

MEASURING JUSTICE

JANE H. AIKEN*

STEPHEN WIZNER**

Introduction.....	79
I. The Challenges of Measurement.....	80
II. Measuring the Unquantifiable.....	81
III. Measuring Empathy.....	83
IV. Measuring Advocacy.....	84
V. Measuring Representation.....	85
VI. Measuring Understanding.....	86
VII. Measuring Inspiration.....	87
VIII. Measuring Satisfaction.....	88
IX. Measuring Injustice.....	91
X. Measuring Mobilization.....	95
XI. Measuring Fairness.....	97
Conclusion.....	98

INTRODUCTION

The research imperative of refining ways to measure justice is important and necessary. Our work as lawyers improves the more we know about our effectiveness and the more our choices are evidence based. Nevertheless, quantifying the work of a lawyer is not easy. How do we ensure that any measure of justice captures outcomes for both trial-based advocacy and non-trial-based advocacy on behalf of clients, including negotiated outcomes? How do we quantify the role lawyers play in listening to our clients, explaining the systems in which they operate, and supporting them through often very difficult times in their lives? How do we ensure that any measure of justice includes a client's sense of the process as well as the outcome? How do we make sure that what we measure does not suggest the limits of what is possible or desired?

* Jane Aiken is the Associate Dean of Clinical Programs, Public Interest and Community Service and Professor of Law, Georgetown University Law Center.

** Stephen Wizner is the William O. Douglas Clinical Professor Emeritus and Professorial Lecturer, Yale Law School.

I. THE CHALLENGES OF MEASUREMENT

As we proceed, we must be aware of the pitfalls in trying to measure justice. Lawyers working for poor and marginalized clients operate at three levels within the context of legal services. First, lawyers help clients to comprehend how the existing system operates. This applies particularly in situations where language barriers play a role, low education restricts comprehension, or mental disability limits capacity to comprehend. Second, if our clients can, in fact, comprehend the way in which the steps unfold, do they understand the reasons for why the system exists in its current form? If they later comprehend the system, do they understand the reasons for the rule and believe that the system is fair? In other words, one might comprehend what is happening at some level but not understand the reasons why events are unfolding in a certain way. Third, lawyers for the poor, same as other legal representatives, tally their win/loss record. They want to win, but are all victories “justice?” All of these—comprehension, belief that the system is fair, and victory (or loss)—fit into the assessment of whether justice has been delivered or perceived to have been delivered. Quantifying justice at these three different levels presents significant obstacles.

Furthermore, lawyers for the poor and marginalized face obstacles that other legal representatives may not typically face. In many cases, they see beyond win/loss records to questions about whether the overall system ought to be improved to meet the needs of their clients. Even if they win, they still think about ways to deliver justice in better ways. Winning, in some cases, may meet the needs of the current client but not the needs of society as a whole. Measuring justice, therefore, becomes part of a larger question about structures themselves—changing the rules altogether. Quantification falls apart.

Another challenge to measurement of justice arises when one contemplates the relative importance of any given case for a client. For a major corporation to lose a tax credit raises issues far different from a client losing a place to sleep with a roof overhead. The latter simply lives closer to the threshold of survival. Like a regressive tax, the unfolding of justice simply matters more to the typical client of a public interest organization or clinic—the burden of failure looms larger. This reality skews quantification significantly.

This project promises to help those people working with poor and marginalized people to become better lawyers armed with more precise tools for increasing access to justice. Unfortunately, in this world of limited resources, this research imperative also risks becoming a way to justify a failure to provide legal services. It is not unreasonable to assume, as well, that as society rations legal services, studies that are easily quantifiable, and therefore lacking in the complex variables

identified here, will be used most often to determine whether having a lawyer makes a difference in outcome. As we argue here, justice is far more than winning or losing. A loss in court may not be experienced as injustice by clients if they believe that the process was fair. Lawyers can make that difference. A loss in court can also educate the lawyer on where the points of resistance are, can mobilize communities, and can lead to changes that are far more meaningful than a simple win would have been. Losing sight of this means that we are no longer measuring justice but, in our efforts to quantify the unquantifiable, merely providing measured justice.

II. MEASURING THE UNQUANTIFIABLE

As law school clinical teachers, we instruct, train, and supervise our students in applying legal knowledge and skills for the benefit of low-income and other underrepresented individuals, groups, and communities. As legal academics we write about social justice issues, finding support for our scholarly endeavors in our clinical experience. Our work may ultimately affect policy and legal practice. *We believe* that our work has a positive impact on the lives of our clients and that it is guided by a social justice mission. It is this belief—and the hope that our students’ clinical experience will serve to inculcate in them a sense of professional purpose that they will carry with them into practice—that motivates and sustains us in our work. Belief and hope are critical elements to sustaining our work but evidence is likely to be even more powerful. Designing ways to quantify the work we do, to measure justice, so to speak, is an important mission. However, in this Essay, we urge that the efforts to measure justice capture the complexity of that project and the possible pitfalls.

In our clinics, we and our students engage in a wide variety of legal services that includes, but is not limited to, litigation. Much of what we do involves professional relationships with clients in which we provide information, advice, and counseling; informal advocacy through legal letters and telephone calls; negotiation and settlement of disputes; legal research, drafting, and writing; and transactional lawyering. Much of what we do does not result in “winning” or “losing” cases in the formal sense, but rather provides clients with legal services that we believe to be helpful to them, and to offer them the experience of having been treated with respect, and of having received useful, and often reassuring, legal advice, counseling, and representation. At the same time, it provides us and our students with insights into how the systems affecting our clients are working, or not working, for them. Such insights create the possibility of a more just legal system, but, in most cases, they pivot on the issue of client comprehension. Do clients comprehend what is

happening to them and their rights? If the answer is “yes,” then a major step forward toward justice has taken place.

We believe all of this to be true, but we have little other than our anecdotal impressions, important in themselves—and possibly, wishful thinking—to confirm that belief. The bulk of legal problems facing poor people involve complex issues and disputes, most of which have “outcomes” that are not measurable by ordinary statistical methods, particularly by randomized trials involving single variables unaffected by other variables. They also necessarily involve the dignitary aspect of having a lawyer, something that simply cannot be statistically quantified.

Most legal problems are not resolved on a binary, win-lose basis but rather through legal advice and counseling, negotiating agreements and settlements, and helping clients make difficult choices about what may or may not be achievable through formal legal actions. Constructing studies that capture this kind of legal assistance in human terms is both important and difficult. However, it is critical that we not embrace a methodology that flattens this rich, contextual understanding of justice. Using a win-loss methodology looks at legal services largely from the point of view of the lawyer. While legal services providers ought not be immune from evaluation of the success of their work, methods need to be employed that capture the experience from the client’s perspective. Studies need to measure such intangibles as clients’ feelings about the services they have received, whether they were treated in a professional and respectful manner, whether the services they received were helpful to them in dealing with their legal problems, and other aspects of the experience of having a lawyer that contributed to their sense of having received substantive justice and procedural fairness. This would involve self-reporting by clients of their experience of legal representation, anecdotal accounts of legal representation, and other nonstatistical measures. There is a need for flexibility in ways of measuring the value and effectiveness of legal services. Randomized trials may be the “gold standard,”¹ but they cannot fully measure the actual value to clients of having a lawyer.

In the pages that follow we offer descriptions of some of what we and our students do in our clinics. In presenting these descriptions, we ask ourselves: What is it that we would be measuring if we wanted to demonstrate the value and effectiveness of our legal services? If we do not have objective measures for what we do, such as winning or losing cases, how can we determine whether it is worth doing? We conclude with some general thoughts about equality, fairness, and justice, and

1. See 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, 2121–22 (2012).

what we provide our clients—and offer our students—beyond objectively measurable outcomes.

III. MEASURING EMPATHY

A growing area of legal support can be found in community-based legal clinics. In one of our clinics, law students, accompanied by clinical instructors, conduct a weekly outreach legal advice and intake program at a community-based social service agency in a low-income urban neighborhood with a significant immigrant population. Most of those who come to the outreach clinic seeking assistance are Spanish-speaking, which is a significant impediment to their ability to resolve legal problems on their own—they cannot comprehend the rules or even the general framework of the system. The services provided by the clinic range from answering questions and providing advice to litigation in courts and administrative agencies. Some of the individuals seeking legal assistance present immigration, domestic violence, and wage-and-hour problems that are amenable to affirmative or defensive legal actions, but many of those who come seeking legal help have problems that cannot, or need not, be addressed by such formal legal means.

For example, immigrants wishing to legalize their status, who have entered the United States by crossing a border without submitting to inspection by immigration authorities, have extremely limited options available to them. Unless they are refugees fleeing persecution who are eligible for asylum, or crime or trafficking victims who have cooperated with law enforcement and are therefore eligible for U-visas or T-visas, or are eligible for cancellation of removal because their removal from the United States would result in extreme and unusual hardship to a U.S. citizen family member (such as a U.S.-born child in need of specialized medical treatment not available in the parents' home country), all that our students can do is listen, answer questions, provide information, and give advice.

We believe that providing respectful and sympathetic listening, explaining why current immigration laws do not offer any legal remedy under the particular circumstances presented by the clients, discussing the possibility of future immigration law reforms, advising clients not to use false documents to obtain employment, but rather to obtain a taxpayer identification number and to pay taxes, and warning them about unscrupulous lawyers who might charge them fees for applying for immigration benefits for which they are not legally eligible, are all legal services that are helpful to those individuals. But we do not routinely ask whether that is so, or otherwise “measure” the value of the experience to those clients.

IV. MEASURING ADVOCACY

Some of the individuals who come to the legal clinic have legal problems that students can help them resolve by providing informal legal advocacy that can lead to positive results without resorting to litigation or administrative agency hearings. Such informal advocacy includes helping people apply for benefits for which they are eligible, making telephone calls and writing letters on their behalf, and negotiating agreements with those who owe them, or to whom they owe, money.

For example, immigrant clients with Lawful Permanent Resident status (“green cards”) may request the clinic’s help in applying for citizenship. The process requires the applicant to complete a fairly complicated application form, provide supporting documentation, and submit to an interview in English in which an immigration officer asks the applicant questions about the United States Constitution and government. Clients who are learning English often require assistance with the application and in preparing for the interview. In some cases involving older applicants or applicants with mental impairments who are not able to learn English, the requirement of the English language civics test will be waived if those applicants can provide the requisite medical and other evidence to confirm the existence of their disability. Law students have been very successful in assisting clients to negotiate the naturalization process. We are convinced that most of these clients could not have handled the process without our legal assistance, but we have no way of measuring whether that is true.

Some of our undocumented clients have U.S.-born children who are eligible for medical assistance, food stamps, and cash benefits. The parents are often unaware of their children’s right to those benefits, and even when they are aware, may fear, incorrectly, that if they apply they will be reported to immigration authorities. Clinic students are usually able to allay the parents’ fears and assist them in applying for and receiving the benefits for which their children are eligible.

Clients often bring to the clinic outreach center disputes with landlords about conditions in their apartments, such as lack of heat and hot water and vermin infestation. Law students are usually able to resolve these problems for clients with telephone calls and letters to the landlords and, if that fails, by arranging for inspections by the municipal housing code enforcement agency. Similarly, clients who have not been paid wages for work they have done, or have been paid less than they were legally entitled to receive, are often able, with the aid of informal advocacy by law students, to secure payment of what is owed to them, either in full or through negotiated settlements when the amount is in dispute. These can be life-changing events for our clients, deeply tied to their sense of justice. Many clients move beyond mere comprehension

and learn to understand the system. Through understanding, they arrive at a reasoned assessment of fairness or lack of fairness in the system. However gratifying the latter stage may be for those who achieve it—or even win—the lion’s share of the workload remains in the challenge of educating clients, helping them achieve comprehension. How do we capture this kind of informal advocacy when we measure justice?

It is critical that we measure informal advocacy because that is largely where justice is done or undone. According to a United States Department of Justice study of state courts in the nation’s seventy-five largest counties, ninety-seven percent of civil cases are settled or dismissed without a trial.² Ninety-five percent of criminal cases result in a plea-bargained outcome and no trial.³ What this means is that the blind-folded lady holding the scales of justice is usually absent in most formal legal cases. The lawyers are most likely to be the main arbiters of justice in such cases. Even when cases are settled by negotiation—and as these statistics show, the vast majority of cases are settled—litigants surely benefit from having legal representation in the negotiation process. It is important that we capture this informal advocacy if we are really attempting to measure justice.

V. MEASURING REPRESENTATION

The practice in this clinic also includes representation of clients in adversary judicial and administrative hearings held in matters before the United States Citizenship and Immigration Services (USCIS), the Immigration Court, the state Housing Court, Small Claims Court, the Department of Social Services, and, on occasion, the United States District Court. One such case involved fifteen Spanish-speaking women who were employed as homemakers and companions to elderly and disabled individuals by a private company licensed and compensated by the state. These clients had all been paid less than the minimum wage and had recently been “paid” with checks that were dishonored because of insufficient funds in the company bank account. When law students attempted to contact the employer, they discovered that the company had closed its office. Telephone calls were not answered and there were no

2. THOMAS H. COHEN & STEVEN K. SMITH, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 202803, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 2001, at 2 (2004).

3. THOMAS H. COHEN & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 228944, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, at 10 (2010). “For a long time the great majority of cases of almost every kind in both federal and state courts have terminated by settlement.” Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 515 (2004).

responses to voicemail messages. Letters to the employer sent by registered mail were neither answered nor returned as undeliverable.

After consultation with the fifteen plaintiffs, individually and as a group, the students and their clinical instructors filed a federal lawsuit against the company and its officers under the Fair Labor Standards Act (FLSA). The students litigated the case, which involved establishing that the plaintiffs, even though designated “companions” by the defendant employer and therefore not covered by the FLSA, were in fact covered “homemakers” and therefore entitled to receive the minimum wage and overtime.

After winning a judgment, the students learned that the state agency that paid the defendant for the services it provided to indigent clients was holding a substantial amount of funds owed to the company. The state had filed an interpleader action against a bank that was owed money by the company and the Internal Revenue Service (IRS) that was owed taxes by the company. The students filed an intervenor-complaint in the interpleader action claiming that the clinic’s clients were entitled to the funds for unpaid wages. The bank’s attorney challenged the clinic’s legal basis for intervening, but agreed to negotiate after being advised that the clinic planned to file an involuntary bankruptcy proceeding against the company, in which case the IRS and the unpaid employees would have priority over the bank. Between what the students obtained through negotiation with the bank, and the amount recovered from the company, each of the fifteen plaintiffs received more than the amount that she had claimed in unpaid wages and overtime. The favorable outcome in this case could not have been achieved without the legal work of the clinic students. However, it is important to note that the work on this case occupied much of the time of the students to the exclusion of serving other clients.

VI. MEASURING UNDERSTANDING

Clinicians sometimes also attempt to bring clients to a sufficient understanding that they might navigate—and win—on their own. Some of the matters handled by law students in the clinic might conceivably be handled by individuals without legal training, or even by the clients themselves with some assistance, but we really do not know whether that is true. Nor do we know whether some clients would feel empowered by the experience of self-representation, how clients feel subjectively about the services they receive from clinic students, or whether the legal services provided by clinic students actually make a difference in the outcomes of many of the cases that they handle. The clinic provides legal services on a first-come-first-serve basis and does not set priorities. These are all issues that are worthy of study.

Many clinicians focus on the education of the student, teaching students to win cases. Building this skill set does not, in most cases, enhance students' skills in educating clients. While the rigors of the legal struggle may, in many cases, bring the client to a point of comprehension, it would unlikely lead to greater understanding. The law students' job, in those cases, is to win, not teach. While students must learn how to win cases, most clinicians experience that educating clients leads to more long-term success. The point here is that the pedagogical imperative shapes the capacity to quantify justice in a clinical setting. How do you measure the delivery of justice in conjunction with the other important mission of delivering legal education?

VII. MEASURING INSPIRATION

Some clinics have a primary goal of educating students and choose their cases to best meet the educational goals of the clinic. Although these clinics do not have specific subject matter goals for having an impact on access to justice, they do seek to provide students with an appreciation for the complexity of working for social justice, an understanding of the variety of skills and strategies that lawyers can use to seek justice, and the faith that students have the capacity to make a difference as a lawyer. To that end, students engage in direct representation and "project" work. The work itself, although responsive to community needs, is driven by how good the fit is with this goal.

In the Community Justice Project, students directly represent clients in unemployment insurance appeals. In these cases, students develop an attorney-client relationship, prepare necessary motions and discovery, and conduct direct and cross-examination and closing argument before an Administrative Law Judge (ALJ). Students typically have two cases during the semester. The clinic is not subject matter driven, however. The subject matter of direct representation cases may change based on community need.

Students also engage in project work that allows them to advocate for broader communities using a wide range of strategies, including nontraditional advocacy, public relations, the use of media, lobbying, legislative and policy drafting, and community organizing. These nontraditional projects challenge our traditional notions of lawyering because there is no obvious litigation or transactional strategy that will "solve" the problem. Such cases provide a platform for students to think strategically about the project of justice. Typically these projects fall within several different categories, including policy and legislative work, extraordinary remedies, community advocacy, and international work. Students work on one project for the duration of the semester.

VIII. MEASURING SATISFACTION

Individual clients are referred to the clinic after their claims for unemployment benefits have been denied. The clinic chose those cases not just because they provide an opportunity to teach a range of litigation skills within a semester but also because unemployment is a significant problem nationally and in Washington, D.C. Last year, the unemployment rate in Washington, D.C. was 11.1% and in certain wards close to 30%.⁴ Unemployment insurance was designed to be a way for newly unemployed people to be able to survive as they sought new employment. In this economy, the hope of finding a new job is dim. Claimants rely on these benefits and a denial can mean the difference between holding onto their housing and being out on the street. Close to one-third of children living in Washington, D.C. live in households below the poverty line.⁵ Unemployment benefits (and the federal extension that made them realistic lifelines) are a critical source of funds. Washington, D.C. residents who are found eligible for unemployment benefits have less than 25% of their income replaced, the lowest percentage in the country.⁶ Nevertheless, the Census Bureau reports that unemployment benefits kept 3.2 million people nationwide from slipping into poverty last year,⁷ which is defined as an income of less than \$22,314 for a family of four.⁸

Claimants who appeal the agency's determination appear before the Office of Administrative Hearings (OAH) for a de novo hearing in which the employer bears the burden of showing that the employee engaged in

4. *Unemployment Rates for States*, BUREAU OF LAB. STAT., <http://www.bls.gov/lau/lastrk11.htm> (last updated Feb. 29, 2012); *Unemployment Data for DC Wards*, DEPARTMENT EMP. SERVICES, <http://does.dc.gov/page/unemployment-data-dc-wards> (last visited Feb. 2, 2013).

5. *New Census Data: 110,000 D.C. Residents Live below Poverty Line*, HUFFINGTON POST (Sept. 23, 2011, 10:58 AM), http://www.huffingtonpost.com/2011/09/23/new-census-data-district-of-columbia-poverty_n_977608.html.

6. COMMUNITY JUSTICE PROJECT, JUSTICE IN UNEMPLOYMENT INSURANCE APPEALS?, *available at* <http://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/Community-Justice/upload/Justice-in-Unemployment-Insurance-Appeals.pdf>. The "replacement rate" is defined as average weekly benefits as a percentage of average weekly earnings. *Unemployment Insurance Replacement Rate*, U.S. DEPARTMENT LAB., http://www.ows.doleta.gov/unemploy/ui_replacement_rates.asp (last updated Nov. 8, 2012).

7. CARMEN DE NAVAS-WALT ET AL., U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, P60-239, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010, at 22 (2011).

8. *How the Census Bureau Measures Poverty*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/www/poverty/about/overview/measure.html> (last updated Oct. 26, 2012).

disqualifying misconduct or voluntarily resigned. Claimants win their appeal and thus are eligible for benefits when the employer fails to bear its burden or fails to appear for the hearing. Lawyers are optional in these administrative hearings. It is difficult to know without OAH data whether the presence of a lawyer increases the likelihood of success. The clinic has found, however, that its clients often are confused about the burden of proof and believe that these are hearings where they get to explain their behavior. By testifying, they often provide the very evidence that permits the employer to meet its burden. Students learn through their representation that a good part of their job is explaining the law and the effect that the burden of proof has on what evidence is presented (or not). It is ensuring client comprehension. We are left with the question, however, do clients learn, at some level, what to do next time to protect their interests? Do they come even close to understanding how the system works?

The clinic uses client surveys to understand clients' experience of the clinic's representation and their sense of justice. Clients are asked to rate their experience on a one-to-five scale (with five being the best score). These surveys offer some insight into measuring justice and reveal what many may find surprising. Although the number of client surveys is too small to make our findings scientifically reliable, they do challenge the notion that justice should be measured by whether the participation of the lawyer is necessary for a positive outcome. Our data is based on eighty-four cases over a two-year period. The clinic prevailed in 82% of the cases and benefits were awarded to our clients. It won 75% of the cases in which there were attorneys representing employers and 59% of those cases when the employers were not represented. The client satisfaction survey was sent to all of the clients after our representation was complete and they had received a determination from OAH. The table below gives a summary of the results.

TABLE 1
UNEMPLOYMENT INSURANCE CLIENT SATISFACTION SURVEY RESULTS

Overall Response Rate	41.68%
Response Rate for Clients Who Won Case	42.03%
Response Rate for Clients Who Lost Case	46.67%
Response Rate for Clients Whose Employer No-Showed	37.50%
Average Satisfaction Rate for Clients Who Won	4.55
Average Satisfaction Rate for Clients Who Won because of No-Show	4.75
Average Satisfaction Rate for Clients Who Lost	3.14
Average Satisfaction Rate for Clients Who Lost But Gave High Rating for "Understood Me" Question	3.75
Average Satisfaction Rate for Clients Who Lost But Gave High Rating for "Responsive to My Concerns" Question	3.80
Total Wins	69
Total Losses	15
I Am Pleased with the Outcome of My Case	4.65
I Gained a Better Understanding of the Legal System and My Rights from Working with My Student Attorney	5.00
From Working with My Student Attorney, I Learned Some Tips That Will Help Me Advocate for Myself	5.00

These results show that winning was not the only indicator of how a client felt about his or her experience. Having a lawyer who listened and tried to understand had a substantial effect on the client's satisfaction with the experience. As social psychologist Tom Tyler has found, people care at least as much, or even more, about procedural justice as they do about substantive outcomes; at least as much, or even more, about perceived fairness of the process as they do about the results of the process.⁹ As the results from the client satisfaction surveys suggest, lawyers can play a central role in injecting respect into the legal experience. It seems difficult, but not impossible, to measure that experience as is done with the client satisfaction surveys. It is critical to capture the importance of lawyer-client interactions, and the impact of counseling on a client's sense of whether there was truly access to justice. Law is certainly much more than an expert evaluation of the client's exposure or likelihood of success and the systematic processing of legal matters. Surely there are ways to measure what may at first seem to be intangibles, incapable of quantification, yet clearly things that

9. Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103, 128 (1988).

should play a role in deciding how to apportion legal services. The results of this survey help the clinic tailor its training and expectations to foster the factors that appear to be very important to the clients' sense of fairness. They reveal information that challenges the use of a flat win-loss analysis as an appropriate measure of justice.

IX. MEASURING INJUSTICE

Determining whether introducing a lawyer into a dispute can increase the likelihood of success as a way to apportion legal services has other significant consequences for the project of justice. As we move forward in trying to measure justice, our methods must match our clients' experiences or we risk reinforcing the notion that prevailing in the legal system, as it functions today, is, in fact, justice. The burden of failed justice affects the poor more than the wealthy, therefore rendering quantification of justice more difficult.

Losing cases often helps the lawyer see the necessity of other approaches, more systemic approaches, to deal with injustice. When clients lost their unemployment hearings, the clinic would make sure that, if they wanted to proceed, they had a lawyer to bring an appeal through the courts. In the District of Columbia, when a claimant is denied eligibility at the OAH, the claimant can bring a direct appeal to the D.C. Court of Appeals, the highest D.C. court. Through losing cases and handling or monitoring our clients' appeals, we learned a good deal about justice, or the lack thereof. Despite our evaluation that our client had a significant chance of success on appeal and certainly a real need for benefits to avert disastrous economic consequences, our appeals seem to disappear into the ether. After seeing this happen on multiple occasions, we approached the District of Columbia Access to Justice Commission and volunteered to study the appeal process for unemployment benefit appeals.

What we learned was deeply disturbing. When the OAH denies a claim for unemployment benefits, the claimant can file an appeal with the D.C. Court of Appeals. Once an appeal is filed, the court notifies OAH and requests the record in the case. This record typically includes a transcript of the hearing and any documents in the court file, including exhibits from the hearing. Although OAH has instituted initiatives to improve the process, it can take many months before the court declares that the record is complete. Once the record is filed, a briefing schedule is set by the court and typically takes approximately three months. The court then schedules oral argument and decides the case, taking from a few months to a year. The most recent published D.C. Court of Appeals opinions issued in unemployment cases have had approximate timelines

of two years from the OAH hearing to the D.C. Court of Appeals decision.

This delay is particularly harmful because an appealing claimant or employer is without recourse while the appeal is pending. Although the D.C. Court of Appeals has a general rule regarding equitable relief, there is no process in place to order interim unemployment benefits and overpayments are notoriously hard to collect.¹⁰

Further, the Department of Employment Services (DOES) closes the administrative process for claiming unemployment benefits to individuals who have been declared ineligible by OAH.¹¹ This aggravates the problem, putting many claimants in the precarious position of attempting to prove they were able and willing to work during those weeks, but were not able to file claims. In short, even victorious claimants can have a difficult time collecting benefits. Simply defining victory raises measurement issues.

An appeal of an unemployment decision in the D.C. Court of Appeals can take as long as two years to be heard and decided, all while an unemployment claimant has no mechanism for obtaining interim benefits. The table below tracks the time from ALJ decision at the OAH to a decision by the Court of Appeals for all published unemployment insurance appeals.

10. COMMUNITY JUSTICE PROJECT, *supra* note 6.

11. *Id.*

TABLE 2
COMMON DURATIONS DURING UNEMPLOYMENT INSURANCE APPEALS
CASES (IN DAYS)

	ALJ Hearing to ALJ Ruling	ALJ Ruling to Court of Appeals Hearing	Court of Appeals Hearing to Court of Appeals Decision	ALJ Ruling to Court of Appeals Decision
2011 Median	30	634	91.5	760.5
2010 Median	4.5	583	70	708
2009 Median	4	517	147	599
2008 Median	7.5	480	31	488
2007 Median	29	546	270	776
2006 Median	8	475	43	394
Overall Med.	8	535.5	68.5	623.5

The clinic project for the Access to Justice Commission also revealed that the D.C. Court of Appeals has a very high reversal rate in unemployment insurance cases that result in published opinions. Since 2005, forty out of forty-four reported unemployment insurance cases at the D.C. Court of Appeals have reversed the OAH decision or remanded it for further proceedings. This means that many people who have been wrongfully denied unemployment benefits face severe economic consequences, from homelessness to hunger to loss of custody of their children, due to administrative delays. Because claimants are typically prevented from filing weekly forms while an appeal is pending, a prevailing claimant must separately petition DOES to award back benefits, which involves reporting weekly employment searches and wage information for the entire interim period—a nearly impossible task for time periods reaching two years. DOES treats this award of back benefits as discretionary, thereby potentially rendering the claimant's appellate victory moot. The report that the students submitted to the Access to Justice Commission made several suggestions of ways to improve access to justice for claimants appealing denials of unemployment insurance benefits. The Commission was then able to approach OAH and the Court of Appeals and begin work on fixing this injustice. The Access to Justice Commission gained access to all unemployment insurance opinions and had studied them to determine if there is an inordinate delay and, if so, where the delay occurs. One early result that may have additional justice implications is that of the

ninety-five decisions in 2011 and 2012, eighty-six were dismissals for failure to prosecute. This is likely to prompt further study.

This project experience reinforces the fact that often numbers speak louder than words. The calculations the students did about the amount of time between filing an appeal and getting a court decision combined with the probability of success on appeal starkly revealed the possibility that there was a lack of access to justice that our clients experienced. However, the students also wisely knew that numbers alone cannot fully capture the injustice. Included in their report was a photocopy of a pro se claimant's hand written motion to expedite his appeal filed on May 12, 2010. The claimant requested that:

I be given a court date as soon as possible because I lost my fair [sic] for unemployment. I have had no income from September 2008 to June 2009. I gave Appeals Court 5 copies of my case and I kept one copy for myself. I mailed a certified copy to Hawk One Security on March 10, 2010[.] Nobody received it. The whole package came back to me by mail on April 2010. Enclosed is the proof that it was returned to me.

I want to continue my case because Hawk One Security layed [sic] me off without good reasons which resulted in me losing everything that I had worked for. I lost my job after 15 years and all of my benefits. Hawk One broke my life. I lost my home foreclosure March 9, 2009. I can't pay child support and I lost all of my credit.

I need justice for my case and my situation.

I went to my first hearing on North Capital in 2008. I could not afford an attorney. The two people at the hearing were professionals. Both of them represented Hawk One Security. One was a Captain and the other person was from Human Resources.

Because I don't speak English fluently for the law it gave me a disadvantage in defending myself.¹²

The numbers are stark; this personal appeal even starker.¹³ This research imperative risks a love affair with quantifying everything. It is

12. *Id.* app. II.

13. The students identified this claimant as they were investigating the problem. He won his appeal but was told that there was nothing the DOES could do for him because he had not continued to file claims during his appeal (even though the department had shut him out of the system so that he could not file such claims). In other words, his victory was hollow. The students fought for him and managed to get back benefits for the claimant. Although he still needed the money desperately, he could never recover from the harm the delay had caused him.

critical that when we measure justice that we are able to quantify outcomes, harms, client satisfaction, and perceptions of justice. We also need to be able to capture stories such as these. That is a great challenge in this effort.

Legal work that results in systemic change results in more than procedural justice or client satisfaction. The need for this change would not have been revealed if the measure of justice were merely a win-loss ratio. Indeed, if justice is measured only by whether clients win their hearings or perceive the process is fair, we have assumed a system that delivers justice. Lawyers working for the poor know that just because a remedy is available for our clients does not mean that justice has been done. Is it justice when a client leaves clutching his unemployment benefit check after losing his job when the business was downsized in response to the economic downturn? Lawyers play a significant role in challenging the very systems that our clients encounter that hinder access to justice. Losing cases help lawyers see where the pressure and resistance points are and ways to use their skills to affect policy. Pushing cases and reaching beyond what is established can also have significant impact on clients themselves. The anger and frustration that necessarily accompany repeated denials by courts and policy makers can be harnessed by community members for collective action. Lawyers can also play a significant role in mobilizing communities through using their clients' experiences of injustice to shape and force a political response.¹⁴

X. MEASURING MOBILIZATION

During the decade of the 1960s one of the authors was a neighborhood legal services lawyer in an impoverished urban neighborhood in a Northeastern metropolis. It was the height of the federal anti-poverty program known as the "war on poverty." Federally-funded legal services for the poor was established as a principal "weapon" in the war, in partnership with the Community Action Program, a community empowerment program.¹⁵ Some have characterized this period the "Golden Age" of poverty lawyering.¹⁶

14. This is often called "community mobilization lawyering." For descriptions of community mobilization lawyering, see Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355, 389–403 (2008), and Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 440–50 (1995).

15. Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964).

16. E.g., Matthew Diller, *Poverty Lawyering in the Golden Age*, 93 MICH. L. REV. 1401 (1995).

A major campaign during the war on poverty was the welfare rights movement, a militant community organizing effort to reform public assistance programs for the poorest Americans, particularly mothers and children, whose bare subsistence needs were addressed by government welfare programs such as Aid to Families with Dependent Children (AFDC).¹⁷ Neighborhood legal services offices were recruited to provide legal support for the community organizing effort, the goal of which was to mobilize welfare recipients to form local welfare rights organizations that would join together to engage in political reform advocacy and would serve the needs of their members.¹⁸

One of the authors was the managing attorney of a storefront legal services office and carried a substantial caseload of individual welfare cases, primarily representing women AFDC recipients in so-called “fair hearings” challenging terminations of benefits and denials of “special needs” grants authorized by statute or regulation.

A community organizer mobilized a group of AFDC recipients in the neighborhood surrounding the legal services office and requested that the office provide legal assistance by incorporating their group as a tax-exempt nonprofit membership corporation and provide instruction to its members about welfare law, training of members to represent themselves at “fair hearings,” and legal representation to its members in the event that their activism (such as picketing and sit-ins at welfare offices) resulted in conflicts with legal authorities.

In consultation with the Citywide Coordinating Council of Welfare Clients’ Organizations, the author agreed to transform his welfare law practice from representing individual clients to serving as counsel to the group, which named itself the Welfare Action Group Against Poverty (WAGAP). In the months that followed, the author, as “in-house counsel” to WAGAP, met weekly with the group, drafted articles of incorporation and bylaws, incorporated the group as a tax-exempt nonprofit membership corporation, prepared an instructional manual on relevant provisions of welfare law with the assistance of volunteer law students, taught classes for the members on welfare rights and fair hearing procedures, and conducted training sessions designed to enable the members to represent themselves and assist one another in processing claims and handling fair hearings. The growing number of women who became dues-paying members of WAGAP handled a great many welfare matters, including representing themselves at fair hearings, with great success and only relatively minimal individual consultation with their legal counsel during the weekly group meetings.

17. See generally MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973, at 40–55 (1993).

18. *Id.*

In retrospect, the author recalls the enthusiasm and successes of the women of WAGAP, but he acknowledges that he never attempted to measure in any serious way either the actual usefulness of his legal services to the group or the subjective experiences of individual members with his “collective lawyering” and their self-representation. Such impact is difficult to quantify but surely is meaningful to the project of measuring justice. It needs to be captured. When determining the effectiveness of legal services, we should value legal services that support client efforts to achieve justice on their own terms rather than just those in which the lawyer and legal practice attempt to achieve justice for our clients.

XI. MEASURING FAIRNESS

As noted earlier, there have been many efforts to capture clients’ perceptions of justice. Social psychologists—notably Tom Tyler—who have conducted empirical studies of people’s attitudes and feelings about justice have found that ordinary people, in their encounters with law and the legal system, care less about the legality of legal decisions or the efficacy of the legal system in resolving disputes than they do about their perceptions and subjective experience of the fairness of the process.¹⁹ People care at least as much about procedural justice in resolving legal disputes as they do about substantive outcomes.²⁰

In their book *Social Justice in a Diverse Society*, Professor Tom Tyler and his colleagues have considered numerous empirical studies that have examined ordinary people’s experiences with and feelings about a variety of justice issues. Based on the findings of these empirical studies, they conclude that “it is important to pay attention to people’s subjective judgments about what is just and fair.”²¹ For example, an empirical study of litigants’ feelings about pretrial mediated resolutions of their cases found that the outcomes of the mediation had no direct impact on the parties’ judgments concerning the results, but that their feelings about the fairness of the mediation process were directly related to their willingness to accept the result.²² In another empirical study of distributive outcomes and procedural fairness, Tyler and his colleagues report that people are as concerned about how decisions are made as they are about what those decisions are.²³

19. See generally TOM R. TYLER ET AL., *SOCIAL JUSTICE IN A DIVERSE SOCIETY* 75–102 (1997); Tyler, *supra* note 9, at 128.

20. TYLER ET AL., *supra* note 19, at 76–78.

21. *Id.* at 4.

22. *Id.* at 7–9.

23. *Id.* at 78.

In a recent inaugural lecture at the Yale Law School on the occasion of his appointment as the Macklin Fleming Professor of Law and Psychology, titled “Legitimacy in Everyday Law,” Professor Tyler summarized his empirical studies of procedural justice as follows: “[s]tudies show that one reason legitimacy is important is that people are more likely to accept and abide by decisions when they view the legal authorities who make them as legitimate.”²⁴ Tyler pointed to three elements of procedural fairness that are valued by ordinary people in their encounters with law and the legal system: (1) the opportunity to speak and be listened to, to present their side of a disputed issue, and to feel that they have a voice in the process; (2) having the outcome of the process explained in a manner that is understandable and being given reasons for the decision; and (3) being treated with respect.²⁵ He emphasized the “centrality of human dignity” to ordinary people in the resolution of legal disputes, and the importance of procedures that people perceive, understand, and experience as fair and that convey respect.²⁶

CONCLUSION

The essential elements of procedural justice—voice, reasoned explanation, and respect—as well as favorable outcomes, can all be enhanced and even made possible in many situations, when the individual has the benefit of legal counseling and representation, especially in adversary proceedings and especially when the adversary has a lawyer.²⁷ There are ways in which this kind of client interaction and informal advocacy can be measured, but it is a far more complex set of variables than regression analysis can capture. This research imperative is important. It is likely to result in more effective provision of legal services, more awareness of areas of significant need, and ultimately result in more access to justice. We should proceed with caution, however. Like many efforts designed to do good, there is substantial risk that our research can be used to ration legal services and to reinforce the idea that the system, functioning better through the

24. See Tom R. Tyler, Macklin Fleming Professor of Law, Inaugural Lecture at Yale Law School: Legitimacy in Everyday Law (Dec. 10, 2012), <http://vimeo.com/56986325>.

25. *Id.*

26. *Id.*

27. A randomized empirical study of summary process eviction cases demonstrated the positive impact of legal representation on outcomes for tenants. D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 908 (2013).

insights we gain from our research, actually provides poor and marginalized people justice. As advocates we know better.