "what happens in small claims court" and whether it can serve as a means of redress for a large number of consumer grievances.
Hollingsworth *et al.* (1973)	Hamilton and Clermont Cties., Ohio	1. Court dockets for FY 1971: random sample of 400 cases from H. and 100 cases from C. 2. Interviews of all individual and unrepresented sole proprietor plaintiffs from sample cases.	Aim: To evaluate court as an effective and inexpensive forum of justice adapted to needs of community, especially the low-income litigant. Analysis of cases in terms of identity of parties, cause of action, amount, disposition, collection, time from filing to disposition. Discussion of role of judge, role of counsel, court as a collection agency, satisfaction, conciliation. Background information on plaintiffs: income, occupation, race, education.

TABLE 1: (Cont'd.) MAJOR STUDIES OF SMALL CLAIMS COURTS

		3. Attorney interviews. 4. Questionnaires to judges & referees in Ohio municipal and county courts. 5. Observation.	
Steadman and Rosenstein (1973)	Philadelphia, Pa.	1. Court dockets for 4 mos., 1971 (consumer plaintiffs only) 614 cases. 2. Questionnaires to plaintiffs. 3. Interviews with court personnel. 4. Observation.	Focus on effectiveness of court from perspective of consumer plaintiff. Analysis of cases in terms of identity of parties, cause of action, amount, disposition, collection, ± lawyer. Discussion of role of judge; significance of representation; satisfaction.
Special Committee on Consumer Protection (1974)	4 N.Y. City courts, especially Manhattan and Harlem courts	1. Court records: 620 cases from CY 1973. 2. Questionnaires to plaintiffs. 3. Marshall & sheriff interviews.	Analysis of collection problems.
Jones (1974)	Buffalo, N.Y.	Court dockets 1970: 788 cases.	Significance of legal representation to success in small claims court. Discussion of informal proceedings and centralized as vs. local court system.

Notable in reviewing this research was the similarity of small claims courts across the country with regard to use patterns and processes. Despite the "local nature"[11] of the courts, all of the studies point to the high number of business plaintiffs, the high number of non-business "individual" defendants (frequently identified as low-income consumers), and a high default rate. In addition, all of the studies note and discuss the problems confronted by unrepresented plaintiffs or defendants appearing in court for the first time. These problems are linked to issues such as courtroom atmosphere (formality or informality), access to information on how to use the court effectively (*.e.g* whether some form of counsel should be present) and types of procedures used (adjudicatory and/or nonadjudicatory). To consider each study separately would involve considerable repetition. We shall instead try to assemble from them the information provided and questions raised with regard to the functioning of the court and its effectiveness. Strengths and weaknesses of each study will be discussed in this context.

Who Is Using The Court?

Moulton wrote in 1969 that "wherever small claims courts exist they tend in practice to be taken over by business-organization claimants—both reputable and disreputable—unless statutory curbs are imposed against this trend." Individual litigants, in contrast, appear most often in small claims court as defendants (1969:1660-62). This is a common theme in all of the studies reviewed. The NICJ *Report* (1972:7), summarizing research in the '50s and '60s, states that "The principal criticism leveled at the small claims court system is that, by and large, its main activity is to serve as a collection agency for creditors." In most of the studies, however, the meaning of such categories as "business" and "individual," and the distinction between "creditor" and "individual" is not carefully explored. There is little or no discussion of the differences between sole proprietors and partnerships, and no rationale is provided for classifying plaintiffs according to whether they are in business or not. Only one study provides reliable information on whether the businessmen using the court are rich or poor. The studies are more specific about who is *not* using the court—the poor, the consumer, the individual with a problem—and on the relative frequency with which

11. Small claims courts are created by individual state legislatures. Rules and procedure (which determine limitations on attorneys, appeals, etc.) are established by legislature or high court and the state. No two states have exactly the same small claims court.

consumers appear in court as defendants. The results of empirical research on litigant categories are presented in Tables 2 and 3.

The data indicate that in most courts where business plaintiffs are permitted, these plaintiffs will in fact tend to predominate, and that they will usually be suing individual (non-business) defendants. In only two of the courts did non-business plaintiffs comprise more than 42% of those bringing suit; in seven of the fourteen courts they comprised less than 17% of the plaintiffs. In contrast, individuals appeared as defendants in at least 78% of the cases in all but two of these courts. More significantly, studies of courts in California and Massachusetts present evidence of repeated use of the court by large businesses for debt collection. Sixteen organizations (most of them large-scale businesses or government agencies)[12] accounted for 44.2% of the claims sampled in an Oakland court for FY 1963; the single most frequent user of the court was a government agency, which brought 20% of the claims sampled.[13] In a Cambridge small claims court, three large businesses brought over forty claims each during CY 1970, and twelve others brought between ten and twenty-nine claims each during this period (SCCSG, 1972a: 174).[14]

With the exception of Pagter *et al.* and Smith (1970), all of the studies deplore the heavy use of small claims courts by government and business plaintiffs for debt collection, and suggest that this use of the court conflicts with the intent of its founders "to make civil justice accessible to the poor" (Moulton, 1969: 1657). The assumption in most studies is that business plaintiff and poor plaintiff are mutually exclusive categories. It is also assumed (Moulton, 1969:1662) that those individuals who do appear as plaintiffs in the court are "middle-class and well educated." Moulton (1969:1662) suggests that "small claims courts

12. Observation based on authors' knowledge of area. Pagter *et al.* (1964) do not comment on the size of the businesses.

13. Of 386 claims sampled by Pagter *et al,* 59.3% were group claims, and they note that "The usual number of group claims filed together was between ten and fifteen" (1964:885). Most of the claims brought by the government agency (County of Alameda) were group claims, and one comprised ninety-seven individual suits (1964:887). Moulton (1969:1661) also comments on the high proportion of group claims, in four rural California courts.

14. The three principal users were New England Telephone Co. (78 claims) Macy Furniture Co. (45) and Mt. Auburn Hospital (44). The data presented by the Small Claims Court Study Group (1972a: 174, Table 15) are unclear, but it appears that the number of claims listed refers to number of appearances of the plaintiff in question, rather than to one appearance with, e.g. a 78-suit group claim. For further discussion of the issue of repeated use of small claims courts by business plaintiffs, see *S. Cal. L. Rev.* 1969: 494, n.6.

TABLE 2: TYPE OF PLAINTIFF

Study	Individual	Proprietorship*	Corporation	Gov't.	Total Bus. & Gov't Pltfs.	Unknown	Total
Pagter *et al.* (1964) California	34.7% (n=134)	16.8% (n=65)	28.5% (n=110)	20% (n=77)	65.3% (n=252)	—	100% (n=386)
Moulton** (1969) California							
Ct. A	24%	32%	28%	16%	76%	—	100% (n=100)
Ct. B	13%	34%	14%	39%	87%	—	100% (n=100)
Ct. C	16%	23%	61%	—	84%	—	100% (n=100)
Ct. D	10%	31%	8%	51%	90%	—	100% (n=100)
Smith** (1970) (Illinois)	14.3%	—	—	—	85.7%	—	100% (n=498)
NICJ *Report* (1972)	34.3%	—	—	—	64.3%	1.3%	99.9%
Ann Arbor Study	(n=79)	—	—	—	(n=148)	(n=3)	(n=230)
SCCSG** (1972a)							
Boston	39.3%	—	—	—	56.5%	4.2%	100% (n=1314)
Cambridge	42.8%	—	—	—	57.2%	—	100% (n=1578)
Sacramento	55.1%	—	—	—	44.9%	—	100% (n=445)
Wash. D.C.	16%	—	—	—	84%	—	100% (n=14,172)

TABLE 2: (Cont'd.) TYPE OF PLAINTIFF

Worcester	22%	—	—	—	78%	—	100% (n=125)
Hollingsworth *et al.* (1973) Hamilton Cty.	26.3% (n=105)	36.3% (n=145)	37.5% (n=150)	—	73.8% (n=295)	—	100.1% (n=400)
Clermont Cty.	11% (n=11)	48% (n=48)	41% (n=41)	—	89% (n=89)	—	100% (n=100)

* Proprietorship: Pagter *et al.* (1964) include individuals and partnerships doing business under a business name. Moulton (1969) includes individuals and partnerships doing business under a business name, and individuals who sued as individuals for a debt identifiable as a business claim. Hollingsworth *et al.* (1973) include any unincorporated business organization and any claimant who could be identified as suing on a business debt.

** Author provides percentages only.

TABLE 3: TYPE OF DEFENDANT

Study	Individual	Proprietorship	Corporation	Government	Total Bus. & Gov't Defs	Unknown	Total
Pagter *et al.* (1964)	85.7% (n=331)	8.8% (n=34)	3.4% (n=13)	.3% (n=1)	12.5% (n=48)	1.8% (n=7)	100% (n=386)
Moulton* (1969)	93.3%	4.3%	2.5%	0%	6.8%	—	100.1% (n=400)
Smith* (1970)	87.2%	—	—	—	12.8%	—	100% (n=498)
Siegel and** Atwood (1971)	43.6% (n=468)	—	—	—	56.4% (n=615)	—	100% (n=1083)
NICJ *Report* (1972) Ann Arbor Study	48% (n=110)	—	—	—	50% (n=115)	2% (n=5)	100% (n=230)
SCCSG* (1972a) Cambridge	79.3%	—	—	—	20.7%	—	100% (n=1578)
Worcester	94%	—	—	—	6%	—	100% (n=125)
Sacramento	78.5%	—	—	—	21.5%	—	100% (n=445)
Hollingsworth *et al.* (1973)							
Hamilton Cty.	78.3% (n=313)	17.6% (n=71)	4% (n=16)	—	21.6% (n=87)	—	99.9% (n=400)
Clermont Cty.	85% (n=85)	10% (n=10)	5% (n=5)	—	15% (n=15)	—	100% (n=100)

* Author provides percentages only.
** Individual plaintiffs only

are 'courts of the poor' only in the sense that many poor people are brought into them by compulsory process," but provides us with no data to support this statement. A more careful examination of small claims plaintiffs elsewhere suggests however that this may not be an accurate description of courts in other parts of the country.

Hollingsworth *et al.*, in a study of an urban and a suburban court in Ohio, distinguish types of business litigants, and find that retail businesses (other than department stores), medical services, and service-repair businesses are the leading business users of the court (1973:513) (Table 4). Two other studies of

TABLE 4: TYPES OF BUSINESS LITIGANTS USING SMALL CLAIMS COURT IN HAMILTON AND CLERMONT COUNTIES, OHIO

Type of Business	Number of Claims	Percentage of all Claims	Percentage of Claims by Business Litigants
Retail-Other	83 (51)*	20.75 (52.0)	28.14 (58.43)
Medical Services	67 (10)	16.75 (10.0)	22.71 (11.23)
Service, Repair-Other	38 (11)	9.5 (11.0)	12.88 (12.36)
Housing-Rentals	20 (1)	5.0 (1.0)	6.78 (1.12)
Retail-Dept. Stores	20 (2)	5.0 (2.0)	6.78 (2.25)
Public Utilities	16 (7)	4.0 (7.0)	5.42 (7.87)
Legal Services	16 (2)	4.0 (2.0)	5.42 (2.25)
Manufacturing	9 (2)	2.25 (2.0)	3.05 (2.25)
Professional Services-Other	7 (1)	1.75 (1.0)	2.37 (1.12)
Publishing	7 (0)	1.75 (0.0)	2.37 (0.0)
Construction	6 (1)	1.5 (1.0)	2.03 (1.12)
Insurance	4 (0)	1.0 (0.0)	1.36 (0.0)
All Other	2 (0)	.5 (0.0)	.68 (0.0)
TOTAL	295 (89)	73.75 (89.0)	100.0 (100.0)

* Figures in parentheses are for Clermont County. Other figures are for Hamilton County.

midwestern courts (Smith, 1970; *Ann Arbor Small Claims Court Study*, 1972) also distinguish business users and present evidence that claims brought by small local businesses comprise a significant proportion of overall business suits (Table 5). These data suggest that the assumption which has followed from Pagter *et al's* findings in California, that a business dominated court is a court dominated by large business group claimants, may not be justified elsewhere, and that a breakdown of business litigants by size may be important for an accurate portrayal of whom the court is serving.

An even more detailed examination of business plaintiffs was carried out in Ohio by Hollingsworth *et al.*, who interviewed all individual and unrepresented sole proprietor plaintiffs in their

TABLE 5: TYPE OF BUSINESS PLAINTIFFS

Study	Small Bus.	Large Bus.	Corp.	Landlord	Professional	Tenant	Employee	Gov't.	Non-Business	Total
Smith (1970) (Illinois)	40.9%	—	7%	11.5%	2.4%	—	—	23.9%	14.3%	100% (n=498)
NICJ *Report* (1972) (Ann Arbor)	17.4% (n=40)	3% (n=7)	—	13.5% (n=31)	8.3% (n=19)	19.1% (n=44)	3% (n=7)	—	35.7% (n=82)	100% (n=230)

400- and 100-case samples. Their aim was to obtain background information on these plaintiffs since they "closely approximated the kind of litigants for whom the court was originally established" (1973:477-78). This is the only study of which we are aware which attempts both to distinguish the "little guy" in business from other business users of the court, and to find out more about him.[15] Almost 34% of the plaintiffs sampled in the urban court, and 46% of those in the suburban court, fell into the individual or unrepresented sole proprietor category. The results of interviews with these plaintiffs, in which information on race, income, occupation and education were obtained indicate that a significant number are in the blue collar, and lower income, brackets.[16] Of particular interest is Hollingsworth *et al.*'s (1973: 487-88) conclusion regarding the two Ohio courts that "the individuals who filed small claims in both counties were fairly representative of the whole community" in terms of the categories examined.

In sum: Most of the studies of small claims plaintiffs have relied primarily or exclusively on information from court records. Others have made unsuccessful attempts to interview a representative sample of former plaintiffs. Because the informa-

15. Both Moulton (1969) and Pagter *et* al. (1964) provide figures for proprietorships which bring suit in California courts, but no attempt is made in either study to explore the social characteristics of business plaintiffs which are grouped in this way. Moulton notes (1969: 1662) in passing that "No doubt many of the business plaintiffs appearing in small claims court, like the 'tradesman, victualler or labouring man' for whom the earliest small claims courts were established, are small businesses whose informal efforts to collect legitimate claims have been unsuccessful," but she does not pursue this point. In the Small Claims Court Study Group report (1972a), proprietorships are not singled out, but are merged with corporate and government plaintiffs.

16. With reference to individual and unrepresented proprietor plaintiffs only (Hollingsworth *et al.*, 1973:514, 519-21): Blue collar workers comprised 51% of plaintiffs in the urban court, 44% in the suburban court. In the urban court, 32% of the plaintiffs earned less than $5,000, but in the suburban court, only 9% were in this category. Thirty-six percent of the plaintiffs in the urban court, and 28% in the suburban court earned less than $10,000. In terms of education 50% of the plaintiffs in the urban court, and 72% in the suburban court, had a high school education or less. Racially, 21% of the plaintiffs in the urban court, and none in the suburban court, were Black. The remainder are classified as Caucasian. Other studies (Siegel and Atwood, 1971; Small Claims Court Study Group, 1972a; 1972b; Steadman and Rosenstein, 1973) also attempt to provide background information on individual plaintiffs but are less successful due to an inadequate response rate on questionnaires sent out. Steadman and Rosenstein's figures (1973:1330-1) on income are based on 164 answers to the income question, out of a total of 614 questionnaires sent. The Small Claims Court Study Group (1972b: 375-381) notes that it attempted to contact litigants using "a number of methods," and in its Roxbury study succeeded in only 22 cases out of 173 (occupations survey), and in only 18 out of 173 for the income level study. Siegel and Atwood (1971: Ch. 3, 11-14) base their analysis of plaintiff background on 67 responses to 109 questionnaires sent out. As Blalock (1970: 58-59) points out, response rates such as these do not provide an adequate data base.

tion available in records is sparse, and that from interviews or questionnaires incomplete, most studies have failed to provide the detailed information on users which is necessary for an accurate evaluation of whether or not the court is meeting its original goals of serving "tradesman, victualler and labouring man." That this is not its only function is clear from several studies which show that corporations and/or government agencies comprise at least 40% of small claims plaintiffs; but only Hollingsworth *et al.* seriously address the question of whom the other 50 or 60% of the plaintiffs are. Their data indicate that while Ohio courts are heavily used by larger businesses, almost a third of the claimants in one court, and almost half in another, are individuals and sole proprietors, and significant numbers of these are in blue collar or lower-income categories. More detailed analyses of this kind are necessary.

How The Cases Are Handled

Although information from most courts on the identity of small claims plaintiffs is still sketchy, there is clear evidence from all courts that the plaintiff almost always wins (Table 6). Studies of fourteen courts in six states indicate that plaintiffs win at least 85% of the claims going to judgment.[17] Furthermore, in all but two of these courts, at least 47% of the victories are won by default. How can the high rate of defendant failure be explained?

Several studies devote particular attention to the question of why so many defendants—and specifically consumer defendants[18] fail to appear in court at all. Mouton (1969:1664) points out that "Default judgements do not always occur simply because the plaintiff has an airtight case." The investigations of Caplovitz (1971:11-5, 11-6) and the SCCSG (1972a:71) suggest that many summonses are not received. Dishonest process servers "drop them down the sewer," and later swear to successful, legal completion of service. Other studies (Moulton, 1969:1662-64; Ison, 1972:19) point to problems such as the inability of some

17. A study by Jones (1970) of the Buffalo, N.Y. small claims court, cites a lower figure (60%) but it is not clear whether this figure includes defaults.

18. Ison (1971:19), discussing the default problem in Great Britain, states that "buyers do not usually defend and rarely ever sue." The National Institute for Consumer Justice (1972:136) points out that most of the default judgments in the Washington, D.C. Small Claims Court are against (consumer) debtors; Pagter *et al.* (1964:888) state that 83% of all actions brought by corporations which went to judgment ended in default whereas the default rate for all actions going to judgment was only 60%; and Siegel and Atwood (1971: Ch. 3, 44) state that a default judgment is more likely in cases where the consumer of a good or service is defending, than where the offerer of goods or services is defending.

TABLE 6: DISPOSITION OF CASE

Study	Total Claims	Not Tried Dismissed at Request of Pltf.	Other	Claims going to Trial	Judg. for Pltf. (% of Claims to trial) After Trial	Default	Total	Judg. for Def. (% of Claims to trial)
Pagter *et al.* (1964) (California)	n=386	17.1% (n=66)	26.4% (n=102)	56.5% (n=218)	30.3% (n=66)	59.2% (n=129)	89.5% (n=195)	10.6% (n=23)
(Moulton** (1969) (California)	n=400	26.5%	27.5%	46%	20%	73.5%	93.5%	6.5%
Smith** (1970) (Illinois)	n=498	—	—	—	—	—	97%	3%
Siegel and Atwood* (1971) (N.Y.)	n=1073	13.4% (n=144)	52.3% (n=561)	34.3% (n=368)	47.8% (n=176)	47.6% (n=175)	95.4% (n=351)	4.6% (n=17)
**Blumenfeld* (1972) (N.Y.)	n=1321	19%	31%	50.1%	—	—	89.9%	10.1%
Dellinger** (1972) (L.A.)***	n=237	14%	19%	67%	84.9%	—	—	15.1%

*Sample includes individual and small business plaintiffs only.
**Author provides percentages only.
***Contested cases only.

TABLE 6: DISPOSITION OF CASE (Cont'd)

Study	Total Claims	Not Tried Dismissed at Request of Pltf.	Other	Claims going to Trial	Judg. for Pltf. (% of Claims to trial) After Trial	Default	Total	Judg. for Def. (% of Claims to trial)
NICJ *Report* (1972) Clute & Hain**** (Detroit)	n=360	20.8% (n=75)	15% (n=54	64.2% (n=231)	28.1% (n=65)	60.6% (n=140)	88.7% (n=205)	11.3% (n=26)
Binder & Airey**** (L.A.)	n=624	—	—	51.6% (n=322)	55.6% (n=179)	30.1% (n=97)	85.7% (n=276)	14.3% (n=46)
Ann Arbor Study	n=213	18.3% (n=39)	37.8% (n=79)	44.6% (n=95)	74.7% (n=71)	24.2% (n=23)	98.9% (n=94)	1.1% (n=1)
Hollingsworth *et al.* (1973) (Ohio)								
Hamilton	n=400	32.5% (n=130)	7.3% (n=29)	60.3% (n=241)	16.2% (n=39)	77.6% (n=187)	93.8% (n=226)	6.2% (n=15)
Clermont	n=100	39% (n=39)	4% (n=4)	57% (n=57)	31.6% (n=18)	68.4% (n=39)	100% (n=57)	0% (n=0)
Steadman and Rosenstein**** (1973) (Philadelphia)	n=614	20% (n=123)	22.3% (n=137)	57.7% (n=354)	36.7% (n=130)	48.3% (n=171)	85% (n=301)	15% (n=53)

****Sample includes individual plaintiffs only

defendants to leave work or to travel to an inconvenient court,[19] and to psychological factors which may be of particular significance when low-income litigants are involved.[20]

Defaults are a significant aspect of the high plaintiff (and particularly the high corporate plaintiff)[21] success rate in small claims court, but defaults alone do not explain this pattern. Analysis of the way contested claims are decided indicates that even defendants who do appear in court have a high rate of failure (Table 7). The problem of how to improve the chances of

TABLE 7: DISPOSITION OF CONTESTED CLAIMS GOING TO TRIAL

Study	Judg. for Pltf.	Judg. for Def.	Total Contested Claims
Pagter *et al.* (1964)	74.2% (n=66)	25.8% (n=23)	100% (n=89)
Moulton* (1969)	75.5% (n=37)	24.5% (n=12)	100% (n=49)
Siegel and Atwood (1971)	91.2% (n=176)	8.8% (n=17)	100% (n=193)
Dellinger* (1972)	84.9% (n=135)	15.1% (n=24)	100% (n=159)
NICJ *Report* (1972) Clute & Hain	71.4% (n=65)	28.6% (n=26)	100% (n=91
Binder & Airey	79.6% (n=179)	20.4% (n=46)	100% (n=225)
Ann Arbor Study	98.6% (n=71)	1.4% (n=1)	100% (n=72)
Hollingsworth *et al.* (1973) Hamilton	72.2% (n=39)	27.8% (n=15)	100% (n=54)
Clermont	100% (n=18)	0% (n=0)	100% (n=18)
Steadman & Rosenstein (1973)	71% (n=130)	29% (n=53)	100% (n=183)

*Numbers approximate; author provides contested claim percentages only.

19. Pagter *et al.* (1964:887-88) point out that in the Alameda Cty. court "approximately twenty percent of all claims were brought against out-of-county defendants. Nearly fifty percent of the actions brought by corporations, however, were against out-of-county defendants."

20. Some studies (*S. Cal. Law Rev.* 1969:493-94; Caplovitz, 1971) suggest that the default phenomenon is linked particularly to low-income consumers in ghetto areas, where "[t]he almost inevitable breach of installment credit agreements by the consumer is anticipated by the merchant who has predicated his selling price and other aspects of his business operation on the ease of collection in the small claims court" (*Southern California Law Review*, 1969:493).

21. See notes 18 and 19, above; Hollingsworth *et al.* (1973: 513) present data indicating that corporations, and particularly represented corporations are awarded a high percentage (66% in the urban, Ohio court) of default judgments.

the defendant (and especially the low-income consumer) in small claims court has been a focus of concern in most of the literature reviewed. In the following pages, several possible explanations for the high rate of defendant failure will be explored.

(1) Defendants fail because they are confronting a more experienced plaintiff.

One of the earliest empirical studies (Pagter *et al.*, 1964: 888) suggested that patterns of success and failure in small claims court might be explained by lack of parity between the litigants, and specifically "the greater degree of business sophistication and legal prowess of corporations vis-a-vis individuals and proprietorships." This notion has been reiterated by Hollingsworth *et al.* (1973:498) and by Moulton (1969:1662) who notes that "The agent of a business that frequently resorts to small claims court to collect delinquent accounts will quickly become familiar with the procedure of the small claims court and with the relevant law governing the types of cases he usually handles. Repeated participation in small claims court is a form of legal education." Moulton suggests that business and government plaintiffs (84% of her sample) are at a particular advantage when suing poor and uneducated defendants.

Neither Moulton nor Hollingsworth provides evidence to support the assumption that business plaintiffs are repeat users of the court, but evidence from other studies (see above, p. 236) indicates that this is in fact the case in many urban areas. No study provides reliable information on the number of times individual defendants have appeared previously in court, but it is assumed by most researchers that they are first-time users.

Even if the assumption is made that defendants are in fact inexperienced, and that this affects their behavior in court, issue can be taken with the hypothesis that lack of experience explains their high rate of failure in contested cases. Individual and sole proprietor plaintiffs win at least as often as corporate and government plaintiffs[22] (Table 6), yet the three studies (Siegel and Atwood, 1971; SCCSG, 1972a; Hollingsworth *et al.*, 1973) which provide information on prior experience of individual and sole proprietor plaintiffs in small claims court indicate that these plaintiffs are not experienced users of the court.[23]

22. Pagter *et al.* (1964:888), Hollingsworth *et al.* (1973:481) and Jones (1974:18) suggest that corporate and government plaintiffs have a higher success rate than individual plaintiffs. Analysis by Jones (1974:19) however, of plaintiff success rate by type of litigant and representation suggests that presence of counsel may be more important to plaintiff success than identity of plaintiff (business vs individual). This is discussed in more detail below.

23. Dellinger's (1972:63) point however that "The plaintiff, through ini-

None of the available literature discusses plaintiff success rate when two experienced litigants confront one another. Neither is there a study comparing the rate of plaintiff success when two litigants of equal experience oppose each other, to that of plaintiffs confronting defendants with more or less experience than they.

Thus, while an explanation of the high plaintiff success rate in small claims court based on relative expereince of the litigants is not supported in the literature, information on this point is incomplete. Dellinger's analysis indicates however that regardless of whether a plaintiff is experienced or not, there is no clear pattern of "plaintiff behavior" which can be linked to his or her success. In the Los Angeles court where Dellinger's research was conducted, plaintiffs won almost 85% of 159 contested cases in which a judgment was rendered. Yet Dellinger notes (1972: 156) that almost 40% of 138 defendants of these cases were "articlate" in defending themselves. Dellinger (1972:67) states further that "a simplistic picture of plaintiffs acting one way and defendants behaving the opposite way is incorrect . . . . Most litigants structure their behavior for one purpose: to make a favorable impression on [the judge] in order to increase the chance of obtaining a favorable decision. In many cases it becomes extremely difficult to tell the suing party from the party

TABLE 8: USE OF ATTORNEY

Study	Location	Total Cases	Attorney for Pltf.	Attorney for Def.	Unknown	Total use of Attorneys
SCCSG	Wash., D.C.	2329	89%	4%	—	93%
(1972a)	Cambridge Mass.	1578	48.2%	9.7%	.8%	58.7%
Smith (1970)	Illinois	498	59.2%	8.8%	.6%	68.6%
Hollingsworth	Hamilton Cty Ohio	400	66%	**	—	—
et al. (1973)	Clermont Cty Ohio	100	35%	**	—	—
Steadman and Rosenstein (1973)	Philadelphia Pa.	614*	28%	13%	—	41%

*Consumer plaintiff only
**Information not provided

tiating his claim, has probably become familiar with the overall small claims court operation, whereas the defendant, unless through some prior experience, goes into court blind" seems reasonable, and may mean that plaintiffs have some edge over defendants. This is discussed in more detail below.

TABLE 9: USE OF ATTORNEY BY TYPE OF PLAINTIFF

Study	Location	Individual		Business (Proprietorship or Partnership)		Corporation		Government		Total	
		n	%	n	%	n	%	n	%	n	%
SCCSG (1972a)	Cambridge, Mass.	107	14.9	156	21.8	440	61.5	13	1.8	716	100
Hollingsworth *et al.*	Hamilton Cty, Ohio	5	1.9	109	41.3	149	56.4	—	—	264	99.6
(1973)	Clermont Cty Ohio	1	2.9	11	31.4	23	65.7	—	—	35	100

being sued without a scorecard." Other researchers (Moulton, 1969:1663-67; Smith, 1970:88; McFadgen, 1972:38-40; SCCSG, 1972a:121-25), in contrast, note the problems defendants frequently have in presenting their cases.

(2) Defendants fail because they are confronting a represented opponent.

An explanation of the high plaintiff success rate based on a lack of parity between the litigants need not be related to differential *litigant* experience alone. Studies of the court indicate that in spite of the goals of its founders (see above, p. 223), lawyers are a standard part of small claims operations in many parts of the country and that they are most likely to appear on the plaintiff's side, representing a proprietorship or corporation (Tables 8 and 9). Four studies (SCCSG, 1972a; Hollingsworth *et al.*, 1973; Steadman and Rosenstein, 1973; Jones, 1974) have raised the question of whether lawyers make a difference to case outcome when they do appear, although only Jones has carried out a careful and detailed analysis of the issue. His data indicate that the tendency for plaintiff success is significantly enhanced when the plaintiff is the only one represented[24] and that plaintiff success is reduced, for all litigant types, when a defense lawyer argues against a lay opponent. Data from a Cambridge court (Table 10) supports the notion that a represented plaintiff arguing

TABLE 10: % PLAINTIFF VICTORIES BY LEGAL REPRESENTATION AND BY TYPE OF LITIGANT: CAMBRIDGE SMALL CLAIMS COURT

Representation by Counsel	Individual Sues Individual	Individual Sues Government	Individual Sues Business	Individual Sues Corporation	Total
Pltf.-No Def.-No	78% (n=91)	*	80% (n=24)	80% (n=41)	79% (n=156)
Pltf.-Rep Def.-Rep	*	*	*	*	78% (n=14)
Pltf.-Rep Def.-No	94% (n=44)	*	*	*	95% (n=56)
Pltf.-No Def.-Rep	73% (n=27)	94%** (n=15)	*	*	75% (n=58)
TOTALS	81% (n=171)	83% (n=15)	79% (n=37)	79% (n=61)	81% (n=284)

* 10 or fewer cases
**Auto accident cases vs. city of Cambridge vehicles

24. Jones (1974:19) states that this is the case irrespective of litigant type, but his data on this point are incomplete.

against a lay opponent has a higher rate of success; but the plaintiff success rate is not significantly reduced when the defendant is the only one represented, either in this court or in the Philadelphia court studied by Steadman and Rosenstein (1973:1332-33). Both the Cambridge and Philadelphia samples are considerably smaller than that from the Buffalo court, however.[25]

Hollingsworth *et al.* (1973:513) present evidence that represented proprietorships and corporations are awarded a significantly higher number of default judgments than those which are not represented, and suggest that the presence of counsel may act as a factor discouraging the defendant from appearing at trial. Attorneys interviewed stated that it was a common practice to call defendants before trial date and attempt to settle.

It is difficult to judge from Jones' data or from that presented by the SCCSG what effect representation of both sides has on the rate of plaintiff success, but both studies suggest that when neither side is represented, the rate of plaintiff success is consistent across categories of litigants, and is approximately equal to the overall rate of plaintiff success irrespective of representation. These data suggest then that while the high rate of defendant failure cannot be explained by lack of representation alone, unrepresented defendants sued by represented opponents are more likely to lose (by default or at trial) than those whose opponents are not represented; in contrast, a represented defendant confronted by a lay opponent may have as much as a 50-50 chance of winning if he goes to trial. This suggests that defendants must be provided with a "handicap" if they are to have an equal chance in court. When the parties are equally balanced, defendants still lose seven cases out of ten in Buffalo and three cases out of four in the Cambridge court.

(3) Litigants are unable to air their cases fully in small claims court, and this is particularly disadvantageous for defendants.

Only three of the reviewed studies (Smith, 1970; Dellinger, 1972; McFadgen, 1972) involved a substantial amount of obervation, but these support the comments of more casual observers that many small claims hearings are rushed, conducted in a confusing atmosphere, and may not allow for a full airing of grievances. McFadgen (1972:27-28), who observed the trial of 100 defended cases in a Massachusetts court, writes that "in many small claims cases, the court does not have put before it, nor is it able to elicit from the parties, all the facts necessary to make

25. In all of these studies, the sample includes individual and small business plaintiffs only.

a meaningful judicial determination of the issues involved." He notes (1972:46-48) that this is particularly problematic in cases which are legally (5% of 100 cases) or factually complex.[26]

> Relevant evidence may not be elicited by judicial questioning because the witness is unable to grasp the direction of the questions being asked of him, because the witness gives the appearance of being unable to supply the information the court is seeking, or simply because the court does not have time to clarify the witnesses' testimony. This is a basic communications problem which has its roots partly in the witnesses' unfamiliarity with the legal framework of the dispute, partly in the courtroom atmosphere, and partly in the time constraints within which the judge must work.

Dellinger, who observed over 200 contested cases in a Los Angeles small claims court, writes (1972:104-105) that "Most of the encounters I observed represented a middle ground between not permitting litigants to explain their cases fully, and allowing litigants to ramble on past a point of diminishing returns. Parties, on the average, were given permission to introduce all of their evidence. The majority of litigants did not appear to need or to want additional time to develop their cases." Dellinger adds, however, that "for every session that I attended, at least one instance of a party being 'cut short' was observed," and suggests that shortage of time is one of the factors which jeopardize fact-finding in the Los Angeles small claims court.[27] Other researchers have noted that shortage of time, and "cutting litigants short" may hinder conciliatio n in cases where a full airing of grievances might make this possible. This issue is discussed in detail in Part III.

Several studies (Murphy, 1967:15-16; Moulton, 1969:1667-68; Hollingsworth *et al.*, 1973:496-97; Steadman and Rosenstein, 1973:1323) point to problems in the role of the judge in small claims court. Moulton (1969:1667-68) asserts that "Contracts that should be questioned and could be defeated tend to be processed as perfunctorily as all others. Rare is the judge who can stand back from this smooth-running judicial machinery, assess the content of justice in its product, and consider its far-reaching implications for the poor tenant or consumer." Hollingsworth *et al.* (1973: 496-97) point out that many Ohio small claims judges expressed confusion as to the proper nature of the judge's role in small claims court. "Many refrain from actively questioning

26. McFadgen (1972:46-48) does not provide figures for the number of cases which were inadequately dealt with.

27. The average duration of 258 contested cases was 8.9 minutes, with a range of 1 to 21 minutes per case. Dellinger lacks interview data from defendants, but notes (1972:99) that some plaintiffs "felt that they had been 'pushed through' a maze of legal boxes by unfeeling and disinterested court personnel, and consequently, that they were given little time to explain their cases."

litigants not because of indifference, but because they feel they must remain neutral both actually and apparently."

Some studies (NICJ *Report*, 1972:206-219, 553; Hollingsworth *et al.*, 1973:500; SCCSG, 1972a:6; Hennessey, 1973:11-19; Consumer Council, 1970:24-25) discuss the fact that the atmosphere of small claims proceedings, and particularly the informality of the hearing, is negatively influenced by the presence of attorneys. Gould (NICJ *Report*, 1972:214) reporting on observations in three courts, notes that "one need only stand in small claims court on a hearing night, and he will see that the overwhelming majority of the frenzied activity is caused by lawyers trying to do various things to facilitate preferential or just speedy treatment of their case." The Consumer Council (1970: 25) reporting on small claims observations in New York, Philadelphia and Washington, D.C. suggests that "the presence of lawyers (particularly lawyers on both sides) made it difficult for the judge to conduct a case informally, asking most of the questions himself. This informal procedure goes against the grain of trained trial lawyers, and the judge himself did not always seem confident enough, in the presence of other lawyers, to dispense with the procedures in which he too had been trained."

In sum, most observational studies suggest that formal atmosphere, judicial indifference or aloofness, presence of lawyers, and a crowded schedule, may hinder a full airing of grievances or a fair presentation of both sides of a case, in at least some small claims hearings. Data considered above suggest, however, that if these factors are operative, they do not seem to prevent inexperienced individual *plaintiffs* from winning when confronting an inexperienced and unrepresented defendant. Rather, they seem particularly applicable to the inexpereinced *defender* of a claim.

(4) Defendants fail because they are *defendants*

No study of small claims court suggests that defendants rarely succeed because they are defending, instead of suing; rather, it is suggested that defendants fail because they are poor, inexperienced, and/or unrepresented. While all of these factors may play a role in determining the outcome of a case, none of the data justify an explanation of the high defendant failure rate on these grounds alone. There is evidence, however, from the early literature (cf. Part I), that an assumption made in planning the court was that plaintiffs' claims would be legitimate, and none of the more recent literature suggests that this assump-

tion is any less pervasive today. Dellinger's (1972:62-63) observations of courtroom interaction in Los Angeles suggest that this assumption may affect the way defendants are treated in court, as well as the judge's decision. He writes (1972:65-66) that

> The suing party, in a mere time sense, is much more involved in the intra-court proceedings than his opponent. Prior to the judge's entrance, plaintiffs are asked by court personnel to step forward and answer questions concerning their case. The defendant receives only a very quick acknowledgement in the pre-bench operations: his name is called to determine his presence . . . . All of this, plus the fact that the defendant is the accused party—accused of some wrongdoing—results in one thing. In relation to the Court, litigants are made to feel that the plaintiffs are the 'insiders' while defendants are the 'outsiders.'

Dellinger points out further (1972:62-63) that

> Although the burden of proof is on the plaintiff, [the judge] gives some weight to the fact that the plaintiff felt such a sense of injustice that he instigated court proceedings. This can be seen in such statements by the judge as: 'I don't think this man . . . would have gone to all this trouble of filing a claim unless there was some real problem at issue here.' Litigants cannot help but pick up such cues, with the result that the plaintiff's confidence is strengthened at the expense of the defendant's feelings.

If Dellinger's assumptions are correct, and if they are applicable to other judges and other courts, special efforts may be necessary on the part of court personnel to assure the defendant of a fair hearing.

Collection

Since information on collection is not available in court files, studies which present data on this (Siegel and Atwood, 1971: Chapter IV; NICJ *Report*, 1972:182-93; SCCSG, 1972a:155, 194; Hollingsworth *et al*, 1973:483-85; Steadman and Rosenstein, 1973: 1335-36; Committee on Consumer Protection, 1974) rely on interviews and questionnaire responses. Most researchers[28] were unable to obtain responses from a representative sample of litigants, but all of the studies report that at least 25% of those responding were unable to collect even part of the judgment. Hollingsworth *et al.* (1973:483, 519) point out that collection is a particular problem for individuals and unrepresented proprietors in one of the Ohio courts: 60% were unsuccessful in collecting even partial judgment. In contrast, over 68% of represented proprietors and corporations collected at least partial pay-

28. It is not clear from Hollingsworth *et al.*'s (1973:519) Table what their sample of plaintiffs in this case was. The information they provide on plaintiff interviews suggests that they only interviewed individuals and unrepresented proprietors, yet this Table includes corporate plaintiffs.

ment. This study, which presents the only significant results of interviews on plaintiff satisfaction, reports (1973:490) that dissatisfied individuals and proprietors cited collection as the prime difficulty in using small claims court.

Summary

A majority of the studies reviewed focus attention and concern on the predominance in small claims court of business plaintiffs who successfully bring suit against individual (poor, consumer) defendants. In particular, the studies object to large, corporate business or government claimants, rather than to proprietorships, although this distinction is frequently passed over lightly when ratios of business to individual claimants are presented. Our examination of the data presented in these studies indicates that while large business and government agencies cannot accurately be said to dominate in small claims courts nationwide, substantial numbers of these plaintiffs are in fact present in most courts. They almost always bring suit against individual defendants; they are almost always represented; and they have a better chance of winning, and of collecting, than individual plaintiffs (or defendants), a fact which has been linked in one study to the fact that they are represented. The studies reviewed also indicate however that plaintiffs win at least 74% of the cases going to judgment (and frequently more), irrespective of who brings suit. The only factor which seems to significantly influence the rate of plaintiff victory is the presence of an attorney on one side.

Studies which criticize the high rate of successful business use of small claims courts against consumer defendants suggest that the situation can be remedied either by barring businesses from the court (and this suggestion is rejected in most studies) or by increasing the parity of the litigants. Our review of the literature suggests however that if the success of business plaintiffs is to be curbed (few reformers seem concerned about the high rate of success of individuals who sue other individuals), some means must be found of making the consumer defendant a little *more* than equal.

A major question emerging from this review is that of what an *effective* small claims court entails—whom it should serve, and what kinds of reforms should be undertaken in order to increase the court's effectiveness for those it serves. If small claims reform aims to create a court which will be an effective tool for consumers (particularly poor consumers) who wish to bring suit

against businesses, and effectiveness is equated with victory, there is evidence only that the court needs to be more widely publicized among consumers in low-income areas. In most courts consumers are in the minority, but when they do bring suit they usually win. If small claims reform aims to create a court which will be an effective tool for individuals who are being sued by businesses, and effectiveness is equated with victory, there is evidence that these individuals will have to be given a "handicap," *e.g.* by being provided with counsel, and the business deprived of counsel. If, in contrast, the goal of small claims reform is to create a more effective court for all litigants, and effectiveness is equated with a full and satisfactory hearing, there is evidence that the courts needs to undergo a thorough revamping. Observational studies indicate that litigants may be subjected to an impersonal and alien atmosphere, that the complexities of their case may not be brought to light, and that if their goal is to vent their spleen, they may not be given the time to do so. These are significant issues, and will be dealt with in the next section of the paper.

III

PROBLEMS IN THE SMALL CLAIMS MODEL

The manifest goals of most small claims reformers today differ little from those of the initiators of the movement in the early part of the century: To provide speedy, inexpensive and simple justice in contract and tort cases which involve small amounts of money. A subsidiary goal for some founders of the court remains important for a few reformers today—that small claims courts should set the pace for overall procedural reform, providing a real alternative to the adversary model. Early advocates, notably Levine (1918), Smith (1919), Harley (1919) and Cayton (1939), envisioned small claims courts as an appropriate arena for experimentation with conciliation; today, reports by Eovaldi and Gestrin (1971:321), Gould (1972) and McFadgen (1972) stress the potential of the small claims court idea as a "theoretical starting point upon which to build a more effective model" for civil litigation, a model in which arbitration and conciliation play a central role.

There is little evidence, however, that the goal of "simple justice" or of serious experimentation with alternative settlement models, was or is widely shared. A point made by Galanter (1974:118) in a recent essay holds for legal reformers in 1920 as for those today: that while lawyers may be ideologically

committed to legal reform, they "have cross-cutting interest in preserving complexity and mystique so that client contact with [the] law is rendered problematic." This cross-cutting interest involves a "preference for complex and finely-tuned bodies of rules, for adversary proceedings, or individualized case-by-case decision making." And McFadgen (1972:167) notes: "The profession for its part has a clear financial interest in preserving the adversary process against incursions by insurance and mediation."

This conservatism seems to have hindered real experimentation even in the small claims arena, where the economic advantage to the profession of preserving mystique is low or nil. The early small claims literature includes a good deal of discussion about procedural innovation, and particularly about experiments with conciliation, but it was attempted in only a handful of courts, where the presiding judge (such as Levine in Cleveland or Cayton in Washington, D.C.) favored this approach. Empirical studies of the small claims process as it functions today reinforce the impression of an underlying conservatism. Most small claims hearings follow the adversary model. Although the process is speedy and inexpensive, it remains too complex for many litigants to handle on their own. In spite of the goal that lawyers should not be necessary, they are present in most courts, a factor which seems to increase rather than reduce complexity. In spite of the goal of a radical change in the role of the judge, he remains a judge in the traditional sense in most courts, although this role is unsuited to proceedings in which one or both parties may be unrepresented and may need judicial assistance.

As this suggests, problems in the way small claims courts are operating today are linked not so much to who is using them, although this is a legitimate cause for concern, but to contradictions in the small claims model itself, contradictions linked to the "cross-cutting interests" of those most involved in planning and setting up the courts.

One of the most penetrating analyses of small claims courts to date, an unpublished dissertation by Terrence McFadgen, undertakes a thorough re-examination of premises on which small claims procedures are and have been operating, and of models of court procedures derived from these. McFadgen was a participant in the Small Claims Study Group, but in contrast to the emphasis placed by this group and by other recent critics (Pagter *et al*, 1964; Moulton, 1969) on whom small claims courts are and should be serving, and on what changes should be made so they are more responsive to the needs of non-business litigants,

McFadgen (1972:1) focuses on a broader issue, the goal of the courts "that rights be vindicated and disputes resolved, cheaply and effectively." His question concerns "what *sort* of process—be it adjudication, mediation, arbitration or some combination of these fundamental forms" is best suited to this goal.

The basic premise McFadgen questions is the assumption made in so much of the literature (cf. Part I) that small claims are simple claims. Evidence from studies in which a substantial sample of case materials has been examined (Pageter *et al,* 1964: 877; NICJ *Report*, 1972:40-41) indicates that in fact no correlation between jurisdictional amount and complexity can be established. Pagter *et al.*, (1964:877) note, quoting a speech by a judge at the Benicia, California Justice Court that "the average small claim is likely to be more complex than the average non-small claims case" and they suggest that "the intention in creating small claims courts was to eliminate cases under a specified dollar amount from the dockets of the formal courts, irrespective of case complexity." In some cases complexity is linked to the fact that no real issues of law are in dispute, a factor considered in some of the early literature to be an element of simplicity (*Colum. L. Rev.*, 1934: 932, note 2).[29] In others, complex legal issues may be involved although the amount is small. McFadgen (1972:56-57) notes that in most defended cases, factual complexity is the rule, rather than the exception.[30] Others (*Colum. J. L. and Soc. Prob.*, 1969:62-63; *S. Cal. Law Rev.*, 1969; Ison, 1971: 23-26; NICJ *Report*, 1972:135-44) have criticized the assumption made in many courts that the many undefended (*i.e.* default judgment) claims are in fact 'simple' cases of debt and thus indefensible, and have pointed to the importance of improving the courts' investigative facilities so that these claims can be handled more effectively.[31]

29. An article on small claims courts in the *Columbia Law Review* (1934:932) notes that "Most of the litigation in New York City Municipal Court involves only simple issues of fact, 'the chief problem generally being the determination as to which litigant is telling the truth.'" An article on Massachusetts small claims courts in *The Journal of the American Judicature Society* (1920:52) notes that "the average small wage or debt claim is a pretty simple matter" and that "arguments and briefs on law are rare in small cases . . .".

30. McFadgen (1972:57) notes further, however, that most cases are not defended, and are won by default.

31. The *Colum. J. L. and Social Probs.* (1969:62-63) asserts that "[c]omplexity of a case, not amount in controversy, is the true determinant of whether a claim is susceptible to the summary procedure of small claims courts. . . . It is clear that cases of the antitrust and securities regulation type, for example, involve extremely complex factual determinations and are out of the ambit of small claims courts. Long lists of expert witnesses, complicated pretrial discovery hearings, extensive economic evaluations from lengthy data . . . are not suited to small claims court determination. Thus a threshold of case

The mistaken premise that small claims are simple was basic to a model for court procedure in which counsel was deemed to be unnecessary. If cases involved "no defense" and/or no disputed legal issues, there was nothing for counsel to do. In such cases, parties would come before the judge in a "friendly forum," "tell him their story, answer his questions, and let him settle it, and that is what most people in such small matters want" (Cayton, 1939:59; House Document No. 597 (1920), quoted in McFadgen, 1972:11). This meant, as McFadgen points out, that parties to small claims were not viewed as engaged in a traditional adversary contest, and courtroom skills were not considered an advantage. The judge, not counsel, was to be the focal point; the judge was to elicit the facts and effect settlement of a dispute, rather than deciding on a winner or loser.

In spite of these assumptions the typical model for small claims procedure was, and is, basically adversary in its orientation, although greatly "stripped down." The judge is expected to adjudicate disputes,[32] and many litigants behave as though they *are* engaged in a contest and bring to bear whatever skills they have to effect a judgment in their favor. As indicated in Part II this puts some unrepresented litigants, and particularly unrepresented defendants, at a disadvantage, especially in cases which are factually or legally complex. In such cases, a fact-finder is required, yet the role of the fact-finder cannot adequately be filled by a judge who first hears of a case a few minutes before he is asked to bring judgment (Murphy, 1967:16; Moulton, 1969: 1665-1667; McFadgen, 1972:25-26; Hollingsworth, *et al.*, 1973: 501; Steadman and Rosenstein, 1973: 1323).

Over a third of McFadgen's thesis is devoted to a critique of the "orthodox" (adversary) small claims model which has predominated in American courts. He also discusses briefly three procedural alternatives to the orthodox model—the inquisitorial model, the arbitral model, and the lay counsel model—all of

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complexity exists which will effectively preclude small claims court adjudication but it is impossible to determine the specific line.

> The usual contract or tort action for damages does not present especially difficult factual situations. However, small contract claims will be less susceptible to easy proof than large ones, since record-keeping is generally less accurate and complete, and since legal help is less frequently sought to draft instruments or to advise on policy. Also, in business dealing in large dollar volumes, irregular merchandising and inadequate record-keeping are less likely to occur due both to standardized techniques and to business pressures resulting from greater notoriety and therefore more accountability to the public.

32. Individual judges differ in terms of whether they do or do not act as adjudicators, but the evidence suggests most view themselves, and behave as, a judge, not a conciliator (cf. Part II, above).

which he considers to be substantively similar to orthodox small claims procedure, and to have similar problems. The problem of role conflict for the judge/fact-finder is found both in the inquisitorial and arbitral models, while the lay counsel model is simply a modification of orthodox procedure, in which the fact-finding/assistance-in-preparation role of lawyer is assumed by a lay person instead. McFadgen (1972:117-140) suggests that the substitution of lay person for lawyer does not alter the basic problems.

McFadgen devotes much more attention to what he considers the major procedural alternative to adjudication, the "conciliation model," variants of which have been implemented in several cities (Cleveland, Minneapolis, Philadelphia, New York and Washington D.C.). The main feature distinguishing conciliation from adjudication is that the "judge" is not a judge, but an active agent in eliciting the true nature of the dispute and in bringing the parties toward a mutually acceptable resolution. 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, with a view to increasing mutual understanding (McFadgen 1972:63, 64).

Advantages of the conciliation model for small claims are that: (a) It aims at amicable resolution of a dispute rather than at fault-finding and an either-or decision, an important consideration when on-going relations are at issue.[33] Even when there is no on-going relation, compromise may be the most satisfactory solution for both parties since the outcome of litigation is unpredictable and each party risks total loss; time and trouble involved may be more than the chance of winning is worth. (b) Further, parties to the dispute are provided an opportunity for self-expression which may in itself be an important factor in "settling" the dispute, as McFadgen (1972:102) and other (Yngvesson, 1965; Moeller, 1972; Hennessey, 1973) have noted. McFadgen (1972:70-73) argues that the very absence of attorneys in small claims proceedings creates a need for some mechanism which will identify and handle cases amenable to conciliation. Many litigants prefer to compromise, but "the traditional buffer between potential litigant and litigation," the attorney, is usually unavailable.

33. No study provides quantifiable data on cases in which on-going relations are involved, but several (McFadgen, 1972: 29-46 and 143-45; National Institute for Consumer Justice, 1972: 157-59; Smith, 1970: 29-42) suggest that this is important in cases observed.

McFadgen (1972:88) suggests that a major problem in U.S. experiments with conciliation has been the attempt to combine in one role the functions of judge and conciliator: Specifically, "The element of incompatibility between, on one hand, the judicial role which stresses disinterested aloofness, and on the other hand, the mediator's role which may require active participation in the working through of the dispute." McFadgen notes further that the mediator's therapeutic role demands human relations skills—tact, ability to empathize, to suspend judgment, to stimulate productive self-expression—which are in conflict with the authoritarian, aloof, and rule-oriented aspect of so much judicial behavior.

These problems in role conflict when a judge attempts to mediate or vice versa have also been discussed by others. Eckhoff (1966:165), provides a detailed analysis of the differences in mediator, judge and administrator roles, noting in particular the difference in time perspective required by each. He concludes that

> it is difficult to combine the role of the judge and the role of the mediator in a satisfactory way. . . . By mediating one may weaken the normative basis for a later judgment and perhaps also undermine confidence in one's impartiality as a judge; and by judging first one will easily reduce the willingness to compromise of the party who was supported in the judgment, and will be met with suspicion of partiality by the other.

Fuller (1963:24-25), referring to contrast of arbitration and mediation, notes the "distinct purposes and hence distinct moralities" of the two processes: mediation aims at optimum settlement for both, while arbitration aims at a decision according to a contract, and these differences in aim imply different procedures. He also raises the important point that "the facts sought by those procedures are different" since "essential facts" can only be defined by reference to an objective (*i.e.*, optimum settlement or a decision according to law). "If a person who has mediated unsuccessfully attempts to assume the role of arbitrator he must endeavor to view the facts of the case in a completely new light, as if he has previously known nothing about them."

Conciliation in small claims court today is very much an appendage to the judicial role if it occurs at all, and many judges have expressed concern about their ability to handle conciliation effectively (cf. Part II above). The empirical data, in conjunction with analyses such as those by Eckhoff and Fuller, have led McFadgen (1972:89) to argue that "the conciliation courts carried the seed of their failure within themselves; for they asked of judges that they perform a function for which, as a group,

they were neither well-trained nor well-suited, . . . a function which was anti-thetical to their judicial habits." He concludes that if conciliation is to be successful, the conciliator must be suited for an activist role in the settlement of disputes and must not be the ultimate decision-maker. He notes, too, that conciliation, to be successful, takes time, and that in most courts this kind of time has not been, and is not presently available.

IV

PROPOSALS FOR REFORM

The literature reviewed here indicates that the goal of rapid and inexpensive processing of small claims, stressed by early small claims court advocates, has to a large extent been achieved. The system for handling such claims has become so efficient in some courts that at least one observer (Dellinger, 1972:98) has described it as "supermarket justice," a result which might have been predicted from the emphasis on quick, inexpensive and simple procedure.

Whether small claims courts are making justice available to the "poor," a goal both of early and later reformers, is more debatable. Recent literature indicates that while such people are found among the plaintiffs in most courts, at least an equal number of relatively affluent corporate and government plaintiffs are there as well. The evidence also suggests that corporate and government plaintiffs make frequent use of the court, while individual plaintiffs tend to appear there only once. Further, observation of defendants in small claims courts suggests that the overriding majority are either the "poor" of the '20s—wage-earners and small shopkeepers—or the poor of today, "the welfare mother, the disenfranchised laborer, and the jobless, hopeless ghetto resident," people who may be unaware of the court's existence until they appear there as defendants (Moulton, 1969: 1657). When they do appear, they are likely to lose.

In light of this evidence, there has been a reassessment and redefinition of goals for small claims courts by many of today's reformers: The courts should be easily available; they should be publicized; and they should be organized in such a way that inexperienced and infrequent users of the court (who may be poor, in today's terms) feel as comfortable there as the experienced and wealthier business and government plaintiffs who appear there frequently. With these goals in mind, reformers are calling for statutory changes such as: Provision of some form of counsel for inexperienced litigants; restrictions on who may sue;

changes in rules regarding venue; revision of provisions for collection; changes in hours and days when the court is available; more publicity for the court; and revision in rules regarding the processing of defaults. If instituted, these changes should help in making the court more accessible to the individual or small business litigant, and more responsive to his needs.

These reforms are important to the goal of changing use pattern of the court and may be of value in providing one mechanism through which relatively powerless persons in our society can make themselves heard. Significantly, however, they fail to bring into question the *kind* of process through which small claims—whether those of rich or poor—are being handled, and thus have left intact a cornerstone of the small claims hearing, the adversary process.

In this regard, Terrence McFadgen's (1972) study and the *Report on Small Claims Courts* prepared by David Gould for the NICJ, are exceptional. Each one goes beyond the main question raised in earlier studies—Is the small claims court being properly used?—to a detailed consideration of a more critical issue: What kinds of procedures are used in the court, and are these effective?[34] In addition, each proposes fundamental changes in the concept of what a small claims court should be and how it should function. Underlying these proposals is a stress on effectiveness over efficiency, an emphasis on the litigant's perspective for determining effectiveness, rather than that of the "justice industry," and a broadening of perspective regarding potential litigants.

Gould and McFadgen both stress the importance of providing a forum for dispute settlement which is flexible and responsive to litigants' needs. Small claims, Gould (NICJ *Report*, 1972: 115) notes, is "a court where we are trying to expand a litigant's freedom of action." Cross-cultural studies of dispute settlement processes by anthropologists (Gluckman, 1955; Nader, 1965, 1969; Gulliver, 1969, 1971; Nader and Yngvesson, 1974; Yngvesson, 1975) during the past half century have pointed clearly to the fact that different kinds of disputes, involving different kinds of relationships, require different kind of handling. Disputes between parties in multiplex relations, and others in which the time dimension of the relationship is a deep one, often require a much broader perspective on the range of issues which are relevant to a just settlement of the dispute and may require time-consuming

34. Three additional studies (*Colum. J.L. and Soc. Prob.* 1969; Small Claims Court Study Group, 1972; Hollingsworth *et al.*, 1973) provide some discussion of this issue as well.

discussion in order to bring the issues to light and work out a resolution. Many cases (cf. Aubert, 1963; Fuller, 1971; Starr and Yngvesson, 1975; Yngvesson, 1975) cannot be effectively adjudicated at all but require mediation, counselling, and other human relations skills if they are to be successfully handled. Other cases, in contrast, are relatively clear-cut, may involve clear issues of fact or law, and may not be amenable to conciliation procedures.

Analyses of types of disputes brought to the small claims court by McFadgen, Gould, R. Smith and others indicate that here too there are a range of issues, and differing types of relationships which require different skills and mechanisms if litigants are to feel their grievances were justly and effectively dealt with, rather than being subjected to assembly-line justice (cf. p. 260). The critical determinant of process should be type of case and type of relationship, not amount involved (McFadgen, 1972:73-75). Gould (NICJ *Report*, 1972:158-59) suggests that many cases do not in fact require a third party for settlement at all. Using data collected by Steadman and Rosenstein in Philadelphia, and by Klein for the Consumer's Union study, he points to the fact that "many parties do successfully confront each other before trial. An average of about one quarter of cases are settled out of court prior to trial time." In some of these, the court may not have been necessary to settlement at all; in others, simply knowing that a suit was possible provided sufficient incentive for the parties to settle out of court. In a second group of cases, actually coming to court is important to settlement, but factors such as presence of an authority figure, the fact that the litigants have been forced to examine the case thoroughly, and the fact that an arena is provided for conversation, will mean that the case is settled without a trial. In a final cateogry of cases, only judgment by an adjudicator will effectively terminate the case.

In light of this case breakdown, Gould (NICJ *Report*, 1972: 159) asserts that small claims court should be 1) A place where consumers *and others* can gain restitution in a contract or tort action, through adjudication; 2) a place where disputes can be settled through conciliation procedures thus maintaining or reestablishing strained relations; 3) a place where antagonists can simply confront one another to talk out their problems—a "supervised conversation pit." Gould recommends that only those cases in which attempts by the plaintiff to contact and settle the case with the defendant have been made, should be permitted before the court.

Both Gould and McFadgen stress the importance of a compulsory pre-trial mediation hearing, presided over by a trained mediator who is not the adjudicator in the same case. McFadgen (1972:111-12) describes the aims of this hearing or "pre-trial conference" as follows:

> First, to endeavor to effect an amicable settlement of the dispute; secondly, to define the issues if settlement is not possible, and thirdly, to otherwise prepare the parties for trial, particularly by providing advice as to the sort of evidence the court will be looking for, how and why that evidence is relevant to the court's inquiry, and how that evidence might be obtained.

An important feature of McFadgen's version (1972:143-47) of the "pre-trial conference" is that even in cases which cannot be mediated, the conference will serve the important function of clarifying issues and marshalling relevant evidence, and of identifying those cases which are sufficiently complex (in terms of facts involved or laws relevant) that outside assistance (attorneys, outside agencies, etc.) will be necessary. McFadgen (1972: 114) estimates that approximately one third of the cases in small claims courts will be disposed of during the mediation hearings. Only if mediation fails will the parties be permitted to proceed to an adjudication hearing.

McFadgen's (1972; 107, 116) mediator, or "small claims administrator," who would preside over the pre-trial conference, is a lay person with detailed legal knowledge in some areas, and with a good understanding of small claims procedures, as well as training in therapeutic counselling. This person should be able to relate to a wide range of people and be familiar with other local agencies to whom the person can be referred for assistance. Gould's recommendations for a mediator are similar, although he does not exclude judges and lawyers from this role. Gould (NICJ *Report*, 1972:160), McFadgen (1972:106) and other reformers (Hollingsworth *et al.*, 1973:496-97) stress the importance of separating the mediator and the adjudicator roles.

Major differences in proposed small claims models emerge in discussions of the adjudication stage of the proceedings. Gould (NICJ *Report*, 1972:129) and others (*Colum. J.L. and Soc. Prob.*, 1969; SCCSG, 1972a; Hollingworth *et al.*, 1973) emphasize that during the adjudication stage "the small claims court should not and cannot be a true arena of advoacy." People come to small claims court primarily to settle disputes, not to argue cases, and this can best be done in a hearing before an inquistor-judge, aided by investigators and lay advocates. Counsel should be excluded because of judge-lawyer rapport, which increases courtroom formality (cf. Part II, above and Ison, 1972:31-32). Mc-

Fadgen (1972:121) points however to problems that flow from the failure of this model to define clearly whether the judge is a *judge* or a *fact-finder* (cf. Part II, above). In addition to the suspicion of bias, which may arise when the judge must elicit facts from one or both parties, there is the problem of the judge who must seek out additional information on a case after the hearing, in order to make an informed judgment (NICJ *Report*, 1972:252). McFadgen argues that this "undermines the whole rationale of the adversary process, for the parties are denied the opportunity to hear, consider, and possibly rebut, evidence vital to the determination of the dispute."

McFadgen (1972:58) suggests, rather, that the adjudication process be just that: A hearing before a judge (not a fact-finder) in which, quoting Fuller (1963:19) "the affected party—'the litigant'—is afforded an institutionally guaranteed participation, which consists of the opportunity to present proofs and arguments for a decision in his favor." The success of this scheme, if lawyers are not present, depends on placing the litigants on an equal footing. One means of achieving this is a pre-trial hearing, in which major issues are identified and relevant evidence is discussed so that litigants will arrive in court prepared to argue their case. During this hearing, cases that are too complex to be handled by an unrepresented litigant, and other cases which may require counsel, are identified.[35] McFadgen (1972:144) proposes that counsel be provided for all litigants (irrespective of income) in such situations. He argues (1972:149), we think convincingly, that:

> One is compelled . . . to recognize that the State has an overriding obligation to make a forum available at a realistic cost to the parties, and to accept that, in principle, it is not so very different whether the State provides free legal assistance because it is beyond the means of the individual in absolute terms, or simply beyond his means because, '. . . the *modus operandi* of the system itself makes litigation financially non-viable for the individual.'

As the discussion indicates, there is a general similarity between the small claims models proposed by McFadgen, on the one hand, and by Gould, the SCCSG, the *Colum J. L. and Soc. Prob.*, and Hollingsworth *et al.*, on the other. Both provide for mediation as well as adjudication and both provide for mechanisms to assist litigants in preparing and presenting their cases. The focus of the McFadgen proposals, however, is on a pre-trial hearing, through which all cases are initially channelled, and

35. McFadgen (1972:144) suggests that a specialist should be used in cases where there is a power imbalance between the litigants because one is particularly disadvantaged, where an issue of law is involved, and where the case is factually complex.

specifically on a "small claims administrator" who presides over this hearing. In contrast, the focus of Gould's and other proposals remains on the courtroom hearing itself, although provisions are made for an effort at pre-trial mediation. These proposals emphasize the role of the judge-inquisitor, a trained lawyer aided by lay advocates, who will handle most claims.

The reforms discussed thus far relate to the question of *effective* small claims procedures, with the litigant's perspective on effectiveness in mind. Another significant reform issue, which was the focus of many small claims studies in the '50s and 60s, is the question of who should be using the courts. Because of the heavy use of small claims courts in many areas in recent years by business plaintiffs many studies (*Stan L. Rev.*, 1952; Robinson, 1963; Pagter *et al.*, 1964; *Colum J.L. and Soc. Prob.*, 1969; Moulton, 1969; *S. Cal. Law Rev.*, 1969; Consumer Council, 1970; Smith, 1970; Hollingsworth, 1973) have proposed or discussed the possibility of banning these plaintiffs from the courts, thus restricting their use to the individual, frequently depicted as a (poor) consumer. McFadgen and Gould concur with other reformers (Pagter *et al.*, 1964; Moulton, 1969) who reject this solution. They argue (McFadgen, 1972:150-63; NICJ *Report*, 1972: 45-57) that the courts were initially conceived with the small businessman in mind, and that if business users were banned from small claims court, they would take their claims to courts which afford fewer protections to individual defendants. Instead, the need to protect against business abuse is stressed. In particular, Gould and McFadgen propose careful scrutiny of default claims, by screening such claims as they are filed and/or by separate hearings for defended and undefended cases. (See also *S. Cal. L. Rev.*, 1969; Ison, 1972; SCCSG, 1972a).

Gould and McFadgen share the interest of other reformers, however, in increasing the number of individual (non-business) plaintiffs in the court, and propose that this should be done by increasing the court's accessibility. Gould (NICJ *Report*, 1972: 21-28) suggests that this be accomplished by locating small claims courts "within the community." He emphasizes (NICJ *Report*, 1972:24) however, that "creating a neighborhood court should mean more than creating a court which is in a neighborhood. The court should also be part of the community and actively seek out community participation." But Gould asserts that "it is probably wise to have as a goal community participation with the court rather than community control of the court," suggesting (NICJ *Report*, 1972:25) that the court will only acquire legitimacy from its relationship to a central court system. Others (Eo-

valdi and Gestrin, 1971:319-21; Cahn and Cahn, 1966:950-955 and 1971:1015) interested in increasing the involvement of individual citizens in the court system, disagree about how such a court might acquire legitimacy, noting the hostility in some (particularly ghetto) neighborhoods towards systems controlled by outsiders. The Harlem Small Claims Court (cf. Conclusion, below) is organized so as to be responsive to both these arguments, and thus extend as much as possible the range of citizens willing to participate in the court.

CONCLUSION

Small claims courts were planned and organized during the early part of this century in response to a need for a more effective system of justice for the "average" American citizen. The movement to set up the courts made rapid headway and by 1940 small claims tribunals were available in most areas of the country and were considered successful by all who reported on them. Yet a more careful assessment of the aims and functioning of the courts during the 1960's and 70's suggests that in fact most of these tribunals suffer from the same deficiencies that mar our legal system as a whole. From the point of view of the average citizen, and particuarly one who is poor, they are much more likely to be used against him than by him; they are not easily accessible; the atmosphere is alien and confusing; and the range of procedures is limited and is geared more to efficiency for those administering justice than to effectiveness for the individual with a grievance.

The past decade has seen a wave of concern about access to justice for lower and middle income citizens. A number of articles—such as those by Cahn and Cahn (1966, 1971), Eovaldi and Gestrin (1971), Jones and Boyer (1971), and Nader *et al.* (1975)—focus on problems of overload, expense, and inflexibility in our legal system, and describe a range of extra-judicial mechanisms which have developed in response to these problems. But there are serious problems regarding the effectiveness of some of these alternatives, linked to questions of voluntary participation, enforceability of decisions, and legitimacy. These problems are particularly relevant to forums for handling consumer grievances, such as the arbitration tribunals set up by the National Center for Dispute Settlement, the Better Business Bureau, etc.

Attention has been focused on the need to improve these extra-judicial mechanisms, but there has also been a drive to bring about changes within the judicial system itself, where the means

for compulsory jurisdiction and enforcement of the decision is available. In this context, small claims courts have again become a target for reform. Much of the renewed interest has been inspired by the consumer movement, which has voiced concern about the use of small claims courts as collection agencies for businesses. Small claims courts have also drawn the attention of those concerned about the alienation of the lower and middle classes from the legal system, and with the resulting need for a forum where minor civil disputes can be resolved simply and effectively. Thus the demand for reform in the small claims area comes from members of the Bar, social scientists, legislators, and especially from student-funded public interest research groups and citizen action groups, as well as from consumer advocates.

A goal shared by these diverse small claims reformers is to combine in one forum the advantages of both judicial and non-judicial settlement mechanisms, while combating problems of accessibility, legitimacy, understandability, and effectiveness from which either the judicial and/or non-judicial mechanisms presently suffer. At present the outstanding example of such a forum is the Harlem Small Claims Court.[36] While this court does not meet all of the objections to present small claims procedure which have been dealt with in this review—*e.g.*, no separate mediator is provided, a pre-trial hearing is not obligatory, presence of lawyers is not restricted—it *is* responsive to some of the major issues raised by reformers:

1) *Legitimacy*: The Harlem court is "in fact and by design a community court" (NICJ *Report*, 1972:690) in that it is located in Harlem and makes use of paraprofessional community advocates, most of whom reside in Harlem. These community advocates not only assist litigants in court, but act as public relations persons for the court in the community, with considerable success (Blumenfeld, 1972:19-32).

At the same time, the court is clearly a part of the regular legal system. It is a division of the Civil Court, and follows the same procedures and rules as other small claims courts in New York City. Judges are drawn from the New York City Civil Court on a rotating basis. Thus the Harlem court is responsive to the two-pronged issue of legitimacy, discussed from different perspectives by Gould, Eovaldi and Gestrin, and Cahn and Cahn (cf. Part IV, above).

36. Information on the Harlem court is based primarily on material provided in an Appendix to the National Institute for Consumer Justice's report (1972:690-97). Additional information is available in Blumenfeld (1972) and the Committee on Consumer Protection (1974).

2) *Accessibility:* The court is located in Harlem, and is open only at night, an important point not only practically but symbolically, since it clearly "says" that this is specifically a court for the working man or woman, not a court for lawyers or others who can be hired to file claims. The work of community advocates, who publicize the court and explain its use, by talking to civic groups, political groups, and others in the Harlem area, is of particular importance since accessibility involves a cultural as well as a physical dimension: The court must not only *be* in the community, but must be perceived by community members as a serious option when they are considering ways of handling a grievance.

3) *Understandability*: The fact that the Harlem court is located in the community and publicized by community advocates means that it is not entirely alien to those who use it. The presence of community advocates in the court to help litigants, informality of the procedures and the decor, presence of interpreters, and the polite and relaxed manner of the judge and arbitrators are commented on by Blumenfeld (1972:11 ff.) and Gould (NICJ *Report*, 1972:693-95) and contribute to the understandability of the proceedings. Lawyers are permitted in court, and the NICJ *Report* (1972:693) indicates that when they do appear, they have a marked effect on formality of the proceedings.

4) *Effectiveness:* Pre-trial hearings and mediation are an option in the Harlem court, although they are not standard procedure. Litigants are however, given the option of having their cases arbitrated rather than adjudicated and this less formal and more relaxed alternative works well for those who choose it according to two studies (Siegel and Atwood, 1971 (III) 31-33; Blumenfeld, 1972:11-17) in which observation of the court was conducted. (Arbitrators also conduct inquests into potential default cases.)

The lack of an institutionalized mediation procedure, and the lack of any substantive change in collection procedures are significant drawbacks in the effectiveness of the Harlem court, but the success of the innovations which *are* being tried, suggest that this court is well on the way to providing an effective system of justice, in the small claims area, for one neighborhood in this country.[37] It is a model with which we might experiment more broadly, not only in small claims, but in other areas of civil litigation as well. As Pound noted in 1906, and the Cahns reiterated (1966:950) the task of achieving just resolution of griev-

37. The criterion for success is the rapidly increasing rate of court usage by low-income consumers (Blumenfeld, 1972:19-32).

ances in a society which is "divided and diversified" is a difficult one. A neighborhood court system would provide for

> local accountability, local resolution of disputes—and a commitment to provide the aggrieved with a source of remedy that does not subject him *unnecessarily* to the perils of a foreign jurisdiction—whether that foreign jurisdiction be 'downtown' or the 'commercial world' or the 'white world' or any world where institutions and rules of law hold sway which are designed to deny him effective remedy and to protect the wrongdoer from bearing responsibility for the consequences of his actions.

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