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EXPANDING SOCIAL JUSTICE THROUGH THE “PEOPLE’S COURT”

Tal Finney & Joel Yanovich***

I. INTRODUCTION

Our judicial motto of “equal justice under law”¹ is a bit of a misnomer. Despite the fact that this nation recognizes “justice”² as one of the fundamental pillars of our society, full access to the justice system has always been (and is likely to remain) reserved for those who can afford it.³

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1. See OFFICE OF THE CURATOR, SUPREME COURT OF THE UNITED STATES, THE WEST PEDIMENT: INFORMATION SHEET, <http://www.supremecourtus.gov/about/westpediment.pdf> (last visited Apr. 10, 2006) (explaining that this phrase is the motto inscribed above the U.S. Supreme Court’s West Pediment).

2. U.S. CONST. pmbl.

3. See generally James W. Meeker & John Dombrink, *Access to the Civil Courts for Those of Low and Moderate Means*, 66 S. CAL. L. REV. 2217, 2218–19, 2225–31 (1993) (discussing the current blockades poor and middle class parties have to the civil justice system, and possible changes which can

This nation guarantees a right to counsel to anyone charged with a crime—even a relatively minor criminal offense.⁴ While this right is firmly entrenched in the criminal justice system, it seems unlikely that it will ever be extended to someone seeking damages for a breach of contract claim. Our criminal justice system may be rife with disparities between those defendants who have and those who have-not,⁵ but it must seem like a bastion of social parity to the injured party who has suffered a simple, although relatively significant, economic injury, yet cannot afford justice.

It has long been recognized that social justice dictates the need for a civil justice system that is accessible and affordable to the average citizen for the redress of common wrongs.⁶ As one scholar put it, “it is a denial of justice in small causes to drive litigants to employ lawyers, and it is a shame to drive them to legal aid societies to get as a charity what the state should give as a right.”⁷ Small claims courts were created to fill this need,⁸ and it is now time to modernize and restructure these courts so they can finally achieve their intended purpose.

In this Essay, we suggest a pragmatic approach to leveling the playing field for low- and moderate-income parties who are denied access to the civil justice system. By improving and expanding access to the nation’s small claims courts, injured parties who cannot afford an attorney would finally be provided with an available avenue to seek justice. If states increase the monetary jurisdictional limits of small claims courts to \$20,000, average citizens could assert

be made by the year 2020).

4. See generally *Argersinger v. Hamlin*, 407 U.S. 25, 30–31 (1972) (holding that the right to counsel extends to a defendant being prosecuted for any crime for which imprisonment may be imposed).

5. See generally Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1453–55 (2005) (describing the suppression of indigent defendants’ speech and the resulting unequal treatment received by these defendants in the criminal justice system).

6. See Suzanne Elwell & Christopher Carlson, *The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV. 433, 434 n.3 (1990) (noting that the nation’s first small claims court was established in 1913).

7. Roscoe Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 318 (1912–1913).

8. See, e.g., *Pace v. Hillcrest Motor Co.*, 101 Cal. App. 3d 476, 478 (1980) (noting that small claims courts were created because “ordinary litigation ‘fails to bring practical justice’ when the disputed claim is small”).

claims that are not economically feasible to assert in traditional courts. Small claims courts should also provide a fair appellate process, especially for cases involving substantial sums of money. Finally, these courts should expand the use of pre-trial mediation to avoid the strife and added cost that naturally arise in litigation.

II. INCREASING THE MONETARY JURISDICTIONAL LIMIT OF SMALL CLAIMS COURTS

It is not at all uncommon for a family to experience a civil wrong in this country. A 1993 study conducted by the American Bar Association (ABA) found that nearly half of all low- and moderate-income families dealt with at least one situation in 1992 that raised civil legal implications.⁹ Furthermore, half of those families with legal needs had to deal with two or more legal dilemmas.¹⁰

Despite the prevalence of legal issues that were potentially suitable for judicial resolution, sixty-one percent of the middle-income families, and seventy-one percent of the low-income families, never turned to the justice system for assistance.¹¹ Rather, low-income families were significantly more likely to take *no* action than to pursue a potential remedy offered by the civil justice system.¹² Moderate-income families fared better in this respect; still, more than a quarter of these families did not pursue legal remedies to rectify their situations.¹³

9. See INST. FOR SURVEY RESEARCH AT TEMPLE UNIV. FOR THE AM. BAR ASS'N CONSORTIUM ON LEGAL SERVS. & THE PUB., LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS; MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY, at "Number of Legal Needs Reported" (1994) [hereinafter LEGAL NEEDS STUDY], available at <http://www.abanet.org/legalservices/downloads/sclaid/legalneedstudy.pdf>.

10. *Id.* These findings are consistent with those made in a 1989 study which focused solely on low-income families. Robert L. Spangenberg et al., Spangenberg Group, Inc., *National Survey of the Civil Needs of the Poor*, in TWO NATIONWIDE SURVEYS: 1989 PILOT ASSESSMENTS OF THE UNMET LEGAL NEEDS OF THE POOR AND OF THE PUBLIC GENERALLY <starting page> (1989) (finding at least one legal issue was raised during the previous twelve months in forty-three percent of low-income families).

11. LEGAL NEEDS STUDY, *supra* note 9, § 3.

12. *Id.* (finding that 38% of low-income families pursued no legal action, and only 29% turned to the civil justice system).

13. *Id.*

The court system should be a last resort for resolving a civil wrong.¹⁴ However, discouraging indiscriminate use of litigation is a far cry from denying access to the civil justice system altogether. Yet, for many potential litigants, the right to access the courts has been effectually eliminated.¹⁵ Depending upon the type of claim, an injured party may face so many obstacles that conventional litigation is simply not a viable option.¹⁶ For example, a potential litigant may feel that finding a qualified lawyer is simply too much of a challenge; this alone often leads an injured party to desert its legal claim entirely.¹⁷ In addition, even if the party manages to find a capable lawyer, the attorney may very well refuse to accept the case because of economic concerns.¹⁸

Generally, attorneys find it cost-ineffective to represent a claimant whose potential damages are less than \$20,000.¹⁹ One survey of attorneys found that most lawyers would only consider taking a case if actual damages exceeded \$60,000–\$65,000.²⁰ Given that most small claims courts cannot hear cases where damages exceed \$5,000,²¹ many potential plaintiffs are precluded from pursuing a small claims case and have no recourse other than to seek an attorney and proceed in civil court. Of course, even if a claimant can find an attorney that agrees to take her case, the party must still consider attorney fees and court costs. If a case goes to trial,

14. See generally Meeker & Dombink, *supra* note 3, at 2218 (discussing the importance of access to the legal system and some of the barriers that prevent it); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34–35 (discussing advantages of mediation as an alternative to litigation);

15. See Edward L. Rubin, *The Code, the Consumer, and the Institutional Structure of the Common Law*, 75 WASH. U. L.Q. 11, 24 (1997) (summarizing a series of factors that deter consumers from exercising their rights in a trial-based, lawyer-dependent legal system).

16. See *id.* at 21.

17. *Id.*

18. See Stephen Elias, LEGAL BREAKDOWN: 40 WAYS TO FIX OUR LEGAL SYSTEM 53 (Stephen Elias et al. eds., 1990).

19. *Id.*

20. William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, 50 DISP. RESOL. J. 40, 44 (1995).

21. James C. Turner & Joyce A. McGee, *Small Claims Reform: A Means of Expanding Access to the American Civil Justice System*, 5 UDC/DCSL L. REV. 177, 180–81 (2000).

attorney fees alone can easily exceed \$20,000.²² Accordingly, it is no surprise that low-income families often forego the civil court system primarily because of the cost of litigation.²³

Small claims courts, on the other hand, are specifically designed to provide an easily accessible court system.²⁴ For example, the rigid rules of civil procedure applied in traditional courts have been replaced with a relatively casual court atmosphere to promote pro se representation.²⁵ In addition, standard rules of evidence have been similarly relaxed, and court fees significantly reduced.²⁶ Required forms have also been designed to accommodate working claimants without advanced educational backgrounds.²⁷ For instance, small claims court forms in California are written at a fourth to fifth-grade reading level.²⁸ Furthermore, many states hold court sessions at nights and on the weekends,²⁹ thereby providing nine-to-five workers with a convenient court schedule.

Although small claims court offers an atmosphere that facilitates pro se litigation, self-representation is not necessarily the ideal way to achieve social justice. As one representative of a pro se legal-

22. See Howard, *supra* note 20, at 44 (noting that attorneys generally charge a thirty-five percent contingency fee on claims with minimum provable damages of \$60,000–\$65,000).

23. See ALBERT H. CANTRIL, AM. BAR. ASS'N, *AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE* 8, 10 tbl.7 (1996); Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209, 214–15 (1990).

24. See Elwell & Carlson, *supra* note 6, at 434.

25. See Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36, 42 (2002).

26. Bruce Zucker & Monica Herr, *The People's Court Examined: A Legal and Empirical Analysis of the Small Claims Court System*, 37 U.S.F. L. REV. 315, 317 (2002-2003).

27. See, e.g., Amy C. Henderson, *Meaningful Access to the Courts? Assessing Self-Represented Litigants' Ability to Obtain a Fair, Inexpensive Divorce in Missouri's Court System*, 72 UMKC L. REV. 571, 577 (2003).

28. BONNIE HOUGH, NAT'L CTR. FOR STATE COURTS, *FUTURE TRENDS IN STATE COURTS: SELF-REPRESENTED LITIGANTS IN CALIFORNIA; COURT PROGRAMS HELPING LITIGANTS HELP THEMSELVES* (Carol R. Flungo et al. eds. 2004), <http://www.ncsconline.org/WC/Publications/Trends%5CProSeCaliTrends2004.html>.

29. See, e.g., CAL. CIV. PROC. CODE § 116.250 (Deering 2005) (allowing all courts, and requiring some, to have evening and weekend hours); COLO. R. CIV. PRO. § 501 (West 2005).

assistance help-line stated, “we have never seen anyone who has the money or resources *choose* to go pro se. The only time they come to us is when they can’t afford the high cost of the law.”³⁰ Nonetheless, as it stands, pro se litigation is commonly used throughout our court system and is the norm in small claims courts.³¹ Therefore, unless the civil court system adopts a *Gideon v. Wainwright*³² stance and provides representation for both plaintiffs and defendants who cannot afford it, self-representation is inevitable, and certainly preferable to no representation at all. Given this reality, increasing the jurisdictional limits would at least provide an avenue for redress to many injured parties who are otherwise unable to obtain justice.

In addition to the difficult task of securing an affordable attorney, where one party has legal representation and the other party does not, the pro se litigant faces a great disadvantage.³³ As a result, some small claims courts have sought to level the playing field by severely limiting the use of attorney representation, while others courts ban representation altogether.³⁴ To further facilitate pro se litigation, small claims courts have also begun providing free resources to assist pro se litigants before trial, such as legal advisors, training videos, self-help Web sites and PowerPoint presentations.³⁵ Perhaps most beneficial, small claims court judges often assist unrepresented parties throughout the court proceedings.³⁶ For example, many small claims court judges ask their own questions of the parties and witnesses.³⁷ Some states even allow judges to investigate issues *ex parte* to clarify those areas that inexperienced litigants fail to properly address.³⁸

30. Margaret Magnarelli, *David, Pro Se v. Goliath*, Medill News Service (2000), <http://docket.medill.northwestern.edu/archives/000955.php> (quoting Carl Frederick of the American Pro Se).

31. See Goldschmidt, *supra* note 25, at 36.

32. 372 U.S. 335, 339–40 (1963) (holding that indigent defendants have the right to appointed counsel in criminal prosecutions).

33. Goldschmidt, *supra* note 25, at 37.

34. See, e.g., CAL. CIV. PROC. CODE § 116.530 (prohibiting attorney participation in small claims actions with few exceptions).

35. CYNTHIA GRAY, *REACHING OUT OR OVERREACHING: JUDICIAL ETHICS AND SELF-REPRESENTED LITIGANTS* 3 (2005).

36. See *id.* at 6–7 (discussing the court’s discretion in accommodating an unrepresented litigant).

37. See Goldschmidt, *supra* note 25, at 49.

38. See *id.* at 51.

This is not to say that all states have embraced pro se friendly measures in their small claims courts. A chief proponent of improving the small claims court system, HALT—An Organization of Americans for Legal Reform (HALT), has harshly criticized states that do not provide easy access to these courts.³⁹ HALT's "2004 Small Claims Report Card" found that many states fail to provide the resources necessary for average citizens to effectively represent themselves.⁴⁰ Furthermore, the study found that many states use complex filing forms with limited instructions.⁴¹ Nonetheless, HALT notes, these deficiencies should not inhibit an expansion of small claims courts.⁴² Rather, the organization argues that state legislatures should adopt a series of reforms to address the deficiencies of small claims courts, including increasing the damages limit to \$20,000.⁴³ With these changes, the small claims court system would become an accessible and efficient forum.⁴⁴

It is important to note that HALT's proposal to raise the small claims court cap on damages is not merely a call for small claims courts to keep up with inflation. Many states routinely raise their small claims courts' jurisdictional limits in order to keep pace with cost-of-living increases.⁴⁵ Instead, increasing the limit to \$20,000 would provide a venue to working-class families for claims that never reach the civil court system for lack of economic feasibility.⁴⁶

39. See generally Turner & McGee, *supra* note 21, at 183–88 (outlining five reforms to improve access to the civil justice system through small claims courts); HALT, Reform Group "Report Card" Reveals Small Claims Courts Not Making the Grade: Study of Small Claims Courts Across the Nation Underscores Need for Reform in State After State (May 3, 2004), http://www.halt.org/reform_projects/small_claims/2004_small_claims_rc/ (grading states on their small claims systems, with grades ranging from B to F).

40. See HALT, *supra* note 39.

41. See Turner & McGee, *supra* note 21, at 187–88.

42. See generally *id.* (advocating improvements to small claims systems to grant full access to the civil justice system).

43. *Id.* at 184–85.

44. *Id.*

45. See, e.g., CAL. CIV. PROC. CODE § 116.221 (West 2005) (giving California small claims courts jurisdiction over cases which do not exceed \$7500); MD. CODE ANN., CTS. & JUD. PROC. § 4-405 (LexisNexis 2005) (raising the small claims jurisdictional limits from \$2500, as set in 1987, to \$5000).

46. See Turner & McGee, *supra* note 21, at 184–85.

For example, consider a lawsuit over the cost of a new car. Thirty-five years ago, the average price of a new car was about \$3,700,⁴⁷ which far exceeded the jurisdictional limits of small claims courts at that time.⁴⁸ Likewise, today, the jurisdictional limits of every small claims court in the nation preclude a working-class family from filing suit over a \$17,000 car.⁴⁹ A jurisdictional limit of \$20,000, however, would allow such a suit.

One of the chief arguments against raising the jurisdictional limits of small claims courts emphasizes that these courts have become the pawns of businesses and debt collectors. These groups use small claims courts to secure judgments against the very people the courts were meant to serve.⁵⁰ Small claims courts were never intended to be the judicial equivalent of a collection agency. Nonetheless, the types of claims most commonly found in these courts—personal finance issues, consumer issues, and issues relating to rented or owned property—⁵¹ have transformed them into magnets for debt collectors.⁵² As a result, critics argue that raising the amount

47. U.S. Department of Energy FreedomCAR and Vehicle Technologies Program: Fact #219: June 3, 2002; Average Price of a New Car; 1970–2001, http://www.eere.energy.gov/vehiclesandfuels/facts/favorites/fcvt_fotw219.html (last visited Feb. 16, 2006).

48. *See, e.g.*, Sultan v. Matthew, No. 03-0831, 2004 Tex. LEXIS 320, at *35 n.41 (Tex. Nov. 18, 2005), *aff'd*, 178 S.W.3d 747 (Tex. 2005) (noting that limits in Texas were \$150 from 1963 to 1983); JAMES CHAPMAN & CATHY NGUYEN, RAISING CALIFORNIA'S SMALL CLAIMS JURISDICTIONAL LIMIT: A QUALITATIVE AND QUANTITATIVE EXAMINATION OF SAN FRANCISCO AND VENTURA COUNTY CIVIL PLAINTIFFS 10 tbl.1 (2005), *available at* http://www.halt.org/reform_projects/small_claims/national_advocacy/pdf/bay_area_sc_plaintiffs_study.pdf (noting that California raised its jurisdictional limits to \$500 in 1972).

49. *See* Turner & McGee, *supra* note 21, at 180–82.

50. *See, e.g.*, Elwell & Carlson, *supra* note 6, at 443–44.

51. LEGAL NEEDS STUDY, *supra* note 9, at chart 2.

52. *See, e.g.*, Elwell & Carlson, *supra* note 6, at 443.

Small claims courts have often been transformed into collection agencies Telephone and gas companies . . . are notorious in their role as small claims plaintiffs.

These business concerns consider the use of small claims procedure to be an attractive alternative to . . . prosecuting the defendant through the slow and costly mechanisms of the regular part of the court. Once the agent of the business-plaintiff becomes educated in small claims procedure, he . . . acquires familiarity and credibility with the court, and assumes a distinct advantage over the unrepresented, often poor and uneducated, defendant.

plaintiffs are allowed to claim would only increase the number of debtors hauled into these courts.⁵³ Of course, collection agencies have every right to recover valid debts through the court system. However, the nation's legislatures intended small claims court to be a "people's court,"⁵⁴ not a tool wielded by businesses to pursue claims against the people. A small claims court is simply not the proper venue for asserting business collection claims.

Fortunately, careful legislation can significantly reduce or eliminate this problem. Many states prohibit assignees or collection agencies from filing claims in small claims courts.⁵⁵ States also frequently impose limitations on the number of claims a person can file in small claims courts each year.⁵⁶ Although these protections may result in debtors finding themselves being sued in a conventional court, this is a risk that exists regardless of the jurisdictional limit of small claims courts.

III. IMPROVING THE APPELLATE SYSTEM OF SMALL CLAIMS COURTS

Increasing the jurisdictional limits of small claims courts will bolster the need for a fair appellate process in that venue. While most states provide some appellate system for small claims,⁵⁷ many states need to expand or modify these systems. Deficiencies in the small claims appellate process arguably do not pose a significant problem under the current jurisdictional limits because appeals are fairly rare.⁵⁸ However, with an increase in the jurisdictional limit, presumably a party will be more likely to appeal a verdict where the damages are more substantial.

John Markwardt, *The Nature and Operation of the New York Small Claims Courts*, 38 ALB. L. REV. 196, 204 (1973-1974).

53. See, e.g., Elwell & Carlson, *supra* note 6, at 488-89, 493-94 (explaining that increasing the limit available in small claims court would increase the number of claims, and that business and collection-type actions are the most prevalent).

54. See Arthur Best & Deborah Zalesne, *Peace, Wealth, Happiness, and Small Claims Courts: A Case Study*, 21 FORDHAM URB. L.J. 343, 345, 348-49 (1994).

55. See, e.g., COLO. REV. STAT § 13-6-407 (2005).

56. See, e.g., Elwell & Carlson, *supra* note 6, at 445.

57. See Turner & McGee, *supra* note 21, at 180.

58. See Best & Zalesne, *supra* note 54, at 367 (finding a total of only 126 appeals of small claims verdicts in a span of three years in the Denver County Small Claims Court); Elwell & Carlson, *supra* note 6, at 512 n.460.

For some states, one important improvement would be to allow plaintiffs to appeal small claims decisions. In some states, plaintiffs—but not defendants—waive their right to appeal when they file a claim in small claims court.⁵⁹ California small claims court plaintiffs, for example, have “no right to appeal.”⁶⁰ A study commissioned by California’s Judicial Council revealed that

a wrong decision can go against a plaintiff as well as a defendant, and the notion that plaintiffs have exercised a choice in selecting to sue in small claims court is really a fiction, given the difficulty in finding a lawyer to take those cases in the regular civil docket.⁶¹

As discussed earlier, parties frequently file claims in these courts because they have no other option.⁶² However, although cost concerns may trump a claimant’s desire for a more expansive appellate process where small sums of money are concerned, the same result does not follow where the damages at issue increase.

Unlike California, other states permit either party to appeal but only to a court where the simplified forms and informal court proceedings have been eliminated.⁶³ The State of Virginia, for example, warns potential appellants on its official Web site that “appeal[s] will be tried . . . in a formal manner strictly following all of the rules of evidence and procedure”⁶⁴ Of course, given that Virginia only permits small claims up to \$2,000,⁶⁵ the right to appeal is unlikely to be an important issue for most of the state’s current small-claims litigants. However, if Virginia, or any other state with this type of impractical appellate process, were to raise its jurisdictional limits, litigants should be provided with a more accessible appeals process that does not force the party to hire an

59. *See, e.g.*, CAL. CIV. PROC. CODE § 116.710 (Deering 2005) (giving small claims court plaintiffs “no right to appeal the judgment”); MASS. GEN. LAWS ch. 218, § 23 (2005) (restricting a plaintiff’s right to appeal adverse judgments related to counter-claims).

60. CAL. CIV. PROC. CODE § 116.710.

61. STEVEN WELLER ET AL., REPORT ON THE CALIFORNIA THREE TRACK CIVIL LITIGATION STUDY 56 (2002).

62. *See supra* note 30 and accompanying text.

63. *E.g.* VA. CODE ANN. § 16.1-122.7 (2003).

64. Virginia’s Judicial System, Small Claims Court Procedures, http://www.courts.state.va.us/pamphlets/small_claims.html (last visited Feb. 4, 2006).

65. VA. CODE ANN. § 16.1-122.2.

attorney.

The primary argument against expanding the small claims appellate process is that it is not cost effective to appeal decisions involving small amounts of money.⁶⁶ Perhaps a compromise can be reached. Policy Studies, Inc. (PSI) suggests that both the small claims plaintiff and defendant be allowed to appeal, but only if the case involves more than \$5,000.⁶⁷ While this solution would inevitably leave some plaintiffs feeling that they have been denied true access to the justice system, it at least alleviates the risk of leaving claimants with larger damages at issue with a clearly erroneous decision.

States may also consider modifying their appellate system to address a separate problem small claims litigants often face: judgment collection. Many times, plaintiffs prevail in small claims court only to find themselves unable to enforce their judgment against a defendant.⁶⁸ However, the burden of judgment collection could be alleviated to some extent if, as a prerequisite to an appeal, the states required defendants to post a bond for the amount of the judgment.⁶⁹ This added measure may even reduce the number of appeals.⁷⁰

IV. USING MEDIATION TO MAKE SMALL CLAIMS COURTS MORE EFFECTIVE

While it is paramount that the average citizen have better access to the court system, states should still encourage parties to seek

66. CAL. LAW REVISION COMM'N: TENTATIVE RECOMMENDATION, JURISDICTIONAL LIMITS FOR SMALL CLAIMS AND LIMITED CIVIL CASES 15 (2002) (noting that small claims awards are considered "small" in relation to the expense of trying a small claims appeal to a jury).

67. *Id.* Nonetheless, claims involving sums of \$5000–\$10,000 may still be considered "small." *Id.*

68. *See Best & Zalesne, supra* note 54, at 345.

69. *See id.*

70. Judgment collection is an enormous issue in many small claims court jurisdictions, *see id.*, and posting bonds on appeal may not significantly reduce this problem. Presumably, most parties who do not plan on abiding by the court order if they lose on appeal, will simply abandon the claim and let the plaintiff fight to collect. However, posting bonds may reduce the number of appeals. Since, more effective solutions to judgment-collection go beyond the scope of this article, they are not fully addressed here. For more on this topic, *see id.* at 365–67.

litigation alternatives. For example, studies have shown that if utilized properly, mediation programs that are integrated into the small claims court system can serve as a productive judicial instrument.⁷¹ Oddly enough, despite recent empirical studies evidencing that mediation is efficient and cost-effective,⁷² very few small claims courts offer this service.⁷³

Perhaps one of the reasons mediation is not more widely available is because it is rarely used in those states where it is provided as an optional service.⁷⁴ However, the low instance of mediation does not mean that the public is disinterested in pursuing this option. Rather, most people are completely unaware of the existence of mediation services.⁷⁵ The ABA's study of low- and middle-income families found that approximately eighty percent of these families were unaware that mediation was a legal assistance option.⁷⁶ The ABA's findings stand in stark contrast to the widespread awareness of small claims courts,⁷⁷ which is due in part to the media through television shows like *The People's Court* and *Judge Judy*.⁷⁸

Given that we cannot count on television to cure our judicial woes, the states should implement other means to funnel claimants toward mediation and its beneficial results. Mediation sessions frequently lead to party settlements,⁷⁹ which are clearly preferable to

71. See generally Roselle L. Wissler, *Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics*, 29 LAW & SOC'Y REV. 323, 354 (1995) (concluding that, overall, mediation is an effective tool).

72. See GOVERNOR'S TASK FORCE ON CIVIL JUSTICE REFORM, FINAL REPORT, Exhibit 7 (2000) [hereinafter GOVERNOR'S TASK FORCE], available at <http://www.state.co.us/cjrtf/report/report.htm> (discussing selected studies and effectiveness in Colorado).

73. Turner & McGee, *supra* note 21, at 183.

74. Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565, 570 (1997).

75. LEGAL NEEDS STUDY, *supra* note 9, at chart 14.

76. *Id.*

77. *Id.* (finding that 61% of low-income families, and 80% of middle-income families, were aware of small-claims courts).

78. Zucker & Herr, *supra* note 26, at 322-23.

79. GOVERNOR'S TASK FORCE, *supra* note 72 (finding an 89% success rate in Denver's City Attorney's Office, and a success rate of more than 50% in other Colorado courts); Wissler, *supra* note 74, at 581 (finding a 62% success

court battles. Studies have shown that parties who use mediation are more likely to be satisfied, even if no agreement is reached, than those who proceed directly to litigation.⁸⁰ Some studies have also found that adverse parties are less likely to suffer long-term strains in their relationship with each other when they use mediation.⁸¹ Fostering good relationships is an especially important factor when opposing litigants are neighbors, co-workers, etc. Finally, parties who resolve their differences in mediation are apparently more likely to collect the monies owed than those who receive a favorable court verdict.⁸²

Even if mediation services became more widely available, the potential benefits would not materialize unless parties utilized the services. Some courts have rectified the problem of underutilization by requiring parties to attend a mediation session before they are permitted to proceed to litigation.⁸³ Although forced mediation does not appear to generate the same stellar results obtained in voluntarily mediation sessions,⁸⁴ the overall results are nonetheless impressive. For example, in 1995, California's mandatory mediation program for cases involving less than \$50,000 resulted in a thirty-two percent settlement rate in Los Angeles, and a forty-one percent rate in San Diego.⁸⁵ Even more encouraging, ninety percent of the parties involved were willing to use mediation in the future.⁸⁶

For states that are uncomfortable with the notion of mandatory mediation for all potential litigants, there are suitable alternatives. For example, courts could limit required mediation to only those cases involving larger sums of money. On the other hand, courts could use a more creative approach, such as telephonic mediation. At least two federal circuit courts have attempted to mediate claims

rate when parties voluntarily use mediation, versus a 46% success rate when mediation is mandated by the court).

80. GOVERNOR'S TASK FORCE, *supra* note 72; Wissler, *supra* note 71, at 341.

81. *See* Wissler, *supra* note 71, at 324–25; Wissler, *supra* note 74, at 567, 569.

82. *See* Wissler, *supra* note 74, at 569.

83. *See id.* at 565.

84. *See generally id.* at 572 (noting that coercion into mediation can evolve into coercion to settle).

85. GOVERNOR'S TASK FORCE, *supra* note 72.

86. *Id.*

over the telephone.⁸⁷ In particular, the Court of Appeals for the Tenth Circuit provides this service both to litigants who volunteer and to those selected at random.⁸⁸ Notably, the Court was able to reach settlement agreements with forty percent of these parties.⁸⁹ With the Tenth Circuit as an example, states could certainly implement similar programs and randomly offer this service to parties who have filed a claim. If done properly, news of this convenient service would likely spread via word-of-mouth or from court-sponsored literature.

Despite these viable alternatives, it is difficult to rationalize that the risks associated with mandatory mediation as a prerequisite to litigation, outweigh the likely benefits. The main argument against mandatory mediation is the fear that it will lead to a “two-tiered justice system,”⁹⁰ where wealthy litigants who use a traditional court are exempt from this additional requirement. While this would be a valid argument if we were attempting to create a utopian judicial system, in the real world, this nation conceded to a two-tier system long ago.⁹¹ As noted above, low-income families are veritably denied access to the courts.⁹² Furthermore, states are currently working towards expanding court access to pro se litigants precisely *because* they are poor and have no other means of submitting their claims for adjudication.⁹³ Furthermore, mandatory mediation is a

87. ROBERT J. NIEMIC, *MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS*, 81, 87 (1997).

88. *Id.* at 81–82.

89. GOVERNOR’S TASK FORCE, *supra* note 72.

90. Larry R. Spain, *Alternative Dispute Resolution for the Poor: Is It an Alternative?*, 70 N.D. L. REV. 269, 276 (1994); see Wissler, *supra* note 74, at 576.

91. See generally Leroy O. Clark, *All Defendants, Rich and Poor, Should Get Appointed Counsel in Criminal Cases: The Route to True Equal Justice*, 81 MARQ. L. REV. 47, 76 (1998) (arguing that “we all have complacently come to tolerate a two-tier system of justice—one version is overburdened and inadequately financed—and the other is allowed to freely use its excessive resources”).

92. See *supra* note 23 and accompanying text.

93. E.g., Ill. State Bar Ass’n, *Board Backs Raising Small Claims Case Limit*, ILL. ST. B. ASS’N B. NEWS, Nov. 2003, <http://www.isba.org/Association/0311e.htm> (supporting a proposed jurisdictional increase to \$7500, in part because a “Chicago-Kent College of Law revealed that pro se litigants are likely to have low incomes and small claims cases, and have difficulty

cost-saving measure.⁹⁴ States should be encouraged to use the service, which would allow them to redirect their limited resources. In the end, forcing parties to work towards finding an amicable solution seems like a small sacrifice to pay to improve the efficiency of our judicial system.

V. CONCLUSION

Few Americans could shrug off an economic loss of \$20,000, yet the cost of litigating such a claim in our conventional court system is oftentimes economically prohibitive. Citizens need an accessible civil justice system that is able to provide fair results for reasonable claims. It is unreasonable to expect attorneys to provide pro bono services for every citizen who cannot afford the financial burden of a court trial. Reforming the “people’s court” to provide greater access and expanding mediation and appellate services would help ensure that “equal justice” is not merely a right reserved for the privileged few.

finding lawyers who will represent them”).

94. GOVERNOR’S TASK FORCE, *supra* note 72.

