Research Report:

How Litigants Evaluate Legal Procedures at the Start of Their Cases

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Although portions of the United States economy have begun to recover from the economic crisis that the country experienced from 2007 to 2009, the nation's judicial system has rebounded more slowly. Forty-three states have substantially cut their judicial budgets.[1] In many jurisdictions, the waiting time for civil trials in state courts has dramatically increased—in at least one major metropolitan area, the waiting time for many litigants has risen to five years.[2] Budgets for alternative dispute resolution ("ADR") programs have also shrunk considerably.[3] In light of these realities, many litigants struggle to obtain civil justice.

Empirical research designed to elucidate litigants' preferences for legal procedures can help courts better serve their constituents moving forward. For example, many courts offer either mediation or arbitration as the only alternative to trial. But which of these two procedures do litigants prefer? Procedural preference research can provide such information and consequently help inform program design. Such research can also help lawyers be more responsive to their clients' needs as they consider their procedural options and better predict the preferences of opposing parties.

It is important for empirical research to elucidate how litigants perceive procedures *ex ante* (before a legal procedure resolves the dispute) as well as how they evaluate them *ex post* (after the case has received a final disposition). *Ex ante* perceptions are relevant for understanding litigants' viewpoints regarding how to "fit the forum to the fuss."[4] Research on such perceptions can help court personnel effectively "market" ADR options to litigants, thereby mitigating burdens related to overstretched budgets, court dockets, and the waiting time for trial. It can also be useful for anticipating resistance toward, or overeagerness to engage in, certain procedures in light of the case-related, demographic, or relationship factors at play in a given dispute. For these reasons, an understanding of litigants' pre-experience conceptualizations of legal procedures should be considered foundational.

In contrast, litigants' *ex post* perceptions are important because they tend to affect how inclined litigants are to voluntarily comply with the terms of the agreement or decision that is reached for their case and how willing they are to abide by the law moving forward.[5] Although the architects of court policy are rightfully influenced by multiple factors, research on litigants' perceptions—both *ex ante* and *ex post*—can help to inform the design and use of procedures that maximize the subjective satisfaction of litigants and increase citizens' respect for the legal system.

To contribute to this body of psychological literature, my research team and I spearheaded the first multi-court study of how civil litigants assess legal procedures *ex ante*.[6] We noticed that several aspects of litigant perceptions had not been fully examined through empirical research. One open issue concerned how litigants compare legal procedures such as mediation, judge trials, and non-binding arbitration. Nearly all of the past studies had consisted of laboratory research, which typically involved surveying undergraduates who evaluated options for resolving hypothetical disputes.[7] How *actual* civil litigants

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Footnotes

1. Mary McQueen, President, Nat'l Ctr. for State Courts, National Public Radio Interview (Oct. 4, 2011).
2. Stephen Stock, *California Superior Courts in Crisis*, NBC BAY AREA, July 24, 2013, http://www.nbcbayarea.com/news/local/California-Superior-Courts-in-Crisis-216668081.html.
3. *See* Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637, n.5 (2014), *available at* http://ssrn.com/abstract=2378622.
4. The idea of "marketing" ADR options to litigants is reminiscent of Frank Sander's work during the 1970s, which focused on "fitting the forum to the fuss" through *ex ante* screening and determination of the most appropriate procedures to be used, based on the particulars of individual cases. *See, e.g.*, Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994); *see also* Timothy Hedeen, *Remodeling the Multi-Door Courthouse to "Fit the Forum to the Folks": How Screening and Preparation Will Enhance ADR*, 95 MARQ. L. REV. 941, 941 (2012) (proposing a structural change in the delivery of ADR services through a pre-mediation consultation process of screening and preparation that focuses not only on disputes but on litigants as well).
5. Donna Shestowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549, 577-79 (2008) (providing an overview of the relevant findings); *see also* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 4-5 (2006) (discussing the benefits of voluntary compliance from the perspective of the authorities).
6. We are currently collecting data on the same litigants regarding their *ex post* perceptions.
7. *See* Shestowsky, *supra* note 5, for review of the relevant literature.

assess their options with respect to actual cases was not clear.[8] To our knowledge, only two past field studies had examined the *ex ante* perceptions of real litigants, and both were conducted in a single jurisdiction and made limited inquiries into litigant decision-making.[9] Another open issue was whether litigants' attraction to procedures is associated with demographic, relationship or attitudinal factors, or the substantive issues involved in their cases. Laboratory research on *ex ante* preferences, and arguably even lawyer intuition, suggest that many factors influence how desirable litigants perceive procedures to be, including their culture, race or ethnicity, gender, the role they have in the case (*i.e.*, defendant or plaintiff), and the causes of action that are involved.[10] A third open issue was whether litigants have a preference between the two ADR procedures that courts commonly offer—namely, mediation and non-binding arbitration.

Our project differs from past field research on *ex ante* litigant assessments of procedures in several ways. First, it surveys litigants from three distinct state court systems, making it the first multi-jurisdictional study of litigants' *ex ante* preferences. Second, the courts from which litigants were recruited offered *both* mediation and non-binding arbitration, in addition to trial, for the *same* cases. Thus, the study investigates preferences within a real-world environment while maintaining a "laboratory-like" setting by keeping the most important variables (*i.e.*, the procedures offered by the courts) relatively constant. Third, compared to earlier research, this work examines how litigants evaluate a much larger variety of procedures and assesses a broader set of factors that might predict attraction to procedures.

METHOD

Participants were recruited from general jurisdiction trial courts (the "study courts") in three states:

Third Judicial District Court, Salt Lake City, Utah ("Utah Court");[11]
Superior Court of Solano County, California ("California Court");[12] and
Fourth Judicial District, Multnomah County, Oregon ("Oregon Court").[13]

For six two-week periods between May 2010 and May 2011, we identified litigants who met the following study criteria in each study court: their case must have been filed in one of the courts during the two-week period and have been eligible for trial as well as both mediation and non-binding arbitration at that court. When the court did not provide litigant contact information, the team researched addresses for the litigants to prevent the data contamination that may have occurred by sending the surveys to the attorneys to distribute to their clients. Surveys were mailed to litigants within three weeks of the date on which their case was filed. An introductory letter and consent form explained that they would be compensated for returning the survey.

The survey collected demographic information (*e.g.*, gender, age group) about the litigants, the kind of litigants they were (*e.g.*, whether they were involved in the case as an individual or were representing a company, organization, or group) as well as some details about their case (*e.g.*, whether they were the plaintiff, the defendant, or both (in cases involving counter-claims), the type of legal issues that were involved, whether the parties had a pre-existing relationship with each other, and how much they valued a future relationship with the other party). They rated the confidence they had in their case by providing a 0-100% chance estimate of winning their case ("If you go to trial for this case, what do you think your chances are of 'winning'?"). They also indicated their impression of the court where the case was filed (1 = extremely negative to 9 = extremely positive). See Table 1 for more details regarding the information that was collected.

Other questions assessed how attractive litigants regarded the following legal procedures: (1) Attorneys Negotiate without Clients, (2) Attorneys Negotiate with Clients Present, (3) Mediation, (4) Judge Decides without Trial,[14] (5) Jury Trial, (6) Judge Trial, (7) Binding Arbitration, and (8) Non-binding Arbitration. Litigants read brief descriptions of these procedures[15] to ensure construct validity and then rated each in terms of how attractive they perceived it to be for their own case (1 = not attractive at all to 9 = extremely attractive).[16]

8. *See* Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 Ann. Rev. L. & Soc. Sci. 171, 173 (2005).
9. For review, see Shestowsky, *supra* note 3, at 651-53.
10. *Id.*
11. The Utah Court is located in Salt Lake City. In 2010, litigants filed 55,074 civil cases in the Utah Court. *See* Utah Dist. Courts, Fy2010 Case Type By Court (2010), *available at* http://www.utcourts.gov/stats/files/2010FY/district/3-Summary.pdf.
12. The California Court is located in northern California, with branches in Fairfield and Vallejo. For the 2010–2011 fiscal year, the Solano County Court received 13,910 civil filings. Judicial Council of Cal., 2012 Court Statistics Report: State Caseload Trends: 2001–2002 Through 2010–2011, at 94 tbl.4b (2012), *available at* http://www.courts.ca.gov/documents/2012-Court-Statistics-Report.pdf.
13. The Oregon Court is located in Multnomah County. In 2010, the Oregon Court received 18,203 civil-case filings. Or. Judicial Dep't, Statistical Report Relating to the Circuit Courts of the State of Oregon, at 2 tbl.1 (2010), *available at* http://courts.oregon.gov/OJD/docs/OSCA/2010_Stats_Table_1.pdf.
14. This procedure was described to participants as follows: Sometimes a judge can decide a case early on, so that a trial is never required. This is because the judge has determined there is no question about the facts, and the case can be decided on the basis of law alone. The lawyers submit documents to the court and may make a presentation to the judge at a hearing. Clients rarely attend and, if they do, they do not speak during the hearing. The judge later announces the outcome in writing, and explains why they decided as they did. This outcome is based on legal rules or principles. A party who is dissatisfied with the outcome can appeal it to a higher court, which will require additional time and proceedings.
15. For a full set of descriptions, see Shestowsky, *supra* note 3, 701-03. "Construct validity" refers to the "degree to which certain explanatory concepts or constructs account for performance on [a] test." Samuel Messick, Validity of Test Interpretation and Use 7 (1990), *available at* http://www.eric.ed.gov/PDFS/ED395031.pdf.
16. We created three versions of the survey, with the same questions presented in different orders in each version.

TABLE 1: PARTICIPANT INFORMATION		
	FREQUENCY	**%**
Court Location		
California	59	14.3
Oregon	190	46.0
Utah	155	37.5
Missing Data	*9*	*2.2*
Role in Case		
Defendant Only	156	37.8
Plaintiff Only	235	56.9
Both	12	2.9
Other	1	0.2
Missing Data	*9*	*2.2*
Party Type (Litigant)		
Individual	287	69.5
Company	97	23.5
Group/Organization	27	6.5
Missing Data	*6*	*1.5*
Party Type (Opposing Party)		
Individual	202	48.9
Company	156	37.8
Group/Organization	32	7.7
Missing Data	*30*	*7.3*
Was the Litigant a Defendant or Plaintiff Before?		
Yes, Defendant Only	52	12.6
Yes, Plaintiff Only	70	16.9
Yes, Both	69	16.7
No, Neither	176	42.6
Missing Data	*46*	*11.1*
Litigant Age Group		
18-25	14	3.4
26-35	80	19.4
36-45	74	17.9
46-55	92	22.3
56-65	82	19.9
66-75	48	11.6
76-80	6	1.5
Over 80	5	1.2
Missing Data	*12*	*2.9*

TABLE 1: PARTICIPANT INFORMATION (CONTINUED)		
	FREQUENCY	**%**
Litigant Ethnicity/Race		
American Indian or Alaska Native	6	1.5
Asian	17	4.1
Hispanic	12	2.9
Black or African American	20	4.8
Native Hawaiian or Other Pacific Islander	4	1.0
White Non-Hispanic	324	78.5
Other	16	3.9
Missing Data	*14*	*3.4*
Litigant Gender		
Female	176	42.6
Male	225	54.5
Missing Data	*12*	*2.9*
Relationship with Opposing Party Before Filing?		
No	218	52.8
Yes	180	43.6
Missing Data	*15*	*3.6*
Insurance Company has an Interest in the Outcome?		
Yes, Plaintiff's insurance has an interest	26	6.3
Yes, Defendant's insurance has an interest	83	20.1
Yes, Both Parties' insurance have an interest	42	10.2
No, Neither Party's insurance has an interest	190	46.0
Don't Know	57	13.8
Missing Data	*15*	*3.6*

Note: N = 413. *Missing data* indicates litigants for whom a response to the question was not obtained. Party Type and Opposing Party Type calculations include participants (*n* = 4 and *n* = 7, respectively) who indicated that more than one type applied to their case.

PARTICIPANTS AND TYPES OF CASES

Four hundred thirteen litigants participated in this study.[17] The majority of their cases involved only personal injury (28.6%) or contracts (24.5%) issues. A variety of other types of cases were included in the sample: property (11.1%), civil rights (2.9%), employment (5.3%), medical practice (1.7%),

17. Ultimately, the mailings resulted in a 10% response rate. The data set includes litigants with mailing addresses from 19 states; 7.02% had addresses from outside of the states where the study courts were located.

and "other" (10.9%). About one-eighth of cases (12.6%) involved multiple causes of action.[18]

RESULTS AND DISCUSSION

We used our data to determine (1) litigants' relative preferences for the various legal procedures and (2) whether case-type, demographic, relationship or attitudinal factors predicted how desirable litigants regarded each procedure. As with any empirical study, it is important to keep in mind how to interpret our findings. First, because ours was not a controlled laboratory study, our data cannot be used to conclusively determine causal relationships between litigants' attraction to certain procedures and the other factors we measured (*e.g.*, that litigants' attitudes toward the court *causes* their level of attraction to the Judge Trial, or that being female *causes* a relative dislike for Binding Arbitration). Thus, although our interpretations of the findings are certainly consistent with the analyses that we report, they should not be taken as evidence that we discovered particular causal relationships. Second, it is important to note that the results do not necessarily generalize to how litigants might evaluate these same procedures *ex post*. Third, although, to our knowledge, the data collected for this study represents the largest data set of litigants' *ex ante* perceptions of procedures published to date, the response rate was 10%.[19] Notably, and perhaps expectedly, defendants opted out of the research at higher rates than plaintiffs did.

A. PROCEDURAL PREFERENCES

Litigants evaluated the attractiveness of each procedure for their case (1 = not attractive at all to 9 = extremely attractive). To determine their relative preferences, we compared how attractive they found the Judge Trial—the default legal procedure[20]—to the other options. Litigants found the Judge Trial significantly more attractive than all other examined procedures except for Attorneys Negotiate with Clients Present and Mediation. Litigant attraction to these two procedures did not significantly differ from that of the Judge Trial. See Figure 1.

Additional analyses revealed that litigants preferred Mediation to all other procedures except for the Judge Trial and Attorneys Negotiate with Clients Present (whose attractiveness ratings did not significantly differ from that of Mediation). They also liked Attorneys Negotiate with Clients Present more than all of the other procedures except for the Judge Trial and Mediation (whose attractiveness ratings did not significantly differ from that of Attorneys Negotiate with Clients Present). Thus, litigants preferred the Judge Trial, Mediation, and Attorneys Negotiate with Clients Present to all other examined procedures,[21] and within this group of best-liked procedures, they did not have a statistically significant preference.

FIGURE 1: HOW LITIGANTS EVALUATED THE ATTRACTIVENESS OF LEGAL PROCEDURES

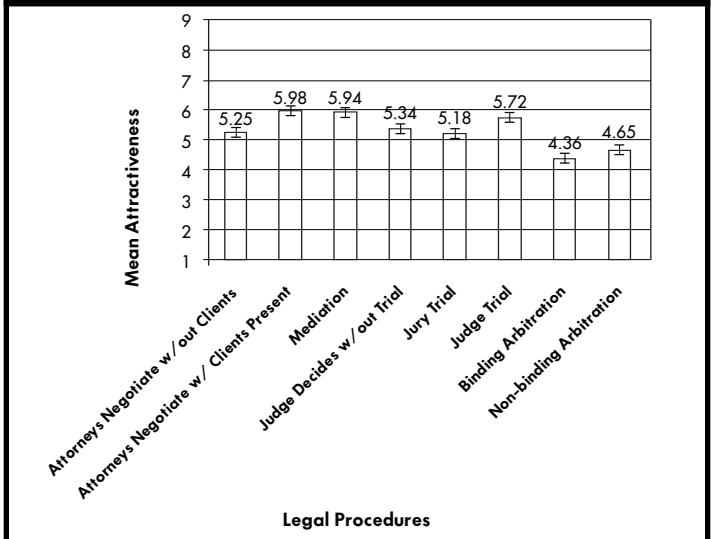

Figure 1. Mean litigant attraction ratings of legal procedures. Error bars are *SE*s of the ratings. Reported above each bar is the average litigant rating for that procedure. Litigants rated their attraction to each procedure using a 9-point Likert scale.

Together, these findings have important implications for courts because court administrators who want to encourage the use of their voluntary programs should strive not only to offer ADR options that litigants find especially appealing relative to each other, but ones that litigants find more appealing (or at least not significantly *less* appealing) than trial itself, *ex ante*. Our study found that not only did litigants prefer Mediation to Non-binding Arbitration, but they liked Mediation significantly more than the Jury Trial (and viewed the attractiveness of Mediation and the Judge trial as statistically equivalent). By contrast, litigants found Non-binding Arbitration significantly *less* appealing than *both* the Judge and Jury Trial.[22] From this perspective, Mediation seems like a better choice for

18. The percentages were calculated using $n = 403$, due to missing data regarding case types.
19. As calculated, the 10% response rate likely reflects a gross underestimate of the true response rate and may significantly understate the representativeness of the sample. Significant research was often required to locate the addresses of litigants; it is possible that in many cases none of the addresses used to reach a particular litigant were correct, and thus, we should not have expected any of our attempts to yield a completed survey. A 10% response rate is not unusual for a survey study of laypeople who are contacted randomly through the mail.
20. A civil litigant must take affirmative action to demand a jury trial. *See* CAL. CIV. PROC. CODE § 631(f) (West 2012) (stating that "A party waives trial by jury . . . (4) By failing to announce that a jury is required, at the time the cause is first set for trial . . . or within five days after notice of setting . . . ."); OR. REV. STAT. ANN. § 52.570 (West 2013) (stating that "[I]f either party . . . demands a jury trial and deposits with the justice such trial fee as is required . . . the issue must be tried by a jury and not the justice; but otherwise it must be tried by the justice"); UTAH R. CIV. P. 38(b) (stating that "Any party may demand a trial by jury . . . not later than 10 days after the service of the last pleading directed to such issue").
21. Hierarchical Linear Model analysis using Attorneys Negotiate with Clients Present as the reference group confirmed this conclusion. The results of this analysis are on file with the author. Other preference results are reported in Shestowsky, *supra* note 3 at 663-66.
22. See Shestowsky, *supra* note 3, at 663-64 (reporting that litigants preferred the Judge Trial to Non-binding Arbitration). A follow-up analysis demonstrated that litigants also preferred the Jury Trial to Non-binding Arbitration, t (406) = 3.45, p = .001.

voluntary programs. Insofar as litigants might be more apt to participate in good faith in settlement procedures they find especially attractive, the fact that litigants favored Mediation to Non-binding Arbitration could be an important finding for mandatory programs as well.

Litigants also preferred negotiations that would include the attorneys along with their clients to negotiations that would involve only the attorneys. They liked Mediation as much as the former but significantly more than the latter. This finding—along with the fact that litigants preferred Mediation to all adjudicative procedures except the Judge Trial—suggests that they want to be present for, and have the option to informally participate in, the resolution process.[23] This finding may come as a surprise to attorneys who assume that they should conduct settlement discussions on their own. Although case strategy might sometimes call for excluding litigants from settlement negotiations, lawyers might anticipate a desire on the part of clients to observe or participate in the discussions themselves and should discuss the advantages and disadvantages of that option in light of their particular case.

Litigants also liked the Judge Trial significantly more than the Jury Trial. At this juncture, explanations for this finding are speculative. Perhaps litigants prefer the judge as fact-finder based on negative depictions of jury trials in the mainstream American media.[24] Alternatively, some litigants may believe that judges are better able to keep an open mind during the trial and not predetermine the outcome.[25] Other litigants may value expediency and suspect that bench trials are more likely to promote it.[26] Future research should seek to explore the greater enthusiasm for the Judge Trial as compared to the Jury Trial.

B. PREDICTORS OF ATTRACTION TO SPECIFIC PROCEDURES

One goal of this project was to determine whether case-type, demographic, relationship or attitudinal variables predicted litigants' attraction to each procedure. To accomplish this goal, we used multiple regression analysis. The variables used as predictors are catalogued in Table 2.[27] The model significantly predicted how attracted litigants were to every legal procedure except for Mediation and Non-binding Arbitration. The latter point suggests that court personnel can choose to offer one of these two procedures without fearing (at least in light of the predictor variables that we examined) that they will inadver-

TABLE 2: VARIABLES USED AS PREDICTORS

VARIABLE NAME	LEVELS OF VARIABLE
Case Type/ Substantive Issue	personal injury, contract, employment, property, other, or two or more case types
Role in Case	defendant, plaintiff, or both
Party Type	individual, company, or group or organization
Opposing Party Type	individual, company, or group or organization
Defendant or Plaintiff Before	whether the litigant had been involved as either a defendant or plaintiff in a previous case; yes or no
Age Group	whether the litigant was 18–25, 26–35, 36–45, 46–55, 56–65, 66–75, 76–80, or over 80
Race	white/Caucasian or other
Gender	male or female
Relationship Before Filing	whether the litigant knew or had a relationship with the opposing party before the case was filed; yes or no
Insurance	whether an insurance company had any interest in the outcome of the case; yes or no
Importance of Future Relationship	1 to 5 rating of the importance of having a relationship with the opposing party in the future; 1 = not at all important, 5 = extremely important
Confindence in Trial Win	0–100% estimate of chances of winning at trial
Court Location	California, Oregon, or Utah
Impression of Court	1 to 9 rating of the litigant's impression of the court where the case has been filed; 1 = extremely negative, 9 = extremely positive

23. The "shuttle" model of mediation was not mentioned in the description of Mediation that was provided to the participants. *See* Shestowsky, *supra* note 3, at Appendix D. Shuttle mediation occurs when mediators meet with the parties separately rather than in joint session and "shuttle' information back and forth between the parties in an effort to reach an agreement.
24. *See, e.g.*, Valerie P. Hans, *Jury Jokes and Legal Culture*, Cornell Law Faculty Publications, Paper 635 (2013) (conducting a systemic analysis of a body of jokes about the jury system, collected from a variety of print and online sources).
25. Studies show that jurors tend to discuss the case before deliberation, despite admonition to the contrary. *See* Natasha K. Lakamp, *Deliberating Juror Predeliberation Discussions: Should California Follow the Arizona Model?*, 45 UCLA L. Rev. 845, 853-54 (1998).
26. *See* Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 Cornell L. Rev. 119, 131 (2002) (explaining that the waiting time for a judge's trial and decision in federal court is shorter than the waiting time in the jury queue).
27. To explore this issue, simultaneous multiple regression analyses were conducted using the attraction rating for each procedure as the outcome variable and a series of case-type, demographic, relationship, and attitudinal variables as predictors. Multiple regression is a common type of analysis used to predict an outcome (in this case, the attractiveness rating for a procedure) based on multiple predictor variables. For each procedure, the intercept of the regression models represents the mean attractiveness of the reference group. Thus, significant nominal predictors in the regression model indicate groups within the variable that are associated with a significant change in the attractiveness rating for a procedure compared to the reference group's average attractiveness rating for that procedure. Similarly, significant continuous predictor variables are variables for which changes in the outcome variable correspond significantly with changes in the predictor. The reference group used in our model consisted of individual white males, between 18 and 25 years of age, who have an individual opposing party with whom they did not have a relationship before the lawsuit and have no interest in having a future relationship, who have a personal injury case, where an insurance company had no interest in the outcome of the case, who have not had experience as either a plaintiff or defendant before, who have zero expectancy of winning in trial, who filed in Oregon, who are plaintiffs in the current case, and who have an extremely negative perception of the court where their case is filed.

TABLE 3								
	ATTYS NEGOTIATE W/O CLIENTS PRESENT	**ATTYS NEGOTIATE W/ CLIENTS PRESENT**	**MEDIATION**	**NON-BINDING ARBITRATION**	**BINDING ARBITRATION**	**JUDGE DECIDES W/O TRIAL**	**JUDGE TRIAL**	**JURY TRIAL**
Case Type/ Substantive Issue		Litigants whose cases concerned personal injury issues only liked this option less than those with "other" case types				Litigants with 2+ case types liked this option more than those whose cases concerned personal injury issues only	Litigants with 2+ case types liked the judge trial more than those whose cases concerned personal injury issues only	Litigants whose cases involved property issues only liked the jury trial less than those whose cases concerned personal injury issues only
Role in Case					Litigants acting as both plaintiff and defendant liked binding arbitration more than those acting as plaintiff only			
Party Type	Companies liked this option more than individuals	Groups and organizations liked this option less than individuals						
Opposing Party Type					Those opposing a company liked binding arbitration more than those opposing an individual			Litigants liked the jury trial more when the opposing party was a group or organization vs. an individual
Defendant or Plaintiff Before					Repeat litigants liked binding arbitration more than first-time litigants			
Relationship Before	Those who had a previous relationship with opposing party liked this option less than those who did not							
Gender					Women liked binding arbitration less than men			Women liked the jury trial less than men
Race								
Age Group		Younger litigants liked this option more than older litigants						
Insurance		Those reporting that an insurance company had an interest in the case liked this option more than those who did not						
Future Relationship		Those who desired a future relationship with the opposing party liked this option more than those who did not						
Confidence in Trial Win	The more confidence litigants had in their case, the less they liked this option					The more confidence they had in their case, the more they liked this option	The more confidence they had in their case, the more they liked the judge trial	The more confidence they had in their case, the more they liked the jury trial
Court Location								CA litigants liked the jury trial less than OR litigants
Impression of Court	The more favorably the litigants viewed the court, the more they liked this option					The more favorably litigants viewed the court, the more they liked this option	The more favorably litigants viewed the court, the more they liked the judge trial	

tently favor the predilections of a subset of the litigants they serve. Table 3 reports the statistically significant predictors for each procedure. Some of these findings are especially worthy of discussion.

1. Repeat Litigants Liked Binding Arbitration More Than First-Time Litigants

Binding Arbitration was the only procedure for which attraction was significantly associated with litigants' past litigation experience. Specifically, repeat litigants liked Binding Arbitration more than their first-time counterparts. This finding resonates with empirical research suggesting that Binding Arbitration awards tend to favor repeat players.[28] It also aligns with the notion that repeat litigants are more likely to appreciate the hardship of protracted discovery and the threat of an appeal following a trial. This appreciation might lead repeat litigants to prefer Binding Arbitration because it can limit the likelihood of both extensive discovery and appeals. In light of this finding, lawyers might attempt to "even the information playing field" by having early discussions about the possible advantages associated with Binding Arbitration, even for cases already filed in court. Courts, too, can provide such information to litigants on their websites or in informational material that explains different alternatives to trial.

The comparative benefits of Binding Arbitration may be mitigated in large commercial disputes, which could explain why companies did not like Binding Arbitration significantly more than individual litigants did. Such disputes tend to introduce costs traditionally associated with "big case" litigation.[29] What is unexpected is that litigants whose opposing party was a company liked Binding Arbitration more than litigants who opposed an individual. This result is surprising given the bad press concerning consumer and employment arbitration, which typically involves cases wherein an individual opposes a corporation.

2. Confidence in Trial Win was Associated with Attraction to Court-Sponsored Adjudicative Procedures

The more confidence that litigants expressed regarding a trial win, the more they liked the Judge Decides without Trial, Jury Trial, and Judge Trial options. One interpretation of this pattern is that the more confident litigants were about their case, the more they expected jurors and judges to feel positively about their case too, and vice versa.

The only other procedure significantly associated with trial-win estimates was Attorneys Negotiate without the Clients. The more litigants believed they would win at trial, the less they wanted a negotiation that opened the door for compromise if they would not be present for settlement discussions.[30] The fact that their estimates of success at trial were not associated with how favorably they regarded the other procedures—including trial-like Binding Arbitration—suggests that they were more agnostic about whether these options would produce results that reflected their own predictions.

From a psychological perspective, litigants' attraction to court-sponsored adjudication as a function of the confidence they have in their case might be due in part to the egocentric bias. The egocentric bias, which is observed when individuals construe information in a self-serving way, can lead litigants to believe their case is much stronger than it is. In our study, 57% of litigants thought they had at least a 90% chance of prevailing at trial, and 24% believed they had a 100% chance. Only 16% thought they had at most a 50% chance of winning. The fact that higher confidence was associated with greater interest in time-consuming and expensive procedures such as jury and judge trials reinforces the importance of lawyers having early discussions about procedures with their clients. Conversations about the risks (as well as the financial and emotional costs) associated with trial might provide litigants a broader perspective from which to consider their options. Courts can encourage such litigant education by enacting court rules that require lawyers to have such discussions early in the litigation process, and can reinforce it themselves via pamphlets or court websites. The latter set of options would be especially important for litigants who represent themselves.

3. Women Liked Jury Trial and Binding Arbitration Less Than Men

Another intriguing finding that emerged was that women liked the Jury Trial and Binding Arbitration less than men did. In fact, these procedures were the only ones for which gender was found to significantly predict procedure attraction. In light of research suggesting that women favor conflict avoidance,[31]

28. *See, e.g.*, Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Arbitration Awards*, 29 McGeorge L. Rev. 223 (1998); Lisa B. Bingham, *The Repeat Player Effect*, 1 Emp. Rts. & Emp. Poly J. 189 (1997).
29. *See* Protocols for Expeditious, Cost-Effective Commercial Arbitration: Key Steps for Business Users, Counsel, Arbitrators & Arbitration Provider Institutions 6 (Thomas J. Stipanowich et al. eds., College of Commercial Arbitrators 2010), *available at* http://apps.americanbar.org/litigation/committees/corporate/docs/2011-cle-materials/10-Prevent-the-Runaway/10c-protocols-expeditious.pdf ("Although many arbitrators and some arbitration rules aim to hold the line on excessive discovery, it is not unusual for legal advocates to agree to litigation-like procedures for discovery, even to the extent of employing standard civil procedural rules.").
30. This interpretation resonates with laboratory research suggesting that when participants have a strong case, they favor procedures in which a third party has decision control. *See, e.g.*, Larry B. Heuer & Steven Penrod, *Procedural Preference as a Function of Conflict Intensity*, 51 J. Personality & Soc. Psychol. 700, 704 (1986) (reporting on laboratory research in which they found "unequivocal support" for the notion "that disputants with a strong case . . . prefer the autocratic and arbitration procedures, whereas their weak-case counterparts . . . prefer the moot, mediation, and bargaining procedures").
31. Some research has found that women exhibit enhanced concern for the other party, a greater willingness to make concessions, and a preference for collaborative strategies. *See, e.g.*, Kwok Leung & Michael Harris Bond, *Effects of Cultural Femininity on Preferences for Methods of Conflict Processing: A Cross-Cultural Study*, 26 J. Experimental Soc. Psychol. 373, 388 (1990); Christine Rack, *Negotiated Justice: Gender & Ethnic Minority Bargaining Patterns in the MetroCourt Study*, 20 Hamline J. Pub. L. & Poly 211, 220-24 (1999).

this pattern makes sense. What is unexpected, however, is that no gender difference emerged with regard to the Judge Trial, which is also adversarial in character. An implication of the lack of gender differences in this category is that women find an exception for Judge Trials compared to these other forms of adjudication.

4. Personal Injury Litigants Liked Jury Trial More Than Property Litigants, but Case Type Was Not a Major Predictor Otherwise

Litigants whose cases concerned personal injury matters only liked the Jury Trial significantly more than those whose cases involved property issues only. This finding fits with the widely held perception that jury sympathy in personal injury cases results in high damage awards to plaintiffs.[32] Yet, the appeal of the Jury Trial was not higher for plaintiffs than defendants. This pattern is curious until one considers that attraction to the Jury Trial was found to be related to confidence (*i.e.*, higher confidence was associated with greater attraction to the Jury Trial, and vice versa). Thus, it is possible that plaintiffs and defendants in personal injury cases were equally attracted to the Jury Trial but that their confidence in a trial win better explained how attracted they were to this procedure. A follow-up analysis designed to test this possibility revealed that the relation between attraction to the Jury Trial and confidence in a trial win for personal injury litigants did not differ significantly between plaintiffs and defendants.[33] This result supports the notion that litigants' attraction to the Jury Trial in personal injury cases was better explained by the confidence they had in their case than by their role as either a plaintiff or defendant.

Case type mattered in relatively few other instances. Those whose cases concerned personal injury issues only liked the Attorneys Negotiate with Clients Present option less than those with other kinds of cases and liked the Judge Decides without Trial option and the Judge Trial significantly less than those with multiple causes of action. The latter result suggests that those with more substantively complicated disputes valued the prospect of having a judge decide their case more than did those whose cases concerned personal injury matters only.

5. Relationship Variables Were Associated with Attraction to the Negotiation Options, but Not with Attraction to Adversarial Procedures such as Binding Arbitration or Trial

An interesting pattern emerged regarding the parties' relationship with one another and how they perceived the two negotiation options. Litigants who had a *pre-existing* relationship with the opposing party liked Attorneys Negotiate without the Clients Present less than those who did not, and vice versa. But those with pre-existing relationships did not differ from litigants without one in terms of how much they liked the Attorneys Negotiate with the Clients Present option. This somewhat counterintuitive pattern suggests that although litigants with a relationship history were agnostic about the negotiations that would allow them to interact with the other party, the idea of negotiations that would take place without them was relatively unappealing. By contrast, the more litigants valued a *future* relationship with the other party, the more they liked Attorneys Negotiate with the Clients Present, and vice versa. Thus, the more litigants desired a future relationship, the more interested they were in informally collaborating to resolve the conflict.

Although one might intuit that the more interested litigants are in a future relationship with the opposing party, the less interested they would be in adjudicative or adversarial procedures (*i.e.*, Judge Trial, Jury Trial, Judge Decides without Trial, and Binding Arbitration), the data did not support this theory. Accordingly, these findings suggest that litigants might not appreciate the negative effects that such procedures might have on their relationships[34] or that they expect the benefits of having a third party decide their case to outweigh any negative consequences.

6. Court Impressions Related to Attraction to Judicial Procedures

The more favorably the litigants rated the court where their case was filed, the more they liked the two options that granted decision control to a judge—namely, the Judge Trial and Judge Decides without Trial. The less favorably they viewed the court, the less attracted they were to these two options. This pattern resonates with findings by Tom Tyler and others, suggesting that greater perceived institutional legitimacy is associated with a greater preference for, and acceptance of, court decisions.[35] The only other procedure that was significantly associated with litigants' regard for the court was Attorneys Negotiate without the Clients Present: the more litigants liked the court, the more they liked this procedure, and vice versa.

7. Demographic Variables

Surprisingly, the findings suggest that factors that previous scholars have speculated or observed to be associated with procedural preferences were rarely, if ever, significant predictors of attraction to procedures. For example, litigants' role in the case

32. *See* Alissa J. Strong, *"But He Told Me It Was Safe!": The Expanding Tort of Negligent Misrepresentation*, 40 U. MEM. L. REV. 105, 142 (2009) ("A problem that arises in personal injury cases is that juries sympathize with and strongly desire to compensate the victim."). *But see* Philip G. Peters, Jr., *Hindsight Bias and Tort Liability: Avoiding Premature Conclusions*, 31 ARIZ. ST. L.J. 1277, 1293 (1999) ("It is widely believed that plaintiffs benefit from jury sympathies. Yet, an increasing body of evidence suggests that jurors begin their job favoring tort defendants and doubting the motives of personal injury plaintiffs . . . .").
33. See Shestowsky, *supra* note 3, at 685.
34. Some empirical research suggests that trial has more of a negative impact on underlying relationships between the parties than mediation. *See* Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 256-68 (1981); Roselle L. Wissler, *Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics*, 29 LAW & SOC'Y REV. 323, 351, 354-58 (1995). *But see* RICHARD J. MAIMAN, AN EVALUATION OF SELECTED MEDIATION PROGRAMS IN THE MASSACHUSETTS TRIAL COURT 7-9, 35, 37 (1997) (finding that litigants were as likely to report that mediation had not improved their relationship as to indicate that it had).
35. *See* Tyler, *supra* note 5, at 25.

was statistically significant only for Binding Arbitration (*i.e.*, litigants acting as both a plaintiff and defendant liked Binding Arbitration more than those acting only as plaintiffs), and court location was a significant predictor only for the Jury Trial (*i.e.*, those with cases in California liked the Jury Trial less than those with cases in Oregon).

Even though previous studies found some factors to be predictive when evaluated individually, the overall pattern suggests that when a multitude of case-type, demographic, relationship, and attitudinal factors are considered simultaneously, relatively few may actually be associated with attraction to procedures. This finding is likely to come as a surprise to lawyers or court administrators who have strong views regarding which procedure is likely to appeal to a "certain kind of litigant" or "someone with a certain kind of case."

CONCLUSION

An important conclusion from this study is that litigants do indeed have procedural preferences. They have great enthusiasm for procedures that theoretically provide litigants with the opportunity for direct participation in the resolution of their cases—namely, Mediation and negotiations that include the parties along with their attorneys. They also have great interest in the Judge Trial, which might reflect respect for authority and perceived procedural fairness through the democratic functioning of the courts. In terms of court-connected ADR, our findings support the choice of Mediation over Non-binding Arbitration.[36]

To the extent that lawyers' attitudes toward procedures differ from those of litigants, some of these differences might be due to litigants' misconceptions about those procedures, whereas others might reflect incorrect assumptions that lawyers have about how litigants view those same options. Rather than relying on their own intuitions about the litigant point-of-view, legal actors could use research findings such as those presented here to anticipate how litigants will perceive their options as a function of factors such as how much litigants value a future relationship with the other party or their perception of the court where their case was filed.

More globally, using research to uncover litigants' perceptions of procedures could lead to a more nuanced understanding of the need for court intervention in the regulation of disputes in the first place. Past research suggests that litigants are less likely to continue their dispute, and more likely to voluntarily comply with the terms of settlement agreements, when they are satisfied with the legal procedures used to resolve their dispute.[37] Thus, offering litigants ADR options that they find subjectively attractive could lead to fewer breach-of-contract claims due to noncompliance with settlement agreements. This scenario would result in diminished demand for scarce court resources. Moreover, when people regard the government as offering subjectively attractive and fair procedures, they subsequently demonstrate greater respect for the legal system and tend to more readily comply with even unrelated laws and regulations.[38] Courts undoubtedly benefit from such voluntary compliance with the law. Thus, as applied to court-connected programs, this kind of empirical research can have important implications for governments stricken by budgetary crises. By better understanding litigants' preferences and designing their programs accordingly, governments might be able to reduce some of the challenges associated with maintaining the civil justice system.

Further research on litigants' perceptions of procedures can continue to fill gaps in the literature in ways that will be useful to lawyers as they serve their clients, as well to court policy. Ultimately, the advancement of procedural justice in light of litigants' preferences will depend on legal actors doing their part to implement such research.

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36. *See supra* Figure 1.
37. *See, e.g.*, Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11, 20-22 (1984) (concluding that litigants in consensual procedures such as mediation are more likely to perceive the outcome as fair and just and, subsequently, are more likely to comply with the outcome than in adjudicated cases); Mark S. Umbreit et al., *Victim-Offender Mediation: Three Decades of Practice and Research*, 22 CONFLICT RESOL. Q. 279, 298 (2004) (concluding that offenders who participate in programs that offer them more opportunity to shape the outcome are more likely to comply with the outcome and are less likely to re-offend than those who engage in procedures that are more adjudicative).
38. As Tom Tyler has argued, on the basis of compelling empirical research, procedures that subjectively appeal to litigants can inspire them to "obey the law" and reduce the need for governmental intervention to ensure legal compliance. *See* Tyler, *supra* note 5, at 3-4, 62.