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Measuring Law School Clinics

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MEASURING LAW SCHOOL CLINICS

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ABSTRACT

Legal education reformers have long argued that law school clinics address two related needs: first, clinics teach students to be lawyers; and second, clinics serve low-income clients. In clinics, so the argument goes, law students working under the close supervision of faculty members learn the requisite skills to be good practitioners and professionals. In turn, clinical law students serve clients with civil and criminal justice needs that would otherwise go unmet.

Though we have these laudable teaching and service goals—and a vast literature describing the role of clinics in both the teaching and service dimensions—we have scant empirical evidence about whether and how clinics achieve these goals. We know from studies that law students value clinics, but do clinics prepare them to be lawyers? We also know from surveys that clinics provide hundreds of thousands of hours of free legal aid in low-income communities, but how well do clinic students serve clients?

These are big questions across a complex field and set of practices that cannot be answered by a single study. Nevertheless, we report here findings from a large data set of cases that shed some light on the teaching-service promise of law school clinics. Analyzing thousands of unemployment insurance cases involving different types of representation, we are able to compare clinical law students' use of legal procedures and outcomes to those of experienced attorneys in cases in the same court.

We find that clinical law students behave very similarly to practicing attorneys in their use of legal procedures. Their clients also experience very similar case outcomes to clients of practicing attorneys. Though further research is needed on the impact of law school clinics in the teaching and service dimensions, our findings are consistent with claims that law school clinics help prepare students to be practicing lawyers and to serve low-income clients as well as lawyers do.

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TABLE OF CONTENTS

Introduction	3
I. The Teaching-Service Promise of Law School Clinics	4
A. Law School Clinics as a Site of Teaching.....	4
B. Law School Clinics as a Site of Service.....	9
II. The Study	12
A. Study Background.....	13
B. Study Setting	14
C. The Data.....	15
III. The Findings.....	16
A. Legal Representation of Parties	16
1. Rates and Types of Representation	17
2. Case Selection Practices among Worker Representatives	19
3. Case Preparation among Worker Representatives	20
4. Discussion	20
B. Are Clinical Law Students Learning to Act like Attorneys?	21
1. Pre-hearing Evidence Disclosure	21
2. Hearing Appearances	22
3. Introduction of Evidence.....	23
4. Discussion	24
C. Are Law School Clinics Serving Clients?.....	26
1. Case Outcomes and Procedural Behaviors	27
2. Case Outcomes in General	32
3. Discussion	34
Conclusion.....	35

INTRODUCTION

The legal profession and law schools are grappling with two pressing and related concerns. First, given the high cost of legal education and the tight legal job market, what is the most effective way to prepare young lawyers for practice? Second, given the substantial unmet legal needs of low- and middle-income people, how can law schools help to fill the so-called “justice gap”?

Law school clinics are posited as one solution to both challenges. Clinics are a key site in the law curriculum where students receive hands-on training in the practice of law. They typically represent real clients under the close supervision of law school faculty. Most clinics also provide free legal services to clients of low and modest means, including in settings analogous to civil legal aid and public defender offices.

Yet we know surprisingly little about what law school clinics deliver in the teaching and service dimensions. As is the case with legal education more generally, to date we have not examined the extent to which law school clinics actually prepare students for practice. Likewise, we have scant data about how well law school clinic students perform on behalf of their clients.

This article sheds new light on these central questions about clinical legal education by analyzing a substantial data set of process and outcome measures in unemployment insurance (UI) cases:

First, we investigate how well law school clinics teach students to practice by comparing how often clinical law students use legal procedures in UI cases compared to attorneys practicing in the same court. We find that clinical law students and attorneys use procedures at very similar rates, suggesting that clinical law students are practicing like attorneys in this setting.

Second, we explore how well clinical law students serve their clients by comparing the outcomes in UI cases where workers are represented by clinical law students to the outcomes of workers represented by attorneys in the same court. We find that case outcomes are similar for workers represented by law students and attorneys, which suggests that clinic students are serving their clients at a lawyer-quality standard of care.

In Part I of this article, we discuss the teaching and service promise of law school clinics, including how little we know about whether and how they achieve such promise. In Part II, we describe our study methods, including the research setting and study population. In Part III, we report our findings on how clinic students’ use of procedural tactics and case outcomes compare to attorneys. We conclude by assessing the implications of our findings for legal education and the provision of legal services.

I. THE TEACHING-SERVICE PROMISE OF LAW SCHOOL CLINICS

Law school clinics were founded with a dual teaching-service mission.¹ In the teaching dimension, law clinics provide hands-on training to prepare students for the practice and profession of law. In the service dimension, they provide legal assistance to low- and moderate-income clients in need. Scholars have described and debated the tension between these goals since the inception of clinical legal education.²

While the teaching-service theory of clinical legal education is well-developed, there have been few efforts to measure whether and how law school clinics are achieving these goals.³ Such measurement will help us better understand each of these goals for law school clinics, legal education, and the profession. In this Part, we briefly describe what we know about the teaching and service missions of law school clinics, much of which derives from a descriptive literature written by clinical scholars.

A. Law School Clinics as a Site of Teaching

The teaching mission of law school clinics is part of the broader goal of law schools to educate lawyers. Legal education has approached this educational goal in different ways over time. Even now, the profession and academy grapple with describing and implementing the teaching mission of law schools.

Defining the teaching mission of law school clinics has animated decades of thinking, deliberation, experimentation, and advocacy in the

¹ See, e.g., Douglas A. Blaze, *Déjà Vu All Over Again: Reflections on Fifty Years of Clinical Education*, 64 TENN. L. REV. 939, 953 (1997) (“[I]t is important . . . that community service fall within the proper scope of law school educational activity to the extent that service affords demonstrably sound, pedagogic opportunities for the education of law students.”). See also Lauren Carasik, *Justice in the Balance: An Evaluation of One Clinic’s Ability to Harmonize Teaching Practical Skills, Ethics and Professionalism with a Social Justice Mission*, 16 S. CAL. REV. L. & SOC. JUST. 23, 24-25 (2006) (“navigating the balance between learning and service has been a challenge from the inception of clinical legal education.”).

² See Margaret Drew and Andrew Morriss, *Clinical Legal Education & Access to Justice: Conflicts, Interests, & Evolution*, in Samuel Estreicher & Joy Radice, eds., *BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE FOR AMERICANS OF AVERAGE MEANS* (2014); Jane Aiken and Stephen Wizner, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 FORDHAM L. REV. 999 (2004) (“From the outset tensions emerged between the public service goals of the first generation of clinical teachers and their funders, on the one hand, and the academic values of law school faculties on the other. The faculties, to the extent they were not openly hostile to the introduction of experiential learning into the curriculum, as many were, were more concerned with the educational value of clinical programs than with the newly hired supervising attorneys’ legal services and social justice motivations.”); Ann Juergens, *Teach Your Students Well: Valuing Clients in the Law School Clinic*, 2 CORNELL J. OF L. & PUB. POL’Y 339, 344-5 (1993).

³ See Jeanne Charn & Jeffrey Selbin, *The Clinic Lab Office*, 2013 WIS. L. REV. 145 (2013) [*hereinafter* Charn & Selbin, *The Clinic Lab Office*]; Jeanne Charn & Jeffrey Selbin, *Legal Aid, Law School Clinics, and the Opportunity for Joint Gain*, MGMT. INFO. EXCH. J., Winter 2007 [*hereinafter* Charn & Selbin, *Law School Clinics*].

field.⁴ The Carnegie Report on legal education is central to the current debate.⁵ It posits that legal education is comprised of three apprenticeships, or types of learning: knowledge, practice, and professionalism.

The *knowledge apprenticeship* “focuses the student on the knowledge and way of thinking of the profession.... In professional schools, the intellectual training is focused on the academic knowledge base of the domain, including the habits of mind that the faculty judge most important to the profession.”⁶

The *practice apprenticeship* “is to the forms of expert practice shared by competent practitioners. Students encounter this practice-based kind of learning...by taking part in simulated practice situations, as in case studies, or in actual clinical experience with real clients.”⁷

The *professionalism apprenticeship* “introduces students to the purposes and attitudes that are guided by the values for which the professional community is responsible.... The essential goal, however, is to teach the skills and inclinations, along with the ethical standards, social roles, and responsibilities that mark the professional.”⁸

Though the Carnegie Report describes each apprenticeship separately, it acknowledges and recommends that all three apprenticeships be integrated throughout the law school experience.

Consistent with the Carnegie Report, one way of thinking about the teaching goals of law school clinics is whether and how they develop in students the sufficient knowledge, practice skills, and professionalism to become lawyers. A related way to frame the teaching mission of law school clinics is how they help students learn to be attorneys who use strategic

⁴ See Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for This Millennium: The Third Wave*, 7 CLIN. L. REV. 1, 16-17 (2000) for an overview of the history and development of clinical legal education. The learning mission of clinical legal education has its roots in Legal Realism, dating to well before law school clinics existed in their present form. See, e.g., Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933); Jerome Frank, *LAW AND THE MODERN WORLD* (1930). This history continues in more recent efforts to formalize such goals for legal education more generally. See, e.g., American Bar Association, Section of Legal Education and Admissions to the Bar, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP* (July 1992); Roy Stuckey et al., *CLINICAL LEGAL EDUCATION ASSOCIATION, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* (2007).

⁵ William M. Sullivan et al., *THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007) (hereinafter “*Carnegie Report*”). The Carnegie Report’s concept of “three apprenticeships” has been highly influential, motivating the current active redefinition of law school education, including defining and measuring learning outcomes, by the ABA. See ABA Standard 302: Learning Outcomes (echoing the structure of knowledge, practice, and professionalism).

⁶ *Carnegie Report*, *supra* note 5, at 28.

⁷ *Carnegie Report*, *supra* note 5, at 28.

⁸ *Carnegie Report*, *supra* note 5, at 28.

expertise—that specific value that attorneys bring to a case.⁹

Of course, other important goals have been articulated for clinical legal education that overlap with the learning and service missions of clinics.¹⁰ We have a rich literature on law school clinics as sites of training students to pursue social justice.¹¹ Clinics also strive to develop reflective practitioners with the ability and motivation to learn from their own

⁹ In an earlier article, three of the authors built on existing socio-legal theories of professional expertise to develop the concept of strategic expertise to help understand what representation may contribute to parties. Strategic expertise is “combining knowledge of the underlying legal framework with the particularities of a given civil legal setting, including individual personalities and preferences, and exercising judgment to apply this knowledge to a particular client’s circumstance.” Colleen F. Shanahan, Anna E. Carpenter, & Alyx Mark, *Lawyers, Power, and Strategic Expertise*, 93 DENV. U. L. REV. 469, 510 (2016). See Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise Through Lawyers’ Impact*, 80 AM. SOC. REV. 909, 915-16 (2015); HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK 38-39 (1998).

¹⁰ For recent examples, see, e.g., Becky L. Jacobs, *Cultivating Purposeful Curiosity in a Clinical Setting: Extrapolating from Case to Social Justice*, 21 CLINICAL L. REV. 371 (2015) (connecting the clinical mode of cultivating curiosity with research finding that curious students are more academically successful); Anna E. Carpenter, *The Project Model of Clinical Education: Eight Principles to Maximize Student Learning and Social Justice Impact*, 20 CLINICAL L. REV. 39 (2014) (describing the educational benefits of project work in clinics); Sara K. Rankin, *The Fully Formed Lawyer: Why Law Schools Should Require Public Service to Better Prepare Students for Private Practice*, 17 CHAP. L. REV. 17 (2014) (describing clinical settings as opportunities for skills training, creating professional identity, and promoting psychological health); Steven Keith Berenson, *Preparing Clinical Law Students for Advocacy in Poor People’s Courts*, 43 N.M. L. REV. 363 (2013) (asserting clinics are a bridge from theory to practice because they develop skills and give an understanding of how justice system really works); Sameer Ashar, *Law Clinics and Collective Mobilization*, 14 CLIN. L. REV. 354 (2008) (arguing for broader social change roles for law school clinics).

¹¹ See, e.g., Juliet M. Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics*, 15 CLIN. L. REV. 333, 335 (2009); Lauren Carasik, *Justice in the Balance: An Evaluation of One Clinic’s Ability to Harmonize Teaching Practical Skills, Ethics and Professionalism with a Social Justice Mission*, 16 S. CAL. REV. L. & SOC. JUST. 23, 24-25 (2006); Stephen Wizner & Jane Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 FORDHAM L. REV. 997, 999 (2004); Steven Wizner, *Beyond Skills Training*, 7 CLIN. L. REV. 327 (2001); Gary Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Methodology*, in CLINICAL EDUCATION FOR THE LAW STUDENT: LEGAL EDUCATION IN A SERVICE SETTING 374, 375 (1973). This goal is also captured in other articulations of education for the profession. See MacCrate Report, *supra* note 10, at 333 (“Law school deans, professors, administrators and staff should be concerned to convey to students that the professional value of the need to ‘promote justice, fairness and morality’ is an essential ingredient of the legal profession”); MODEL RULES OF PROF’L CONDUCT Preamble, ¶ 1 (2002) (adopted in whole or in part by forty-nine of the fifty states, begins: “A lawyer, as a member of the legal profession, is a . . . public citizen having special responsibility for the quality of justice.”). See also Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLIN. L. REV. 109, 169 (2001) (concluding that “teaching . . . fundamental lawyering skills and values to help prepare law graduates for practice” is a burden to be borne not solely by clinics, but law schools as a whole).

experiences.¹² Each of these goals, though not explicitly articulated in the terms of the Carnegie Report, are captured by the report's three apprenticeships. But if law school clinics have the overarching teaching goal of training students to become attorneys with sufficient knowledge, practice skills, and professionalism, are they achieving this goal?

Despite clinical education's focus on assessment and evaluation and in the face of robust calls for empirical research, we have limited data on whether and how law school clinic students are learning to be lawyers.¹³ In general, the literature is replete with descriptions of law school clinics and the learning that occurs in them.¹⁴ There have been limited and varied attempts to expand this analysis to measure learning outcomes.¹⁵ One approach is to ask how young lawyers perceive clinical legal education. Multiple studies have found young lawyers rate clinical training highly compared to other law school experiences for making the transition to practice.¹⁶

Other studies have tried to connect clinical experience to employment outcomes or other post-graduation behaviors, with mixed results.¹⁷ Another

¹² Donald A. Schön, *Educating the Reflective Legal Practitioner*, 2 CLIN. L. REV. 231 (1995); Brodie, *supra* note 11, at 353.

¹³ See, e.g., Charn & Selbin, *The Clinic Lab Office*, *supra* note 3; Roy Stuckey, *Teaching with Purpose: Defining and Achieving Desired Outcomes in Clinical Law Courses*, 13 CLINICAL L. REV. 807 (2007).

¹⁴ See, e.g., Colleen F. Shanahan, *Cultivating Justice for the Working Poor: Clinical Representation of Unemployment Claimants*, 18 GEO. J. ON POVERTY L. & POL'Y 401 (2011); Carasik, *Justice in the Balance*, *supra* note 1; Philip Schrag, *Constructing a Clinic*, 3 CLIN. L. REV. 175 (1996); David F. Chavkin, *Matchmaker, Matchmaker: Student Collaboration in Clinical Programs*, 1 CLIN. L. REV. 199 (1994); Jane Aiken, *The Learning Contract in Legal Education*, 44 MD. L. REV. 1047 (1985); Peter T. Hoffman, *Clinical Course Design and the Supervisory Process*, 1982 ARIZ. ST. L. J. 277 (1982).

¹⁵ Other professions are also struggling to measure directly whether clinical education is meeting learning goals. See, e.g., Brenda Happell, *The Importance of Clinical Experience for Mental Health Nursing – Part 1: Understanding Students' Attitudes, Preparedness and Satisfaction* 17 INT'L J. OF MENTAL HEALTH NURSING 326 (2008) (using survey of student perceptions to measure preparedness for practice); Roy Remmen et al., *Effectiveness of Basic Clinical Skills Training Programmes: A Cross-Sectional Comparison of Four Medical Schools* 35 MEDICAL EDUCATION 121 (2001) (finding improvement in scores on a written test of skills after hands-on clerkship experience).

¹⁶ Margaret E. Reuter, *The Practice Value of Experiential Legal Education: An Examination of Enrollment Patterns, Course Intensity, and Career Relevance*, 22 CLIN. L. REV. 181 (2015); Rebecca L. Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLIN. L. REV. 57 (2009) (describing national survey of young lawyers showing that clinical training is highly rated compared to other law school experiences for making the transition to practice); Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLIN. L. REV. 109, 135-8 (2001) (reporting data regarding student reporting of how clinic learning informed whether students would engage in pro bono activity after graduation).

¹⁷ Jason W. Yackee, *Does Experiential Learning Improve JD Employment Outcomes?*, 2015 WIS. L. REV. 601 (2015); Robert R. Kuehn, *Measuring Clinical Legal Education's Employment Outcomes*, 2015 WIS. L. REV. 645 (2015) (refuting claims that clinical experiences do not improve law graduates' employment outcomes and reporting data that suggest clinical experiences are important to employers and help some students secure

approach is to measure a particular skill performed by students with and without clinical experience. One study of a program with a significant clinical component found that students in that program performed better in client interviews than students without the experience.¹⁸

None of these approaches to measurement squarely addresses whether law school clinics are preparing students with the knowledge, skills, and professionalism to function as attorneys – it is a complex task to define and measure professional training. But one way to assess whether law school clinics are achieving their teaching mission is to compare clinical law students to the “standard of care” of practicing attorneys.¹⁹ Our data allow us to measure whether clinical law students perform similarly as lawyers do in the same advocacy setting.

Implicit in the choice to compare law students with practicing attorneys is the assumption that attorneys are an appropriate “standard of care” against which to judge student performance. This is not an objective evaluation of the quality of lawyering by attorneys. Rather, the reality of our civil justice system and the site of this study is that these attorneys are the logical, available comparison. This approach is consistent with both legal frameworks and related research. There are legal standards for assessing the quality of lawyering, such as in ineffective assistance of counsel claims in the criminal setting and malpractice claims in the civil setting, and these standards operate by comparison to a generic conception of other attorneys.²⁰ In addition, studies of paralegals and similar

employment); Sandefur & Selbin, *The Clinic Effect*, *supra* note 16 (finding no evidence of a relationship between clinical experience and pro bono service or civic participation, and a strong relationship with sustaining original civic commitments).

¹⁸ Alli Gerkman, IAALS, *Ahead of the Curve: Turning Law Students into Lawyers, A Study of the Daniel Webster Scholar Honors Program at the University of New Hampshire School of Law* (2015) (finding the only significant predictor of standardized client interview performance was whether or not the interviewer participated in the Honors Program. Neither LSAT scores nor class rank was significantly predictive of interview performance).

¹⁹ Jane Aiken & Stephen Wizner, *Measuring Justice*, *supra* note 36, at 90; Ann Shalleck, *Thought and Advocacy About Student Debt: Representation of Low-Income Borrowers in Law School Clinical Programs*, 48 SUFFOLK U. L. REV. 751, 761 (2015).

²⁰ There are two obvious analogies where the law evaluates reasonable representation relative to other attorneys. The first is the ineffective assistance of counsel standard in criminal law. See *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (establishing that a counsel’s performance is deficient if it “fell below the objective standard of reasonableness” and if a reasonable probability exists that the proceeding would have been different, but for counsel’s errors); see also John Blume and Stacey Neumann, *It’s Like Deja Vu All Over Again: Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel*, 34 AM. J. CRIM. L. 127, 134 (2007) (discussing the evolution of effective assistance of counsel standard from “farce and mockery” to “within the range of competence demanded of attorneys” to Strickland’s “objective standard of reasonableness” which is “was only a slight improvement to the ‘farce and mockery’ test, if an improvement at all.”). The second is the standard for legal malpractice in civil law. See *Nat’l Sav. Bank v. Ward*, 100 U.S. 195 (establishing a “reasonable degree of care and skill” as the basis for legal malpractice actions); see also Benjamin Zipursky, *Legal Malpractice and the Structure of Negligence*

professionals in other legal systems have similarly used a generic, typical attorney as the standard of care against which the other service provider is measured.²¹ Thus, comparing students to this standard of care, rather than a hypothetical or idealized lawyer, is a reasonable way to measure whether and how law school clinics are meeting their teaching goals.²²

B. Law School Clinics as a Site of Service

Clinical legal education is deeply rooted in a service mission. As others have noted: “[o]ne of the primary reasons for having a clinic was to engage a law school more directly in providing representation [for the poor in both criminal and civil cases].”²³ This service mission was born in the 1960s of two motivations: “to make law schools relevant to the career aspirations of antipoverty lawyers and to urgent calls for social and economic justice.”²⁴ The mission – though now more frequently labeled as a social justice mission – continues to be a source of inspiration and examination for law school clinics.²⁵

As clinical legal education has grown, these service goals have broadened from providing direct representation to indigent litigants to policy advocacy, transactional advice, and community organizing support to

Law, 67 *FORDHAM L. REV.* 649, note 151 (1998) (surveying each state’s reasonableness standard).

²¹ See, e.g., Richard Moorhead, et al., *QUALITY AND COST: FINAL REPORT ON THE CONTRACTING OF CIVIL, NON-FAMILY ADVICE AND ASSISTANCE PILOT (TSO 2001)* (United Kingdom); Mary Ann Noone, *Paralegals and Legal Aid Organizations*, 4 *J. OF L. & SOC. POL’Y* 146 (1988) (Canada). For a different perspective on standardization, see Karen Barton, Clark D. Cunningham, Gregory Todd Jones, Paul Maharg, *Valuing What Clients Think: Standardized Clients and the Assessment of Communicative Competence*, 13 *CLINICAL L. REV.* 1 (2006) (discussing adoption from medical education to legal education in United Kingdom of model using “standardized” client actors to simulate and give feedback on interviewing skills).

²² This is a different question than what the learning goal of a law school clinic should be, which may well be to guide students to be better than average attorneys. See Kenneth R. Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision*, 40 *MD. L. REV.* 305 (1981) (“The student must be encouraged to aim beyond the typical standard of the marketplace.”)

²³ Jane Aiken and Stephen Wizner, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 *FORDHAM L. REV.* 997-8 (2004). See Marc Feldman, *On the Margins of Legal Education*, 13 *N.Y.U. REV. L. & SOC. CHANGE* 607, 638 (1985); Stephen Wizner & Dennis Curtis, “Here’s What We Do”: Some Notes About Clinical Legal Education, 29 *CLEV. ST. L. REV.* 673, 678-80 (1980).

²⁴ Charn & Selbin, *The Clinic Lab Office*, *supra* n. 3, at 149. See Gary Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology*, in *CLINICAL EDUCATION FOR THE LAW STUDENT: LEGAL EDUCATION IN A SERVICE SETTING* 374 (1973); Michael Meltsner & Philip G. Schrag, *Report from a CLEPR Colony*, 76 *COLUM. L. REV.* 581, 586-87 (1976).

²⁵ See Stephen Wizner, *Is Social Justice Still Relevant?*, 32 *BOSTON C. J. OF L & SOC. JUSTICE* 345 (2012); Jane H. Aiken, *Provocateurs for Justice*, 7 *CLINICAL L. REV.* 287 (2001).

those who would not otherwise have access to professional assistance.²⁶ Despite the evolution and expansion of models of clinical legal education, the service mission persists.²⁷

Although many of us believe law school clinics' low- and moderate-income clients are better off with the assistance of law students than without, we have limited empirical evidence to support our views.²⁸ As with the teaching mission, the literature is replete with descriptions of law school clinics serving clients, whether individuals or broader legal causes.²⁹ While we have a rich and compelling literature extolling the virtues of clinic

²⁶ See Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J. INT'L L. 505 (2003); Dina Schlossberg, *An Examination of Transactional Law Clinics and Interdisciplinary Education*, 11 WASH. U. J. L. & POL'Y 195 (2003). In recent years, some clinicians have questioned whether law clinics must necessarily pursue a service goal at all. See Praveen Kosuri, *Losing My Religion: The Place of Social Justice in Clinical Legal Education*, 32 B.C.J.L. & SOC. JUST. 331 (2012).

²⁷ See Carolyn Grose, *Beyond Skills Training Revisited: The Clinical Education Spiral*, 19 CLINICAL L. REV. 489, 496 (2013); Stephen Wizner, *Is Social Justice Still Relevant?*, 32 BOSTON C. J. OF L & SOC. JUSTICE 345, 353 (2012) ("Law school clinics can maintain their focus on the provision of legal services to low income and other under-represented clients in all of their clinical work, whether it be direct individual client service, impact litigation, transactional lawyering, legislative advocacy, environmental defense practice, or any of the other increasingly varied legal activities in which contemporary law school clinics are engaged.")

²⁸ See Charn & Selbin, *The Clinic Lab Office*, supra note 3; Jeanne Charn and Richard Zorza, CIVIL LEGAL ASSISTANCE FOR ALL AMERICANS 38 (2005).

²⁹ See Mary A. Lynch, *Law School Clinics in the Community*, in TOWN AND GOWN: LEGAL STRATEGIES FOR EFFECTIVE COLLABORATION (Cynthia Baker & Patricia Salkin eds., 2012) (highlighting the various benefits that law school clinic provides to the community in which it is situated); Shanahan, *Cultivating Justice*, supra note 14; Dale Margolin Cecka et al., *Empowerment, Innovation, and Service: Law School Programs Provide Access to Justice and Instill a Commitment to Serve*, 48 FAM. CT. REV. 672 (2010) (describing five programs and their benefits to students and clients); Lauren Carasik, *Justice in the Balance: An Evaluation of One Clinic's Ability to Harmonize Teaching Practical Skills, Ethics and Professionalism with a Social Justice Mission*, 16 S. CAL. REV. L. & SOC. JUST. 23 (2006) (describing a particular clinic); Jill I. Gross & Ronald K. Filante, *Developing a Law/Business Collaboration Through Pace's Securities Arbitration Clinic*, 11 FORDHAM J. CORP. & FIN. L. 57 (2005) (describing how the authors' model meets the multiple needs of clients, law students and graduate business students); Margaret Martin Barry, *Accessing Justice: Are Pro Se Clinics A Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?*, 67 FORDHAM L. REV. 1879 (1999) (describing particular clinics); Kevin R. Johnson & Amagda Perez, *Clinical Legal Education and the U.C. Davis Immigration Law Clinic: Putting Theory into Practice and Practice into Theory*, 51 SMU L. REV. 1423 (1998) (examining the question of whether clinical legal education, often implemented in programs providing legal assistance to subordinated communities, does any good for those communities); Maurice Emsellem & Monica Halas, *Representation of Claimants at Unemployment Compensation Proceedings: Identifying Models and Proposed Solutions*, 29 U. Mich. J.L. Reform 289, 327 (1996) (describing clinical education as a valuable community resource providing high quality representation); Susan Bryant & Maria Arias, *A Battered Women's Rights Clinic: Designing a Clinical Program Which Encourages a Problem-Solving Vision of Lawyering That Empowers Clients and Community*, 42 WASH. U. J. URB. & CONTEMP. L. 207 (1992) (discussing a particular clinic).

service,³⁰ we know surprisingly little about service outcomes in the clinical setting.

Indeed, scholars are only now beginning to understand and measure what “serving a client” means for legal services more generally. There is a broad, spirited effort underway to expand our empirical understanding of representation and other access to justice interventions.³¹ Just as we are only now starting to measure legal services outcomes, we also have very little data about clinical law students and their role in civil justice.³²

Beyond pairing the assertions that there are legal needs and that law school clinics provide free legal services,³³ a few studies have tried to measure the service mission of clinics. One study has attempted to survey and count representation in clinics.³⁴ The only randomized controlled trial to measure outcomes of law school clinic representation concluded that an offer of representation—not actual representation in the legal proceeding—

³⁰ See, e.g., Michael Millemann, *Implementing Maryland Law School’s Mandatory Clinical Requirements*, 47 Md. B.J. 46 (2014) (providing examples of positive impact of law school clinic work); Ann Juergens, *Teach Your Students Well: Valuing Clients in the Law School Clinic*, 2 CORNELL J. OF L. & PUB. POL’Y 339, 348-9 (1993) (asserting that client interests are served by clinics, perhaps even better than by private law firms, and also recognizing that the comparison between clinic representation and no representation may be careless.)

³¹ See Catherine R. Albiston and Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WIS. L. REV. 101 (2013); Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. OF LEGAL EDUC. 531 (2013) (identifying need for adequate research on access to justice, and advising on data-gathering strategy). Examples of recent empirical access to justice research include Elizabeth L. MacDowell, *From Victims to Litigants: Self-Help Legal Services and the Erosion of Advocacy*, 67 HASTINGS L.J. 1299 (2016); Elizabeth L. MacDowell, *Domestic Violence and the Politics of Self-Help*, 22 WM. & MARY J. WOMEN & L. 203 (2016); Mary Spector with Ann Baddour, *Collection Texas Style: An Analysis of Consumer Collection Practices In and Out of the Courts*, 67 HASTINGS L.J. (forthcoming 2016); Fatma Marouf, Michael Kagan, & Rebecca Gill, *Justice on the Fly: The Danger of Errant Deportations*, 75 OHIO ST. L.J. 337 (2014); 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); Jessica Steinberg, *In Pursuit of Justice: Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL’Y 453 (2011); Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE JOURNAL FOR SOCIAL JUSTICE 69-71 (2010).

³² Charn & Selbin, *The Clinic Lab Office*, *supra* note 3. See also, Jeffrey Selbin, Jeanne Charn, Anthony Alfieri & Stephen Wizner, *Service Delivery, Resource Allocation, and Access to Justice: Greiner and Pattanayak and the Research Imperative*, 122 YALE L.J. ONLINE 45, at 53-54 (2012) (acknowledging lack of empirical data on the impact of clinic client services).

³³ Legal Services Corp., DOCUMENTING THE JUSTICE GAP IN AMERICA (2017) (http://www.lsc.gov/press/documents/LSC%20Justice%20Gap_FINAL_1001.pdf); Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1785 (2001).

³⁴ ROBERT R. KUEHN & DAVID A. SANTACROCE, CENTER FOR THE STUDY OF APPLIED LEGAL EDUCATION, *2013-2014 Survey of Applied Legal Education* 27 (2015), available at http://www.csale.org/files/Report_on_2013-14_CSALE_Survey.pdf (“Extrapolating to all law clinics at all ABA-accredited law schools, the estimated total number of clients provided with free civil legal services by clinics during the 2012-13 academic year was over 70,000.”).

did not improve outcomes and delayed case adjudication.³⁵

Our data allows us to observe case outcomes for clients represented by student attorneys in individual representation matters. As with the teaching mission of law school clinics, we can observe clinical law student representation by reference to practicing attorneys in the same setting. Our data allow us to measure whether clinical law students achieve service outcomes on behalf of clients that are comparable to service outcomes for clients represented by attorneys.

While individual litigation representation by students is only one way in which law school clinics achieve a service mission, it is a common and easily measurable one. And, of course, measuring case outcomes in clinical legal education does not account for less tangible contributions to clients' experiences.³⁶ But the data presented in this article provides a valuable opportunity in the face of limited empirical research to measure whether people represented by clinic students experience positive case outcomes.

II. THE STUDY

Our study draws on a large data set of unemployment insurance (UI) cases in the District of Columbia (D.C.) Office of Administrative Hearings (OAH).³⁷ The data set includes quantitative data from more than 5,000 UI cases heard in the OAH from January 2011 to June 2013 and qualitative data from interviews with representatives and judges who participated in these cases. This is not a random sample of all available cases—it includes every such case in the District of Columbia during the study period.³⁸

³⁵ Greiner & Pattanayak, *supra* note 31. For an in-depth discussion of some of the limits of the Greiner & Pattanayak study, see Selbin et al., *Service Delivery*, *supra* note 32.

³⁶ Jane Aiken & Stephen Wizner, *Measuring Justice*, 2013 WIS. L. REV. 79 (2013); Tom R. Tyler, Macklin Fleming Professor of Law, Inaugural Lecture and Yale Law School: Legitimacy in Everyday Law (Dec. 10, 2012) <http://vimeo.com/56986325> (identifying elements of procedural fairness as (1) having a voice in the legal process; (2) having the outcome explained clearly; (3) being treated with respect); Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures* 22 LAW & SOC'Y REV. 103 (1988) (finding citizens reacted positively to legal system which employed procedural fairness, regardless of their case outcome).

³⁷ For a more detailed discussion of our previous analysis of this data, see Colleen F. Shanahan, Anna E. Carpenter, & Alyx Mark, *Lawyers, Power, and Strategic Expertise*, 93 DENV. U. L. REV. 469 (2016) [hereinafter Shanahan, Carpenter, & Mark, *Lawyers, Power, and Strategic Expertise*]; Anna E. Carpenter, Alyx Mark, & Colleen F. Shanahan, *Trial and Error: Lawyers and Nonlawyer Advocates*, 41 LAW AND SOC. INQUIRY (2016) [hereinafter Carpenter, Mark, & Shanahan, *Trial and Error*]; Colleen F. Shanahan, Anna E. Carpenter, & Alyx Mark, *Can a Little Representation Be a Dangerous Thing?*, 67 HASTINGS L.J. 101 (2016) [hereinafter Shanahan, Carpenter & Mark, *A Little Representation*]. In addition, data from the same study has informed additional analysis of the role of judges in access to justice. See Anna E. Carpenter, *Active Judging and Access to Justice*, (forthcoming NOTRE DAME L. REV. 2018); Colleen F. Shanahan, *Keys to the Kingdom: Judges, Pre-Hearing Procedure, and Access to Justice* (forthcoming 2018).

³⁸ Our data does not consider the subset of unemployment appeals regarding eligibility and benefit calculation, as these appeals involve a state agency rather than the employer as the opposing party.

In this Part, we describe the background of our study, the study setting (the relevant court and its procedures), and our data and its limits.

A. Study Background

This study is a part of a larger research agenda designed to help understand how representation impacts access to justice in the context of retail level civil courts. From the available court data, we have examined the balance of power between parties, the use of procedures for represented and unrepresented parties, and nonlawyer representation.³⁹

In *Lawyers, Power, and Strategic Expertise*, we found that parties generally have better case outcomes when represented, but that employers see less benefit from representation than workers.⁴⁰ We also found that represented parties are more likely to use procedures than unrepresented parties, but found that represented workers who use certain evidentiary procedures had worse case outcomes than represented workers who did not use those same procedures. To understand this surprising final finding, we developed the theory of strategic expertise.⁴¹

To further understand strategic expertise, we analyzed data concerning representation for employers. Employer representation is particularly interesting because our data includes both attorney and nonlawyer representation for employers, and nonlawyer practice is the subject of much discussion and reform in the United States.⁴² In *Trial and Error: Lawyer and Nonlawyer Advocates*, we found that experienced nonlawyers can help parties navigate common court procedures and basic legal concepts.⁴³ We also discovered that judges were a critical force in shaping nonlawyer legal expertise and that this expertise developed almost exclusively through trial and error.⁴⁴ Further, we found evidence that while nonlawyers could provide basic assistance to parties, they were not equipped to advance novel legal claims or advocate for law reform.⁴⁵

In *Can a Little Representation Be a Dangerous Thing?*, we explored how access to justice interventions that provide a little representation, such as nonlawyer representation, are valuable but risky.⁴⁶ When a litigant receives assistance with a discrete legal need in a specific moment, and that assistance is part of a system that is incompatible with challenging or developing the law, our own legal system is at risk of developing in a way that does not structurally address the needs of low- and middle-income

³⁹ Shanahan, Carpenter, & Mark, *Lawyers, Power, and Strategic Expertise*, *supra* note 37; Carpenter, Mark, & Shanahan, *Trial and Error*, *supra* note 37; Shanahan, Carpenter & Mark, *A Little Representation*, *supra* note 37.

⁴⁰ Shanahan, Carpenter, & Mark, *Lawyers, Power, and Strategic Expertise*, *supra* note 37

⁴¹ *See supra* note 9.

⁴² Shanahan, Carpenter & Mark, *A Little Representation*, *supra* note 37.

⁴³ Carpenter, Mark, & Shanahan, *Trial and Error*, *supra* note 37.

⁴⁴ Carpenter, Mark, & Shanahan, *Trial and Error*, *supra* note 37.

⁴⁵ Carpenter, Mark, & Shanahan, *Trial and Error*, *supra* note 37.

⁴⁶ Shanahan, Carpenter & Mark, *A Little Representation*, *supra* note 37.

litigants.⁴⁷

This article addresses the teaching and service outcomes of clinical law students by comparing them to attorney representatives. Our previous work has led us to examine the strategic expertise that attorneys and nonlawyer advocates use in using procedure and representing clients. This additional data allows us to explore new, related questions: whether law school clinics prepare students for practice by teaching them to act as attorneys, including exercising strategic expertise, and whether clinic students serve clients as well as practicing attorneys do.

B. Study Setting

The OAH is a professionalized central administrative court where Administrative Law Judges (ALJs) hear all UI appeals in the District of Columbia.⁴⁸ This process begins when the claimant (worker) files for benefits with the District of Columbia Department of Employment Services (DOES), and one party—the employer or the worker—subsequently appeals the grant or denial of benefits by DOES to the OAH.⁴⁹ The OAH proceedings are *de novo*, which means the ALJ reaches a decision without regard to DOES’s initial determination.⁵⁰

In UI cases, the worker is presumptively entitled to benefits; the employer has the legal burden to prove otherwise.⁵¹ Because the claimant is presumed qualified for benefits, hearings begin with the employer’s case-in-chief, including witnesses and documentary evidence.⁵² The worker may then present witnesses or documents. The ALJ may ask questions of either party and may also allow the employer to present a rebuttal case. Because the review is *de novo* and the employer has the burden of proof, if a claimant attends the hearing and the employer does not, the claimant automatically wins.⁵³

By rule, the OAH requires parties to send to the court and the opposing party, at least three days prior to the hearing, the documents and witnesses that the party plans to offer (excepting those that may be used to impeach or rebut) at the hearing.⁵⁴ This “three-day disclosure rule” poses different strategic considerations for workers and employers. Workers, who do not bear the burden of proof, may choose not to disclose a document in advance, but to use it later only if necessary for impeachment or rebuttal.

⁴⁷ Shanahan, Carpenter & Mark, *A Little Representation*, *supra* note 37.

⁴⁸ *About OAH*, D.C. OFF. ADMIN. HEARINGS, <http://oah.dc.gov/page/about-oah> (last visited Nov. 8, 2015). These hearings are what Russell Engler has dubbed “poor people’s courts” Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 *FORDHAM URB. L.J.* 37, 39 (2010). *See also* Shanahan, *Cultivating Justice*, *supra* note 14.

⁴⁹ *See id.* (emergency action adopted as a regulation on Nov. 6, 2015).

⁵⁰ *See* *Rodriguez v. Filene’s Basement Inc.*, 905 A.2d 177, 179-80 (D.C. 2006).

⁵¹ *See id.* at 180; *see also* D.C. CODE § 51-110 (2016).

⁵² *See* D.C. CODE § 51-111 (providing minimal guidelines for hearing procedure); *see also* D.C. MUN. REGS. tit. 1, § 2822.4-5.

⁵³ *See* D.C. MUN. REGS. tit. 1, § 2822.4 (2016); *see also* *Rodriguez*, 905 A.2d at 180.

⁵⁴ D.C. MUN. REGS. tit. 1, § 2985.1.

Conversely, employers have stronger strategic reasons to disclose documents or witnesses, especially because the failure to disclose may lead to exclusion of the evidence at the hearing and thus prevent the employer from meeting its burden of proof.

C. The Data

The OAH maintains electronic records and paper files on all UI cases before the court. For each case heard in OAH from January 2011 through December 2013, we collected data from the court's electronic case management system and paper case files. Using a structured collection and coding system, we gathered information on dozens of variables for each case, including basic case characteristics, the types of parties and representatives, the legal procedures deployed in each case, and case outcomes.⁵⁵

We also performed structured qualitative interviews with representatives for workers and employers. We contacted all of the regularly practicing representatives in these cases, and completed interviews with the majority of these individuals. Those individuals who were not interviewed did not respond to our requests for interviews. These interviews included the directors of law school clinics that are active in this court, the three attorneys who most commonly represent workers in these cases, and the attorneys and non-lawyer representatives who regularly appear on behalf of employers.⁵⁶ All of these representatives are "repeat players" in UI cases.⁵⁷

Finally, we conducted structured, open-ended interviews with judges who heard cases in the time period for which we have quantitative data. We contacted all sixteen of the judges who heard cases over the time period studied, and ultimately interviewed twelve of them. Three of the judges who were not interviewed did not respond to our requests and one judge had been appointed to a higher court and declined to be interviewed.⁵⁸

It is important to note that this is an observational, retrospective study. We do not use a randomized design due to the nature of the data and the

⁵⁵ For a more detailed description of our data collection, see Shanahan, Carpenter, & Mark, *Lawyers, Power, and Strategic Expertise*, *supra* note 37; Carpenter, Mark, & Shanahan, *Trial and Error*, *supra* note 37.

⁵⁶ Two of the authors supervised clinical law students in these same cases in more than a hundred cases combined over five years, and the qualitative experience of those hearings and of our general experience with the operation of this court and clerk's office also informs our analysis. We note that information specifically in our findings when relevant. Our access to this data was possible because of relationships with OAH judges formed through this clinic representation. See Charn and Selbin, *Clinic Lab Office*, *supra* note 3.

⁵⁷ Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Social Change*, 9 *LAW & SOCIETY REV.* 95 (1974).

⁵⁸ Though not discussed in depth here, two forthcoming articles address questions of judging and access to justice using data from the same study site. See Anna E. Carpenter, *Active Judging and Access to Justice*, (forthcoming *NOTRE DAME L. REV.* 2018); Colleen F. Shanahan, *Keys to the Kingdom: Judges, Pre-Hearing Procedure, and Access to Justice* (forthcoming 2018).

ethical challenges of randomizing representation.⁵⁹ The data in this study include every unemployment case in the court over a two-and-a-half-year period where the worker's separation from employment is at issue. This type of observational study provides a more comprehensive picture than a randomized study focused on a limited intervention.

To analyze this data, we use statistical methods to compare groups and demonstrate the correlative relationships between representation and case and procedural outcomes. We use qualitative data to add interpretive context to the quantitative analysis. We report our quantitative findings as comparisons, and we do not make causal claims.⁶⁰ Though not randomized, this large, population-sized sample, with extensive data on each case, and qualitative information across the data, allows us to explore questions of clinical teaching and service.

III. THE FINDINGS

In this Part, we describe the findings of our study. We first report rates and types of representation in the UI court, including levels of preparation. We next share data comparing clinical law students' use of key legal procedures in UI cases with attorneys' use of such tactics in similar cases. These comparisons shed light on whether students in law school clinics are learning to be attorneys. Finally, we compare case outcomes among types of representation and then narrow our inquiry to case outcomes in relation to the use of procedural tactics. These comparisons tell us something about whether law school clinics are serving their clients as well as practicing attorneys.

A. Legal Representation of Parties

One of the interesting attributes of the study site is the variety of legal representatives who appear on behalf of the parties (workers and employers). Many workers and employers represent themselves. Parties with representation are represented by attorneys, law students, and lay (nonlawyer) advocates. Among workers, we can compare clinic student representation with lawyer representation, in contrast to employers who are

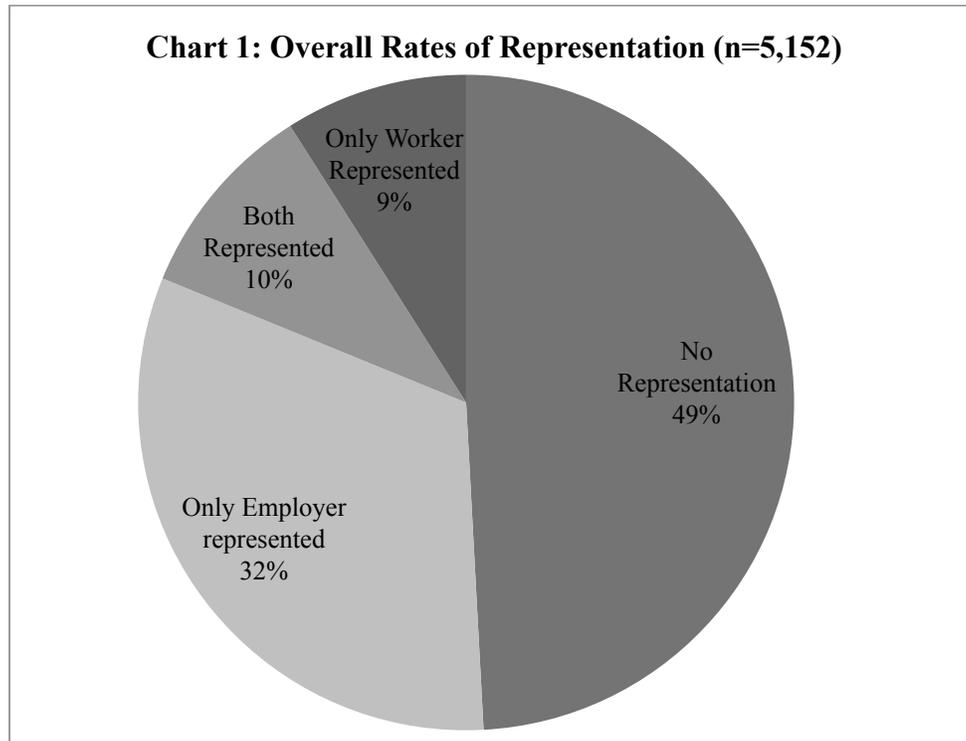
⁵⁹ We also note that much of our analysis involves comparing parties with different types of representation (attorneys, law students, and lay advocates). While this does not eliminate all potential selection bias, all of the parties in these comparisons sought representation and obtained it. Thus, these comparisons avoid concerns about the differences between parties (and the cases of those parties) who seek representation and those who do not.

⁶⁰ For example, "represented claimants have a higher win rate than unrepresented claimants." For ease of expression, we do not reiterate each time we describe a finding that this describes two distinct groups: the group of claimants in the data who were represented and the group of claimants in the data who were not represented, rather than the experience of a single claimant exposed to the presence and absence of the variable of representation. In addition, we use the word "significant" to report statistically significant findings. All of the differences described here are statistically significant unless explicitly described otherwise. For more about our methodology, see Shanahan, Carpenter, & Mark, *Lawyers, Power, and Strategic Expertise*, *supra* note 37.

represented by lawyers and nonlawyer or lay representatives.⁶¹

1. Rates and Types of Representation

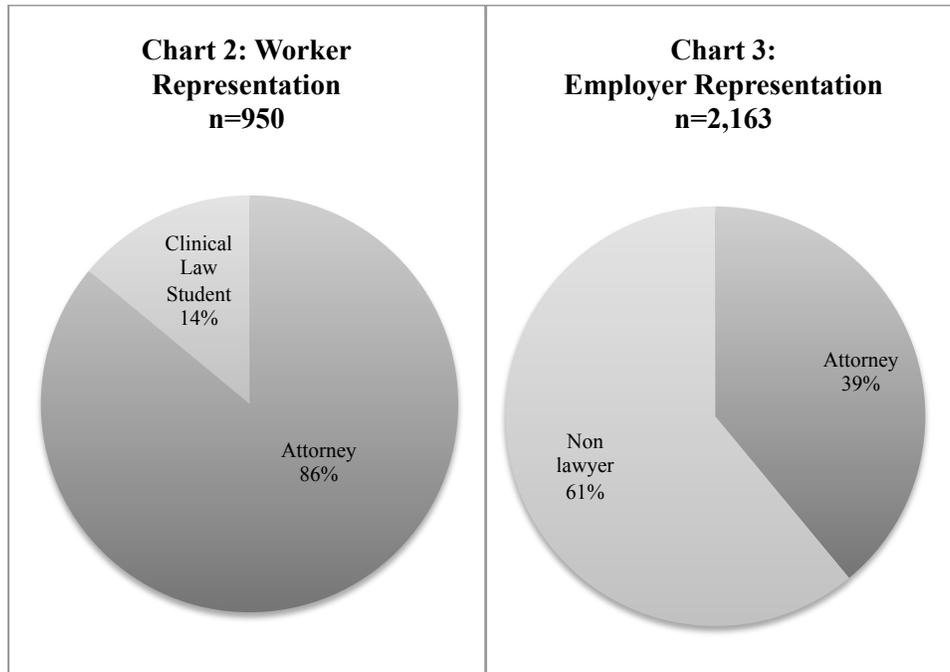
Workers and employers in our study have different rates of representation, as depicted in Chart 1. In almost half of all cases, neither the worker nor the employer has representation. In about 10% of the cases, both parties are represented. In 9% of the cases, only the worker is represented, while in 32% of the cases, only the employer is represented. Overall, workers are represented in 19% of the cases and employers are represented in 42% of the cases.



OAH rules allow nonlawyers to appear in unemployment appeals. As a result, workers and employers have different types of representation.

As depicted in Chart 2, in the 19% of total cases in which workers are represented, 86% have an attorney and 14% have a clinical law student. As depicted in Chart 3, in the 42% of all cases in which employers are represented, 39% have an attorney and 61% have a nonlawyer representative. Although workers are less than half as likely as employers to be represented in UI cases at the OAH (19% vs. 42%), when they *are* represented, they are much more likely than employers to be represented by a lawyer (86% vs. 39%).

⁶¹ Carpenter, Mark, & Shanahan, *Trial and Error*, *supra* note 37; Shanahan, Carpenter & Mark, *A Little Representation*, *supra* note 37. As discussed in our earlier articles, previous studies of nonlawyer representation have typically included this type of lay representation. See, e.g., HERBERT M. KRITZER, *LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK* 38-39 (1998).



The attorneys for workers come largely from the District of Columbia AFL-CIO's Claimant Advocacy Program, which is involved in 88% of such cases. The AFL-CIO lawyers have practiced exclusively in UI appeals in the District for more than 15 years. The Legal Aid Society of D.C. began representing workers in 2011 and provides lawyers in 2% of such cases.⁶² Both of these organizations provide representation for free. The attorneys who regularly represent workers in these cases are a handful of individuals with extensive experience in this court. As such, these attorneys can be said to be repeat players.⁶³

The clinical law students come from Georgetown, George Washington, American, and Catholic Universities where they are closely supervised by full-time clinical faculty or supervising attorneys housed in the law schools.⁶⁴ Services are provided for free. Under OAH rules, clinical law students can only appear at hearings with a supervising attorney. The attorneys from the law school clinics who accompany students to hearings include clinic directors, whose experience in these cases ranges from several years to almost two decades, and teaching fellows who supervise students for one or two years at a time. Though law clinics as institutions may appear consistently in the court, their case volume is much smaller, and an individual student typically only appears once or twice.⁶⁵

⁶² Approximately 10% of the workers' attorneys in our data set appeared only a single time.

⁶³ Galanter, *supra* note 57.

⁶⁴ There were no pro bono, externship, or student-run volunteer programs that provided representation in these cases in the study time frame.

⁶⁵ The nature of administrative hearings, and their emphasis on the actual hearing rather than written pleadings, may lessen the nature of clinics and clinical faculty as repeat players

Attorneys for employers are a mixture of paid attorneys and attorneys who provide pro bono assistance through the District's Employer Advocacy Program.⁶⁶ The same handful of individual attorneys serve in both roles and are repeat players in these matters with years of experience. Most lay representatives on the employer side come from a human resources outsourcing industry made up of primarily large corporations that provide this representation, among other services. Like employers' attorneys, many of the lay advocates are repeat players and many of them represent large corporate clients.

2. Case Selection Practices among Worker Representatives

Our understanding of case selection practices derives from observation of court operations and from qualitative interviews with representatives. Workers learn of the opportunity for legal services in two ways. First, each court order notifying a worker of her hearing date includes a flyer with contact information for the court's resource center and for the Claimant Advocacy Program and Legal Aid Society.

Second, the court's resource center is located directly next to the court's waiting room and has prominent signs advertising the availability of free legal assistance. Any individual who contacts the resource center is given information about the various programs, including law school clinics. In addition to information from the court, various intake centers in the District will send potential clients to the organizations for assistance with unemployment cases. A parallel process exists for unrepresented employers.

We found wide variation in case selection criteria among those who represent workers. In one legal services organization, the individual attorneys make decisions about taking cases and articulate their selection criteria as a mixture of scheduling, the merit of the case, and the worker's ability to make herself heard on her own (indicating her likelihood of being a good witness). Another organization focuses on client vulnerability and high impact cases.

Some attorneys apply pre-determined client selection criteria when choosing clients, such as prioritizing people with disabilities or people who have experienced domestic violence. They may also use certain case selection criteria, such as choosing clients whose cases might lead to law reform. The legal services attorneys generally reported giving substantial advice to individuals whose cases they could not take, especially those cases due to scheduling conflicts.

The law school clinics similarly use a diverse combination of screening

because judges and opposing counsel see different students each time. A recent study examining U.S. Supreme Court litigation provides an example where law school clinics may function as more classic repeat players, and in fact see high success rates compared to professional law firms. See Adam Feldman and Alexander Kappner, *Finding Certainty in Cert: An Empirical Analysis of the Factors Involved in Supreme Court Certiorari Decisions From 2001-2015*, 61 Villanova Law Review 795 (2016).

⁶⁶ See Carpenter, Mark, & Shanahan, *Trial and Error*, *supra* note 37 for our detailed analysis of employer representation and nonlawyer advocates.

criteria. One clinic looks for more difficult cases that “make a difference.” Another clinic evaluates whether the worker has a meritorious case and the relative benefit to the client, as well as whether the case is deemed “appropriate for students” (a standard that is highly subjective, even within a particular clinic). Still another clinic is driven largely by scheduling, does not screen for merit at all, and in the rare circumstances where not all potential clients can be helped, will choose the client who seems more vulnerable. Only one clinic reported giving limited advice to clients to whom it did not provide full representation.

3. Case Preparation among Worker Representatives

We also interviewed representatives to understand their client contact, case preparation, use of procedures, and engagement with substantive law. Attorneys with legal services organizations described somewhat less client contact in preparing a case than students in law clinics. However, the cases in our data set have very short timelines: often two to three weeks from when the case is scheduled (which is when a representative typically takes a client) to the hearing. As a result, legal services attorneys report two to three phone calls or meetings with a client before a hearing, and clinical law students typically have three to four phone calls or meetings before a hearing.

We found a similar variation between attorneys and clinical law students in their amount of investigation and factual preparation for each case. Attorneys reported less activity in obtaining documents and tracking down witnesses in preparing a case. In part, attorneys said that many witnesses are not useful because of credibility or reliability concerns and because the timing is often too short to get a subpoena for documents. In contrast, two of the law school clinics reported regularly using subpoenas or direct document requests of employers to obtain documents before a hearing.

In a related contrast, the attorneys at legal services organizations reported introducing documents and witnesses (other than the client) less often at hearings. The explanations for this included the burden of proof—representatives did not need to introduce evidence to win the case. Representatives were also concerned about the risks of putting a witness on the stand, which might lead to unwelcome surprises, and criticism from judges when trying to use evidence that had not been disclosed in advance of the hearing pursuant to OAH rules.

4. Discussion

The qualitative data suggest that outcomes are not driven by case selection bias, at least not in the sense of representatives cherry picking only “winning” cases.⁶⁷ The general lack of uniformity in how attorneys choose

⁶⁷ For an in-depth discussion of whether representatives select cases based on merit and the implications of this common (and as three of the co-authors have previously argued, incorrect) assumption for theory and research, see Carpenter, Mark, & Shanahan, *Trial and Error*, *supra* note 37.

clients likely mutes such concerns. In addition, because the employer bears the burden of proof in these cases, there is no worker who has a “bad” case. If the worker appears at the hearing and the employer either does not appear or appears without admissible or reliable evidence, the worker will win the case regardless of its legal or factual “merit.”⁶⁸

The qualitative data also suggest that, while there is not wide variation in case preparation due to the short timeline of these cases, law school clinics at least see themselves as preparing more intensely for these cases. In their own descriptions, this means that clinical law students deploy procedural tools more often than practicing attorneys.

B. Are Clinical Law Students Learning to Act like Attorneys?

The first question we address is whether students in law clinics are learning to act like attorneys. Our data allow us to compare the representation by clinical law students to the representation of attorneys in similar cases before the same court. If law clinics are effective in preparing students to become attorneys, then we expect clinical law students to act in a manner similar to attorneys in these cases.⁶⁹ We test this hypothesis by asking whether students use procedures in the same way as attorneys in similar cases.

Specifically, we examine three key procedural choices that parties make in these cases: (1) Pre-hearing evidence disclosure,⁷⁰ (2) hearing appearances, and (3) introduction of testimony and documents.⁷¹ The data is drawn from a single court and a single case type docket, however the procedures used in this analysis are common ones across state civil courts and case types. As described below, the data suggest that clinical law students deploy all of these procedural tactics in ways similar to attorneys.

1. Pre-hearing Evidence Disclosure

Parties in UI cases are required to disclose documents or witnesses to the opposing party and the court three days prior to the hearing.⁷² Chart 4 describes our findings on the rates at which workers disclose either documents or witnesses. The disclosure data is disaggregated by the worker’s type of representation: unrepresented, represented by an attorney, and represented by a clinical law student.

As a general matter, represented workers disclose pre-hearing evidence more frequently than unrepresented workers. Unrepresented workers disclose evidence less than 20% of the time, workers represented by attorneys disclose evidence almost 35% of the time, and workers

⁶⁸ In fact, many of the individual attorneys we interviewed mentioned the legal burdens as a factor in their openness to accepting clients regardless of the circumstances of the case.

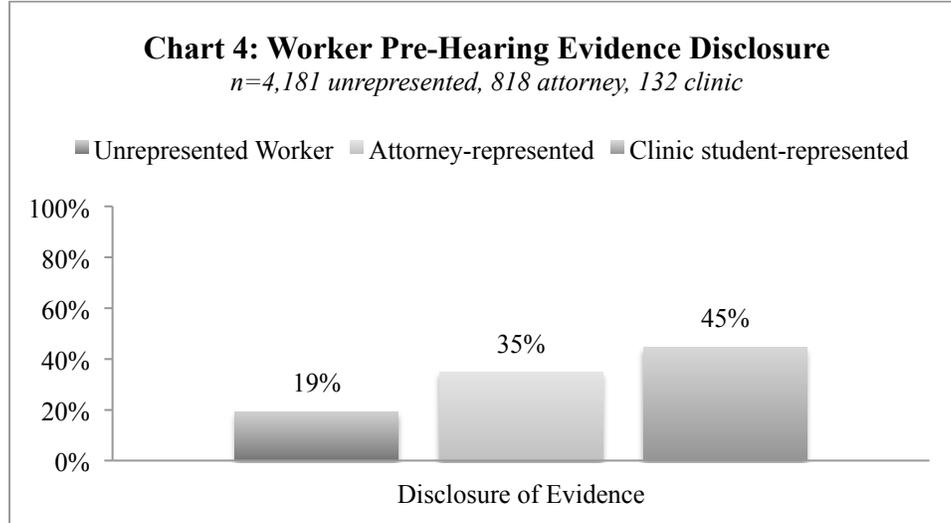
⁶⁹ See *supra* notes 19-22 and accompanying text.

⁷⁰ Parties who disclose information using OAH’s three-day disclosure rule typically disclose documents, and rarely disclose only witnesses. Thus, we have combined these two steps into a single model.

⁷¹ We do not separately analyze admission of documents because there are very few documents that are introduced, but not admitted in our data.

⁷² See *supra* note 54 and accompanying text.

represented by clinical law students disclose evidence almost 45% of the time. The difference in disclosure rates between represented and unrepresented workers is statistically significant, while the difference between those represented by attorneys and those represented by clinical law students is not.⁷³



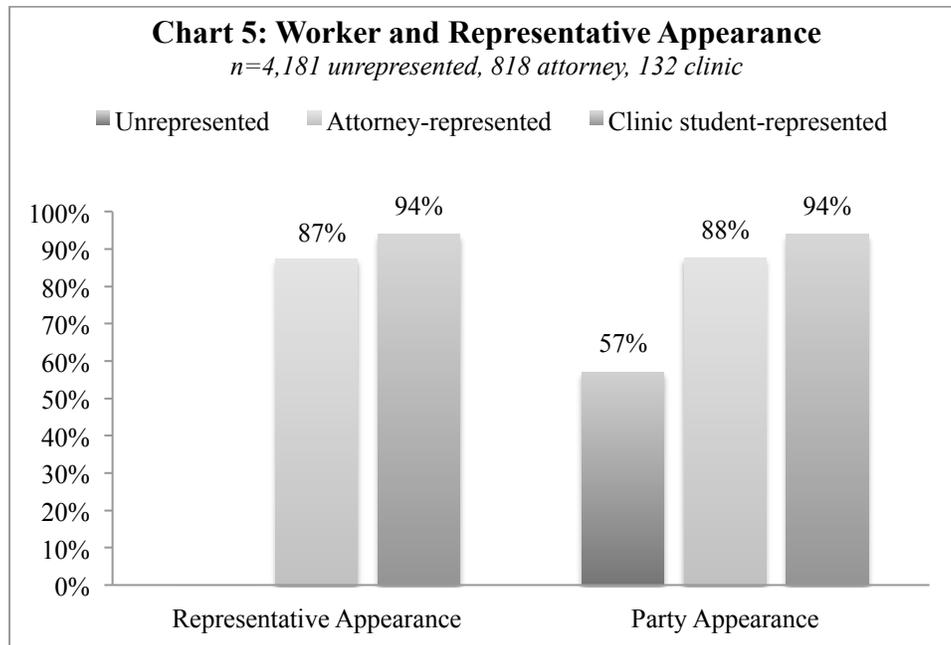
2. Hearing Appearances

The hearing is the single most crucial element of unemployment cases.⁷⁴ Because the hearing is *de novo* and the employer has the burden of proof, appearing at the hearing is very important for both parties. We separate the appearance data by the appearance of the worker and the representative, and also by the type of representation: unrepresented, represented by an attorney, and represented by a clinical law student.

Chart 5 illustrates our findings regarding both worker and representative appearances at the hearing. Workers who are represented appear at their hearings more often (about 90% of the time) than workers who are not represented (about 60% of the time). Workers represented by law students appear at hearings more often (94%) than workers represented by attorneys (88%). Clinic students also appear at their clients' hearings more often (94%) than attorneys (87%). These differences are all statistically significant.

⁷³ In our data, clinical law students represent far fewer clients than attorneys. See *supra* Chart 2. We note percentages and *n* sizes for clarity. When addressing case outcomes, we also note statistical significance of the comparisons.

⁷⁴ Shanahan, Carpenter, & Mark, *Lawyers, Power, and Strategic Expertise*, *supra* note 37; Carpenter, Mark, & Shanahan, *Trial and Error*, *supra* note 37.



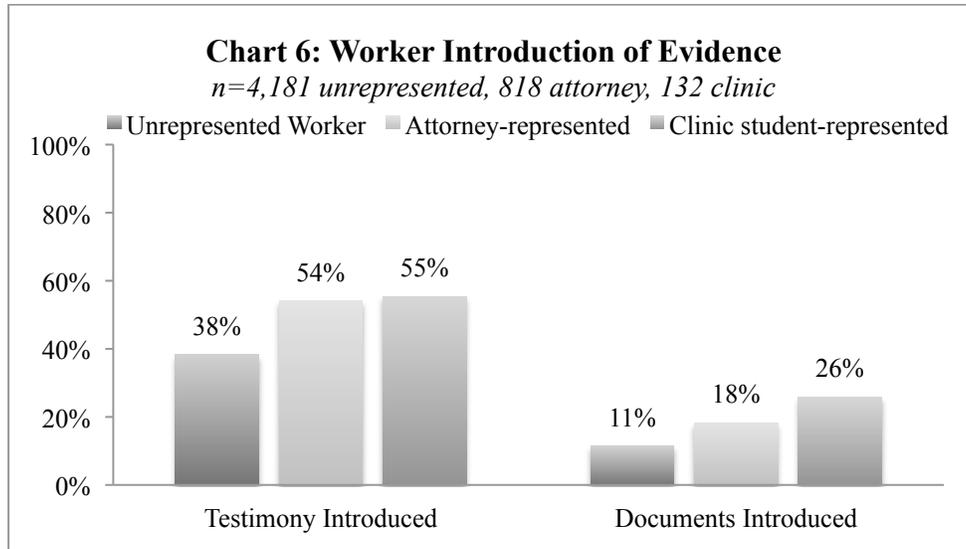
3. Introduction of Evidence

The introduction of evidence, specifically testimony and documents, during the hearing is an important strategic choice.⁷⁵ In theory, an ALJ may not accept into evidence documents that are introduced at the hearing unless the documents meet a finding of admissibility. In practice, hearsay is admissible in the hearings, witnesses are rarely excluded, and other evidence is almost always admitted. Our data bear this out: there is an overwhelming overlap between the introduction and admission of documents.⁷⁶ As a result, we do not present separate data here about whether evidence is actually admitted.

Chart 6 captures the data regarding introduction of evidence. Represented workers introduce testimony and documents at a rate that is higher (54-55%) than unrepresented workers (38%). Workers represented by clinical law students and attorneys present testimony at the same rate (54-55%), while clinical law students introduce documents significantly more often (26%) than attorneys (18%).

⁷⁵ We use all cases in the sample for our analysis of parties' introduction of evidence. We do not control for party appearance in this analysis because we view the choice not to use an available procedure as a meaningful choice that a party and/or representative makes regardless of whether the party appears at the hearing. A party might consider her case, choose not to present testimony, and thus make the logical choice not to attend the hearing. Or a party might choose to appear but not to present testimony. Either way, the party is making an affirmative decision about how to proceed in the case given available options in the litigation. If we excluded cases where a party does not appear from an analysis of introduction of evidence, we would be making potentially unreasonable assumptions about the failure to appear.

⁷⁶ See Shanahan, Carpenter, & Mark, *Lawyers, Power, and Strategic Expertise*, *supra* note 37.



4. Discussion

What can we conclude from these findings about procedural behaviors? A key component of an attorney's professional expertise is procedural expertise.⁷⁷ If attorneys who practice in the OAH are the professional "standard of care," our data suggest that clinical law students are practicing at this standard. Law school clinics in this setting are teaching students to practice, at least with respect to using available procedures.

Our interviews with unemployment judges help us to interpret these findings about clinic student representation. The judges' opinions about student representation are consistent with the idea that students offer a similar standard of care as attorneys. A number of judges spoke about representation quality and expressed support for law student practice as a general matter. The judges noted that quality among students, like that of lawyers, varies from person to person, with some advocates operating at a higher level than others do. Judge 8 put it this way:

Some [law students] are very good, some are not. Some are overzealous, they get kind of emotional with their arguments, and that can be a problem. You need distance in order to be effective. Some are well-organized and present good arguments. I guess it depends on how well they are trained by the clinic.

As discussed above, this finding is important because legal educators have assumed, largely without measurement, that they are teaching law students to act like lawyers.⁷⁸ Proponents of law school clinics have asserted that the clinical experience is a crucial site of professional training. The finding that law students use procedures like practicing lawyers suggests that clinical law students are learning to be lawyers.

The significance of this finding might be muted, since law school clinics

⁷⁷ Shanahan, Carpenter, & Mark, *Lawyers, Power, and Strategic Expertise*, *supra* note 37; Sandefur, *supra* note 12.

⁷⁸ See *supra* notes 13-18 and accompanying text.

invariably combine the expertise of a student with the expertise of her supervisor.⁷⁹ Perhaps we are not measuring student learning but instead measuring supervisor expertise? While we acknowledge the conceptual and methodological challenges of teasing out these distinctions, they may be overstated. Lawyers invariably work in collaboration with others. We cannot separate a lawyer's expertise in cross-examination from the hours a paralegal spent reviewing documents to find the perfect exhibit for impeachment, nor can we separate the relative contributions of an associate who drafted a closing statement from a partner who edited and delivered it.

This means that, at a minimum, our data tell us that clinical law students, working as junior collaborators, are acting like practicing lawyers, who themselves may or may not be working in collaboration with other legal professionals. In theory, law school clinics are dedicated to giving students maximum responsibility and autonomy consistent with their professional obligations to clients.⁸⁰ In fact, clinical law students may have more autonomy in their clinic cases than they will in practice as new attorneys.

In addition, a closer look at the data suggests that clinical law students are using procedural tactics incrementally more often than attorneys. The law students and their clients appear at their hearings more often than attorneys and their clients. Students disclose pre-hearing evidence more often than attorneys. And students introduce documents at the hearing more often than attorneys. These higher levels of engagement might be understood in a few ways.

First, clinical law students might have a singular focus on their clients that practicing attorneys do not (or cannot).⁸¹ Clinical law students typically have many fewer clients than legal services attorneys. Often, a clinic client is the first client for whom a student is the lead representative. The student may be able to focus more on the case—resulting in more time on investigation, more effort collecting witnesses and documents, more thorough preparation—than a seasoned practitioner with a sizeable case load.

Second, clinical law students might bring extra resources to the case. As our interviews confirmed, a clinic student may work with a student partner, a supervising attorney, and a larger group of student colleagues. More advocates might uncover additional witnesses or documents and develop additional case theories or arguments, which translate into more active procedural engagement of the kind we measure.

These explanations are consistent with judges' perceptions of law student practice. Judges consistently reported that law student practice

⁷⁹ Other professions have struggled with separating the role of collaborating service providers. *See, e.g.,* Joseph Durlak, *Comparative Effectiveness of Paraprofessional and Professional Helpers*, 86 *PSYCH. BULL.* 80 (1979) (noting the difficulty of separating the influence of supervising mental health service providers, and suggesting more research as the solution).

⁸⁰ *See* Schrag, *supra* note 14.

⁸¹ *See* Shanahan, *supra* note 7, Juergens, *supra* note 2, Shalleck *supra* note 69.

involves more procedural moves and longer hearings than that of lawyers. Most judges noted, and in some cases were critical of, the ways in which student practice is less “streamlined.” One judge said that students like to do things “by the book” and that hearings thus take more time. The judges pointed to procedures that are not captured by our quantitative data, including opening and closing statements, objections, and the length and complexity of testimony.

Overall, the judges expressed a mix of frustration that law student’s hearings may take more time and appreciation for the quality of student representation. For example, Judge 2 said:

Law students play an important role. They want to over-litigate sometimes, but that comes with the territory. I don’t know how many times [the students] have been in evidentiary hearings so they’re under pressure to perform well. But it is my understanding that they know the burdens, their clients, they tend to be well prepared.

Judge 7 offered a similar view:

When law students represented claimants, they were interested in a soup to nuts case. Not every case involves a constitutional issue. We can accept hearsay, you don’t need to object to that. But the law students paid a lot of attention to the claimants. [Some attorneys] did not, perhaps because of their workload. [Some attorneys] did not spend as much time as the law students did with the clients.

Though the judges lamented that cases involving students take more of the court’s time, they also applauded that law students appeared to spend more time and energy on their cases compared to attorneys. And their observations are consistent with the quantitative findings that students engage in more procedural moves than lawyers. In fact, the judicial perspective suggests that it is students’ greater level of investment in their cases that leads to the use of more procedures, and in turn, to longer hearings.⁸²

Our data suggest that clinical law students are learning how to be lawyers because they are exercising procedural expertise that approximates that of experienced attorneys. But do clinical law students help clients? We explore our findings on this question in the next section.

C. Are Law School Clinics Serving Clients?

As we have just described, clinical law students use key procedures as often or more often than lawyers. But does this serve their clients? We investigate this question by asking two questions of our data. First, how do case outcomes compare for unrepresented workers, workers represented by law students, and workers represented by attorneys? Second, when these

⁸² This phenomenon may be related to the finding in another study—though our data do not suggest it—that an offer of student of representation delays the receipt of UI benefits. Greiner & Pattanayak, *supra* note 31.

differently represented parties use procedural behaviors as described above, how do the case outcomes compare?

We recognize that case outcomes are only one way of measuring whether a representative serves a client. Case outcomes do not account for less tangible but equally significant contributions to the client's experience of the civil justice system.⁸³ Nonetheless, such outcomes are important measures of representation, especially in the context of unemployment insurance hearings where the benefits of winning are immediate and tangible. We also recognize that this is an observational study and our analysis speaks only to correlation. That said, these observations provide new insight into questions of law clinic service that has not existed.

As described in this section, we find that similar use of procedural tactics by clinical law students and attorneys yield similar case outcomes, though we find some variation that suggests expertise may operate differently for clinic students and attorneys. We also find that workers represented by clinical law students have similar case outcomes to those represented by attorneys.

1. Case Outcomes and Procedural Behaviors

We begin by examining how procedural moves by clinical law students and attorneys relate to case outcomes. In our analysis of case outcomes, we include outcomes for unrepresented parties for reference and context. While we include the data for unrepresented workers, we recognize that we cannot account for the impact of selection bias between parties with and without representation. Thus, our main inquiry is into the *relative* behavior and performance of clinical law students compared to attorneys.

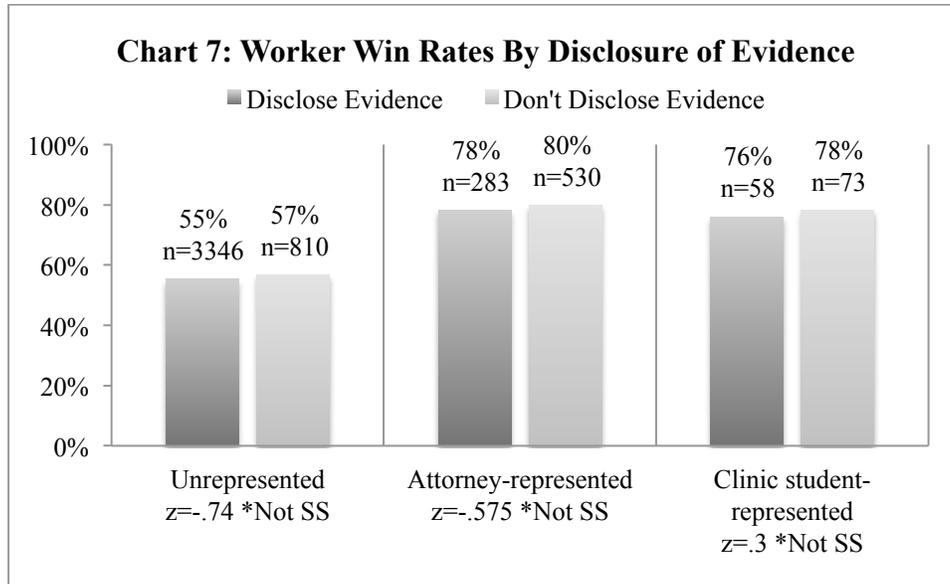
Interestingly, we find that the use of a procedure does not correlate consistently with higher worker win rates. As discussed below, the implications of these findings are complex. Expert worker representatives, including clinical students, may assist clients by choosing *not* to use a procedure.

a. Pre-Hearing Disclosure of Evidence

As Chart 4 above describes, clinical law students and attorneys who represent workers disclose pre-hearing evidence at roughly similar rates (35% and 45% of the time, respectively).

As depicted in Chart 7, workers generally do not win more often when they disclose pre-hearing evidence. Unrepresented workers prevail roughly as often when they disclose pre-hearing evidence (55%) as when they do not (57%). The same is true for workers represented by clinical law students and attorneys—they do not prevail any more often when they disclose evidence (76% for students, 78% for attorneys) than when they do not (78% for students, 80% for attorneys).

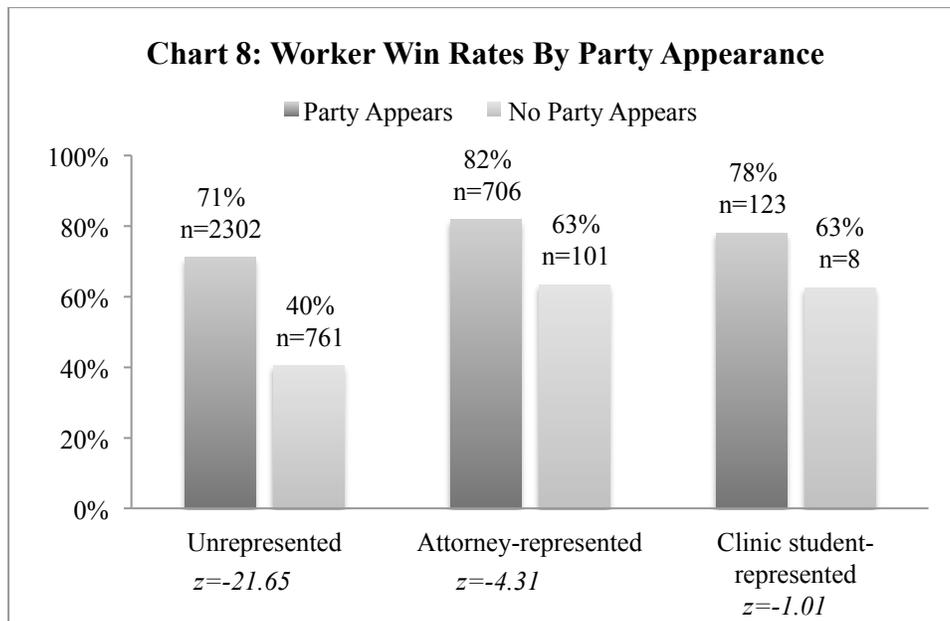
⁸³ See *supra* note 36.



b. Party Appearance at Hearing

Chart 5 above describes how workers represented by clinical law students and attorneys appear at similar rates at hearings (approximately 90% of the time).

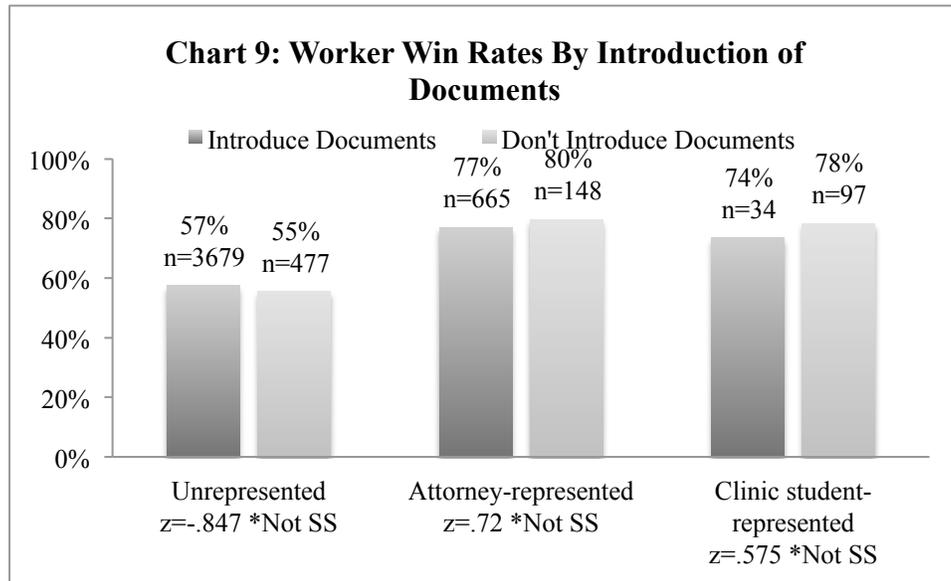
As Chart 8 depicts, workers who appear at their hearings win significantly more often than workers who do not, regardless of representation. Unrepresented workers win much more often when they appear (71%) than when they do not (40%). The same is true for workers represented by attorneys (82% vs. 63%) and clinical law students (78% vs. 63%). These differences are all statistically significant.



c. Introduction of Testimony and Documents

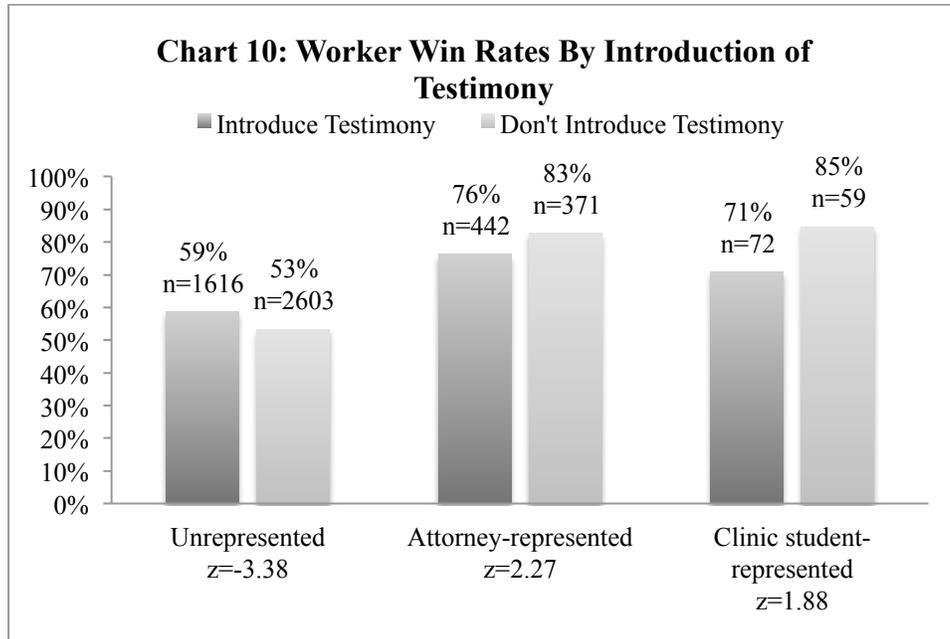
Chart 6 above illustrates how clinical law students introduce testimony and documents in hearings at slightly higher rates than attorneys.

As Chart 9 depicts, workers generally do not fare any better when they introduce documents. And this null finding is true, regardless of whether the worker is represented or by whom.



As depicted in Chart 10, unrepresented workers win slightly more when they testify (59%) as when they do not (53%). However, represented workers win more often when they do *not* present testimony.⁸⁴ This finding is statistically significant for both workers represented by attorneys and workers represented by clinical law students.

⁸⁴ This finding (independent of representative type) is also discussed in Shanahan, Carpenter, & Mark, *Lawyers, Power, and Strategic Expertise*, *supra* note 37.



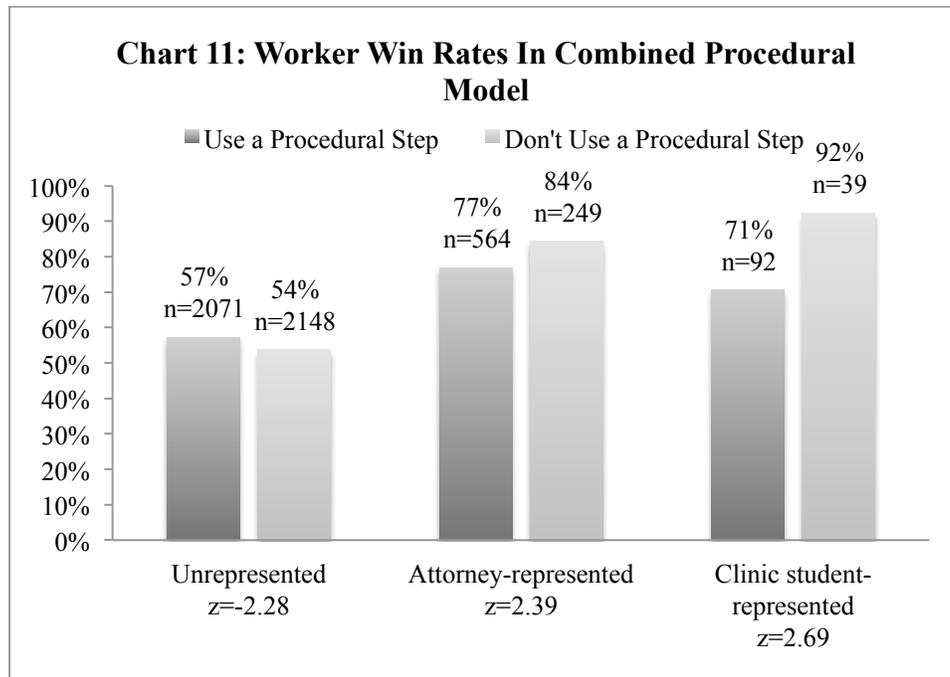
d. Combined Procedures

Finally, we aggregate these procedures to compare overall procedural behavior and case outcomes of workers represented by attorneys to those represented by clinical law students.

Chart 11 depicts case outcomes when workers took any one of the procedural steps described above (pre-hearing evidence disclosure, hearing appearances, or introduction of testimony and documents). When unrepresented workers took a procedural step, they have slightly higher, but statistically greater win rates (57%) than when they took no steps (54%). However, workers represented by attorneys win less often when they deploy a procedural step (77%) than when they do not (84%); workers represented by clinical law students likewise win less often when they take a procedural step (71%) than when they do not (92%).⁸⁵

Further, workers represented by clinical law students appear to prevail more often (92%) than workers represented by attorneys (84%) when they do not deploy a procedural tactic, especially the introduction of testimony; at the same time, workers represented by clinical law students prevail less often (71%) than workers represented by attorneys (77%) when they deploy such a tactic.

⁸⁵ This analysis of combined procedures raises the question whether appearance is a distinct procedural step or one that subsumes introducing evidence. Each step is distinct in the data, accounting for different case outcomes in comparison to each other. Each step is also theoretically different and an important consideration in understanding strategic expertise. To disclose evidence is a different strategic choice than to appear at a hearing and to appear at a hearing is a different strategic choice than to introduce testimony.



What are the potential explanations for the observation that workers represented by clinical law students win more often than workers represented by attorneys when they *do not* use a procedural step, and win less often when they *do* use a procedural step? One explanation is that students win less than attorneys when they use a procedural step because of a gap in expertise that translates to less successful uses of procedure. This explanation is consistent with the results discussed below showing that worker attorneys are more successful than clinical law students against represented employers.

Another explanation is that clinical law students may use procedure for procedure's sake. Put another way, students' procedural expertise (or desire to exercise it) may exceed their strategic expertise. This explanation is borne out by our interviews with clinic directors—some of whom discussed using procedural steps, especially gathering, disclosing, and introducing documents, more aggressively as a matter of clinic practice.⁸⁶ It is also consistent with the perspective of judges in our interviews.⁸⁷

A third explanation is that clinical law students win more when they *do not* use a step because they have the time and resources to take and invest in harder cases.⁸⁸ This means they have done more investigation or more analysis of the facts of their client's case to make the strategic choice *not* to disclose or introduce evidence. As a result, this choice yields better case outcomes. For example, with limited factual investigation, it may seem like a worker is a credible witness with reasonable explanations for the incident

⁸⁶ See *supra* Section I.A.3.

⁸⁷ See *supra* Section IV.A.4.

⁸⁸ See *supra* Section I.A.2.

for which she was fired, and thus having her testify is a wise strategic use of procedures. Yet additional investigation and preparation would uncover several older disciplinary incidents that would be revealed on cross examination, making the worker testimony a risky procedural move. This theory is consistent with our interviews, where clinic directors reported extensive preparation processes.⁸⁹ On the other hand, attorneys handling these cases reported that they sometimes took clients shortly before hearings, a practice that limited factual preparation.

A fourth explanation is based in our interviews with clinic directors, who suggested that clinics do not screen for cases based on merit, and often prefer to take “harder” cases. These cases may involve challenging facts, challenging clients, or expansion of the law, all of which are seen as valuable educational opportunities for law students.⁹⁰ In addition, with very rare exceptions, clinical law students always attend the hearings.⁹¹ Our interviews confirmed our instinct that clinical law students are unlikely to counsel a client to drop a case. This may in part be due to student enthusiasm and desire to conduct a hearing, but is also grounded in the law, which places the burden on employers in these cases.

In contrast, our interviews with attorneys representing workers revealed a somewhat different approach. The attorneys who represent the large majority of workers in these cases discussed how they do not cherry pick or select cases that are sure to win, but rather select cases with sympathetic clients as well as cases that have the potential to expand areas of the law that are a priority.⁹² In addition, attorneys reported—and the data bears out—that they do not always see cases through to a hearing, sometimes counseling a client to drop a case or sometimes taking a client without the promise of hearing representation and instead providing advice or assistance before the hearing. This combination of factors may result in clinic students appearing at hearings where they are less likely to win than hearings at which attorneys for workers appear. This simple explanation—law students’ use of procedure is less successful because they have tougher cases—may explain our finding regarding use of procedures and win rates.

2. Case Outcomes in General

Finally, we examine overall patterns of case outcomes among workers with different types of representation. We find that clinical law students and attorneys have overall similar case outcomes, though when the employer is

⁸⁹ *Id.*

⁹⁰ Another way to characterize this difference is that clinical law students are less likely to have “meritorious” cases. We resist this characterization – and the theories that flow from it – because we do not believe “merit” is a useful metric in this analysis. Workers do not have the burden of proof in these cases and in practice this means that no worker has an objectively “meritless” case. This also means that all cases have a commonality, based in the law and its allocation of presumptions and burdens, regardless of the factual circumstances of the case.

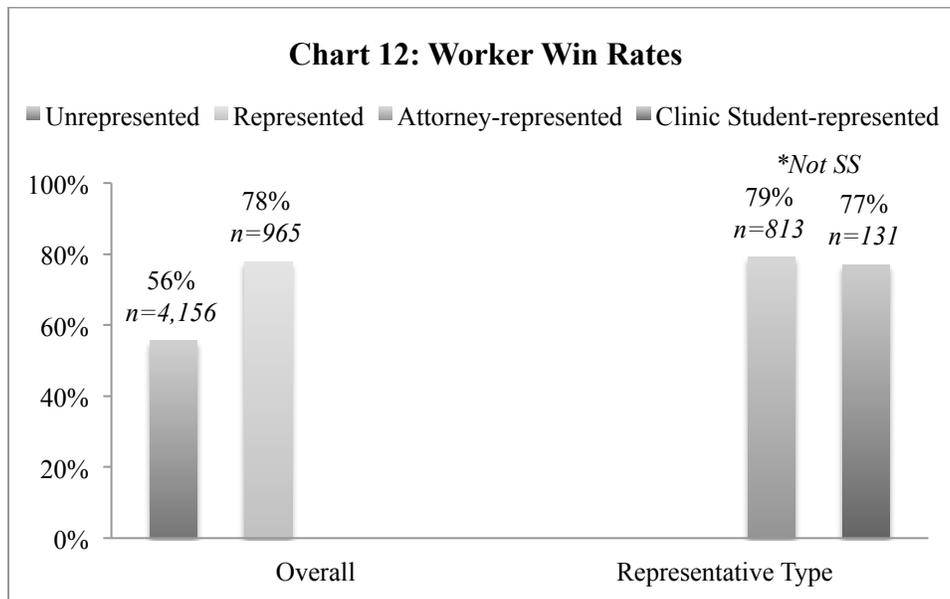
⁹¹ As shown in Chart 5, *supra*, only 6% of clinical law student representatives (8 representatives over almost three years) did not attend a hearing.

⁹² *See supra* Section IV.A.2.

represented, workers represented by an attorney win more often than workers represented by clinical law students.

a. Worker Win Rates

As depicted in Chart 12, workers win their cases more often when they are represented (78%) than when they are not (56%), and the difference is statistically significant. Workers represented by either clinic students or attorneys win their cases at statistically indistinguishable rates (77% and 79%, respectively).



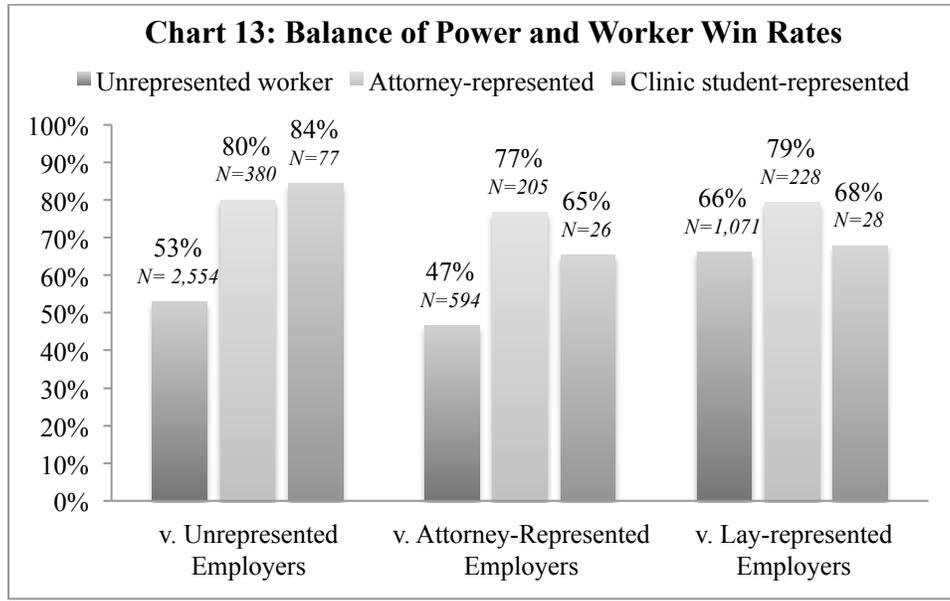
b. Balance of Power and Worker Win Rates

As described in our earlier work, introducing the balance of representation gives a more nuanced picture than a party's case outcome on its own.⁹³ Chart 13 illustrates worker win rates with employer representation included.

In cases where the employer is unrepresented, workers win their cases more often when they are represented, with significantly higher win rates when the worker is represented by clinical law students (84%) than when they are represented by attorneys (80%). In cases where the employer is represented—by either a lawyer or a lay advocate—workers win their cases more often when represented.

However, workers win cases against represented employers less often when they are represented by clinical law students (65% against attorneys, 68% against lay advocates) than when they are represented by attorneys (77% against attorneys, 79% against lay advocates). In fact, when a lay advocate represents the employer, unrepresented workers win almost as often (66%) as workers represented by clinical law students (68%).

⁹³ Shanahan, Carpenter, & Mark, *Lawyers, Power, and Strategic Expertise*, *supra* note 37.



3. Discussion

There are a number of possible explanations for this variation between clinic students and attorneys as representatives. First, both clinical law students and attorneys are quite successful when facing unrepresented employers. This is not particularly surprising, as we have discussed elsewhere.⁹⁴ Clinic students' slightly greater success than attorneys against unrepresented parties may be explained by the relative advantage of being a representative with expertise who is nonetheless perceived as non-threatening or inexperienced. That is, a clinic student may be less likely to be seen as having an unfair advantage against an unrepresented employer, but still have similar procedural expertise to an attorney.

Second, clinical law student performance against represented employers may reveal that clinical law students' expertise approximates, but is not quite at the same level as that of attorneys. Thus, clinic students are successful representatives for workers generally, but less so when challenged by a representative for the employer. This may be particularly salient in our data set, where many of the lay representatives and attorneys for employers are both repeat players and better-resourced corporate parties.⁹⁵

In contrast, though law clinics as institutions may appear consistently in the court, an individual student is not a repeat player. And though law clinics and legal services organizations have more resources than a *pro se*

⁹⁴ See Shanahan, Carpenter, & Mark, *Lawyers, Power, and Strategic Expertise*, *supra* note 37.

⁹⁵ See Carpenter, Mark, & Shanahan, *Trial and Error*, *supra* note 37. See also Donald R. Songer, Reginald S. Sheehan, and Susan Brodie Haire, *Do the "Haves" Come Out Ahead over Time? Applying Galanter's Framework to Decisions of the U.S. Courts of Appeals, 1925-1988*, 33 *LAW. & SOC'Y REV.* 811 (1999) (finding advantages for repeat players and for "haves" or litigants with substantial organizational resources).

litigant, they do not martial the resources of either a large corporate employer or the large companies that provide lay representation in our data.⁹⁶ Thus, a lay or attorney representative for employers who regularly appears in this court can outmatch a clinical law student with no relationship to the judge and limited case experience. The relative case outcomes between attorneys and clinic students on the worker side may be even more exaggerated because the attorneys on the worker side are also largely repeat players, thus they can offset the repeat player advantage of the employer's representative.

CONCLUSION

This study moves us towards answering important questions about law school clinics: do law clinics teach students to practice and do clinical law students serve their clients well? These questions address two core challenges of our legal system: the challenge faced by law schools to prepare students for legal practice and the challenge faced by our civil and criminal justice system to ensure access for low- and middle-income individuals. It is not surprising that law school clinics have been suggested as a solution to each challenge. Our findings suggest that clinics are both teaching students to behave like lawyers and serving clients as lawyers do.

Our findings support arguments that law school clinics are preparing students to become lawyers because they show clinical law students exercising procedural expertise in the same way as experienced lawyers. Our findings support arguments that law clinics can increase access to our civil courts because they show that clinical law students' use of procedures yields similar case outcomes to the same behavior by experienced attorneys. Though our findings regarding the relationship between procedural behavior and case outcomes suggests that clinical law students may be exercising strategic expertise in perhaps less-developed ways than experienced attorneys, workers represented by clinical law students overall have similar case outcomes to those represented by experienced attorneys.

Our findings also suggest that clinical law students may be over-engaging in their clients' cases in a way that advances learning, but may initially appear not to serve client well. An equally plausible explanation is that law clinics are taking harder cases. This, too, is part of the service mission of law school clinics. It may be that law school clinics achieve the most impact when they intentionally take clients less likely to win, in contexts where the law is not operating well, so that the very presence of clinic representation achieves broader change.⁹⁷

⁹⁶ See *supra* note 66 and accompanying text.

⁹⁷ See, e.g., Shanahan, Carpenter & Mark, *A Little Representation*, *supra* note 37; Beth Harris, *Representing Homeless Families: Repeat Player Implementation Strategies*, 33 *LAW & SOC'Y REV.* 911 (1999) (drawing on Marc Galanter's theories of public interest lawyers as agents of social change to describe the combination of adversarial legal tactics with leveraging judicial decisions to implement reform for homeless families in housing disputes).

At least two lessons emerge from this study. First, we should continue to develop law clinics as a way to prepare students for practice. And this development must include measurement of this preparation. There are more than one thousand law school clinics around the country engaged in different educational approaches, yet few of us actually measure how well we achieve our teaching outcomes.⁹⁸ We are encouraged by clinicians' increasing openness to evaluation and measurement, and we hope that our study motivates others to undertake such inquiry.

Second, we should maximize law clinics as opportunities to serve clients and close the justice gap.⁹⁹ Our findings suggest that clinics serve clients well. Increasing clinic resources, developing new clinics, and connecting clinics with access to justice movements would help to address the justice crisis. There are dozens of state access to justice commissions trying to help low- and middle-income Americans access our civil courts with limited resources. Law school clinics are natural partners in such efforts, and measuring their impact can only improve service delivery models and outcomes going forward.

⁹⁸ Though the American Bar Association's current efforts to mandate outcome measurement by law schools is complex and controversial, we believe that law school clinics hold the potential to design and define measurement of learning outcomes in a thoughtful way that reflects and respects the strengths of clinical legal education.

⁹⁹ This study includes only data about clinical law students from in-house clinics. While we recognize that other forms of student representation exist in many places, we do not have comparative data of that nature here. We hope that this article spurs research into these different types of student representation to explore their value as educational and access to justice solutions.