

ASSESSING EXPERIENTIAL LEGAL EDUCATION: A RESPONSE TO PROFESSOR YACKEE

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INTRODUCTION

My colleague Jason Yackee offers some interesting data on comparative rates of law-related job placement for graduates of the top 100 U.S. law schools.¹ In the end, his analysis in part reaches the entirely unsurprising conclusion that higher-ranked law schools are more successful at placing their graduates in full-time law-related jobs than are lower-ranked schools (although it turns out that holds true only for those in the top 50).² More interestingly, and less obviously, his data also suggest that schools that offer more experiential learning opportunities (as measured by the school's number of clinical offerings, both in the aggregate and per student), do not have any greater success in placing their students in full-time law-related jobs than do schools

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1. Jason Webb Yackee, *Does Experiential Learning Improve JD Employment Outcomes?*, 2015 WIS. L. REV. 601.

2. In his article in this issue of the *Wisconsin Law Review*, Robert Kuehn shows that the statistical correlation between class rank and employment outcomes does not hold for schools ranked below the top 50. Robert R. Kuehn, *Measuring Clinical Legal Education's Employment Outcomes*, 2015 WIS. L. REV. 645, 659. From this, Kuehn concludes that "many schools ranked [51-100] would gain very little, and perhaps no, measureable employment advantage for their students were they to invest heavily in improving their *U.S. News* ranking." *Id.*

with fewer clinical offerings.³ From this, he poses the question whether clinical legal education is worth the expense and opportunity costs that it represents to law schools.

Yackee acknowledges that his first cut at an empirical analysis of a link between law school clinics and employment outcomes is preliminary and that “[t]he statistical model is admittedly thin.”⁴ As he notes, the correlations he shows may not reflect causation; there may be numerous other factors at work that his initial data analysis cannot detect. Statistical modeling can be difficult, and indeed, Yackee’s statistical analysis might be compromised by a variety of methodological concerns that others have raised.⁵ These matters—some of which Yackee, to his credit, acknowledges—are important. But they are not the focus of my response in this paper.

Instead, I will assume for the moment that Yackee is correct when he concludes that clinical offerings do not seem to increase hiring rates in some general way. That raises an even more important question: why *aren’t* employers influenced by clinical education when (a) they vocally demand practice-ready lawyers and (b) it is so pedagogically valuable? In this paper, I offer a possible answer to the employer-neglect question, making some suggestions about how that problem might be addressed. I will suggest that the problem does not reflect a lack of interest by employers in experientially trained and practice-ready graduates (and hence in clinics), but rather inadequacy in the hiring metrics and heuristics that are currently available to employers, and indeed a desire by private law firms for a *broader* range of clinical offerings (not fewer clinics).

But before addressing that issue, it is important to address the fundamental question Yackee’s paper raises implicitly—what significance should attach to any disconnect that may exist between

3. In this paper, I will follow Yackee’s convention of referring to “clinical education” and “experiential education” interchangeably, with the understanding that Yackee’s analysis is based on data about only the clinical variety of experiential education. See Yackee, *supra* note 1, at 602.

4. *Id.* at 609.

5. Questions exist, for example, about Yackee’s decision to include only long-term, permanent positions. Yackee also considers data only from two years, and then considers the number of clinical offerings in those years, but offerings and hiring rates can vary significantly from year to year based on shifting economic conditions. Likewise, the analysis assesses clinical offerings, rather than clinical positions filled, and at many schools those numbers do not align perfectly. For discussions of some of these issues, see Kuehn, *supra* note 2; *Do Clinical Offerings Improve Law School Graduates’ Job Outcomes?*, L. & ECON. PROF. BLOG (Feb. 9, 2015), http://lawprofessors.typepad.com/law_econ/2015/02/thats-the-question-raised-by-jason-yackee-in-a-working-paper-he-recently-posted-to-ssrn-the-paper-is-a-nice-starting-poin.html.

clinical opportunities and hiring rates? I write from the perspective of one who was for many years a clinical teacher but who has now crossed the divide to become a doctrinal faculty member. On a personal level, I understand the teaching and learning benefits of clinics on their own merits and as a vehicle to deepen both skills and doctrinal learning. Simply put, the primary objective underlying the move toward clinical education, and the reason the American Bar Association (ABA) has increasingly demanded more attention to a skills-based curriculum and practice-ready graduates, is not to improve the hiring rates for law school graduates. Rather, the rationale for clinical education is much more about effective pedagogy for adult learners (both about substance and skills) and the need to create effective lawyers, not just as beginning attorneys, but as life-long learners and reflective practitioners.

I. WHAT'S DRIVING THE PUSH FOR EXPERIENTIAL LEARNING?

While everyone would no doubt like to improve hiring rates, in the end, hiring rates are not what animate the move toward clinical education. A rich literature exists on the theories and benefits of clinical legal education.⁶ Almost none of it identifies a hiring advantage as one of the rationales for experiential learning. Rather, clinical and experiential learning are valued because they are sound pedagogy, and they provide a depth and substantive scope of learning that simply cannot be provided in the classroom alone. In this sense, asking whether clinical education produces sufficient hiring advantages to be worth the cost and effort is akin to asking whether teaching Constitutional Law, Evidence, International Law, or any other traditional doctrinal course is worth the opportunity costs in terms of its payoff in providing a hiring advantage to the school's graduates. Indeed, as Robert Kuehn has shown, when one applies Yackee's statistical analysis to other—traditional and entrenched—law school programs like law review and moot court, the data show the same thing that Yackee finds about clinical education—no statistical correlation to improved hiring rates.⁷ No doubt law schools would continue to offer

6. That literature is too vast to cite here. Suffice it to note, for my purposes here, that an entire law journal, the *Clinical Law Review*, hosted by NYU Law School, is devoted to issues related to clinical legal education, and much of it references the values of and theories underlying clinical education. Virtually none of it focuses on hiring advantages. I have also previously canvassed *some* of that literature in an article in that journal. Keith A. Findley, *The Pedagogy of Innocence: Reflections on the Role of Innocence Projects in Clinical Legal Education*, 13 CLINICAL L. REV. 231 (2006). A small sampling of some of that literature is referenced below.

7. Kuehn, *supra* note 2, at 655–57.

those opportunities and teach those courses, regardless of whether their presence or absence in the curriculum made a difference in hiring rates, simply because they are important components of educating lawyers.⁸

Much of the push for experiential and skills-based learning comes from the ABA. Indeed, in August 2014 the ABA amended its standards for law school accreditation to include a requirement that *all* law schools require all of their graduates to take at least six credits of experiential coursework.⁹ It is hard to imagine, however, that the reason the ABA is demanding more experiential and skills education is because it wants to give any particular students a hiring advantage. The requirement, after all, will apply to all law schools and all law students. Moreover, the market will absorb the lawyers it needs regardless of whether law schools provide experiential learning. There is no argument that experiential learning (or any other kind of legal education) will *expand* the market for new lawyers. Rather, Yackee's inquiry examines whether, within that market, experiential learning gives the graduates of experiential-learning-rich schools an advantage over graduates of law schools with fewer experiential learning opportunities. But in a static market, the ABA cannot possibly have an interest in privileging the graduates of some law schools over the graduates of other law schools. Rather, the ABA is prodding law schools toward experiential learning because it is good for the profession—that is, it provides value independent of a competitive hiring advantage for some schools or some graduates.

So what might that value be? Sound pedagogy is at the forefront. Experiential education provides a platform for hands-on learners, intertwines theory and practice in ways that the classroom alone cannot, and explores problem solving, hypothesis testing, and strategic planning, among other pedagogical benefits.

Increasingly, legal educators are recognizing that students have varying learning styles, and that it serves students well to provide varied educational opportunities that meet those divergent learning needs. Some students are visual learners, others are auditory learners, and others learn best by engaging in interactive and kinesthetic activities. Clinics serve the needs of hands-on learners especially well.

8. Robert Condlin, whom Yackee cites for his “spirited critique of the concept of ‘practice ready,’” Yackee *supra* note 1, at 602 n.3, makes essentially this point: “Law school curricular reform is not an economic stimulant and trying to use it for that purpose will destroy something that works in a futile attempt to revive something that does not.” Robert J. Condlin, “*Practice Ready Graduates*”: *A Millennialist Fantasy*, 31 *TOURO L. REV.* 75, 79 (2014).

9. ABA STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHS. Std. 303(a)(3) (2014–15).

Moreover, education theory teaches that adult learners (in contrast to child and adolescent learners) have specific learning styles and needs. Psychological, educational, and management studies reveal, among other things, that “adults learn best when faced with questions that arise in real-life experiences followed by opportunities to answer and reflect upon those questions.”¹⁰ Hence, “[i]t is axiomatic in learning theory that when cognitive studies are accompanied by active engagement in their application to concrete problems, a likely result is fuller comprehension, better retention, and apter recall of the cognitive material.”¹¹ According to adult learning theory: “(1) Learning should be through mutual inquiry by teacher and student . . . ; (2) emphasis should be on active, experiential learning . . . ; (3) learning should relate to concurrent changes in the students’ social roles . . . ; and (4) learning should be presented in the context of problems that students are likely to face”¹² Clinical education meets those needs in ways that traditional classroom education simply cannot.

Practical skills are, of course, an important part of clinical education. Skills are important to lawyers, just as they are to other professionals (imagine medical school with no opportunities to wield a scalpel, dissect a cadaver, or diagnose and treat live patients), and they are best (perhaps only) learned in a practice setting. Skills are often viewed in the legal academy as somehow remedial, or unworthy of a lofty academic enterprise. But, as should be obvious by now, they are in fact essential components of a competent attorney. And, while skills can often be learned on the job and will always be honed throughout one’s career, not all lawyers will have good opportunities for mentoring and on-the-job training, and all lawyers need to enter the profession with a solid foundation in essential skills.

As important as skills are, however, clinical education is often mistakenly equated with teaching “just skills.” Reducing clinics and experiential education to merely teaching skills as rudimentary as drafting a complaint or papering a deal is naïve and ignores the deep literature in clinical pedagogy and testing of its outcomes.¹³ In reality,

10. Kimberly E. O’Leary, *Evaluating Clinical Law Teaching—Suggestions for Law Professors Who Have Never Used the Clinical Teaching Method*, 29 N. KY. L. REV. 491, 495 (2002).

11. Frank I. Michelman, *The Parts of the Whole: Non-Euclidean Curricular Geometry*, 32 J. LEGAL EDUC. 352, 353–54 (1982).

12. Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321, 333–34 (1982).

13. Condlin, whom Yackee cites, references this error. Condlin writes, for example, that

[l]egal education’s principal purposes should be (and always have been) to develop an intellectual understanding of law and legal institutions and the

lawyering-skills training is just one component of clinical education.¹⁴ Anthony Amsterdam has explained that clinics teach not only practical skills but also “methods of critical analysis, planning, and decision-making which are not themselves practical skills but rather the conceptual foundations for practical skills and for much else, just as case reading and doctrinal analysis are foundations for practical skills and for much else.”¹⁵ Amsterdam describes these foundations as “no less conceptual or academically rigorous than case reading and doctrinal analysis.”¹⁶ Amsterdam explains that traditional law-school pedagogy based on the case/Socratic method teaches three kinds of analytic thinking thought essential to lawyering: case reading and interpretation;

way they work, as well as the critical thinking skills that underlie law practice tasks generally. Becoming proficient at practice tasks is the work of work, so to speak, the result of performing the tasks over and over again, on a daily basis, under the guidance of mentors, as part of the process of being socialized into the profession.

Condlin, *supra* note 8, at 79. As set forth below, this conception of experiential learning as equating with “skills training” in the sense that it is merely “the work of work” grossly misunderstands the real value of clinical education and its attention to skills. As Condlin himself makes clear, clinics do much more than that:

The distinctive feature of [clinical instruction] is its ability to confront its subject both methodologically and substantively: to analyze skills while actually using them. Students work on problems in the first person, in lawyer role, in the full richness of real-life factual situations, with the ready-made pressures that responsibility for the interests of others produces. They make choices and judgments to a degree absent in other types of instruction and live with the consequences. This makes the issue of responsibility a meaningful concern. The driving force in this process is the dynamic of role adjustment and the need it generates to understand and justify one’s actions. Performing unfamiliar tasks under expert observation, with real interests at stake, requires a cognitive framework that reduces the anxiety unfamiliarity generates and gives consistency and coherence to one’s behavior. Since this process is tied intimately to a sense of self, the motivational energy generated is very high.

Id. at 91.

14. For examples of the literature discussing the goals of (and hence the justifications for) clinical education, see ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 234 (1992) [hereinafter MACCRATE REPORT]; Findley, *supra* note 6; Caroline Grose, *Beyond Skills Training Revisited: The Clinical Education Spiral*, 19 CLINICAL L. REV. 489 (2013); William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor*, 28 AKRON L. REV. 463, 471–73 (1995); *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508, 512–17 (1992); Philip G. Schrag, *Constructing a Clinic*, 3 CLINICAL L. REV. 175 (1996).

15. Anthony G. Amsterdam, *Clinical Legal Education—A 21st-Century Perspective*, 34 J. LEGAL EDUC. 612, 612 (1984).

16. *Id.* at 615.

doctrinal analysis and application; and logical conceptualization.¹⁷ But without attention to other modes of learning—particularly practice-oriented clinical experiences—law schools fail to teach other equally important kinds of reasoning. Clinical education, he notes, can teach these other kinds of reasoning, including what he calls “[e]nds-means thinking,” a subset of problem-solving—“the process by which one starts with a factual situation presenting a problem or an opportunity and figures out the ways in which the problem might be solved or the opportunity might be realized”; “[h]ypothesis formulation and testing in information acquisition”; and “[d]ecisionmaking in situations where options involve differing and often uncertain degrees of risks and promises of different sorts.”¹⁸

The core argument for clinical education thus is that, while traditional, case-method-based doctrinal teaching (which is now largely what I do) is essential, it is not enough as a matter of sound educational practice. Eric Mills Holmes has observed that, while traditional case-method-based classroom teaching can teach

a basic intellectual capacity for legal reasoning, . . . it develops only a few of the intellectual capacities which a lawyer ought to possess. Although it can be used with admirable effectiveness in the first year, the endless succession of cases throughout three years of legal education can be a narrowing experience which dulls student response to broader issues and perspectives. The case method of teaching can therefore be said to sharpen a student’s mind by narrowing it.¹⁹

Understood properly, the argument for clinical education is that it is an important component of a full and deep legal education, *as a matter of sound pedagogy and intellectual rigor*,²⁰ not some hiring advantage disembodied from its rich pedagogical moorings.

17. *Id.* at 613.

18. *Id.* at 614. Recently, Katherine Kruse, among others, has made a similar argument. See Katherine R. Kruse, *Legal Education and Professional Skills: Myths and Misconceptions About Theory and Practice*, 45 MCGEORGE L. REV. 7, 9–10, 32–33 (2013).

19. Eric Mills Holmes, *Education for Competent Lawyering—Case Method in a Functional Context*, 76 COLUM. L. REV. 535, 539 (1976).

20. See John O. Mudd, *Beyond Rationalism: Performance-Referenced Legal Education*, 36 J. LEGAL EDUC. 189, 197, 200 (1986) (noting that experience-based legal education, or “performance-referenced legal education,” is not “beneath [law schools’] academic dignity as members of the university community, but . . . is terribly demanding precisely because it is so rich in both conceptual and practical elements”).

Along these lines, clinics and other experiential learning opportunities contribute in important ways to the *substantive* and intellectual education of law students. Clinics deepen students' understanding of substantive material by providing a context to help them understand doctrine more deeply. Students can learn in the classroom about the Fourth Amendment, or commercial law, or whatever the subject may be, but they inevitably gain a fuller understanding when they try to solve problems for real clients in those doctrinal areas. Imagine again the medical school that sought to teach anatomy by having students read about it and discuss it without allowing them to experience the human body through hands-on exploration.

A full accounting of the unique contributions to a full education that experiential learning offers is beyond the scope of this short paper. Suffice it for my purposes here to note a few additional advantages of experiential learning and to reference some of the additional literature that explores these questions in greater detail. Among other things, clinics teach, in uniquely powerful ways, about the importance of facts and the interrelationship between facts and law; how to resolve ethical challenges; important values of the profession; how to learn from experience; critical analysis of legal institutions in their real-world operation; cross-cultural awareness; creative problem-solving; professional identity; judgment—and the list goes on.²¹

Yackee acknowledges that there are other metrics beyond employment rates for assessing the value clinical education, but doesn't give much attention to them or the pedagogy behind experiential legal education. He notes, while highlighting some of its limitations, the recent study by the University of Denver suggesting that clients were more satisfied with their lawyers who had participated in the University of New Hampshire's skills-based "honors" program than with those who had not.²² Other assessments look at how law graduates themselves assess the value of their clinical experiences. A pair of surveys conducted in 2010 and 2011 found that the great majority of lawyers who participated in a law school clinic rated them "very useful" in preparing them for the practice of law.²³ A major multi-year

21. See, e.g., Grose, *supra* note 14, at 491–501 (summarizing much of the literature on goals and methods of clinical education); Kruse, *supra* note 18, at 14–28.

22. Yackee, *supra* note 1, at 604–05 (citing Jacob Gershman, *Study: Law School's Practice Ready Program Produced Better Grads*, WALL ST. J. L. BLOG (Jan. 5, 2015, 10:47 AM), <http://blogs.wsj.com/law/2015/01/05/study-law-schools-practice-ready-program-produced-better-grads/>).

23. On a scale of 1–4, with 4 representing "very useful" and 1 representing "not at all useful," 63.1% of private lawyers and 83.2% of public lawyers gave their clinic coursework the top rating, very useful. NAT'L ASS'N FOR LAW PLACEMENT & THE

longitudinal study of 4500 lawyers' careers, *After the JD*, questioned lawyers about the helpfulness of ten types of law school experiences, to their early work assignments. The respondents ranked clinics the highest of any of the curriculum-based experiences, above upper-level lecture classes and course concentrations.²⁴ Research from the nationwide *Law School Survey of Student Engagement* found that graduating students who had taken at least one clinic reported that their legal education also "deepened their capacity for serving the public good, handling stress, moral reasoning, and acting with integrity, at higher levels than students who had not had a clinic."²⁵

A key component of clinical teaching theory is that clinical teaching aims to teach students to learn to be reflective—reflective about their own work as students, but also reflective as practitioners, not just in their first jobs, but throughout their careers.²⁶ Thus, while Yackee acknowledges a few potential benefits of clinics, his emphasis on student happiness during law school and the possibility of an improved ability to perform and satisfy clients in graduates' first jobs does not capture the real significance of clinical education. Certainly, student happiness and the ability to do well in first jobs are important, but the benefits are far deeper and more enduring. Clinical education is aimed, in short, at preparing lawyers to be lifelong learners. Hiring rates have little to do with it.

NALP FOUND., 2010 SURVEY OF LAW SCHOOL EXPERIENTIAL LEARNING OPPORTUNITIES AND BENEFITS 26 (2011); NAT'L ASS'N FOR LAW PLACEMENT & THE NALP FOUND., 2011 SURVEY OF LAW SCHOOL EXPERIENTIAL LEARNING OPPORTUNITIES AND BENEFITS: RESPONSES FROM GOVERNMENT AND NONPROFIT LAWYERS 26 (2012); *see also*, Margaret E. Reuter & Joanne Ingham, *Experiential Education and Our Divided Campuses*, 22 CLINICAL L. REV. (forthcoming Fall 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2533698.

24. RONIT DINOVTIZER ET AL., *AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS* 81 (Janet E. Smith et al. eds., 2004) [hereinafter *AFTER THE JD*]. The *After the JD* survey population is a nationally representative sample of 4500 lawyers, in all practice areas and settings, who were first admitted to the bar in the year 2000.

25. Carole Silver, Amy Garver & Lindsay Watkins, *Unpacking the Apprenticeship of Professional Identity and Purpose: Insights from the Law School Survey of Student Engagement*, 17 J. LEGAL WRITING INST. 373, 403 fig.8 (2011).

26. *See* Grose, *supra* note 14, at 494–95.

II. WHAT'S DRIVING THE DATA, OR, WHY DOES IT APPEAR THAT EMPLOYERS AREN'T INFLUENCED BY CLINICAL EDUCATION?

A. *The Disconnect Between Hiring Metrics and Hiring Needs*

Yackee's data do suggest some interesting questions about the apparent disconnect between employers' expressed desires and actual hiring practices. Yackee hypothesizes that a primary reason why clinical experiences may not have much to do with hiring rates is because

law firms and their clients don't actually take skills training into account when deciding whether to hire (or to pay for work by) young associates.

Firms tend to rely overwhelmingly on simplifying heuristics when deciding where to interview (primarily, a law school's national reputation; perhaps also geographic proximity to the firm) and who to hire (primarily law school GPA; perhaps also moot court or law review selection; probably the candidate's poise in the interview).²⁷

To this he adds that these heuristics are probably rational, because "it would be costly and difficult for firms to identify and compare skills training opportunities across schools, or even across law students"²⁸

Yackee is almost certainly correct that firms tend to rely on simplifying heuristics,²⁹ and the available heuristics exclude clinical experiences. But that does not necessarily mean that skills training, experiential learning, and practice-readiness are not *really* important to employers or their clients. Rather, what it may mean is simply that the heuristics that employers use—which have a long tradition that aligns much better with the era of *The Paper Chase*³⁰ than the contemporary law school world—are not very good ones for measuring what employers actually want today. The data may show that the problem is not a lack of value in experiential learning, but a mismatch between the value of experiential learning to employers and clients (and law school graduates) and the available heuristics.

27. Yackee, *supra* note 1, at 603.

28. *Id.*

29. See William D. Henderson, *Successful Lawyer Skills and Behaviors*, in *ESSENTIAL QUALITIES OF A PROFESSIONAL LAWYER* 59, 64 (Paul A. Haskins ed., 2013) (documenting the heavy emphasis on law school status in hiring patterns of elite corporate law firms).

30. *THE PAPER CHASE* (Twentieth Century Fox Film Corp. 1973).

So it might be that employers are not schizophrenic—demanding skills training³¹ while at the same time not really valuing it—but that, instead, employers don't have good tools for assessing the value of experiential learning and skills training. Law school rank and GPA are known quantities with few risks to employers. Understood in this way, the problem is not that experiential learning is not actually valuable, but that the available tools for assessing experiential learning, skills proficiency, and practice readiness just don't exist yet. Stated differently, the hiring patterns may simply reflect what Daniel Kahneman refers to as the availability heuristic—the natural human tendency to rely upon information that appears relevant and is familiar and readily accessible, rather than undertaking the more difficult task of searching out less accessible but perhaps more meaningful data.³² If that is so, the remedy then ought not to be to question whether to continue investing in experiential learning opportunities, but to find ways to translate those opportunities into metrics that are accessible and available to employers.

Despite some thoughtful pleas among some law teachers and administrators for law schools to stop participating in the misleading and corrupting law-school-rankings game,³³ law school rankings and GPA are likely to remain the most useful heuristics for employer assessment of law graduate excellence. But law school rankings almost entirely exclude the quantity and quality of experiential learning offered by a law school. And because many clinical experiences are ungraded, excellence in clinical work might not be reflected on student transcripts or in cumulative GPAs.³⁴

31. For an empirical analysis of the competencies the employers and the ABA say they want in their new hires, see Neil W. Hamilton, *Changing Markets Create Opportunities: Emphasizing the Competencies Legal Employers Use in Hiring New Lawyers (Including Professional Formation/Professionalism)*, 65 S.C. L. REV. 547 (2014). It is noteworthy in this regard that, in California, the State Bar of California Board of Trustees unanimously adopted a recommendation that California bar admission applicants must have taken 15 credits of experiential learning coursework in law school. Reuter & Ingham, *supra* note 23, at 2 n.3 (citing STATE BAR OF CAL., TASK FORCE ON ADMISSIONS REGULATION REFORM: PHASE II FINAL REPORT (2014), <http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000012739.pdf>).

32. DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 126–36 (2011); *see also* Henderson, *supra* note 29, at 72–73.

33. *See, e.g.*, Posting of Jeffrey Selbin, jselbin@law.berkeley.edu, to lawclinic@lists.washlaw.edu (Mar. 7, 2015) (on file with author) (“Without belaboring its perverse impact at all levels of legal education, I believe we can only end the US News & World Report hegemony by no longer tinkering with the machinery of the rankings.”).

34. National law school survey data show that 24% of clinics, 19% of clinic seminars, 79% of field placements, and 41% of externship seminars are graded on a pass/fail basis. ROBERT R. KUEHN & DAVID A. SANTACROCE, *CTR. FOR STUDY APPLIED*

U.S. News and World Report, for example, is stuck in the pre-clinical era of forty or fifty years ago. Despite the nearly universally recognized significance of clinics in contemporary legal education, none of the factors used by *U.S. News* in its rankings include anything designed to score clinical offerings.³⁵ Clinics are largely left out of the traditional ranking tools.³⁶ For that reason, a few rankings have emerged devoted just to clinical programs, as if clinics were separate entities, unconnected to the core teaching and research missions of their host institutions.³⁷ At least one of those rankings relies entirely on the number of clinical and other experiential offerings per student, rather than their nature, scope, breadth, or quality.³⁸

By the same token, reputational rankings of law schools almost always are based on criteria that ignore clinics. Indeed, because teaching quality—whether traditional classroom teaching or clinical teaching—is almost impossible for outsiders to assess, law school reputational rankings (which comprise a full 40% in the *U.S. News* rankings of law schools—the largest component in the rankings) are based almost entirely on the perceived quality of a law school’s scholarly output (and hence largely, although not entirely, its doctrinal faculty). At the least, absent complete rejection of the rankings system by a significant proportion of prominent law schools, *U.S. News* or competing rankings could and should be recalibrated to explicitly

LEGAL EDUC., 2013–14 SURVEY OF APPLIED LEGAL EDUCATION 21, 24, 32, 35 (2015), http://www.csale.org/files/Report_on_2013-14_CSALE_Survey.pdf.

35. The criteria used by *U.S. News* can be found at Sam Flanigan & Robert Morse, *Methodology: 2016 Best Law Schools Rankings*, U.S. NEWS & WORLD REP. (Mar. 9, 2015, 9:58 PM), <http://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology>.

36. It is interesting, however, to note that higher-ranked schools tend to have more clinical offerings than do lower-ranked schools. Yackee, *supra* note 1, at 611 (“[L]ower-ranked schools offer fewer clinical opportunities, but the relationship appears quite modest and is not statistically significant . . .”). We cannot tell from this, of course, whether that means that clinics might be to some extent contributing in reputational ways to the more elite schools’ high rankings.

37. *U.S. News*, for its part, has an entirely separate ranking for clinical programs. See *Clinical Training*, U.S. NEWS & WORLD REP., <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/clinical-training-rankings> (last visited Sept. 30, 2015). The *U.S. News* clinical rankings are based entirely on peer assessments by clinicians—a process that, in my experience, almost all clinicians view skeptically, given that there is no ready way for outsiders to assess the quality of any other school’s clinics in a systematic or widespread manner. See Flanigan & Morse, *supra* note 35 (“Specialty rankings are based solely on nominations by legal educators at peer institutions.”).

38. The *National Jurist*, for example, created a ranking designed “to determine the top schools when it comes to experiential learning by calculating which offer the most opportunities per student.” Mike Stetz, *Best Schools for Practical Training*, NAT’L JURIST, Mar. 2014, at 22.

include quantity, scope, and depth of clinical offerings in their overall law school rankings (and the rankings could eventually include assessments of quality, which could be measured by objective factors such as whether clinical faculty have parity of status, governance rights, and pay with doctrinal faculty; clinical-student teacher ratios; and the like).³⁹ If the rankings were recalibrated in that way, Yackee's data would suggest that, because clinical learning would then have an impact on rankings, clinical offerings would then indeed have an impact on hiring rates. The hiring heuristic would be better matched to employers' stated needs and goals.

One could argue that this merely bootstraps clinical learning opportunities onto law school rank, so that it wouldn't really reflect the value of experiential learning to employer hiring decisions. But by that same logic, the current system artificially excludes experiential learning from employer hiring decisions by largely excluding experiential learning from one of the hiring heuristics that is most readily available to employers. Because clinics are in fact an important part of legal education today, it only makes sense that law schools should be evaluated and ranked on their clinical offerings along with the other traditional criteria presently included in the rankings.

B. Factors Masked by the Clinical Opportunities/Hiring Rates Data

Making sense of the data is also made difficult by a variety of confounds. Yackee measures the effect of clinical offerings on graduate hiring rates by simply counting the number of clinical positions offered at each law school.⁴⁰ But clinics vary dramatically in content, quality, and scope from law school to law school, and even program to program within law schools. Some clinics are one-semester affairs with little actual casework that award just a credit or two.⁴¹ Other clinics are intensive immersion experiences that span multiple semesters or even

39. While nothing in the current rankings prohibits a faculty member from including clinical offerings in his or her assessments, there is no available metric for making those assessments, and *peer* assessments (which alone comprise 25% of the total rankings score) are obtained only from law school deans and recently tenured faculty. According to recently released survey data, only about one-quarter of clinical teachers are tenured or tenure track faculty members. See KUEHN & SANTACROCE, *supra* note 34, at 25. Accordingly, most clinicians are not even eligible to participate in the ranking process. Assessments by practicing lawyers and judges count for another 15% of a school's total score, and they certainly can consider a school's clinical offerings. Flanigan & Morse, *supra* note 35. But clinical offerings and quality are even more inaccessible to most of these voters for all but a few schools with which they may be quite familiar.

40. See Yackee, *supra* note 1, at 610.

41. See KUEHN & SANTACROCE, *supra* note 34, at 23.

years and involve intensive, high-level lawyering, and generate fifteen academic credits or more.⁴² Conceivably, some clinics might improve hiring prospects, and some could have less effect, or even reduce those prospects. Lumping all clinical offerings together may be masking the significance of some types of clinical experiences to employers.

Survey data provide at least some indirect support for this intuition. An important recent analysis of data from the *Experiential Learning Opportunities and Benefits Survey*, which gathered data from 2142 lawyers in private practice, government, and public interest organizations, focused its inquiry not on hiring effects but rather on the lawyers' assessments of the value of their experiential learning opportunities in preparing them for the practice of law.⁴³ The survey drilled down to discern differences between various clinical and other experiential offerings. For clinics, for example, "[t]he survey asked how many terms was the clinic, whether the respondent considered himself the lead or co-lead counsel, and whether he conducted the matter under a student practice order/rule."⁴⁴ The data showed that a set of course intensity factors yielded consistently high values for all lawyers.⁴⁵ In sum, "[c]ourses that gave the lawyers the opportunity to test oneself in a live environment," as well as course combinations that offered students more time-on-task and intense learning experiences, yielded heightened values.⁴⁶ Those data do not draw a straight line to hiring outcomes, but they do at least confirm the notion that there are important course intensity differences among clinical offerings and that those differences matter to practicing lawyers.

Yackee's data, which he acknowledges take a broad-brush look at clinical offerings and hiring, might also mask differences in hiring rates that may exist not in the aggregate but by job type. Because national survey data show that clinical experiences are especially highly valued in public service and government jobs,⁴⁷ might there in fact be a real hiring advantage for students seeking that type of employment, which this broad-stroke data cannot detect? The data also simply cannot tell us a whole host of other important things about hiring, such as whether clinical experiences might help students get their first jobs sooner, or at

42. *Id.* at 17, 23. As Yackee notes, the law school at which we both teach, Wisconsin, offers some clinics that require a commitment of a full calendar year and offer significant credits—up to as many as 17 (exceeding even the 12 credits Yackee notes) for at least one clinic. Yackee, *supra* note 1, at 608 n.16. But even at Wisconsin there are other clinics that offer much less intensive experiences.

43. Reuter & Ingham, *supra* note 23, at 5.

44. *Id.* at 9.

45. *Id.* at 26.

46. *Id.* at 4, 27–29.

47. *See id.* at 3.

a better salary, or most likely, in positions that are the students' first choice.

Moreover, even focusing primarily on Big Law, it may be, as Adam Levitin has observed, that clinics don't have much impact on hiring because most clinical experiences aren't available until the second and third years of law school, while most big firms make their hiring decisions based on assessments of students' first-year coursework.⁴⁸ The hiring calendar simply does not permit consideration of most clinical experiences.

The data on Northeastern and Washington and Lee, which Yackee references, may suggest that extensive reliance on experiential learning is not in fact preferred by employers, because both schools rely extensively on clinics but underperform in their placement rates.⁴⁹ While that may be the case, it is also entirely possible that they are outliers, or that their underperformance reflects employers' unbending reliance on the law school rankings heuristic above all. Or it may reflect something entirely different—such as the possibility that students attracted to those schools are more interested than their peers at other schools in public interest work, and the public interest market is much more limited than the corporate and big-firm market. From the data presented, we simply cannot tell.

Again, the recent analysis of the *Experiential Learning Opportunities and Benefits Survey* provides some insights into these possibilities. Strikingly, the data show that, among lawyers, public interest litigators consistently rate their clinical experiences most highly (and they rate it very highly indeed), and large firm transactional lawyers value their clinical training least highly (although they still find

48. Levitin writes:

[I]s there any reason we would think clinical offerings would in fact improve employment outcomes? Most clinics are 2L/3L offerings. Large firms, at least, tend to hire from their summer associate classes, and the [sic] select their summer associate classes between 1L and 2L year, before students actually have firmly committed to, much less taken clinical courses. I can't see clinical education as having anything other than a marginal effect on employment outcomes, at least at 1st and 2d [sic] tier schools.

Adam Levitin, Comment to *Do Clinical Offerings Improve Law School Graduates' Job Outcomes?*, L. & ECON. PROF. BLOG (Feb. 9, 2015, 7:01 PM), http://lawprofessors.typepad.com/law_econ (search the "Monthly Archive" drop-down box for "February 2015"; then scroll down to the comment).

49. As Yackee observes, it is possible "that absent their skill-based programs these schools would under-perform to an even greater degree." Yackee, *supra* note 1, at 616.

it valuable).⁵⁰ By the same token, “public lawyers not only took more clinics, externships and skills courses, but they were more likely to enroll in the full palette of experiential learning courses” (clinics, field placement, and simulation skills courses).⁵¹ In part, that appears to be because most clinics and externships are in public interest practice and government settings, which the lawyers destined for private law firms might have deemed less relevant to their education.⁵² Perhaps any hiring advantage may be present only where the specific clinical offerings are aligned with the work of the hiring law office, bolstering an argument for a broader range of substantive clinical opportunities, including business and transactional clinics (not a reduction of clinical offerings).⁵³ Other national survey data confirm that indeed “[t]here is a significant positive correlation . . . between clinic participation and subsequent public service employment.”⁵⁴ Clinical programs, as currently constituted, do indeed draw students who are more interested, or *become* more interested, in going into public interest law, where the job market is most difficult.

While these data speak in terms of student assessments of the value of their experiential learning opportunities to their preparedness to practice law, it also offers direct insights into the value of such experiences in job hunting. Again, the differences break down by type of legal job, with public interest lawyers reflecting a dramatically higher sense of the importance of their clinical experiences in their job application process. “The great majority [of] legal services lawyers felt that their [experiential learning] coursework was very useful in obtaining their first job (nearly 70%). In poignant contrast, a scant five transactional lawyers (1.7%) indicated they had extensive conversations about their [experiential learning] coursework in interviews.”⁵⁵ Again, the relative dearth of transactional clinics might help explain that difference.

In any event, assuming that there is indeed no connection between clinical opportunities and hiring rates, all of this suggests that the

50. Reuter & Ingham, *supra* note 23, at 15. Other survey data have also consistently shown that “early-career lawyers value clinical experience more highly than any other aspect of the formal law school curriculum in preparing them to make the transition to the profession.” Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLINICAL L. REV. 57, 58–59 (2009) (citing AFTER THE JD, *supra* note 24, at 81).

51. Reuter & Ingham, *supra* note 23, at 17–18.

52. *Id.* at 23.

53. Indeed, the survey data showed that, of the private lawyers, the transactional lawyers found the least utility in experiential learning opportunities (even while still finding it to have value). *Id.* at 37–38.

54. Sandefur & Selbin, *supra* note 50, at 59.

55. *Id.* at 39.

problem is likely one of outmoded heuristics and a misalignment between clinical offerings and the interests of private-law-bound students. If so, instead of questioning whether to invest in clinics, the appropriate response might be to realign the ranking tools so that employers will have some way of knowing which law schools are actually producing what they say they want—more fully rounded, well-developed, and (more nearly) practice-ready young lawyers. At the same time, law schools might actually consider *expanding* clinical offerings to provide more experiences that would appeal to students interested in careers in private law.

CONCLUSION

When asking questions about how to shape legal education, it is useful to consider relevant empirical data. But it is equally important that we ask the right questions and understand fully the curricular components we are evaluating. Without that understanding, there is a risk that the data will mislead more than it will enlighten.

If indeed offering more clinical opportunities does not improve the hiring prospects of a school's graduates in the aggregate—despite the growing demands of employers and the ABA for more skills in the curriculum and more practice-ready graduates—then the first question is, why not? If, as I have hypothesized (consistent with Yackee's own intuitions), much of the problem is that existing metrics for assessing law school quality and student excellence (which *do* matter to employers, according to the empirical evidence) are inadequate to the task, then they need to be revised to include experiential learning as a component. Additionally, if the problem is that some students and private employers would value other types of clinical experiences more than or in addition to those that are currently available, then that might argue for broadening the clinical curriculum. Regardless, data about the hiring rates of graduates from various law schools should not dominate discussions about the value of clinical education. Rather, the other, more meaningful and real justifications for clinical education should be at the center of discussions about curricular design.