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MISSING THE VALUE OF CLINICAL LEGAL EDUCATION

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As a law professor teaching an in-house law clinic, I am acutely aware of the argument that in this time of economic hardship for law schools, clinical legal education¹ is too expensive. This argument is the subject of *Pricing Clinical Legal Education*, in which Professor Robert Kuehn observes that while clinical education is widely perceived to drive up the cost of student tuition, there has never been any verification that this is the case.² Using empirical data certified by law schools, Kuehn persuasively demonstrates that there is no relationship between increasing clinical legal education opportunities for students and increased student tuition. These data lead Kuehn to the conclusion that it is not the *cost*, but the *will*, of law school administrators and faculty that prohibits the guarantee of clinical opportunities to all students. In this Comment I discuss why I am persuaded by Kuehn's argument and share my firsthand experience of the targeting of clinical legal education as too expensive.

Kuehn begins his discussion with a comparison of the clinical requirements of legal education versus other professional education. Strikingly, other professions require one-quarter to one-half of a new licensee's education to be clinical in nature, whereas law requires only one-fourteenth.³ Whether one believes that law schools should provide their students with more clinical—versus simulated or doctrinal—training, as a practical matter, employers are increasingly demanding the former,⁴ and this demand appears to be a significant factor swaying the discussion surrounding cost.⁵ Kuehn extensively documents this demand, illustrating its critical importance at a time when legal education is under the gun

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1. "Clinical legal education" comprises law clinics housed within a law school, as well as externships. The critical element is the real-client or real-case (not simulated-client/case) experience. Robert Kuehn, *Pricing Clinical Legal Education*, 92 DENV. U. L. REV. 1, 5 (2014) ("[C]linical courses, defined as law clinics and externships . . .").

2. "[N]o research has addressed whether or not providing more clinical legal education results in students paying higher tuition." *Id.* at 5.

3. *Id.* at app. A (comparing law with medical, veterinary, pharmacy, dentistry, social work, architecture and nursing). At least some of these professional schools are also criticized for their extraordinary costs. See, e.g., Janet Lorin, *Medical School at \$278,000 Means Even Bernanke Son Has Debt*, BLOOMBERG (Apr. 11, 2013, 8:53 AM), <http://www.bloomberg.com/news/2013-04-11/medical-school-at-278-000-means-even-bernanke-son-carries-debt.html> (describing the crushing debt of medical school).

4. Kuehn, *supra* note 1, at 17–18 (discussing several state bar associations' findings that law firms are less willing to bill clients for the services of new attorneys who are not practice-ready).

5. *Id.* at 19 (linking the demand for more practice-ready graduates to concerns about the costs of providing clinical education to more students).

for the extremely high debt its students accumulate, combined with the somewhat low probability of earning enough upon graduation to pay that debt.⁶

The thrust of Kuehn's argument is not to extol the benefits of clinical education. Nor does he suggest that the teaching of a traditional in-house clinic (usually consisting of a low student-to-faculty ratio) does not have instructional and other costs to the school.⁷ Rather, Kuehn looks for evidence that the potentially higher costs of clinical legal education hike up student tuition.⁸ After carefully examining and analyzing data reported to the American Bar Association by law schools, Kuehn convincingly makes the case that the proof simply isn't there.

To cut to the chase of his argument, Kuehn demonstrates that of 202 schools that submitted reports to the ABA in 2013, 170 of them (84%) reported that they already have the capacity to provide each student with a meaningful clinical opportunity.⁹ Fourteen of those schools currently make this guarantee to their students.¹⁰ Twenty-two schools do not merely guarantee, but mandate a clinical experience.¹¹ Yet the thirty-six schools that already guarantee or mandate a clinical experience to every student are not charging their students more in tuition than schools that do not provide this guarantee or requirement.¹² Put another way, "students that receive fewer clinical education opportunities . . . or are not offered law clinic training, do not benefit financially from this lost educational opportunity."¹³

In addition, Kuehn offers case studies of three schools at which the faculty has decided to mandate an extensive clinical experience, and he shows that at none of these has the cost of tuition for students increased.¹⁴ In short, between his quantitative and qualitative data, Kuehn

6. *Id.* at 6–7 (describing the average debt of law school graduates and the salary required to pay it). *But see* Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree*, 43 J. OF LEGAL STUDIES 249, 251 (2013) (arguing that "absent catastrophic changes exceeding changes already seen from 2008 to 2013 and uniquely affecting law school graduates—law school remains a lucrative investment that reduces the long-term risks of financial hardship for most law school graduates.").

7. Kuehn makes clear that there are instructional and other costs to schools, but argues that these costs have not been shown to be passed on to students in the form of higher tuition. *See* Kuehn, *supra* note 1, at 20 ("Even in the limited, and now dated, instances where reliable data have been available, those reports do not show that widespread clinical education is financially infeasible but simply state the obvious—that lower enrollment law clinics have higher per academic credit instructional costs than large enrollment classes." *See also id.* at 31 (providing case studies of schools that have added significant clinical offerings without increasing tuition).

8. Kuehn argues that "in spite of the higher costs many associate with clinics," his findings "demonstrate that clinical courses have not cost, and need not cost, students more in tuition." *Id.* at 1.

9. *Id.* at 32.

10. *Id.* at 31.

11. *Id.*

12. *Id.*

13. *Id.* at 39.

14. These are Washington and Lee University School of Law, the City University of New York School of Law, and the University of the District of Columbia David A. Clarke School of Law,

shows that increasing clinical opportunities by providing students with more real-practice education need not be in tension with containing tuition. The real issue, as Kuehn argues, is one of resource allocation and will. What does the administration and faculty have the will to do with its tuition resources?

Denver Law has the will to offer all of its students an experiential opportunity. Recently we joined those schools, referenced by Kuehn, that guarantee a live-client experience.¹⁵ To increase experiential opportunities, faculty who in the past have taught purely doctrinal classes are increasingly adding a live-client component to their courses. In addition, we added “hybrid externships,”¹⁶ “labs,” “semesters in practice,” and “practicums.”

At the same time that we’ve added this variety of opportunities, we’ve lost an in-house, live-client clinic, and this clinic will be replaced by a visiting professor who will teach a practicum.¹⁷ As someone who teaches an in-house clinic, I am worried that in our rush to provide as many experiential opportunities as we can, and as cheaply as we can, the value of the in-house clinic is missing in the discussion. This is particularly troublesome in the current debate over the cost of experiential education, where the in-house clinic is targeted as too expensive.¹⁸

DU Law Dean Marty Katz recently wrote an article that starts from the proposition that to provide the experiential opportunities for students that the market demands, we must control costs so as not to “risk pricing a large and growing segment of the population out of our market.”¹⁹ He proposes a new model of calculating the costs of experiential legal education.²⁰ In his “Basic Model,”²¹ he estimated the cost per-student credit

in which students complete a seven-credit clinic in their second year and another seven-credit clinic in their third year. *Id.* at 26–27.

“What is significant about these examples, in addition to the administration and faculty’s commitment to mandate clinical education, is that the three schools reflect the range of the 202 ABA-accredited law schools. They include schools that are: public and private; ranked as “the top schools” and unranked (“second tier”) by *U.S. News*; in urban and rural areas; graduating students that seek employment primarily locally and students looking across the country; offering a part-time degree program; and charging high and low tuitions.”

Id. at 27.

15. See *2014 Year in Review*, LAW.DU.EDU, <http://www.law.du.edu/index.php/2014-year-in-review> (describing the “Live Client Guarantee”).

16. *Id.*, (describing two new hybrid externships, in which student supervision is shared between a tenured or non-tenured faculty member and a lawyer in the community).

17. We lost a clinic because the faculty member who taught it retired and the administration has decided not to fill his line with a clinician.

18. Kuehn, *supra* note 1, at 34–35 (“Law clinics in particular, compared to clinical legal education more generally (which includes both low student/teacher ratio law clinics and typically higher enrollment field placement courses), often are the focus of the claim that clinical legal education costs too much.”).

19. Martin J. Katz, *Understanding the Costs of Experiential Legal Education*, 1 J. EXPERIENTIAL LEARNING 28, 28 (2014).

20. *Id.*

21. *Id.* at 44.

for an in-house clinic to be \$2,517 versus an externship (\$467) versus an average-sized “podium class” (\$490).²² Katz explicitly sets out *not* to address the benefit-side of a cost-benefit analysis of the relative expense of law clinics, in a law school’s overall budgetary and curricular planning. He makes this point salient:

It is important to note that this is an Essay about cost, which represents only half of the important question of value. The other half of the equation is the set of benefits provided by experiential education. For purposes of this Essay (and more generally), I will assume that the benefits of experiential legal education are extremely high.²³

I appreciate Dean Katz’s acknowledgement of the benefit of experiential education. Aside from this statement, and with no attention to the benefits of an in-house, live-client clinic, Katz focuses on costs. This model is precisely the type of analysis—one done in a vacuum—that Kuehn warns against:

Any debate over the costs of clinical legal education needs to focus on the knowledge, skills, and values students should obtain while in law school to prepare them for the effective, ethical practice of law and on how schools can best provide instruction in those areas. Because of the many variables contributing to the high cost of legal education and the need to contain tuition, schools should be asking which expenditures most benefit students and are most worthy of preserving or enhancing and which benefit others and perhaps should not be so heavily subsidized by student tuition. Simply saying that clinical education costs more than other modes of instruction and should not be increased, or should be among the first items cut to reduce expenses, shortchanges students by failing to consider the costs and benefits to students from how their tuition dollars are spent.²⁴

One need only imagine shopping for eggs at the grocery store to make this point concrete. If cost was the only concern, one would buy the cheapest dozen of eggs. Once concerns beyond cost are added—such as the nutritional value of the product, or the political value of paying the workers in the factory a fair wage, or the moral value of treating the chickens humanely—cost, while important, quickly becomes relative.

Still, a consumer must know the cost of each type of egg (organic, free range, cage-free, etc.) to make an informed decision about how to spend in light of her overall budget. As one tackles cost projections (only), it is critical to get the costs right. A major problem with Katz’s costs, according to Kuehn, is that Katz’s “Basic Model” assumes a type of clinic that is not at all basic—or even representative—of the vast majority of

22. *Id.*

23. *Id.* at 29–30.

24. *Id.* at 25.

in-house clinics nationwide.²⁵ Kuehn draws on a 2014 survey of over 500 clinical faculty, showing that more representative and realistic assumptions stand Katz's cost projections upside down.²⁶

More concerning to me is that while Katz explicitly purports not to comment upon value, he does not fulfill this promise. First he argues that externships and "hybrid clinics"²⁷ are not merely lower-cost (than in-house clinics)²⁸ but in fact are "added-value," in the sense that they build strong ties with the legal community.²⁹ If the issue is now value and not just cost, Katz has overlooked the same value in many, if not most, in-house clinics, and particularly the clinic at Denver Law associated with his "Basic Model." That clinic routinely co-counsels its cases with lawyers in the community.

Second and more critically, Katz concludes overall: "From a cost standpoint, the analysis above points the way: Any offerings that add courses, credits, or seats at a cost less than current forms of experiential education will move a school in the right direction."³⁰ The same argument could be made about classroom education. If we combined our first-year sections into one 240-person class taught by a single professor, instead of three 80-person sections taught by three professors, this too would save money. But law schools don't do that. In fact, we don't even question that because we care about the benefit to student learning.

My point is that it's not *always* the case that buying the cheaper eggs moves us in the right direction. Cheaper experiential opportunities provide benefits to student learning, but the benefits are not the same as those provided by the in-house clinic. In the in-house, live-client clinic, students grapple with the rules of professional conduct, learn and apply large bodies of substantive law (quickly), understand how procedural rules affect a client's case, learn what it means to be client-centered, struggle with larger social justice issues, exercise professional judgment, and begin to develop a sense of professional identity.³¹ In good extern-

25. *Id.* at 23 ("Dean Katz's basic model uses assumptions that do not reflect the majority of today's law clinics.")

26. Using survey results, Kuehn argues that a true "Basic Model," rather than the unrepresentative cost assumptions in Katz's model, results in costs per student credit of \$881: "Using the model's non-tenure-line faculty labor costs and conservatively assuming that the faculty member would only teach an additional 0.5 non-clinical courses per year with 20 students at 3 credits, reduces the law clinic faculty member's labor costs from \$2,078 to \$881 per student credit, below even the \$950 cost of a 'small podium' 20 student course." *Id.* at 24 n.132.

27. "Hybrid" clinics are those in which student supervision is shared between a tenured or non-tenured faculty member and a lawyer in the community. Katz, *supra* note 19, at 53.

28. Katz does not explain the actual costs of a hybrid clinic, nor does he include it in his cost projection models.

29. *Id.* at 56.

30. *Id.*

31. This is my opinion, based on eleven years of experience as a tenured law professor in a clinic, plus two years of experience as a teaching fellow at Georgetown University Law Center (where I learned from the pioneers of clinical legal education). *See generally* WILLIAM SULLIVAN ET

ship placements they arguably do these things as well, but in the in-house clinic they do this through the day to day practice of law³² as the primary decision makers on their cases and under the intensive supervision of a faculty member whose chief responsibility is to provide them with learning experiences that allow them to integrate these skills, knowledge and emotion, and to guide them to reflect on every single decision they make, at every critical moment, in every single case. They are afforded this opportunity because their professors are dedicated full-time to this endeavor, and at DU Law (and many schools) their faculty has received extensive training, if not a LL.M., to provide this intensive supervision.

The assumptions in Katz's model perpetuate the myths that Kuehn's data show to be false: that law clinics cannot be afforded by schools, or that students, even those paying \$40,000 or \$50,000 per year, cannot expect to be provided with a clinical experience like other professions.³³ Without a careful consideration of the unique value of live-client clinical education, this analysis may be wrongly understood to reduce the debate to one exclusively about student-teacher ratio. Indeed, as one commentator interpreted Katz's model, it "supports [the] common sense idea" that "a live-client clinic with eight students costs much more than a traditional lecture class with 50 or 80 students – even if the clinic supervisor is a low-paid adjunct professor and the lecturer is an expensive tenured professor."³⁴ Kuehn's data dispels these myths as they relate to tuition costs. I have argued that it is equally dangerous to have this discussion without a meaningful consideration of the relative value of in-house, live-client clinical education.

AL., EDUCATING LAWYERS, PREPARATION FOR THE PROFESSION OF LAW (2007); ROY STUCKEY, BEST PRACTICES FOR LEGAL EDUCATION (2007).

32. A mere sampling of the nitty-gritty, day-to-day questions faced by students in my clinic as on-the-ground issues implicating these larger values include: What does a lawyer do when the judge has left for the day and is unavailable to hear an emergency motion? What does a lawyer do when the court's electronic filing system is "down" just prior to the deadline for a filing? What does a lawyer tell a judge when the client does not show up? How does a lawyer handle opposing counsel's wholly-inappropriate comment during negotiation? Though not the purpose of this Comment I would like to make clear that no simulated course could approach a similar educational experience.

33. E-mail from Robert Kuehn to author (Dec. 12, 2014) (on file with author).

34. Don J. DeBenedictis, *Despite Early Worries, Law School Unfazed by New Skills Requirements*, DAILY JOURNAL, Oct. 3, 2014.