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## The Keys to the Kingdom: Judges, Pre-Hearing Procedure, and Access to Justice

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**THE KEYS TO THE KINGDOM:  
JUDGES, PRE-HEARING PROCEDURE, AND ACCESS TO  
JUSTICE**

COLLEEN F. SHANAHAN\*

Judges see themselves as—and many reforming voices urge them to be—facilitators of access to justice for pro se parties in our state civil and administrative courts. Judges’ roles in pro se access to justice are inextricably linked with procedures and substantive law, yet our understanding of this relationship is limited. Do we change the rules, judicial behavior, or both to help self-represented parties? We have begun to examine this nuanced question in the courtroom, but we have not examined it in a potentially more promising context: pre-hearing motions made outside the courtroom. Outside the courtroom, judges rule on requests such as motions to continue or for telephone appearances that allow parties to participate in and access the hearing room. These requests have significant consequences for the party, do not implicate the merits of the underlying case, and are a pared-down environment in which to examine the interaction of judicial behavior and procedures.

This article analyzes pre-hearing procedures using more than 5,000 individual unemployment insurance cases, largely involving self-represented litigants, to investigate how judges and procedure interact to expand or contract access to the hearing room and thus to justice. The data show significant variation in how judges apply these procedures and in parties’ case outcomes. These findings underscore the importance of pre-hearing procedures and judicial decisions that grant or deny access to the courtroom, and the barriers that judicial application of these procedures can present for self-represented litigants. The findings also suggest that changes to judicial behavior—through suggestion, training, or ethical codes—may be insufficient to address this aspect of access to civil justice.

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## INTRODUCTION

Tens of millions of Americans engage with the civil justice system, overwhelmingly in state civil and administrative courts.<sup>1</sup> These courts are struggling to serve the litigants who seek help through their doors.<sup>2</sup> The core of this challenge is that, despite an adversarial system designed around the norm of attorneys representing the parties, state civil and administrative litigants overwhelmingly do not have representation.<sup>3</sup>

1. Recent estimates are that there are about twenty million civil non-domestic cases in the state courts each year. PAULA HANNAFORD-AGOR, SCOTT GRAVES & SHELLEY SPACEK MILLER, NAT'L CTR. FOR STATE COURTS, *THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS* 16 (2015) [hereinafter NAT'L CTR. FOR STATE COURTS]. A 2012–13 survey, capturing about 5% of all state civil cases in the country, found that 64% of these cases were contract matters (of these, 37% were debt collection cases, 29% were landlord tenant matters, 17% were foreclosures), 16% were small claims, 9% were other civil agency determinations, 7% were tort matters, and 1% were property cases. This data does not count administrative matters. *Id.* at 16–19. Further, research shows that courts see only a fraction of legal needs: one study estimates only 24% of civil legal problems were ever taken to a lawyer, and only 14% were taken to a court. Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. FOR SOC. JUST. 51, 56–60 (2010).

2. NAT'L CTR. FOR STATE COURTS, *supra* note 1, at iii–vi.

3. The most recent research shows that in 76% of non-family law cases in state civil court, including contract, tort, and property matters, at least one party does not have representation. NAT'L CTR. FOR STATE COURTS, *supra* note 1, at iv, 31–32. Research from the larger study of which this article is a part, among others, has shown low levels of representation in administrative courts. *See, e.g.*, Colleen F. Shanahan,

In state civil and administrative courts, the hearing—the in-person interaction that occurs between self-represented litigants and judges in the courtroom—is the focal point of the justice system due to two related factors. First, litigants are largely self-represented and thus have limited capacity to engage in written pleadings.<sup>4</sup> As a result, the only way for litigants to actually participate in state civil and administrative courts is to come to court in person and talk to the judge. Second, the procedural rules and substantive law in state civil and administrative courts are crafted to accommodate this limitation and thus provide limited opportunities for litigants to engage with state civil courts outside the hearing. In the face of self-represented litigants who are unlikely to write motions and briefs, courts may change their procedures to become more “pro se-friendly” or “simplified” by emphasizing in-person interaction in the hearing room.

This focus on the hearing as the almost exclusive site of justice casts judges as the central actors. Thus, the role of judges in the courtroom is the natural focus of the limited research and reform that has occurred to date.<sup>5</sup> Yet, not every litigant gets into the hearing room. This is because state civil and administrative courts have written procedures, applied by judges, that control access to the hearing room. These procedures—such as requests to appear by telephone or for a new hearing date—are independent of the merits of the underlying case, and happen in writing (with varying degrees of formality). Due to the central role of hearings in these cases, these pre-hearing procedures functionally allow or end a litigant’s case.

The judicial gatekeeping role in deciding pre-hearing procedural motions is largely unseen. The invisibility of these procedures is a consequence of the inconsistency between the assumption of representation in our adversarial model and the reality of the civil justice system. Self-represented litigants, and some types of representatives, rarely challenge a judge’s application of procedure in

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Anna E. Carpenter & Alyx Mark, *Lawyers, Power, and Strategic Expertise*, 93 DENV. L. REV. 469 (2016) [hereinafter *Lawyers, Power, and Strategic Expertise*].

4. NAT’L CTR. FOR STATE COURTS, *supra* note 1, at 31–32, 35.

5. *See, e.g.*, Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987 (1999); Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 FORDHAM L. REV. 969 (2004); Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in “Small Case” Civil Justice*, 2016 BYU L. REV. 899; Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423 (2004).

the courtroom.<sup>6</sup> Without challenges, our legal system does not allow us to see what happens in small cases; if there is no objection to overrule and from which to appeal, we do not know the problem exists.<sup>7</sup> If this is true in the hearing room, where the procedure is playing out in plain view, it is exacerbated in procedures outside the hearing room. A self-represented party may submit a form asking for a continuance. That request is denied. The case ends. Paired with the lack of research, this invisibility means we do not know the scope of state civil and administrative court procedures that control access to the hearing room, or whether they are transparent, predictable, or fair for millions of litigants.

This article begins to make this part of our justice system visible by examining extensive empirical data about one example of pre-hearing procedures that control access to the hearing room. Using data from over 5,000 unemployment insurance cases, the article looks at how judges decide motions to continue and motions to appear by telephone. The findings reveal significant variation among judges in how they decide these motions and thus control access to the hearing room for litigants. The data also show that a judge who is more likely to decide these motions in favor of access to the hearing room correlates with improved case outcomes for litigants.

Like all empirical studies, the data presented in this article are from a particular example—in this case, an administrative court and its collection of judges. This particular example is helpful because motions to continue and for telephone appearance are common examples of pre-hearing procedures that exist in thousands of state civil and administrative courts around the country. In addition, as discussed in more detail below, the data are from a court that is generally friendly to self-represented litigants. As a result, the challenges revealed by this study are likely to be experienced in more extreme forms in courts with fewer resources and less investment in access for self-represented litigants.

Part I of the article discusses the scholarly context for this article. Part II describes the site of the study, the data, and the methodology. Part III presents the findings. Part IV discusses the implications of these findings.

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6. See, e.g., Anna E. Carpenter, Alyx Mark & Colleen F. Shanahan, *Trial and Error: Lawyers and Nonlawyer Advocates*, 42 L. & SOC. INQUIRY 1023 (2017) [hereinafter *Trial and Error*].

7. Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *Can a Little Representation Be a Dangerous Thing?*, 67 HASTINGS L.J. 1367, 1373 (2016) [hereinafter *Can a Little Representation Be a Dangerous Thing?*].

## I. CONTEXT

Scholars have only begun to research and understand the challenges facing state civil and administrative courts.<sup>8</sup> Most of this scholarship examines questions of representation, driven by the stark difference between the impossibility of a lawyer for each litigant in state court and the theoretical norm (and general reality in the federal system) of two represented parties in an adversarial system.<sup>9</sup> As a result, state civil and administrative courts and their lack of resources—especially representation—have earned them the moniker “poor people’s courts.”<sup>10</sup> The literature has begun to theorize about the role of representation, observe the variation in how state civil courts operate, evaluate the role of representation in these systems, and expand empirical examination of these questions.<sup>11</sup> In addition, there is

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8. Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101. See also *Can a Little Representation Be a Dangerous Thing?*, *supra* note 7; D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118 (2012); *Lawyers, Power, and Strategic Expertise*, *supra* note 3; Ethan J. Leib, *Local Judges and Local Government*, 18 N.Y.U. J. LEGIS. & PUB. POL’Y 707 (2015); Shannon Portillo, *The Adversarial Process of Administrative Claims: The Process of Unemployment Insurance Hearings*, 49 ADMIN. & SOC’Y 257 (2017) (describing a sociological study of the District of Columbia Office of Administrative Hearings); Mary Spector & Ann Baddour, *Collection Texas-Style: An Analysis of Consumer Collection Practices in and out of the Courts*, 67 HASTINGS L.J. 1427 (2016); Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 CONN. L. REV. 741 (2015); *Trial and Error*, *supra* note 6. Two early seminal studies of state courts were HERBERT M. KRITZER, *LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK* (1998) and Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992).

9. *Lawyers, Power and Strategic Expertise*, *supra* note 3. See also Richard Zorza, *We Now Have the Data that Shows that the One-Side-Self-Represented Case is the Dominant Case Situation in US Civil State Courts and that We Need a Fundamental Rethink of the State Civil Justice System*, ACCESS TO J. BLOG (Aug. 26, 2016), [<https://perma.cc/5P3H-B23L>].

10. Russell Engler coined the term some years ago, and the recent increase in scholarship concerning civil access to justice has resurrected it. Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers’ Negotiations with Unrepresented Poor Persons*, 85 CALIF. L. REV. 79, 83 (1997). See, e.g., Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People’s Courts*, 22 GEO. J. ON POVERTY L. & POL’Y 473, 476 (2015); Steinberg, *supra* note 8.

11. As empiricism has grown in legal scholarship, there is an increasing focus on research that looks at the civil justice system in the lower courts and in the lives of most Americans. One strain of this scholarship labels itself as access to justice scholarship. See, e.g., Albiston & Sandefur, *supra* note 8; MacDowell, *supra* note 10; Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL’Y 453, 456–58 (2011).

increasing awareness of the complementary and prevalent role of administrative courts along with state civil courts in our legal system.<sup>12</sup>

The overwhelming conclusion of existing research is that these courts are not working. They are not working for litigants looking for effective problem solving mechanisms,<sup>13</sup> for an experience of justice or satisfaction in their interactions with the system,<sup>14</sup> or for avoiding negative social or economic consequences from legal problems.<sup>15</sup> This is especially true for less-resourced litigants in cases with asymmetrical power relationships.<sup>16</sup> The courts are not working for low or no cost legal service providers who are overwhelmed by demand and under resourced.<sup>17</sup> They are not working for court systems, either from a

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Other voices come from new legal realism. See e.g., Howard Erlanger, Bryant Garth, Jane Larson, Elizabeth Mertz, Victoria Nourse & David Wilkins, *Is it Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 337; Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 79 (2009). The scholarly literature is complemented by efforts of state court actors to understand the realities and potential in the existing system. LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* (2017); NAT'L CTR. FOR STATE COURTS, *supra* note 1.

12. Judith Resnik, *Reinventing Courts as Democratic Institutions*, 143 DAEDALUS, J. AM. ACAD. ARTS & SCI. 9 (2014). See also Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark, *Studying the “New” Civil Judges*, 2018 WIS. L. REV. 249.

13. Jonathan D. Casper, Tom Tyler & Bonnie Fisher, *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483, 485–87, 499–500 (1988); William M. O'Barr & John M. Conley, *Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives*, 19 L. & SOC'Y REV. 661, 661–62, 666–67 (1985).

14. Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 L. & SOC'Y REV. 645 (2008); E. Allan Lind, et. al, *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953 (1990); William M. O'Barr & John M. Conley, *Lay Expectations of the Civil Justice System*, 22 LAW & SOC'Y REV. 137 (1988); Victor D. Quintanilla, *Taboo Procedural Tradeoffs: Examining How the Public Experiences Tradeoffs Between Procedural Justice and Cost*, 15 NEV. L.J. 882 (2015); Tom R. Tyler, *Justice and Power in Civil Dispute Processing*, in JUSTICE AND POWER IN SOCIOLEGAL STUDIES (Bryant G. Garth, Austin Sarat eds., 1998) (providing overview of empirical studies about litigant satisfaction, viewed subjectively); Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 L. & SOC'Y REV. 103 (1988); Nourit Zimmerman & Tom. R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L.J. 473 (2010) (party participation leads to voluntary compliance with governmental decisions).

15. LEGAL SERVS. CORP., *supra* note 11, at 7 (seven in ten low-income Americans report that a legal problem has significantly affected their lives).

16. *Lawyers, Power, & Strategic Expertise*, *supra* note 3, at 484–89.

17. LEGAL SERVS. CORP., *supra* note 11, at 37–45.

system design perspective or as an exercise in public spending. In the face of the reality that lawyers cannot assist litigants as the adversarial system presumes, scholars and advocates have begun to develop new norms and designs for state civil and administrative justice systems. One strain of this scholarship casts judges as key actors in facilitating access to justice in state civil courts.<sup>18</sup>

Federal civil judges have long captured the attention of the scholarly community, and this literature is far more developed than research about state civil or administrative judges.<sup>19</sup> This research has largely focused on the role of judges inside the courtroom, or in deciding dispositive pretrial motions such as motions to dismiss or for summary judgment.<sup>20</sup> The scholars who have considered judges as procedural gatekeepers outside the courtroom have almost exclusively

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18. Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227 (2010); Engler, *supra* note 5; Pearce, *supra* note 5; Steinberg, *supra* note 8. In addition to the judge-focused thinking discussed in this article, there are other approaches such as those focusing on clerk and self-help centers. Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 899–901 (2009); Jeffrey Selbin et al., *Service Delivery, Resource Allocation, and Access to Justice: Greiner and Pattanayak and the Research Imperative*, 122 YALE L.J. ONLINE 45, 60–61 (2012) (noting self-help reforms and court simplification efforts “have become significant features of the access-to-justice landscape in their own right”). Another strain of this literature focuses on technology and design, driven in part by the role of technology in current society and perhaps also by commercial interests in technological solutions. See BENJAMIN H. BARTON & STEPHANOS BIBAS, *REBOOTING JUSTICE: MORE TECHNOLOGY, FEWER LAWYERS, AND THE FUTURE OF LAW* (2017); Margaret Hagan, *The User Experience of the Internet as a Legal Help Service: Defining Standards for the Next Generation of User-Friendly Online Legal Services*, 20 VA. J.L. & TECH. 394 (2016).

19. This is unsurprising. We write what we know and lots of us know federal courts and federal judges. In addition, access to empirical data is far easier in the federal courts. See, e.g., LEE EPSTEIN, WILLIAM M. LANDES & RICHARD POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 65–85 (2013) (discussing political affiliation and judicial decision making); Jerome Frank, *Are Judges Human? Part One: The Effect on Legal Thinking of the Assumption that Judges Behave Like Human Beings*, 80 U. PA. L. REV. 17, 21, 25 (1931); Adam N. Glynn & Maya Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?*, 59 AM. J. POL. SCI. 37, 38 (2015) (discussing gender of judge's children & votes on gender issues); Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855 (2015); Corey Rayburn Yung, *A Typology of Judging Styles*, 107 NW. U. L. REV. 1757 (2013).

20. EPSTEIN, LANDES & POSNER, *supra* note 19, at 65–85; Frank, *supra* note 19, at 21–25; Glynn & Sen, *supra* note 19, at 38; Wistrich, Rachlinski & Guthrie, *supra* note 19; Yung, *supra* note 19.



considered the role of federal judges in discovery in complex litigation.<sup>21</sup>

At best, this literature is a distant analogy for state civil or administrative judges.<sup>22</sup> This is because in federal and complex litigation, attorney representation for both parties is more consistently present.<sup>23</sup> This representation shapes (and checks) judicial behavior in ways that define the judicial role. In addition, federal procedure—resting on the assumption of attorney representation—provides for meaningful process outside the courtroom.<sup>24</sup> A simple example illustrates the difference: in federal court, a lawyer may request a rescheduled hearing date because the party has a medical condition. Even if that request is denied, the party has not lost her chance to pursue her case. Rather, the attorney would go without the party, or the attorney would file a motion for summary judgment that resolves the case, or any other collection of procedural adjustments. A default ruling against the party would be highly unusual. Without this representation or procedure in state civil courts, both the context and the judicial role are different: if the request for continuance is denied, the party is without recourse in practice and her case would end.

As my co-authors and I explain in more detail in *Studying the “New” Civil Judges*, there is a glaring need for research about state civil and administrative courts and judges.<sup>25</sup> It is unsurprising that the limited research that does exist examines the role of judges in the

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21. E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306 (1986); Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1247–50 (2005); Todd D. Peterson, *Restoring Structural Checks on Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41 (1995); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378–80 (1982). *But see* Paul R.J. Connolly, *Why We Do Need Managerial Judges*, JUDGES’ J., Fall 1984, at 34 (arguing in favor of managerial judging). *See generally* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (describing the rise of public law litigation in the federal courts and the role of judges in this context).

22. It is worth noting that even in complex federal litigation, the managerial judge has been criticized, criticism that is magnified in the state civil court context. *See, e.g.*, 1 FED. COURTS STUDY COMM., WORKING PAPERS AND SUBCOMMITTEE REPORTS 55 (1990) (criticizing arbitrariness of judicial discretion in “managerial” decisions).

23. Federal courts are not completely immune to the challenges of self-represented litigants, as reflected in Judge Posner’s recent attention to how self-represented litigants are treated in federal appeals (which are largely appeals from administrative matters). *See* Adam Liptak, *An Exit Interview with Richard Posner, Judicial Provocateur*, N.Y. TIMES (Sept. 11, 2017), [<https://perma.cc/G6LH-LZUQ>].

24. *See, e.g.*, FED. R. CIV. P. 16; Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 U. KAN. L. REV. 347, 395 (2003).

25. Carpenter, Steinberg, Shanahan & Mark, *supra* note 12.

hearing room—what is the judge doing, how, why, and could the judge behave differently so that the civil justice system operates more effectively?<sup>26</sup> The handful of studies that have considered judicial behavior outside the hearing room have done so in circumstances that are not squarely in state administrative or civil courts.<sup>27</sup>

This article uses as its foundation the research we do have about state civil and administrative courts and the role of judges, and the limited analogy of research about federal judges. With this foundation, the article makes visible the decision-making of judges in pre-hearing procedural requests. Without the layers of interpersonal interaction that occur in the hearing room, this is a low “noise” way to consider questions of judicial decision-making.<sup>28</sup> The article addresses a narrow set of questions about these pre-hearing procedures, and this analysis provides insight into larger questions of access to justice in state civil and administrative courts.

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26. JONA GOLDSCHMIDT ET AL., AM. JUDICATURE SOC’Y, MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS 54 (1998); Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992) (empirical study of a Baltimore housing court); Anna E. Carpenter, *Active Judging and Access to Justice*, 93 NOTRE DAME L. REV. 647 (2017) [hereinafter *Active Judging and Access to Justice*] (developing theories of judicial behavior in the administrative hearing room that underpin “active judging”); Michele Cotton, *A Case Study on Access to Justice and How to Improve It*, 16 J.L. SOC’Y 61 (2014) (study examining the experiences of unrepresented tenants in a landlord/tenant court); Jessica K. Steinberg, *Informal, Inquisitorial, and Accurate: An Empirical Look at a Problem-Solving Housing Court*, 42 L. & SOC. INQUIRY 1058 (2017); Steinberg, *supra* note 8, at 788 (discussing “dismantling barriers put in place by procedural and evidentiary rules” and “narrow conceptions of the judicial role”); *id.* at 747 (a reformed system is one where “disclosure of key documents is automatic, the rules of evidence emphasize weight rather than admissibility, and judges assume an active role in identifying legal theories and drawing out relevant testimony”).

27. See John M. Conley & William M. O’Barr, *Fundamentals of Jurisprudence: An Ethnography of Judicial Decision Making in Informal Courts*, 66 N.C. L. REV. 467, 467–68 (1988); Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 372–73 (2007) (discussing immigration adjudication in federal setting).

28. Robert P. Burns, *The Rule of Law in the Trial Court*, 56 DEPAUL L. REV. 307, 319–20 (2007) (suggesting that legal rules may be applied more accurately in motions than in trials, in part because exposure to extraneous factors is less likely); Morton Denlow, *Justice Should Emphasize People, Not Paper*, 83 JUDICATURE 50, 50 (1999) (arguing that the lack of face-to-face interaction among parties, judges, and lawyers is detrimental to the federal justice system); Wistrich, Rachlinski & Guthrie, *supra* note 19, at 899 (demonstrating “that affect influences law interpretation and application and that it does so even in the relatively emotionally arid (compared to trial) setting of pretrial motions”).

## II. DATA AND METHODOLOGY

Like all empirical studies, the data in this article describe only the court and the cases being studied. Yet the characteristics of this study site are not unusual. State courts are the courts closest to the people and they hear the largest number of cases in the country. Administrative courts are increasingly formal and central to people's lives.<sup>29</sup> Administrative courts exist in every jurisdiction, with significant case volume and limited representation, and handle issues such as housing disputes, Social Security, Medicare, unemployment and other benefits, school discipline, and family law issues.<sup>30</sup> Though there is variation of all kinds at the state and local levels, there are also shared characteristics, including the hearing as the centerpiece of the process and limited discovery or merits consideration outside the hearing room.<sup>31</sup>

A. *Data and Site of the Study*

This article draws on data including more than 5,000 individual unemployment insurance cases with information on every part of the case.<sup>32</sup> The data capture the entirety of the court's docket—all of the cases that were filed—for two and a half years. The data also include qualitative interviews with representatives and judges who try and hear these cases.<sup>33</sup> The study is informed by the author and co-investigator's experiences representing clients in these cases.<sup>34</sup>

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29. Paris R. Baldacci, *A Full and Fair Hearing: The Role of the ALJ in Assisting the Pro Se Litigant*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 447, 455–56 (2007); Phyllis E. Bernard, *The Administrative Law Judge as Bridge Between Law and Culture*, 23 J. NAT'L ASS'N ADMIN. L. JUDGES 1, 9–12, 18 (2003) (describing Social Security administrative law judges behaving like civil trial judges and noting, “[i]n many agencies today, administrative litigation is virtually indistinguishable from civil litigation”).

30. Bernard, *supra* note 29, at 25–28.

31. See Baldacci, *supra* note 29, at 455–56, 486.

32. To collect the quantitative data, my co-researchers, research assistants, and I engaged in a three-step process. First, we obtained data from Office of Administrative Hearings' case management system. Second, we supplemented and verified this data through review of each paper case file, conducted according to a comprehensive collection protocol. Third, we performed supplemental two-tier data checks of the paper case files and reviewed the collected data for both internal consistency and consistency with court procedures. The collected data were then coded according to a comprehensive coding plan to allow for the use of statistical software for analysis.

33. The qualitative data are presented in this article only when relevant to the quantitative analysis. For more on the qualitative data, see Colleen F. Shanahan,

These cases are unemployment insurance appeals in the District of Columbia's central administrative court, the Office of Administrative Hearings (OAH). OAH is an independent organization, which began formal operation in 2004 to improve hearings arising from District agencies.<sup>35</sup> Unemployment insurance appeals, the focus of our data, are one of about a dozen types of cases heard at OAH.<sup>36</sup> Appointed administrative law judges (ALJs) hear these cases, to which they are randomly assigned.<sup>37</sup>

On one side of an unemployment insurance appeal is a worker who has been separated from her job and is seeking unemployment benefits. On the other side of the appeal is the worker's former employer, whose incentive to contest benefits is a tax rate that corresponds to the number of former workers who have received unemployment benefits.<sup>38</sup> Employers include a wide range of small and large corporations and government agencies. Workers in these cases disproportionately held low-wage jobs.<sup>39</sup>

Though the opposing parties are the worker and employer, this is an administrative proceeding that arises from the Department of Employment Services' decision about the worker's qualification for benefits. As a result, these cases do not have the typical settlement rate of other "small" civil cases. To the contrary, an employer does not

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Jeffrey Selbin, Alyx Mark & Anna E. Carpenter, *Measuring Law School Clinics*, 92 TUL. L. REV. 547 (2018); *Active Judging and Access to Justice*, *supra* note 26; *Trial and Error*, *supra* note 6.

34. We did not formally collect data by observing hearings, though the combination of my five years and Professor Carpenter's two years of experience supervising student representation in the same clinic exposed us to hundreds of these cases between 2010 and 2015.

35. *About OAH*, OFFICE OF ADMIN. HEARINGS, [<https://perma.cc/BR2R-CL8Y>].

36. *Id.*

37. ALJs are appointed by the Commission on Selection and Tenure (COST), ultimately for six-year terms. *See* D.C. CODE § 2-1831.08(c) (2017). COST consists of one member appointed by the Mayor, one member appointed by the Chairman of the D.C. Council, one member appointed by the Chief Judge of the Superior Court of the District of Columbia, and two non-voting members appointed by the Office of the Attorney General and the Chief ALJ. *Id.* § 2-1831.07(a). The ALJs come from a range of professional and personal backgrounds. *ALJ Biographies*, OFFICE OF ADMIN. HEARINGS, [<https://perma.cc/9RJZ-QCMF>].

38. D.C. CODE § 51-103 (2015).

39. *See* AUSTIN NICHOLS & MARGARET SIMMS, URBAN INST., RACIAL AND ETHNIC DIFFERENCES IN RECEIPT OF UNEMPLOYMENT INSURANCE BENEFITS DURING THE GREAT RECESSION (2012), [<https://perma.cc/G9BQ-69DZ>]; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-0701147, UNEMPLOYMENT INSURANCE: LOW-WAGE AND PART-TIME WORKERS CONTINUE TO EXPERIENCE LOW RATES OF RECEIPT (2007), [<https://perma.cc/CBC7-SXE8>].

have the ability to settle a case because the employer does not control the award of benefits; rather, the employer only contests the facts regarding separation from employment.

### *B. Centrality of the Hearing*

These cases are good opportunities to observe how judges implement pre-hearing procedures because the hearing is the substantive centerpiece of the litigation. There is a strong emphasis of a resolution on the merits in the hearing room. Consistent with due process principles, the procedural rules at OAH accommodate self-represented parties with limited capacity for substantive motions practice outside the hearing room.<sup>40</sup> Unemployment insurance appeals at OAH are *de novo* hearings, where the underlying agency determination has no legal weight and the agency record (other than the agency determination letter) is not introduced into evidence or even made available to the parties. Discovery procedures are limited, and rarely used, save for a rule that requires the parties to share exhibits and witnesses three days before the hearing.<sup>41</sup> In addition, the employer in these hearings bears the burdens of production and of proof. In practice, this means that if an employer does not appear at their hearing and the worker appears, the worker wins. Thus, pre-hearing requests are particularly important because these requests are necessarily about participating at all in one's case.

Further, in the District of Columbia, there is explicit appellate authority for a “‘strong judicial and societal preference’ for the resolution of disputes on their merits rather than by default,”<sup>42</sup> a preference that necessarily requires activity in the hearing room due to the procedural rules in these cases. Appellate law further provides that “resort to technicalities to foreclose recourse to . . . judicial processes is ‘particularly inappropriate’” in unemployment and other statutory

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40. See *Goldberg v. Kelly*, 397 U.S. 254, 268–69 (1970) (“[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.”).

41. D.C. OAH Rule 2985.1 (2016). In practice, a failure to disclose does not always prevent use of this evidence. *Active Judging and Access to Justice*, *supra* note 26, at 678, 687–88.

42. *Moore Energy Res., Inc. v. Pub. Serv. Comm’n*, 785 A.2d 300, 305 (D.C. 2001) (quoting *Abell v. Wang*, 697 A.2d 796, 800 (D.C. 1997)).

schemes “in which laymen, unassisted by trained lawyers, initiate the process.”<sup>43</sup>

Proceedings at OAH look and feel similar to a court of general jurisdiction, in contrast to administrative proceedings in some other contexts.<sup>44</sup> Judges hear cases in formal hearing rooms with a dais, witness box, gallery, and audio equipment. The judges wear robes, have gavels, and the parties sit at separate “counsel” tables. The process of these hearings is also formal, including objections, motions, and introducing documents. Every case results in a written decision. Our earlier articles have explored how procedures play an important role in these cases, and that self-represented parties are less likely to use procedures than represented parties.<sup>45</sup>

A majority of parties in the data have no representation, and workers are more likely to be unrepresented. Neither party has representation in forty-nine percent of these cases, with workers going without representation in eighty-two percent of cases and unrepresented employers in fifty-eight percent of cases.<sup>46</sup> In almost ninety percent of the cases in the data, at least one party does not have representation.<sup>47</sup> OAH has a variety of legal representation for those who are represented. Most represented workers are served by law school clinics, the pro bono Claimant Advocacy Program, or the Legal Aid Society of D.C.<sup>48</sup> Represented employers are served by nonlawyers working with human resources companies, in-house counsel, private attorneys, or the pro bono Employer Advocacy Program.<sup>49</sup>

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43. *Barnett v. D.C. Dep’t of Emp’t Servs.*, 491 A.2d 1156, 1163 (D.C. 1985) (quoting *Bethel v. Jefferson*, 589 F.2d 631, 642 (D.C. Cir. 1978)); *Id.* (quoting *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972)).

44. See Nina Schuyler, *The Challenges and Rewards of an Administrative Law Judge*, S.F. ATT’Y, Spring 2010, at 39, 40–41. Unemployment appeal hearings in some states are held by telephone or in meeting rooms. See, e.g., MICH. UNEMP’T INS. AGENCY, A GUIDE TO UNEMPLOYMENT INSURANCE APPEALS HEARING 7, 11–13, 15, [https://perma.cc/J4S4-B3Q8] (discussing hearings being held either in person in a hearing room or by telephone).

45. *Can a Little Representation Be a Dangerous Thing?*, *supra* note 7, at 1375–76; *Lawyers, Power, and Strategic Expertise*, *supra* note 3, at 470.

46. *Trial and Error*, *supra* note 6, at 1032.

47. Shanahan, Selbin, Mark & Carpenter, *supra* note 33, at 17.

48. *Lawyers, Power, and Strategic Expertise*, *supra* note 3, at 476; Shanahan, Selbin, Mark & Carpenter, *supra* note 33, at 18.

49. *Trial and Error*, *supra* note 6, at 1032–33.

*C. The District of Columbia: A Pro Se-Friendly Jurisdiction*

The District of Columbia is a relatively pro se-friendly jurisdiction. The potential contrast with other jurisdictions makes the data particularly important: if this is the experience of parties in a pro se-friendly jurisdiction, what is the experience of unrepresented parties in less friendly jurisdictions? Any findings from this data that suggest restricted or difficult access to the hearing room are the “better” version of this access to justice challenge. It is a reasonable hypothesis that these problems are worse elsewhere.

The pro se-friendliness of the District of Columbia arises in the data in several ways. First, data collection for this study occurred just after the District of Columbia completed an effort to examine the role of judges in facilitating pro se access. This effort resulted in an expansion—as captured in both formal rules of conduct and informal training and guidance—of the understanding of how judges could assist self-represented parties in hearings.<sup>50</sup>

Second, even before this effort in the District of Columbia, OAH had formal rules and informal practices that accommodated self-represented parties. This is in part a reflection of the nature of administrative law, with its more flexible rules of evidence and standards of review. It is also in part a reflection of the relatively unusual phenomenon in the District of Columbia of a centralized, professionalized court to hear administrative cases. It is also a consequence of the D.C. Court of Appeals’ active role in requiring pro se friendliness in administrative matters, and the effect of this appellate activity on the judges at OAH.<sup>51</sup>

Third, the substantive law governing unemployment insurance appeals is claimant (worker) friendly, and workers are the more likely pro se, and typically less-resourced party.<sup>52</sup> Federal and District law clearly establishes “[u]nemployment benefits ‘are a matter of statutory

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50. For a summary of D.C. court reform, see *District of Columbia Courts, DC ACCESS TO JUSTICE COMM’N*, [<https://perma.cc/2PF6-VB2N>]. See *Active Judging and Access to Justice*, *supra* note 26.

51. *Prime v. D.C. Dep’t. of Pub. Works*, 955 A.2d 178, 185 (2008). The court stated:

We have repeatedly held, in applying statutory regimens in which litigants ordinarily represent themselves, that a measure of leniency is appropriate with respect to procedural or other similar errors or miscues, that the contentions of the *pro se* litigants are to be generously construed, and that waivers of substantive claims or defenses are not to be lightly inferred.

See also *Active Judging and Access to Justice*, *supra* note 26.

52. *Lawyers, Power, and Strategic Expertise*, *supra* note 3.

entitlement for persons qualified to receive them.”<sup>53</sup> The D.C. Court of Appeals has actively enforced its holding that the unemployment compensation statute “should be construed liberally, whenever appropriate to accomplish the legislative objective of minimizing the economic burden of unemployment.”<sup>54</sup> As a result of this overlap of substantive law, procedures, and judicial conduct reform, the data in this article capture a pro se-friendly version of how pre-hearing procedures control access to the hearing room.

#### *D. Pre-Hearing Procedures*

In unemployment insurance appeals at OAH, parties can make pre-hearing and post-hearing requests.<sup>55</sup> These requests must be in writing, but the court accepts almost any form of writing, so the submissions range from formal motions written by lawyers to handwritten letters from workers. If a party attempts to make a request by telephone or in person, the clerk tells the person to submit the request in writing by mail, fax, email, or in person. The court’s website has simple forms for basic requests.<sup>56</sup> OAH has a resource center directly next to the clerk’s desk where parties can get assistance completing these forms or otherwise submitting written requests.

This article examines the two most common pre-hearing procedural requests: requests to appear by telephone and requests for a different hearing date. When judges consider these pre-hearing requests, they typically have only the request to consider. There are no discovery motions, pretrial merits motions, pretrial hearings, settlement conferences, or any other information or interaction that can form an impression about the case like there is in federal or complex civil litigation. In this data, the judge has little to no information about the substantive claims in the case when considering the pre-hearing procedural requests. The judge can see the caption in the case, which indicates whether it is the worker or employer who has filed the appeal,

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53. *Hawkins v. Dist. Unemployment Comp. Bd.*, 381 A.2d 619, 623 (D.C. 1977); see D.C. CODE § 51-110(a) (2015).

54. *Bublis v. D.C. Dep’t of Emp’t Servs.*, 575 A.2d 301, 303 (D.C. 1990).

55. Though this article focuses on pre-hearing requests, there are also post-hearing requests such as a motion for new hearing or motion for reconsideration that ask a judge either to schedule a new hearing when the party has missed a court date or to change her decision based on new evidence. Because the written law of post-hearing requests combines both procedural access and the merits of the underlying case, these requests are not part of this article’s analysis.

56. *OAH Forms*, OFFICE OF ADMIN. HEARINGS, [<https://perma.cc/EUJ9-62QP>].



and thus who lost the agency determination. Though it is not evidence in the case or legally binding in any way, the judge may be able to access a paper case file with a one-page agency determination letter that typically has a few sentences about the reason for a decision. However, our qualitative research shows that it is rare for a judge to have the case file far enough in advance of a hearing to have read it while considering a pre-hearing request.<sup>57</sup>

Specific OAH rules and practices, as well as appellate law, govern these requests. Telephone appearances are explicitly provided for in OAH's procedural rules and are permitted "for good cause shown" and "will ordinarily be granted where the witness does not reside [in the area]."<sup>58</sup> There is not a specific OAH Rule governing rescheduled hearing dates in unemployment insurance cases.<sup>59</sup> As a matter of practice, a "good cause" standard is also applied to these requests. The standard appears routinely in the written decisions in these cases when reciting a procedural history where a continuance was granted.<sup>60</sup> In addition, written decisions where one party does not appear note the absence of a continuance or telephone request in explaining why the court proceeded in the party's absence.<sup>61</sup>

The D.C. Court of Appeals, while not directly addressing pre-hearing continuance or telephone requests in unemployment cases, has considered pre-hearing continuances in other administrative matters and

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57. This understanding is based on qualitative interviews with judges and representatives that were part of the broader study. It is consistent with the author's experience directing a clinic that represented hundreds of workers in these cases. *See Active Judging and Access to Justice*, *supra* note 26.

58. D.C. OAH Rule 2821.8 (2016). Telephone appearances may be the one area where D.C. is less pro se-friendly than other states: in many states, unemployment compensation hearings are exclusively telephone hearings. Andrew Grosjean, *Preparing for an Unemployment Hearing or Telephone Conference*, TOUGHNICKEL (Aug. 17, 2016), [<https://perma.cc/J4YL-SV9K>] (stating that "most [u]nemployment hearings are done by phone").

59. There is a "good cause" standard for other specific types of cases. There is a specific rule allowing for extension of time to file an initial unemployment appeal for "excusable neglect or good cause." D.C. OAH Rule 2981.1 (2016). There are also specific rules for school discipline and failure to attend a public benefits hearing. D.C. OAH Rule 2902.8 (2016) (school discipline); D.C. OAH Rule 2976.2 (2016) (failure to attend public benefits hearing).

60. *See, e.g., M.L.B. v. Employer*, No. 2010 DCOAH 00446, 2010 WL 2168924, at \*1 (D.C. Office of Admin. Hearings March 23, 2010) ("On March 15, 2010, for good cause shown, I granted Employer's request for a continuance and rescheduled the hearing . . .").

61. *See, e.g., U.H.C. v. K.W.*, No. 2007 DCOAH 109180, 2008 WL 2953173, at \*1 n.1 (D.C. Office of Admin. Hearings Jan. 30, 2008) ("Claimant failed to appear for the January 25, 2008 hearing. . . . Claimant did not file a request for continuance or otherwise explain an inability to appear for the hearing.").

taken a generous stance despite the high abuse of discretion standard to which administrative agencies are held.<sup>62</sup> On appellate review, the court considers “the reasons for the request for continuance, the prejudice that would result from its denial, the parties['] diligence in seeking relief, any lack of good faith, and any prejudice to the opposing party.”<sup>63</sup> In addition, the Court of Appeals applied a “good cause” standard to an unemployment case where the continuance request was made at the hearing itself.<sup>64</sup>

Taken as a whole, the formal law and practices that are the context for the data in this article are such that pre-hearing motions to continue and for telephone appearances can be considered similar requests for access to the hearing room, using a similar legal standard, in a legal regime where the hearing room is the centerpiece, and the law both allows for and, in some ways, encourages judges to grant such requests for access.

## 1. MATERIALS FOR LITIGANTS

In addition to formal procedures, OAH provides materials to the public about continuances and telephone hearings.<sup>65</sup> Each party receives a scheduling order that includes a hearing date, information about pro bono attorney services, and information about continuances and telephone hearings. The scheduling order provides this information regarding telephone hearings (which is then followed by instructions about filing the request and service on the other party): “Participation by Telephone: You may ask to participate by telephone, if you have a good reason. You may also ask that a witness participate by telephone, if there is a good reason.”<sup>66</sup>

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62. “The denial of a continuance will be reversed when a continuance is needed ‘to avoid “material hardship and injustice.”’” *Murphy v. A.A. Beiro Constr. Co.*, 679 A.2d 1039, 1043 (D.C. 1996) (per curiam) (quoting *Feaster v. Feaster*, 359 A.2d 272, 273 (D.C. 1976) (quoting *Etty v. Middleton*, 62 A.2d 371, 373 (D.C. 1948)); see also PUB. ADMIN. LAW & PROCEDURE § 137 (73A CORPUS JURIS SECUNDUM 1983) (“[T]he refusal by an administrative agency to grant a continuance of a hearing clearly required by the ends of justice is an abuse of discretion.”).

63. *A.A. Beiro Constr. Co.*, 679 A.2d at 1043.

64. *Nursing Unlimited Servs., Inc. v. D.C. Dep’t of Emp’t Servs.*, 974 A.2d 218, 220 (D.C. 2009).

65. As with many courts, these publicly available materials and orders evolve regularly. The materials described here were available during the time period captured by the data in this article.

66. D.C. Office of Admin. Hearings, Scheduling Order for an In-Person Hearing, at 2 (on file with author).

It provides this information regarding a new hearing date: “Changing Hearing Date or Time: We discourage this because we want to resolve your case quickly. If you have a good reason for making such a request, you must first try to contact the other party and see if they will agree.”<sup>67</sup>

In addition, OAH provides standardized request forms on its website and at the resource center. The Telephone Form states, “[y]ou or your witness may participate by telephone at your hearing . . . if you have a good reason. You must try to get the other party to agree.”<sup>68</sup> The Different Hearing Date Form states “[y]ou may ask for a different hearing date or time if you have an emergency or another good reason. You must try to get the other party to agree.”<sup>69</sup>

OAH also publishes (online and at the resource center) two “What to Expect at a Hearing” booklets: a general one and an unemployment insurance specific one. The unemployment insurance booklet says that parties “may submit evidence to OAH in the form of in person or telephonic sworn testimony by themselves or other witnesses and/or documents or other exhibits” but includes no instructions or standards for telephone hearings or continuances.<sup>70</sup> The general booklet has language that sets a high bar for these requests.<sup>71</sup> Regarding telephone hearings, the booklet states:

In **rare** circumstances you may file a written Motion to Appear by Telephone at your hearing. OAH generally doesn’t allow telephone hearings because it puts the person on the telephone (and the parties and judge in the courtroom) at a disadvantage. You must show that coming to the hearing in person is a true hardship in order to be allowed to appear by phone.<sup>72</sup>

Regarding continuances, the booklet states:

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67. *Id.*

68. *General-Request to Participate by Telephone – English*, OFFICE OF ADMIN. HEARINGS, [https://perma.cc/D556-YKT8].

69. *General-Request for a Different Hearing Date – English*, OFFICE OF ADMIN. HEARINGS, [https://perma.cc/2BG9-XFJT].

70. OFFICE OF ADMIN. HEARINGS, WHAT TO EXPECT AT AN UNEMPLOYMENT INSURANCE HEARING, [https://perma.cc/NA88-U5N3].

71. OFFICE OF ADMIN. HEARINGS, WHAT TO EXPECT AT A HEARING 5–6, [https://perma.cc/X2LE-CGJ5].

72. *Id.* (emphasis in original).

You **must** attend the hearing in person. If you don't, you could lose your case. In rare circumstances, such as scheduled surgery or a hearing in another court, you can request a new hearing by filing a written Motion for a Continuance. You must ask for a continuance **as soon as** you know about the conflict. OAH won't normally postpone a hearing for personal reasons or business appointments. Judges also usually won't accept last minute Motions for Continuance, unless you have an unforeseen, serious conflict outside of your control, such as a medical emergency.<sup>73</sup>

These materials for litigants are interpretations (and perhaps modifications) of the formal procedures and appellate law in the District, and in some ways are inconsistent among themselves. The data in this article do not provide the ability to separate the formal law from the informal information provided to litigants. What can be said is that litigants are making these pre-hearing requests in the face of informal information that is at least as stringent as the formal law.<sup>74</sup>

#### *E. Methodology*

The quantitative analysis in this article begins with the hypothesis that there is variation among judges in how frequently they grant continuances or telephone hearings. After observing variation in each kind of request, I hypothesize that this variation might matter in some way to the rest of litigants' case experiences.

To explore this hypothesis, I develop the theory of access-friendliness. Access-friendliness observes a judge's likelihood of granting each type of pre-hearing request. It captures the collection of individual preferences and exercises of discretion in applying the law that result in a judge's decisions, so that this characteristic can be observed relative to other data about these cases.<sup>75</sup> A judicial access-friendliness scale captures this variation as a characteristic of the particular judge. The scale uses the two types of requests (telephone hearing and continuance) to best avoid correlation issues between outcome-based motions, process-based motions, and unobservable

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73. *Id.* at 5 (emphasis in original).

74. See Richard H. Frankel & Alistair E. Newbern, *Prisoners and Pleading*, 94 WASH. U. L. REV. 899 (2017) (measuring how form complaints for federal prisoner actions impose burdens inconsistent with governing law).

75. This article observes the characteristic of access-friendliness, but does not have the data to analyze why a particular judge is access-friendly. This is plainly an area for future research.

characteristics of a case or party and to account for sample size constraints.<sup>76</sup> The scale is fairly reliable with an alpha score of .45. A similar scale captures party-specific access-friendliness, that is, a judge's likelihood of granting a particular party type's pre-hearing telephone or continuance request. This scale is also reliable with an alpha score of .65.

Returning to the hypothesis, if access-friendliness is a meaningful judicial phenomenon, the expectation is that this variation matters in some way. The scale forms the basis for a model that investigates the relationship between access-friendliness as an independent variable and case outcomes as a dependent variable. The model uses logistic regression and controls for the presence of representation and the party's status as appellant. The findings below report odds ratios for ease of interpretation.

This study is observational in nature. It does not use randomized design due to the nature of the data and the ethical challenges of randomizing cases and their characteristics. It is careful not to call results "causal" and instead demonstrates correlative relationships. This design acknowledges the unknown selection bias that may occur in a party's choice to appeal an unemployment insurance case or seek and obtain representation. The analysis is nonetheless useful because it is a very large, population-sized collection of data (every unemployment case in the District of Columbia over a two-and-a-half-year period where the worker's separation from employment is at issue) that provides insight into a breadth of issues of concern. This type of observational study provides useful analysis that a randomized study, necessarily focused on narrow variables, cannot. It is also worth noting that the analysis in this particular article is primarily concerned with judges and not the relative experiences of represented parties as compared to unrepresented parties. To that end, representation is captured in the descriptive statistics and functions largely as a control variable in the analysis.

### III. FINDINGS

Two main questions guide this inquiry into judges as procedural gatekeepers to the hearing room. The first is whether some judges are more access-friendly than others. That is, is there variation among judges in the granting of procedural requests for a new hearing date or

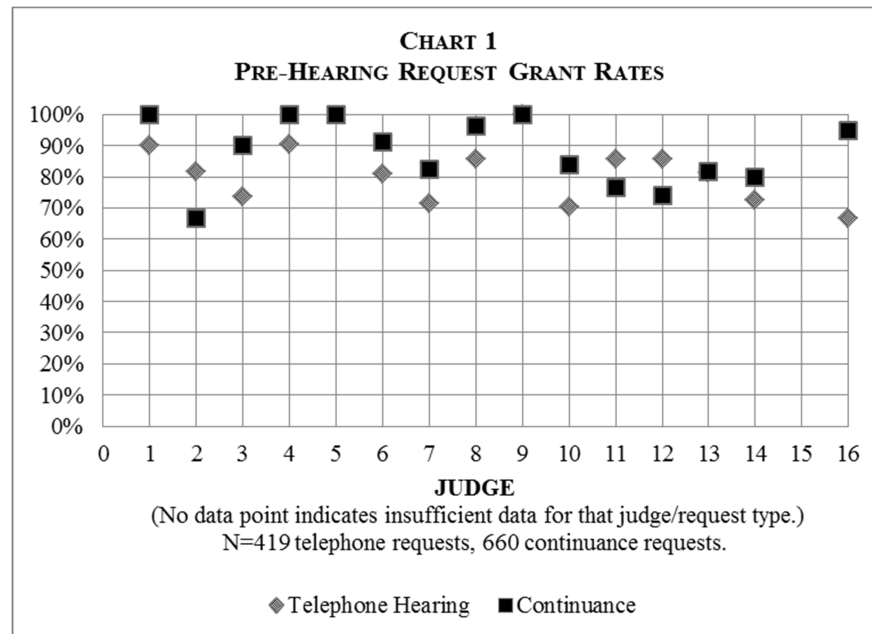
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76. As a result, some motions that arguably relate to access to a courtroom (for example, a motion for a new hearing after the scheduled hearing date) are not included here.

to appear by telephone? The second is, if there is a range of access-friendliness among judges, does having an access-friendlier judge reveal something about the rest of a litigant's case experience? Specifically, does having a more access-friendly judge correlate with better case outcomes for a litigant?

#### *A. Judicial Variation in Access-Friendliness*

First, the data show significant variation in how judges apply pre-hearing procedures. Overall, judges grant from 66% to 100% of these pre-hearing requests: an average of 80% of telephone hearing requests and 85% of continuance requests.<sup>77</sup> Chart 1 displays this variation in the frequency with which judges grant these requests.



There is a dearth of data about how often procedural requests are granted in any context, so it is hard to know whether this range of variation is consistent with other jurisdictions or case types.<sup>78</sup> Even in

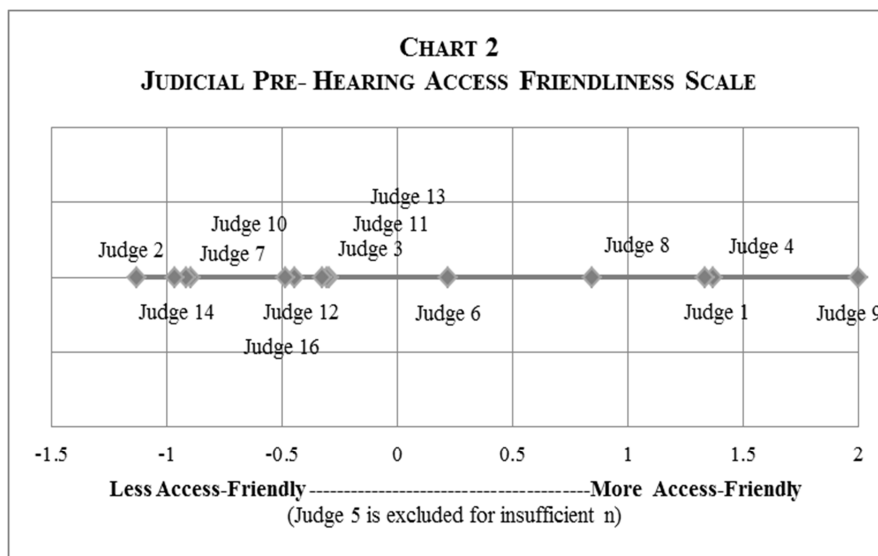
77. There is a low incidence of repeated requests from the same party in the data: 13 of 419 telephone hearing requests and 51 of 660 continuance requests are subsequent requests (by either party) in the same case.

78. Variation in judicial decision-making has largely been measured in the context of ultimate case outcomes. *See, e.g.,* Ramji-Nogales et al., *supra* note 27. One recent study of pretrial decisions in the administrative context is similarly tied to the underlying merits of the case, as it considers pretrial bond decisions. Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 L. & SOC'Y REV. 117 (2016).

the absence of comparisons, given the low levels of representation in this data, the variation may suggest a previously unmeasured barrier for self-represented litigants in civil access to justice. One way to describe this variation is from the perspective of judges' roles in access to justice: particular judges are more or less "access-friendly" in applying the same non-merits based pre-hearing procedures in the same cases. For litigants, this means a judge assignment represents more or less access to the hearing room.

While there is variation among judges, it is confined to a relatively high rate of granting these procedural requests. The context of pre-hearing requests generally, and this study, in particular, suggest this variation is nonetheless meaningful. As discussed above, these cases are ones where there is both a presumption of a worker receiving unemployment compensation and law encouraging access to a hearing. It is also useful to remember that these procedural requests do not implicate—or even give judges information about—the merits of the underlying case. Rather, the requests solely concern the reason for the procedural request, such as conflicting medical, family, or professional circumstances. Against this backdrop, it is notable that some judges deny the request of one in five litigants to appear by telephone or to change a hearing date.

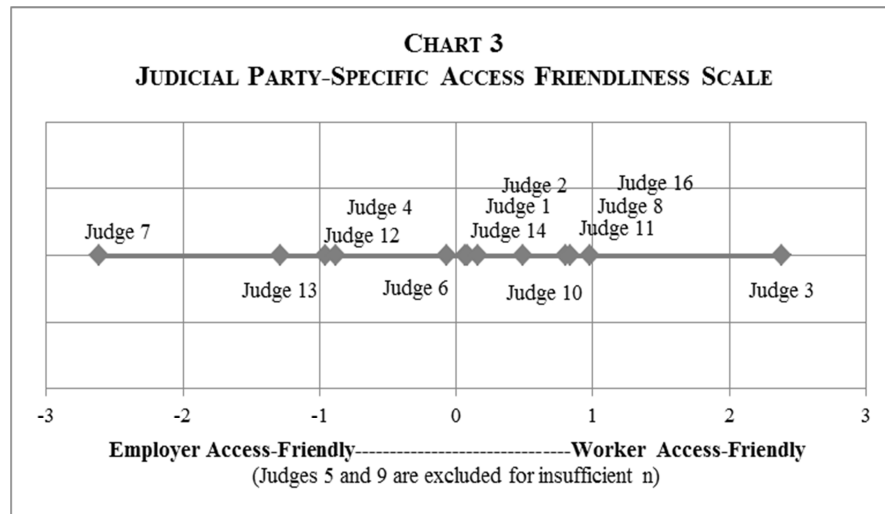
As described in the methodology section, a judicial access-friendliness scale describes a judge's propensity towards granting pre-hearing requests. Each judge's value on this scale captures his or her access-friendliness, providing a tool for observing how this variation plays out in other data about these cases. Chart 2 illustrates this scale.



The scale captures only the variation in grant rates of pre-hearing requests, and does not take into account the party requesting the procedural motion or if they are represented.

Is this observed variation in access-friendliness just party-friendliness? When a particular judge is more likely to grant a pre-hearing request, is that only because she favors letting workers (as opposed to employers) have their day in court? This additional layer of analysis gives insight into whether a judge's access-friendliness is about fidelity to procedural rules, or whether it is a party-specific orientation. The scale in Chart 3 captures the difference between judges' amenability toward worker and employer motion requests. Positive values of this difference scale indicate that a judge is more favorable towards workers' requests than to employers' requests.

Chart 3 shows a different distribution among judges than the general access-friendliness scale. A particular judge who is overall access-friendly (grants more pre-hearing procedural requests as shown in Chart 2) does not do so in a way that proportionally favors either the worker or the employer (as shown in Chart 3). This suggests that the observed access-friendliness is not masking friendliness toward one party over another.



This variation among judges' rulings on pre-hearing requests tells us that, even in the context of straightforward procedural requests, judges do not apply these rules in the same way. It does not tell us what inputs the judges are using to make these varying decisions. What we do know is that the law as written does not make the merits or substance of a party's case or defense relevant to these pre-hearing requests. Nonetheless, one possibility is that some judges are importing



the perceived merits of a case or defense into these procedural rulings. This would be consistent with psychological research observing judges' difficulties in disregarding inadmissible information in decision-making.<sup>79</sup> If this is an input causing the variation in pre-hearing request rulings, then it suggests that access-friendliness overlaps with another characteristic: fidelity to written procedure. In this data, following the written law of pre-hearing procedural requests and granting requests for "good cause" means not considering the substantive merits of the case. A finding that judges are not following this written law has implications for state civil and administrative courts generally. This is because when parties are unrepresented and the traditional protections of the represented adversarial process are not available to the parties, judicial fidelity to written procedure—that is designed to facilitate access to the hearing room—becomes a disproportionately important procedural protection.

Another explanation for the variation in this data is that judges are following the law as written and have individual preferences that guide decisions on pre-hearing requests. For example, a particular judge dislikes telephone appearances and denies all of them, while another judge is comfortable with telephone appearances and always grants them. It could be that a judge has a very clear standard created from her own experience and preferences, such as parties who are outside a thirty-mile radius can appear by phone, and applies that standard consistently, while another judge has no particular standard and is internally inconsistent. This explanation for the observed variation raises questions of how much discretion and transparency is necessary or appropriate for these informal standards for pre-hearing procedural requests.

### *B. Judicial Access-Friendliness Is Related to Case Outcomes*

Even without knowing why the observed judicial variation occurs, we can ask what the observed access-friendliness means for the rest of a litigant's case experience. Is this variation in access-friendliness only a theoretical concern? The data provide an opportunity to explore this broader question by asking whether a litigant with a more access-friendly judge has a different case experience than one with a less access-friendly judge. That is, regardless of whether the litigant herself has made a pre-hearing procedural request, does a judge who is access-

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79. Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L. & SOC. SCI. 203, 216–18 (2017) (collecting studies).

friendly also behave in certain ways towards litigants generally? In this data, the most straightforward way to ask this question is to see if there is a correlation between where a judge falls on the access-friendliness scale and a litigant's case outcome. As noted above, the main object of this inquiry is judicial behavior and not case outcomes, and also the data is observational and thus the analysis is not causal. Nonetheless, investigating these correlative relationships is valuable because it helps to develop a theoretical understanding of judicial behavior and pre-hearing procedures in expanding or constraining access to the hearing room.

#### 1. ACCESS, PARTY APPEARANCES, AND CASE OUTCOMES

This analysis begins with already-reported results from this study: that a worker is more likely to win her case than not (in our data, workers win 67% of cases).<sup>80</sup> As discussed elsewhere, this worker-win rate is consistent with other studies and with the substantive legal framework of unemployment compensation law.<sup>81</sup> This article also relies on earlier-reported data regarding appearances: workers appear at 66% of hearings and employers appear at 53% of hearings.<sup>82</sup>

These overall case experiences change when filtered through pre-trial procedural requests. As Table 4 shows, when a worker has a continuance denied she appears at the hearing less (42% compared to 66% overall) and is less likely to win her case (52% compared to 67% overall). In contrast, when an employer has a continuance denied, it is more likely to appear at the hearing (58% compared to 53% overall) and less likely to win the case (*worker* wins 79% compared to 67% overall).

There appear to be different variations with telephone appearance requests, but the lack of statistical significance for some comparisons limits this analysis. When an employer has a telephone appearance denied, the employer appears at the hearing more (65% compared to 53% overall) and wins more (*worker* wins 58% compared to 67% overall).

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80. *Lawyers, Power, and Strategic Expertise*, *supra* note 3, at 482.

81. *Id.* at 481–82.

82. *Trial and Error*, *supra* note 6, at 1035, 1039.

**Table 4**  
**Appearances & Outcomes When Procedural Request is Denied**  
*(case outcomes are reported as rate at which worker wins the case)*

	Overall	Worker continuance denied	Employer continuance denied	Worker telephone denied	Employer telephone denied
<b>Worker appears at hearing</b>	66%	42%		75%**	
<b>Employer appears at hearing</b>	53%		58%		65%
<b>Worker wins case</b>	67%	52%	79%	38%**	58%

\*\*Insufficient sample size to be significant

The differences in appearances and case outcomes after procedural requests may be the result of the different nature of representation for workers and employers in these cases. Only 19% of workers are represented in these cases and these workers are largely those in hourly-wage jobs. Thus it may be that when a worker requests a continuance, it is because she has an inflexible conflict—such as a new job without time off that she does not want to lose. Thus, without a continuance, she is likely to forego unemployment compensation and keep her new job.<sup>83</sup> In contrast, employers are represented in 42% of cases in this data, largely by the same small collection of attorney and lay representatives.<sup>84</sup> Because there is a significant presence of sophisticated representatives, and because these representatives often have scheduling conflicts among cases, it may be that an employer's continuance request reflects greater flexibility than a worker's and, when a continuance is denied, an alternate representative or witness is obtained and the parties appear at the hearing in greater numbers. Large employers in this jurisdiction are also repeat players in these cases and they may have a clearer understanding that a failure to appear at a hearing, even when a continuance is denied, means losing the

83. If a worker gets a new job she can only claim unemployment compensation for the period of time she was unemployed, but because of the lengthy claims and appeals process, workers often have hearings at OAH—concerning whether they will receive unemployment compensation for interim weeks or months of unemployment—long after they have obtained new employment. These are vital economic benefits for many workers who are behind on rent or otherwise foregone expenses while unemployed and so they still pursue them despite having found new employment.

84. *Trial and Error*, *supra* note 6, at 1032.

case.<sup>85</sup> In addition, the fact of seeking a continuance may spur an employer to focus on preparing a case earlier, leading to a more informed choice about contesting the case, and thus a greater inclination to appear at the hearing.<sup>86</sup>

The decreased win rates for employers whose continuances are denied may reflect a combination of the substantive legal burdens in these cases and additional notice to workers. If an employer does not appear at a hearing and a worker does, the worker automatically wins the case due to the employer having the burden of proof. If the denial of a continuance means the employer is less likely to attend the hearing, this would increase the likelihood of the worker winning the case. In addition, when an employer has a continuance denied, this triggers at least two additional notices (service of the request and the order denying the request) to the worker. This additional notice may increase the likelihood the worker attends the hearing, due to additional notice and due to the impression that the employer may not attend.

Though the data is not sufficient to draw meaningful conclusions about workers' telephone requests, employers' telephone requests are more consistent with a straightforward explanation of the behavior of the more powerful, more represented party in the face of denied requests.<sup>87</sup> Table 4 shows that employers whose telephone appearance requests are denied are more likely to appear at the hearing than employers overall. The fact of a telephone appearance request from an employer suggests that the employer has a witness whose testimony it wants to present. Thus the increased appearance rate is consistent with the explanation that these cases are ones where the party or its representative has invested some time in understanding the case, which either reflects a choice to contest the case or leads to such a choice because solid evidence is located. As Table 4 shows, employers are also more likely to win these cases. This is what we would expect—having made an informed investment in the case, located evidence, and appeared at the hearing, employers win more.

## 2. ACCESS-FRIENDLINESS AND CASE OUTCOMES

The data about party appearances and case outcomes are the backdrop for the second part of the inquiry about judicial access-

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85. *Lawyers, Power, and Strategic Expertise*, *supra* note 3, at 491.

86. *See generally id.*

87. *See, e.g., Lawyers, Power, and Strategic Expertise*, *supra* note 3, at 491 (discussing theories of how powerful parties develop and exercise expertise in navigating procedures).

friendliness: what difference does this judicial characteristic make in a party's overall case experience? This next part of the analysis is constructed to ask whether the likelihood of a worker winning is positively related to a higher placement on the pre-hearing access-friendliness scale (i.e. a judge who more frequently grants requests for a new hearing date or telephone appearance). Though this model asks whether a worker wins, this of course inversely relates to whether an employer wins. As Table 5 reflects, the model controls for the presence of worker representation and the worker's status as the appellant in the case.

Table 5 reports the outcomes of logistic regression and reports odds ratios for ease of interpretation. An odds ratio of less than 1.0 indicates that the variable is negatively related to worker win rates—the odds of a worker winning when those conditions are present are lower than if those conditions are not present. Alternatively, an odds ratio greater than 1.0 indicates that the presence of a particular variable increases the odds of a worker winning her case.

<b>TABLE 5</b>	
<b>LIKELIHOOD OF WORKER WINNING CASE &amp; ACCESS-FRIENDLY JUDGE</b>	
	Odds Ratio (std. error)
<i>More Access-Friendly Judge (higher score on scale)</i>	1.12 (.045)
<i>More Access-Friendly Judge &amp; Worker has representation</i>	2.83 (.241)
<i>More Access-Friendly Judge &amp; Worker is appellant</i>	.546 (.037)
Wald Chi <sup>2</sup>	218.1
Pseudo R <sup>2</sup>	0.04
N	5086

This analysis shows that a worker with a judge who is more access-friendly is more likely to ultimately win her case (an odds ratio of 1.12 indicates that the presence of a more access-friendly judge increases the odds of a worker winning her case). The data also show that this increased likelihood of the worker winning her case is not the judge's predisposition towards workers. This is both because, as discussed above, the pre-hearing access-friendliness scale is not a proxy for party preference and because using the same model as Table 5 with the party-specific access friendliness scale shows a weaker relationship

between party-specific access friendliness and the likelihood of the worker winning her case.<sup>88</sup>

Table 5 also shows that representation for a worker increases the likelihood that a worker with an access-friendly judge will win her case (an odds ratio of 2.83 indicates that the presence of an access-friendlier judge and representation for the worker increases the odds—even more—that the worker will win her case). This is consistent with previously reported results about the role of representation in this data.<sup>89</sup> Interestingly, Table 5 also shows that a worker who is the appellant is less likely to win her case with a pre-hearing access-friendly judge (an odds ratio of .546 indicates that the presence of a more access-friendly judge and the worker as appellate decreases the odds that the worker will win her case). This is also consistent with previously reported results about overall case outcomes for appellant parties.<sup>90</sup>

What do these results mean for pre-hearing procedural requests and judges? The data tell us a worker with an access-friendly judge is more likely to get in the hearing room, more likely to win her case and receive unemployment compensation, and thus more likely to experience the benefits that flow from that.<sup>91</sup> The model also tells us that these advantages for workers are not party-related bias on the part of particular judges. To the contrary, this data may be showing relative fidelity to the law as written. This may be fidelity to written procedure that favors litigants getting in the hearing room or it may be fidelity to written substantive law that favors workers receiving unemployment compensation. It may also be fidelity to informal standards developed by the particular judge.

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88. The odds ratio for a more party-specific-access friendly judge and a worker winning her case is 1.04 (.027).

89. *Lawyers, Power, and Strategic Expertise*, *supra* note 3 (finding that representation for workers increases the likelihood of the worker winning the case, and that representation for employer decreases the likelihood of the worker winning the case).

90. *See id.* (finding that worker as appellant decreases likelihood of worker winning the case).

91. *See* CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR & JESSICA C. SMITH, U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010, at 22 (2011), [<https://perma.cc/BUT7-MHM5>] (calculating that 3.2 million people would have fallen below poverty line in 2010 without unemployment insurance benefits); Jonathan Cylus & Mauricio Avendano, *Receiving Unemployment Benefits May Have Positive Effects on the Health of the Unemployed*, 36 HEALTH AFF. 289 (2017) (discussing the “health-promoting effects” that come with receiving unemployment benefits).

Table 5 also reflects, like previous articles about this data and the work of others, that representation magnifies all of these advantages in the civil justice process.<sup>92</sup> At its simplest, it may be that this aspect of the data is showing that access-friendly judges are operating within the system as the written law intends, and representation for a worker ensures that this is happening consistently.<sup>93</sup> In a system where parties are all represented, representation is a way of monitoring and challenging judges who are less friendly toward procedural requests provided for by law or—viewed more broadly—who are not applying the law appropriately to the facts.<sup>94</sup> A related insight from the data is that if there is no representation—as is the case for at least one party in the large majority of cases in this study—the interaction of judges and written law may produce different kinds of judicial behavior. This variation, and a greater understanding of the reasons for it, is a valuable focus for future research.

The finding that a worker who is the appellant is less likely to win her case with a pre-hearing access-friendly judge may reveal an additional nuance to this concept of fidelity to procedures and access-friendliness. It may be that there is a fairness concept embedded in access-friendliness that is rooted in written procedure (or at least general procedural norms). It may be that judges believe that the party who “started” a case should meet a higher standard to delay a case because it is unfair to drag another party into court and then make them wait to resolve the case. This is not necessarily an inappropriate perspective, but it should be a transparent and consistent one, rather than a matter of personal judicial approach or behavior.

It may also be that the data reveal a gap in fidelity to the law, driven perhaps by human nature and perceptions of the adversarial system. While the written law does not give a “loss” in the agency proceeding any meaning or weight in the cases in this data, it may be that a judge is implicitly incorporating this information into decisions.<sup>95</sup> The data may be capturing a judge who sees an agency claims

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92. *Lawyers, Power, and Strategic Expertise*, *supra* note 3.

93. Rebecca L. Sandefur, *When is Law in Action?*, 77 OHIO ST. L.J. FURTHERMORE 59, 62–64 (2016), [<https://perma.cc/4CJN-99M4>].

94. In an earlier article, my co-authors and I address a variation on this point: the absence of law reform arising from cases where parties are unrepresented because lawyers challenge the system in ways that self-represented parties, lay representatives, or lawyers providing less than full representation are not equipped to. *Can a Little Representation Be a Dangerous Thing?*, *supra* note 7.

95. This would be consistent with other studies of judicial behavior. See Rachlinski & Wistrich, *supra* note 79, at 205, 216–18 (collecting studies regarding judicial consideration of inadmissible evidence).

determination and does not formally receive it as evidence in a case, yet it informs the judge's intermediate decisions—such as whether a document or witness is relevant—and the ultimate decision. In either circumstance, this finding about workers as appellants has particular salience for self-represented parties as both the concept of fairness and the implicit incorporation of agency determinations rest on assumptions that are far harder to see or overcome without representation.

### C. *Implications*

The implications for this analysis rest on two premises that are unlikely to change: (1) the hearing room will remain the centerpiece of state civil and administrative courts and (2) parties in these courts will be overwhelmingly unrepresented. If these premises hold, then the analysis in this article suggests that we should invest in clarifying how we value access to the hearing room, and how we establish and make transparent written law and judicial behavior to implement that value.

There has been plenty of focus on judicial behavior including judicial training, rules of judicial conduct, and judicial selection processes. The American Bar Association and many states have implemented judicial ethical reform focused on helping self-represented parties. As discussed above, the District of Columbia, the site of the data for this study, implemented among the most aggressive reforms in the country right before the data collection for this study. The qualitative research from this study—conducted two years after these reforms—suggests that judges were universally aware of their role as facilitators of access to justice, and yet varied widely in how they played this role in the hearing room.<sup>96</sup> Despite these reforms, this article reveals similar variation in pre-hearing access-friendliness. Some scholars have suggested a more formalistic approach that shifts responsibility to the courts for procedural compliance.<sup>97</sup> But do judges enforcing judges simply exacerbate the challenge? Again, the qualitative data from the larger study, of which this is a part, suggests that in the hearing room this approach yields inconsistent results.<sup>98</sup>

A threshold question is: whether we value access to the hearing room enough to clarify and enforce that value in written law? Are there some parts of our written law where we do not need judicial discretion because we are clear about the value of access to the hearing room?

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96. *Active Judging and Access to Justice*, *supra* note 26, at 655–56.

97. Steinberg, *supra* note 8, at 795.

98. *Active Judging and Access to Justice*, *supra* note 26, at 656 (reporting inconsistency in hearing behaviors at OAH despite mandated peer review system).



The narrowest way to answer these questions in the affirmative is “automatic” access to a hearing. For example, court rules could provide that every litigant, regardless of the reason for the request, receives one automatic hearing continuance or telephone hearing. Or rules like the “good cause” standard in the data in this article could become more specific requirements, such as granting a new hearing date for a fever, but not for a routine dental cleaning. Some courts have versions of such rules already, with varying degrees of formality. We should study these formal and informal rules more. There are undoubtedly costs associated with docket management and court resources, as well as timeliness of decisions. But in some cases and courts—including the one that is the site of this study—those might be acceptable burdens in the pursuit of access to justice in a civil or administrative court system that is no longer a represented, adversarial process.<sup>99</sup>

There are also broader implications to these findings. First, should we be considering this relationship between the value of access, pre-hearing procedures, and judicial implementation in a systematic way? What if a state or local court undertook a comprehensive review of its pre-hearing procedures, identified where access to the hearing room is a key value, identified which procedures ostensibly exist to create access, and asked whether these laws could be rewritten to pursue this value more explicitly and directly, even if that meant reducing judicial discretion? Such an effort might yield unexpected results in terms of litigant satisfaction, use of court resources, and efficient system function.

In an even broader sense, the findings in this article inform more ambitious redesign of justice systems. There are active movements—arising largely out of technological advancements—to reconceive of justice systems.<sup>100</sup> For example, technology developed by Modria, originally developed for Ebay’s lauded online dispute resolution system, was used to adjudicate divorces in the Netherlands and is now being redeveloped into a new form.<sup>101</sup> The system gathers information from both parties and then recommends options for both representation and judge-based adjudication depending on the circumstances of the

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99. This echoes a call in a different context for making the rules match the reality of pretrial circumstances. See J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713 (2012).

100. See BARTON & BIBAS, *supra* note 18.

101. The tool can be found at Rechtwijzer.nl. See Roger Smith, *Goodbye, Rechtwijzer: Hello, Justice42*, LAW, TECH. & ACCESS TO JUST. (Mar. 31, 2017), [<https://perma.cc/DHJ8-J26E>].

case.<sup>102</sup> Essentially, the system has automated the access choices in the judicial system without explicitly constraining access. Of course, this brave new world of automating court processes implicates weighty questions balancing of certainty, efficiency, and individual justice that are beyond the scope of this article. Yet the findings of this article suggest that technological redesign and judicial reform efforts may come from different intellectual sources, but they end up asking the same question: are we implementing state civil and administrative justice systems consistent with how we value access to a substantive determination? The implication of this study that some access-focused procedures may be better suited to clearer standards, or even automatic and not judicially implemented decisions, informs these technological efforts.

#### CONCLUSION

This article examines the question of how judges apply pre-hearing procedures that control access to the hearing room. The data show significant variation in how judges apply the same procedure in the same types of cases, and that this variation is not explained by party bias or representation. This variation in judicial application of straightforward procedure outside the courtroom suggests that we need to know more about the role of pre-trial procedures in access to justice for self-represented litigants in state civil and administrative courts. This suggestion is compounded by the analysis—not demonstrating a causal relationship, but nonetheless underscoring the importance of getting in the courtroom—that a worker who gets a judge who is more likely to let her in the courtroom is more likely to win her case.

These findings emphasize the importance of procedures and judicial decisions that grant or deny access to the courtroom for self-represented litigants. They also underscore that changes to judicial behavior—through suggestion, training, or ethical codes—are likely insufficient to achieve access to justice in state civil and administrative courts. Though it may be in tension with the individualized decision making that comes from judicial discretion, access to justice reform in state civil and administrative courts may necessarily require a new approach to legal standards, procedures, and systems that more closely hew to the value of access to justice for self-represented litigants.

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102. *See id.*