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## Epilogue: Theory in the Basement

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# Epilogue

## EPILOGUE: THEORY IN THE BASEMENT

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**T***heory vs. Practice.* The debate occurs on law campuses, in bar committees and in legislatures. It is a debate that has come to embody many of the challenges facing modern legal education. Many see theory and practice as being mutually exclusive, if not downright hostile.<sup>1</sup> Some scholars see the “theory-practice” dichotomy as hostile to the theoretical perspective, valuing practice over theory.<sup>2</sup> Ironically, clinicians often see the duality invoked to value theory over practice. However, as the academy considers its approach to professional education, there are lawyers and legal academics who find theory and practice inextricably intertwined.<sup>3</sup>

As Professor Martínez notes in his introduction, the growth of a strong relationship, even partnership, between clinicians and critical theorists provides empirical evidence that “theory and practice” are not antithetical. As the authors in this symposium demonstrate, the academy need not value one element over the other. This symposium demonstrates how the practice of law enriches our view of theoretical issues and how, in turn, theoretical considerations enhance clinical teaching and learning. Why, then are these two elements of legal education pitted against each other?

Any dichotomy is merely a matter of perspective. From a clinical perspective there is no conflict between “theory and practice.” A problem as simple as a justice court’s challenge to a pauper’s affidavit raises a number of theoretical issues that include questions of procedure, sociology, doctrine and policy that the clinic student must confront in the course of representation. The student must develop a rapport with her client as she asks hard questions to determine whether her client satisfies the statute’s definition of indigency. She must engage in statutory interpretation as she considers whether the statute permits the court to chal-

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1. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Steven Lubet, *Is Legal Theory Good for Anything?*, 1997 U. ILL. L. REV. 193 (1997).

2. See George Martínez, *Foreword: Theory, Practice, and Clinical Legal Education*, 51 SMU L. REV. 1419 (1998).

3. See Jules Coleman, *Legal Theory and Practice*, 83 GEO. L. J. 2579 (1995).

lenge a pauper's affidavit on its own motion. She will think about institutional and political issues regarding access to courts and whether statutes purportedly designed to increase access, in reality place additional burdens on poor litigants. As she drafts her pleadings and prepares for her hearing, she will also consider strategic issues related to the role of the advocate in representing an indigent client before a potentially hostile tribunal.

Professor Dubin's description of the history of the modern law school sheds light on "theory-practice" debate.<sup>4</sup> Prior to the appropriation of legal education by colleges in post-graduate programs, legal training was acquired through an apprenticeship—on the job training. The aspirant would affiliate with a practitioner to learn the law and eventually take an examination for a license. As formal legal education moved into the academy and took the form of post-graduate professional training,<sup>5</sup> divisions between theory and practice emerged. In this educational model, the teaching of law occurred in classrooms using the case method and focused on doctrine. This shift away from apprenticeships signaled a rejection of the practice-based approach to legal training.

In the 1920s and 1930s, isolated voices saw this shift toward theory as an unwelcome rejection of the practice-based approach and called for inclusion of the practice-based model in the curriculum.<sup>6</sup> Discussions of the relative merits of a theoretical or practical approach to legal education simmered on and off campuses for nearly 60 years. Professor Dubin describes how the most recent product of that debate, the 1992 publication of the American Bar Association's report on law schools and the profession<sup>7</sup> resulted in the expansion of the classroom model to incorporate non-client, simulation courses in interviewing, counseling, trial advocacy, and negotiation. This approach may have unconsciously served to widen the perceived gap between theory and practice in the legal academy by creating the sense that "skills" training was nothing more than the technical mastery over a set of discrete tasks.<sup>8</sup> Professor Dubin suggests that emphasis on skills often occurred at the expense of the broader, theoretical issues necessarily implicated in the practice of law. As he points out, skills training in the clinical context has moved beyond this narrow definition of "practice" to explicitly incorporate the concerns that contemporary legal theory raises.

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4. See John C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461 (1998).

5. See Mark Spiegel, *An Essay on Clinical Education*, 34 UCLA L. REV. 577, 580-86 (1987).

6. See Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933).

7. SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BARD, AMERICAN BAR ASSOCIATION, LEGAL AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSIONS: NARROWING THE GAP, 1992) [hereinafter MACCRATE REPORT].

8. See Spiegel, *supra* note 5, at 590.

Clinical education today embodies the best of these educational developments. As Professors Pérez and Johnson point out, however, it is not without some constraints.<sup>9</sup> All of the authors recognize that students enrolled in clinical programs can learn skills as they apply critical lawyer theory, the theoretics of practice, and law's potential to bring about social change through what Professor Dubin calls "holistic representation and service."<sup>10</sup> Although Professor Chavkin's article differs from the others as he demonstrates how clinical education can provide a framework to explore important theoretical questions grounded in the everyday practice of law, he uses the clinical model to explore the theoretical dimensions of the attorney-client relationship.<sup>11</sup>

This symposium demonstrates that despite clinics' focus on "practice," clinical education is more than simply "practical."<sup>12</sup> Clinicians embrace theoretical perspectives in their teaching and in their research and writing. The articles included in this symposium provide a realistic sense of clinical education today and reinforce the belief that any gap between theory and practice is illusory.<sup>13</sup>

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9. See Kevin R. Johnson & Amagda Pérez, *Clinical Legal Education and the U.C. Davis Immigration Law Clinic: Putting Theory into Practice and Practice into Theory*, 51 SMU L. REV. 1423 (1998).

10. Dubin, *supra* note 4, at 44.

11. See David Chavkin, *Am I My Client's Lawyer?: Role Definition and the Clinical Supervisor*, 51 SMU L. REV. 1507 (1998).

12. See Spiegel, *supra* note 5, at 590.

13. See Rodney J. Uphoff et al., *Preparing the New Law Graduate to Practice Law: A View from the Trenches*, 65 U. CIN. L. REV. 381 (1997); Amy D. Ronner, *Some In-House Appellate Litigation Clinic's Lessons in Professional Responsibility: Musical Stories of Candor and the Sandbag*, 45 AM. U. L. REV. 859 (1996); Shirley S. Abrahamson, *The Justice Who Never Graduates: Law Schools and the Judicial Endeavor*, 68 IND. L. J. 621 (1993); Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599 (1991).

