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## **Bridge of Hope, Journey to Justice:**

### **An Essay**

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Katherine Hessler<sup>1</sup>

#### **INTRODUCTION**

The following narrative reflects my participation on a panel<sup>2</sup> entitled “Theory Meets Praxis: The Impact of Critical Legal Theory on Lawyering Strategies and Experiential Learning.” The panel was the first formalized dialogue between scholars and practitioners rooted in critical legal theory<sup>3</sup> and experiential learning<sup>4</sup> to expressly consider the complimentary, overlapping, and sometimes divergent nature of their work within law schools.<sup>5</sup> The previous lack of conversation between these two groups resulted from inattention and overwork rather than from antipathy. The panel was motivated by a recognition of the need to spend time together examining the paradigms within which each group operates and how they are related to one another, and by a sincere desire to bridge a perceived divide between these two communities based on their different approaches to similar questions.

The goals of the panel were the following: first, critically examine the benefits and limitations of cross-fertilization between scholarly and practical work; second, issue a general call for more ongoing formal and informal dialogue; third, forge productive relationships to reduce the isolation of those working in these fields; and, finally, bring the work of critical legal theorists and experientially based educators to a wider, and more common, audience. With these goals in mind, the panelists explored several issues: the relevance of critical legal theory to lawyering strategies and client representation; the role experiential courses can play in conveying the lessons and insights of critical legal theory to students; the opportunities for students to apply those lessons to

client interactions to enhance understanding, trust, and the quality of legal representation; and the insights critical legal scholars can draw from the practical application of their theories.

Both of these relatively new and powerfully transformative areas have recently come into their own. Because we are less embattled than before, as members of these communities, we now have the ability, privilege, and responsibility to look up from our work to find solidarity, common ground, and enriching opportunities across the invisible lines that unnecessarily divide us so that we can learn from each other.

As I contemplated the work of the panel, the image that came to my mind was that of two different roads coming together at a bridge. I see these roads as sometimes parallel and sometimes overlapping, sometimes intersecting and sometimes widely divergent and seemingly at cross purposes.

But, in my mind's eye, at this point where the roads meet before the bridge, I had the feeling that this was a bridge of hope. Hope, because I do not think that we would do the work we do if we were not essentially hopeful people believing as we do that it is possible for us to be involved in the betterment of our legal system and society. And, because we also believe that we should work for this change, we are on a journey to justice.

The bridge of hope marks our awakening to the reality that we are on this journey together. It acknowledges our commitment to help each other along the way. This bridge of hope on our journey to justice; this is our common ground.

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This is the tale of two young women, Practice<sup>6</sup> and Theory,<sup>7</sup> separated in youth. Both dedicate their work to making the world a better and more just place. They traverse roads “less traveled” and different from one another. They speak different dialects and have different traveling companions. When their paths sometimes cross, they do not recognize each other. Often their paths intersect busier, well-traveled roads. The women, at times, feel lonely and see themselves as “other.” Frequently, their journey is questioned, their

choices derided. It is the belief in the need for their work that sustains their too-often isolated journey.

That is, until one day, when the strangers meet on a bridge and see each other as sisters. They sit on the bridge with their toes dipped into the river of knowledge, sharing food, conversation, and insight. This is the story of their awakening upon the bridge of hope on their journey to justice.

### **THEIR STORY**

Practice introduced herself to Theory and told her that she had seen Theory before. She indicated that she was on a journey to justice in this land of Law and taught in the Tower.<sup>8</sup> Theory then wondered why Practice did not travel the same road with her, as she also was on a journey to justice as a teacher, and surely her road was faster and surer. Practice objected, saying that Theory's road was the path of privilege,<sup>9</sup> a path too distant and remote from the practical obstacles to achieving justice to hope to overcome them. But Theory did not agree, she told Practice that their roads were more alike than dissimilar.

Both women recognized that too few people traveled the roads with them, and fewer still traveled as they did: slowly and intentionally, observing those people and ideas often unnoticed or overlooked by others in society. Traveling companions were few for both women. Others, who sped by on paths not destined for justice, often mocked the women and their journey. Some had come to accept them. Others struggled to acknowledge that the women had the right to be on these paths. Still others did not understand the women or believed that they were misguided in their journey. Each woman welcomed the company of the other and recognized that they shared some access to paths of privilege through their work in the Tower. They were pleased to know that they both chose to use their privilege to speed their journey to find justice for others.

Practice asked Theory why she spoke in such a complicated way, believing that she was clever enough to make her meaning plain. Theory responded that it was the habit of her road, the language of fellow travelers, and that it allowed

her better access to certain roads. Theory then pointed out that Practice often had the same problem when speaking of law and justice to those unfamiliar with the language, including students. Theory also pointed out that the language Practice used with clients in the land of Law could be quite foreign indeed. Both women agreed that they could, and should, think of ways to communicate more clearly and more broadly. They were both glad for supportive critique.

Practice then asked why Theory distanced herself from life outside the Tower when writing and speaking. Practice indicated that in the messiness of the world outside the Tower, Theory could find examples of exactly those things that she wanted to show people and that these stories could help people understand what Theory was saying. Theory replied that she was trying to communicate large global realities, such as racism, to people who did not want to accept them, and that, therefore, she did not have time to address the peculiarities of specific contexts. She indicated her belief that it was easier to generalize a theory down to the specific circumstances of a client's situation than to convince courts that a pattern existed based on the facts of individual cases. Practice again emphasized her belief that the reality of theories like racism had little meaning to people until they saw their impact in the real world.

"Perhaps," said Theory, "but why mire yourself in those realities?" Theory believed that this was one reason why Practice had little time to share her insights with others and why she often had difficulty convincing people of the importance of using those insights in a systematic way to make important changes. Theory explained her view that it was hard to help those not already convinced of the existence of racism, for example, to understand its impact simply by pointing out one or two examples. Both women realized that they had different starting points. Theory started at the general theoretical level and sometimes looked to examples to make her points, while Practice started with individual examples and generalized from there. Each woman agreed that her

efforts would be enhanced by incorporating some of the other's thoughts and styles into her own work.

Practice offered concrete stories to make Theory's ideas more accessible and offered a laboratory in which to test some of Theory's ideas. Theory offered a supportive framework that Practice could use when talking with students, clients, and courts. She believed that this would help Practice more successfully convey her ideas and relate them to larger, more generalizable contexts.

### **PRACTICE'S AND THEORY'S COLLABORATION AND STRATEGIES**

Both women were beginning to appreciate that they really were on the same journey and that they had the same goals; that is, they both wanted to end injustice, inequality, and oppression. To some extent, their differences were ones of emphasis and focus, not of substance. It made their hearts glad to work closely together, and well, on issues dear to them.

After talking for a while, Theory and Practice came to understand that they both used theoretical constructs in their work all the time. Both recognized that they lived in the tangible world and needed to know that their ideas were meaningful in practice. Both women spoke of the difficulty of their journey and tasks and of the constant assaults they faced by intelligent and well-resourced opponents. Theory and Practice also recognized the need to be able to change tactics and strategy in order to respond to these efforts. They agreed to build on one another's successful approaches, and because of the importance of continuing the struggle for justice in a world that is not static, where successes are threatened and failures become exacerbated, they agreed to avoid creating additional barriers, which they had done in the past by not working together. With the sun high over head, they set to work developing a strategic approach.

Practice emphasized the need for community voices in the land of Law and in the work of those in the Tower. She shared her view that the participation of those whose lives are more directly impacted is required for success, because

they are less protected by privilege from injustice and therefore have a more intimate knowledge of the face of injustice. Theory agreed that more voices are needed in the formulation of solutions.

Theory focused on generating more travelers, in general, on the journey in order to gain from their wisdom and to help spread the word. Practice agreed that more work should be done to educate and recruit those within the Tower and that it could be useful to include them in her work.

Practice then suggested that they both try to be more explicit about their goals in order to attract more like-minded people, though she recognized the role for subtlety when addressing power and privilege. She articulated the difficulty of having a conversation in the Tower that presupposes racism, for example, and expressly advocates teaching students to recognize and work to overcome it. This is especially hard when not all in the Tower agree about the presence and impact of racism in the legal system. Practice also owned the need to have more conversations with affected populations in ways that do not exploit them. She recognized that conversations between people with and without privilege are often difficult and emphasized that members of the Tower should avoid paternalism in suggesting solutions for those outside. Further, Practice cautioned against using clients and their stories merely as a means of proving or advancing well-meaning theories. Theory agreed, though she was unclear about how to develop a structure to achieve these goals.

### THE CLIENT

The women's newfound collaboration was quickly put to the test as another traveler joined them. As the sun began to set in the sky, Client approached them, recognizing Theory as a teacher of critical legal theory and Practice as a clinical teacher. "I see that you are engaged in deep conversation," said Client, "and I don't mean to disturb, but I have a problem and wonder if I can talk with you about it?" Practice asked what the problem was. Client told the women that she had been propositioned and groped by her boss, and when she declined his advances and reported him, he fired her.

Theory immediately responded that Client was a victim of sexual harassment and sexual assault, that it was illegal, and that she could seek redress in court. Theory went further to say that Client should make this public so that her boss could not behave this way in the future. Practice told Client that Theory was quite right in her legal assessment.

Practice addressed the scope of representation issues and then asked Client what she wanted. Client said that she was the sole wage earner in her household and had no savings, and that if she did not work, her family would not eat. Client was nearly in tears explaining her story and shared with the women that she could not even afford the medicine that the doctor prescribed for her anxiety resulting from this situation. Practice again asked Client what she wanted. Client responded, looking furtively at Theory, that she wanted her job back because it offered a good salary and benefits.

Theory gently explained to Client the history of these matters and about the relatively recent and hard fought ground that had been gained, upon which Client could stand. Theory went on to indicate that Client's predicament was not unique and was a result of economic, legal, and other factors, as well as her individual circumstances. Client felt better knowing that she was not alone, did not bring this on herself, did not have to accept her boss's behavior, and was not at fault for her family's precarious financial status.

Practice explained that if Client wanted to pursue legal options, she could sue the company to get her job back and for damages, sue her boss for his behavior and the damage it caused, report the assault to the police, or any combination of the three. Client seemed overwhelmed and told the women that her boss had promised her job back if Client would withdraw her report. She wondered aloud what was the best way to guarantee the return of her job, and the end of the harassment.

Giving Client time to compose herself, Practice began a dialogue about non-legal options. She asked whether Client could easily find comparable employment, or whether the mere suggestion of legal action might achieve the desired result. Theory took Practice aside and exclaimed, "This is an open and



shut case! You should pursue all legal remedies and make a point to this boss, this company, and this community that harassment will not be tolerated.” To which Practice responded, “But who will feed Client’s family if the case does not go as we expect? What if we have to win on appeal and it takes years? I agree that this appears to be a very good legal case, but Client is the one who has to live with the consequences of this decision.”

After discussing the non-legal options, Practice and Theory went on to discuss with Client the risks and benefits of all the legal options before her. Theory pointed out the vulnerability of relying on any private agreement with her boss. Practice also indicated that legal results are often challenged or ignored. Together, all three women went on to have a fuller discussion of all of Client’s goals: what she wanted her daughters to learn from this, her desire for vindication and apology, guarantees about future behavior, and repayment of lost wages and other expenses incurred as a result of her boss’s behavior. Once Client’s goals were more fully articulated, the women sat together to discuss costs and benefits of each alternative for achieving them and then began to prioritize among the goals and options.

Ultimately, a plan began to take shape, one that prioritized Client’s most significant goals and minimized the risks to the extent possible by developing more than one strategy for success. Client had become quite engaged and, in the end, turned to Theory and Practice and thanked them for helping her work through this problem and for helping her think about how she might approach these and other issues in the future, both before and after something occurs. “Theory, you’ve helped me see this situation in context,” said Client. “Practice, you’ve helped me work through what is best for me right now. And you’ve both helped me see how my decision could affect others as well.” Client thanked them again and continued her travels, having found a shorter route on her road to personal justice, and at the same time, having moved along the road to social justice as well.

Practice and Theory congratulated themselves on a fine collaborative effort and began to deconstruct what had just happened as a way of better

understanding their different approaches and concerns, in general, and as they related to Client. Theory argued strongly for Practice to use situations like these to further the agenda of justice. Practice bristled, believing Theory paid too little attention to the risk clients face in an effort to achieve her own goals. Practice emphasized the need to attend to her professional responsibility while working in a flawed system. She indicated her preference that every case be a vehicle for reform and voiced her belief that she must temper personal and professional desire with appropriate concern for every client's goal for a good outcome in their own specific setting. Theory responded that there must be a way to bring these matters of justice to light in all cases and that failure to do so results in complicity with injustice. Practice argued for informed decision making by all parties, and sensitivity to the slow pace of reform, not borne on any one person's back. "Exactly," intoned Theory, "why it should be shared by all." "All who wish it," replied Practice. Both women agreed that this was an issue for much future discussion.

Another troublesome conversation related to the fear of failure and its relation to where the risk of the decision making falls. Practice pointed out that there is no problem if justice is guaranteed. However, because it is not, a client's decision to pursue justice beyond her own personal needs is a difficult and dangerous one. If justice is not achieved, it is the client who will live not only with those consequences, but with the potential of receiving diminished personal justice for herself, or none at all. Theory suggested that the very clients most reluctant to address injustice might be the ones to benefit the most from its defeat. Practice agreed but indicated that for many, the risk was far too great and the potential for true justice far too remote. Both women acknowledged instances when bravery was rewarded with justice, but neither could think of many instances when the reward was complete or immediate.

Practice discussed the weight of the double burden she carried—of attempting to create both individual justice for a client and systemic justice for all in society. She indicated that, as a member of privilege, she felt the risk of failure should fall more on her shoulders than on her clients'. Theory

suggested that this attitude diminished the very empowerment of clients in which Practice hoped to participate. Practice admitted that this might be true but said that she felt uneasy asking clients to bear the risk.

Practice went on to explain that in the conversation with a client about whether she should address issues of justice larger than her own, a client is at a disadvantage in making an informed decision about which course of action to pursue and how to evaluate the risk. Practice indicated that she felt it was possible to do well but had not developed a model for doing so that was sufficiently protective of a client's interest, and she therefore felt reluctant to raise the matter, though she was more than happy to respond to a client who did so. Theory thought perhaps Practice was too narrowly reading her professional obligations and was perhaps patronizing clients. Practice thought Theory did not fully appreciate the obligations in question, both moral and legal, and too lightly made her suggestions. Again, the women recognized that these issues were not capable of easy resolution and committed to continue their dialogue.

### THE STUDENT

After a moment of peaceful reflection watching dusk turn dark, they both realized one aspect of their work that they had not yet addressed. They began to discuss the role of the student and of teaching as it relates to these issues.

Practice told Theory that it is hard work to focus on not only the consequences relating to clients and society but on those directly affecting students as well. Theory articulated her goal to establish reform in the Tower as well as the courts so that questions and issues concerning justice might be explicitly addressed. She indicated that this was necessary in order to better prepare students to see the need for the journey as well as the ways in which they can become fellow travelers. Practice agreed and also mentioned that attention must be paid to eliminating or reducing the barriers, for students in particular, to join the journey. She articulated her concern that some students feel penalized when they attempt to have conversations about justice within the

Tower and that the costs of education within the Tower often prohibit many students from taking the lower-paying jobs that allow them to specifically address justice issues. Both women agreed that those who work in the Tower too often neglect their duty to address economic barriers that prevent students from pursuing certain types of work in the land of Law. They agreed on the need to develop guidelines to assist teachers and students in managing those decisions.

Practice indicated that while some of her students have trouble empathizing, she also worries about those who struggle to avoid becoming overwhelmed by what they see in a clinical setting. Theory understood the emotional and psychological impact that can result from this work. She shared stories of students becoming disaffected, cynical, or hopeless after learning about society and the legal system through a critical perspective. Practice and Theory both agreed that too narrow a focus in either clinical legal work or critical legal theory can be troubling for students, and the antidote is a mix of both.

Practice went on, "Imagine," she said, "if my students could remain energized and hopeful knowing more about how their efforts are part of a larger movement toward social justice that has had some stunning victories. That might help them get through the difficulties posed by the daily realities of each case." "And too," said Theory, "imagine if my students learned of and helped out with the good work of your students, and realized that work, large and small, can be and is being done to address injustice. It would buoy them immeasurably to experience that reality more closely." Theory realized that this was a way to value personal justice more than she had in the past, as that which sustains and reflects social justice. Practice thought about whether she had been too afraid to focus her students on larger social justice conversations and the benefits of globalizing their individual experiences.

Practice and Theory began brainstorming ways to bring this concept alive. Practice offered to provide some case studies (with permission from clients) to share with Theory's students. Theory offered her materials for use in clinic seminars. They both agreed it would be great to find appropriate ways for

students to be involved in the community and develop more of their own experiences against which to compare their lessons in the Tower. Theory and Practice became excited at the thought of teaching sections of one another's classes, and of co-teaching. Practice suggested ways for clients themselves to be more present in the work of the Tower.

In the illumination of the moon, Theory and Practice recognized obstacles. Practice worried about the difficulties in focusing too much on theoretical issues, as students are already well inculcated in those methodologies. Theory wondered at her limitations in trying to translate law into individual or community language, making it relevant to them, instead of forcing them to fit into the law. Both women agreed about the need for cross-cultural and interdisciplinary lawyering and teaching. Practice wondered again about how and when to bring theoretical considerations into the conversation with clients directly.

### HOPE

During the conversation, Practice discovered, to her surprise, a new realization of the power of her work, clinical pedagogy: not that it is non-directive in nature or that it is based in real situations, though these are vital aspects, but rather the power of trusting students. The statement that her work makes to students is the following: "I trust you to do good work. I value your insight and opinion. I welcome you as a partner in the profession. I know that you will work hard for your client, and I am here to help you." It is this affirmation that is transformational.

"Hope," mused Practice, "is essentially what clinical education offers—to students, teachers, clients, and the Tower itself, and to the concepts of justice, fairness, and zealous representation on behalf of the undervalued people and ideas in our society."

Theory too realized in a new way the power of her work. Its message is "I will search for the underlying causes of injustice and inequality and bring those truths to light. I will search for solutions to the problems I see. I will engage

with others in this work and I will not stop until we achieve justice, equality and the end to oppression.”

“Hope,” said Theory, “is also what critical legal theory offers. It identifies the undervalued, abused, and forgotten people and ideas in society and seeks to explain that the reason for their oppression resides outside of themselves and in a larger construct of racism, sexism, homophobia, and other destructive structures. Hope comes from the notion that identifying and naming problems can lead to restructuring the world in new ways that are more inclusive and less oppressive.”

Hope, indeed, comes from the collaboration of experiential learning and critical legal theory, the accurate assessment and naming of the types, scope, and nature of the problems of our society, the development of strategies to eliminate and improve those situations, the idea that it is right to teach students that they have a role in identifying and alleviating suffering and injustice in this world, and most of all, the belief that it is possible and that we must continue the struggle as each new day dawns.

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<sup>1</sup> Katherine Hessler is Professor of Law at the Case Western Reserve University School of Law.

<sup>2</sup> The panel took place at the Association of American Law Schools (AALS) Annual Meeting in Atlanta, Georgia, in January 2004. It was cosponsored by three AALS sections: Minority Groups, Clinical Legal Education, and Litigation. Panelists included Professor Anthony Alfieri, University of Miami School of Law; Professor John O. Calmore, University of North Carolina School of Law; Professor Rashmi Goel, University of Denver College of Law; Professor Sherrilyn Ifill, University of Maryland School of Law; and Professor Darren L. Hutchinson, American University, Washington College of Law.

<sup>3</sup> There is no single definition of critical legal theory. It is fair to say, however, that it is legal theory that identifies the systemically undervalued, abused, and forgotten people and ideas in society and seeks to explain that the reason for their oppression resides outside of themselves and in a larger construct of racism, sexism, homophobia, and other destructive structures. Critical legal theory attempts to identify and name this phenomenon based on the notion that identifying and naming problems can lead to restructuring the world in new ways that are more inclusive and less oppressive.

<sup>4</sup> In law schools, experiential education primarily, though not exclusively, refers to clinical education. Though there are many types of clinical education, in general, it offers an opportunity for students to work in the real and messy world of clients’ problems with an eye to helping clients and to learning how to become good lawyers, based on these experiences,

with the help of their supervisors. Clinical legal education is also often a place for students, teachers, and clients to have conversations about the concepts of justice, fairness, and zealous representation on behalf of the undervalued, as well as all people and ideas in our society.

<sup>5</sup> Sometime referred to as the Academe and also referred to as the Ivory Tower.

<sup>6</sup> Represents experiential educators.

<sup>7</sup> Represents critical legal theorists.

<sup>8</sup> Refers to legal education broadly.

<sup>9</sup> Refers to the notion that law professors are privileged members of society, some of whom use that privilege to distance themselves from the concerns of other less privileged people.