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A Meditation on the Theoretics of Practice

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by
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Introduction

This Essay started out as something between a mild critique of and philippic against some of the articles that comprise the "theoretics of practice" movement.[1] But the more I thought about how to convey some of what I consider to be the deficiencies of the literature, the more it seemed that the best way to do this was through writing about a case our clinic handled this past semester. For it was in reflecting upon the way we handled this case, and the way the students and I came to think about some of the issues it raised, that I began to understand more concretely the theoretical content of my clinical work. Moreover, through consideration of this case, I understood more profoundly what was missing for me from some of the theoretics literature. I also developed a deeper appreciation for some of the positive aspects of the literature.[2] What I propose to do in this brief Essay is to describe the case and my

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1. It is hardly self-evident which articles should be subsumed within the "theoretics of practice" movement. Tony Alfieri, one of the prime explicators of the movement, includes within its sweep "a resurgent theoretical and practical literature dedicated to the critical analysis of poverty law practice." Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2119 & n.42 (1991) (collecting articles) [hereinafter Alfieri, *Reconstructive Poverty Law Practice*]. A slightly different compilation appears in Anthony V. Alfieri, *Speaking Out of Turn: The Story of Josephine V.*, 4 GEO. J. LEGAL ETHICS 619, 619 n.2 (1991) [hereinafter Alfieri, *Speaking Out of Turn*]; *see also* Howard Lesnick, *The Wellsprings of Legal Responses to Inequality: A Perspective on Perspectives*, 1991 DUKE L.J. 413, 438-39 & nn.47-49 (discussing literature that emphasizes opportunities to reshape understandings of the current social order and reconceptualize the process of collaboration between lawyers, clients, and lay people). I will refer to specific "theoretics" articles as appropriate in Part II of this Essay.

2. The Hastings Theoretics of Practice Conference may well turn out to be the first critical event in the evolving effort to define the theoretics movement. For me, one of the positive results of the conference was my perception that those writing in this area, and most identified with it, are to a great extent struggling with the problems of the movement and its written literature that I and others have begun to identify.

reactions to different aspects of it and then to suggest how it may be instructive in our assessment of the current state of the theoretics literature.

I. The Story of the Case

I teach a criminal justice clinic in which third-year students, under faculty supervision, represent indigent defendants charged with misdemeanors, and some felonies, in a local suburban jurisdiction outside Washington, D.C.[3] Last semester, two of my students represented a client whom I will call Mrs. Smith.[4] The State had charged Mrs. Smith, a black immigrant from a West African country, with one count of common-law battery against each of two sisters. The sisters were African-Americans from a lower-class background. The prosecution claimed that our client had hit one of the sisters with a tennis racket for no apparent reason, and then hit the other sister when she tried to intervene.

The jurisdiction in question has a two-tiered trial court system. Mrs. Smith, represented by the local public defender's office, went to trial before a judge in the lower court, testified in her own defense, and was convicted on both counts of battery. The court sentenced her to concurrent suspended sentences and imposed a fine; she appealed. Under the procedures of the jurisdiction, she was entitled to a trial de novo, with the right to trial by jury in the second court. Our clinic received the case from the local public defender's office after the defendant filed notice of her appeal, and we assigned the case to one of our student teams. Trial was scheduled to occur in less than four weeks.

As is our clinic's practice, I did not accompany the students when they interviewed the client. Our first supervision meeting after the initial client interview made it clear that this case was not going to be easy. The students reported that the client was adamant about going to trial because she "wanted to tell her story." Mrs. Smith's articulation of her goal was striking because of our focus during the semester on the importance of client story-telling.[5] It was as if Mrs. Smith was a simulated

3. Each student spends one semester prosecuting and one semester defending primarily misdemeanor cases. Prosecution students work in one of the local prosecution offices, and are supervised by lawyers from those offices. On the defense side, the students work directly under the supervision of two full-time clinical faculty members. Students handle their defense cases in teams of two.

4. I have changed the name of the client and some characteristics of the case in order to preserve client confidentiality.

5. In recent years, my colleagues and I have experimented with a number of approaches and readings designed to teach clinic students about the importance of developing a coherent theory of the case and investigating and thinking about facts in a manner consistent with one's

client whose "client instructions" had directed her to state this as her goal. Her story, interestingly enough, did not differ greatly from the story the prosecution had told in the first trial. She admitted that she had swung at and hit the first sister with the tennis racket, although she described the second battery as more of a wrestling scuffle than an unprovoked battery. What she did dispute, however, were her motivations. The client indicated that prior to the initial battery the complainant had waved to her with an outstretched palm, which, she told us, was a sign of disrespect in her culture. Faced with this provocation, Mrs. Smith felt justified in swinging her tennis racket at the complainant.

So far, the story was an intriguing one. But while recognizing various defenses to battery, our jurisdiction did not accept disrespectful words or gestures as justifications for the offense.[6] Nevertheless, our client insisted that she wanted to go to trial. She told the students that she was unhappy with the assistant public defender who had handled her case because he had strongly urged her to accept a negotiated resolution.[7] Although she faced the prospect of being incarcerated if she went to trial and lost, Mrs. Smith stated on a number of occasions that if this was the price of "telling her story" it was a price she was willing to pay.

As the students continued to meet with the client over the next two weeks, it became apparent that her situation was more complex than we had initially perceived. For example, she stated that the complainants

case theory. This year, for our class on case theory and strategic decisionmaking, we assigned brief excerpts from Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1989), and Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990). For the class on investigation and discovery, we assigned an excerpt from Gerald P. López, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603 (1989). In addition, some of the students in the seminar attended a reading given by one of our colleagues in the university's literature department. We were struck by the degree to which our students took to the reading and pursued the storytelling metaphor throughout much of their clinical fieldwork.

6. Because battery is a common-law offense in our jurisdiction, common-law defenses such as self-defense were applicable. Self-defense, however, requires that the defendant not be the aggressor and that she reasonably believe herself to be in imminent danger of unlawful bodily harm from her opponent. *See* WAYNE R. LAFAVE AND AUSTIN W. SCOTT, JR., CRIMINAL LAW 454 (2d ed. 1986).

7. In the initial trial court, it appeared that the State was prepared to place the case on the "stet" docket, a status in which the case remains pending but, in time, is dismissed so long as the defendant incurs no new charges and satisfies any conditions imposed on her. In this case, as is typical in battery cases, the proposed condition would have required that the defendant have no offensive contact with the two complainants.

Once the State had prevailed in the first trial, it had little incentive for continuing to agree to place the case on the "stet" docket. Nevertheless, the prosecutor indicated that he would be willing to have the defendant plead guilty to one of the two charges and to commit himself not to seek any period of incarceration for the defendant.

were harassing her by reading her mail and listening in on her telephone conversations. As Mrs. Smith reiterated and elaborated upon this claim, the students and I became more and more concerned about her emotional state. Whatever psychiatric problems she might have had, however, did not appear to interfere with her ability to assist us in defending her.[8] Nor was her desire to go to trial, even without a legally cognizable defense, so irrational or unusual that we could conclude that we should override the client's choice of trial over a plea. We teach the theory of client-centered decisionmaking[9] in our clinic, and we try to take it seriously in our practice. If client-centered decisionmaking means anything, it means that, so long as we counsel the client thoroughly about her options and predict the legal consequences of her choice as accurately as we can, the decision ultimately is for the client to make. Thus, we told Mrs. Smith that, based on our research, the likely result of a trial was that she would be convicted. Nonetheless, she wanted to go to trial, and we prepared to do so.

Yet as the trial date loomed, the students and I had to deal with the practical realities facing our client. She was a mother of three young children, the oldest seven years old. If she went to trial and took the witness stand—which seemed necessary if she was truly to "tell her story"—she ran the risk not only of another conviction, but of receiving jail time. In theory, of course, trial judges are not supposed to penalize a defendant for exercising her constitutional right to trial. But in the real world, judges sometimes do just that, especially if the defendant testifies and the court concludes that the jury's finding of guilt implies the defendant must have lied.[10] Moreover, we suspected the judge would wonder why we were taking a case to trial when the client's story was not exculpatory. Judges sometimes are critical of clinical programs because they think the students' inexperience may hurt their clients. Here, we

8. That is, it did not appear that the client was incompetent to stand trial. *See* CRIMINAL JUSTICE MENTAL HEALTH STANDARDS Standard 7-4.1 (Am. Bar Ass'n 1989).

9. *See generally* DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (2d ed. 1991). For a fuller discussion of client-centered decisionmaking, see Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement,* 32 ARIZ. L. REV. 501 (1990).

10. This conclusion is hardly compelled. While a conviction necessarily implies that the jury believed the state proved its case beyond a reasonable doubt, it is possible for a jury to believe not that the defendant lied but that he or she was mistaken in some manner. In our case, there would have been less concern about the possibility of enhanced sentencing if the defendant had testified to the story she told us, because the story admitted that she had committed battery. Of course, the client's admission raised the fundamental question, why was she insisting on a trial?

thought, the judge might well conclude that "real lawyers" would have persuaded the client that a trial was not in her interest.[11]

On the eve of trial, before the students were to review Mrs. Smith's testimony with her for the next day, I discussed the situation with them. I sometimes worry that when students counsel clients about the likelihood of success at trial they are prone to say unhelpful things like "you have a fifty-fifty chance."[12] So I emphasized to the students the importance of telling Mrs. Smith that if she told the story she had told us all along we would be happy to represent her at trial, but our best legal judgment was that the story would result in a conviction on one or both counts of the charging document. In theory, providing this information to the client is not only consistent with, but required by, even the most client-centered approaches to legal counseling. But I had to question whether, here, our timing might not be a subtle attempt to convince the client to change her mind, while maintaining the illusion that she was making the decision herself.

We also discussed another option: the client could go to trial, but not testify; if she were convicted, the sentencing hearing would provide her an opportunity to tell her story. Though this option would serve some of her interests, it would provide a less satisfactory way to present her story. Moreover, it probably would not provide any greater likelihood of success on the merits, as our case theory would be reduced to attempting to poke holes in the State's case by suggesting the complaining witness might have been mistaken (or might have lied) about whether Mrs. Smith hit her.

Furthermore, we discussed whether our theory of the case could or should include an argument that Mrs. Smith was psychiatrically disabled in some manner that caused her to misinterpret some of the things that

11. The presumed behavior of practicing lawyers here could well explain the persistent distrust that criminal clients are believed to feel toward their lawyers, especially public defenders. *See* JONATHAN D. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE 108-09, 117-18 (1972) (clients of public defenders are critical of latter's tendency to tell them what to do, and perceive them, perhaps inaccurately, as doing so more often than private defense lawyers); Dinerstein, *supra* note 9, at 575 n.333 (citing sources). Incarcerated defendants might well overstate the degree to which their predicament is caused by their lawyers having pressured them into pleading guilty. Yet because these clients must live with the frequently severe consequences of their choices, lawyer dominance of decisionmaking can easily poison the lawyer-client relationship and leave clients bitter and resentful.

12. This may be because the students do not have sufficient experience on which to base such a judgment or because they are uncomfortable making predictions on which the client might rely. I have found that students who are averse to trial may understate the chances of success for that reason. Conversely, it is at least possible that students who wish to gain trial experience will overstate the chances of success in order to influence a client to select the trial option. These misjudgments, of course, are not unique to student lawyers.

had happened to her.[13] I was skeptical that she would agree to this theory, but a full examination of the options seemed to argue for at least exploring this alternative. We had to recognize, however, that even tentatively floating this theory would risk whatever fragile rapport the students had developed with her. The students approached the problem by inquiring whether Mrs. Smith would be interested in attending a counseling program if the state insisted on it as part of a negotiated disposition. Her sharp insistence that she would not attend a program because there was nothing wrong with her seemed to indicate an unwillingness to admit to any psychiatric problems or to proffer a psychiatrically-based defense.

We had not been able to unearth any authority that would support a defense to battery based on Mrs. Smith's perception of the complainant's insulting behavior towards her. Were the students being creative and thorough enough in their research and in thinking about the case? Was I pushing them hard enough to look at the case creatively? Was there some social or political theory underlying the criminal justice system's treatment of Mrs. Smith that could explain her actions and be used to fashion a defense?[14] Would it be appropriate to focus on a seemingly fanciful theory of legitimate provocation at the expense of other preparations we knew we needed to make? Was it possible to consider all sides of the case given the comparatively short period of time we had for trial

13. Potentially, there were several ways in which the client's psychiatric difficulties might have figured into our case theory. First, we could have counseled the client about the possibility of raising a defense of mental nonresponsibility (or insanity). However, even if the client satisfied the standard for this defense, she would face the grave risk of being found not mentally responsible and thus eligible for civil commitment. In fact, the risks of a nonresponsibility plea in a misdemeanor case are quite substantial. *See* Jones v. United States, 463 U.S. 354 (1983) (person acquitted by reason of insanity in a criminal case can be committed to a mental institution until no longer dangerous and mentally ill, irrespective of maximum possible jail sentence that could have been imposed upon conviction); CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, *supra* note 8, at Part VII (Commitment of Nonresponsibility Acquittees). Second, we could have explored whether the client's mental state amounted to a form of diminished capacity. However, our common-law jurisdiction did not recognize defenses, such as diminished capacity, that were not defenses at common law absent specific legislation to the contrary. *See* Fisher v. United States, 328 U.S. 463, 476 (1945) (diminished capacity defense not recognized at common law). Third, if the defendant were convicted, we could have argued at sentencing that her psychiatric difficulties should mitigate the sentence she received. This last argument was not a winning case theory but, rather, a fallback position were we to lose at trial. For the reasons soon discussed, however, the client was disinclined to stress her supposed psychiatric disabilities.

14. *Cf.* Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement,* 61 N.Y.U. L. REV. 589, 606-10 (1986) (describing author's and colleagues' development of self-defense theory in murder case incorporating perspective of client, a Native American woman).

preparation? What were—and what should have been—our priorities? By listening to our client's story and trying to incorporate it into the existing legal context, we implicitly answered these questions. But I wish we had had the time to be more explicit about choosing the more conventional approach over possibly more creative options. In any event, the students completed their preparation and counseling of Mrs. Smith, and she remained committed both to going to trial and to testifying on her own behalf. We were ready for trial.

The morning of the trial, we waited in the courtroom to learn whether our case actually would go to trial that day or whether it would be postponed because not enough judges were available. Eventually, the clerk called our case. The judge questioned us sharply on why we were taking the case to trial, wondering why he had to impanel a jury on this simple battery charge.[15] Of course, we could not say anything about whether we thought the client had a good defense or why she wanted to go forward. We merely indicated that we had counseled the client thoroughly and carefully and were persuaded that her informed decision was to go to trial.

In many ways, the trial is the least important part of this story. The State presented three witnesses, the two complainants and their sister. The students cross-examined them, doing a good job of raising questions about the alleged battery against the second sister. After the court denied our motion for judgment of acquittal, we prepared to present our case. Once again, we consulted with Mrs. Smith about the wisdom of her testifying in light of her inculpatory story. She reiterated her intention to testify and we called her to the stand. She testified that one sister had waved to her with splayed fingers and that she took this as an insult. Unfortunately, she also testified to the sisters' practice of reading her mail and tapping her phone, and to their generally knowing her unexpressed thoughts. True to her concern, the client told her story. We rested our case after our one witness, and after a very brief rebuttal by the State we adjourned for lunch.

15. Here again, theory and practice in lower criminal courts diverge sharply. In theory, defendants choose whether to go to trial or accept a plea offer. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1980) (in criminal case client should decide what plea should be entered; defense lawyer should advise client of desirability of particular plea); STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2(a) (Am. Bar Ass'n 1991) (Control and Direction of the Case); *cf.* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (a) (1983) (Scope of Representation). In practice, judges often assume that experienced lawyers will be able to persuade their clients to accept what the lawyer believes is in their best interest, and that such persuasion is both appropriate and necessary. In the jurisdiction in question, the circuit court judges frequently dislike hearing cases that begin in district court, believing that trials de novo are frequently a waste of time and resources.

While in the cafeteria line, the judge came up to me and whispered that he now thought he understood why we had gone forward with the trial. I took his comment to mean not that he thought we had a good defense, but rather that he believed the client was mentally disturbed and had left us little choice but to proceed. His comment made me feel ambivalent. I was pleased the judge recognized that we were not just "kids" playing at having a trial in the face of the client's contrary interest in a plea bargain. But I was uncomfortable with the suggestion that the client's case was a loser and that she was somehow out of control. My dual loyalty as a lawyer was thus engaged; even as the judge—the embodiment of the legal system—vindicated our judgment, he served notice that, after all, it was and always would be the professionals against the lay people. So much for the power of client narratives.

After lunch, the court instructed the jury and both sides presented their closing arguments. One of the student-attorneys gave an excellent closing, and the court submitted the case to the jury. We commenced to wait, as they say. While we waited, Mrs. Smith and the students had a heated discussion. Mrs. Smith felt we had not presented her case as forcefully as we might have. In particular, she thought we should have argued more vociferously for her version of the key interaction with the complainants and should have emphasized their interference with her mail, telephone, and thought processes. She repeatedly pointed out that in her country lawyers do whatever their clients want and said we had not lived up to this standard. The conversation ended uneasily and unsatisfactorily for all concerned.

The jury was out for over two hours, which, in the time-honored fashion of the criminal defense bar, we took as at least a moral victory. Finally, the jury returned a verdict. It found Mrs. Smith guilty on one count of battery (against the first sister) but not guilty on the second count.

For a moment—a long moment—we were elated. Here was a client who despite all odds had done better at this second trial than at the first one. The jury had either believed our argument that the physical contact with the second sister was at best ambiguous, or had had at least a reasonable doubt that the battery was intentional. I expected the court to leave Mrs. Smith out on bond pending sentencing, which I expected would occur in about four to six weeks.

Then all hell broke loose. As the judge began to address the students, Mrs. Smith suddenly interrupted the colloquy and began to complain that the complainants—who had returned to the courtroom to hear the jury render its verdict—were continuing to bother her and that the

conviction was unfair. She grew increasingly agitated, yelling "Excuse me, excuse me," whenever the judge tried to get a word in. Though we tried, there was little we could do to control her. The judge, faced with Mrs. Smith's outburst and undoubtedly thinking back to her testimony regarding the sisters' alleged nefarious spying, decided that she was in psychiatric distress. He ordered the sheriffs to place her in handcuffs and directed that she be transported to a local emergency room for psychiatric evaluation.

One of the students argued that our client would be prepared to seek treatment voluntarily pending sentencing and that commitment was therefore unnecessary. Though improbable, the argument demonstrated that the student was doing his utmost to be an advocate under extremely difficult circumstances. Unfortunately, to bolster the argument he told the judge that Mrs. Smith could not be committed because to do so would leave her three young children with no one to care for them. When the judge asked who was caring for the children that day, the student answered that no one was. Mrs. Smith apparently had left her children unattended, and her husband would not return home from work until around 9:00 p.m. The judge, outraged at our client's conduct and apparently concerned for her children's welfare, directed the clerk to call protective services. We could only hope Mrs. Smith would not lose custody of her children, in addition to her liberty.

This was the first that I knew of the client's decision to leave her children home alone that day. To the student, this disclosure undoubtedly had seemed the best available means to forestall the harm of an involuntary emergency civil commitment. On reflection, of course, it put the client in even greater jeopardy. Despite all our case supervision meetings, the student's revelation in response to the unpredictable turn of events highlighted for me the contingent nature of clinical supervision and provided fresh evidence that it is never possible to anticipate every issue that may arise in representing real clients with real cases. As the sheriffs took Mrs. Smith away, the judge indicated that his office would contact us regarding the sentencing. We left the courtroom in something of a daze, truly having experienced defeat pulled from the jaws of at least partial victory.

It took a while to track down Mrs. Smith, but we later learned that she was committed for observation and then sent to the local mental institution, where she stayed for over two weeks. The students spoke to her near the end of her commitment. Happily, the children had not been removed from the home. Mrs. Smith was calm and was looking forward to her imminent release. She thanked the students for representing her.

The students indicated that they would contact her when the court set a sentencing date. Although we later learned that our client was in fact released from the hospital, we never heard from her again.

The court scheduled the sentencing for approximately three weeks after our last contact with Mrs. Smith. A week prior to the sentencing, the students called her apartment, but the phone was disconnected with no forwarding number. They visited the apartment complex, but the resident manager reported she had moved out a few days before. At the sentencing, we stated that our client was not present. In light of our knowledge that Mrs. Smith had moved, we could not represent that she merely might be delayed. We awaited the inevitable set piece: the prosecutor would ask for a bench warrant; the court would grant it (perhaps after fulminating against ungrateful defendants); and we would return to our office with one more experience to debrief in our supervision session.

But a curious thing happened on the way to the case's inexorable conclusion. The judge said that he had only been trying to help Mrs. Smith when he committed her and that he hoped he had not unduly complicated her situation. After going on for a few moments about how difficult a case it was, he looked out at us and the prosecutor and asked what he should do. Amazingly, there was silence. The prosecutor was not asking for a bench warrant. The judge was not offering to issue one. And we, of course, were not about to volunteer our conclusion that a bench warrant probably was in order.

Finally, the judge pierced the silence. He supposed that he could not sentence the defendant *in absentia*[16] and that he appeared to have no choice but to issue a bench warrant. As he signed the order, though, he

16. It appears that the judge may have been incorrect in assuming that he could not sentence the defendant *in absentia*. Our local rule of procedure, like Federal Rule of Criminal Procedure 43, allows a court to proceed with the trial of a defendant who absents herself, at least where the defendant does so after the trial has commenced. *See* United States v. Crosby, 917 F.2d 362, 364-66 (8th Cir. 1990) (extending Rule 43 to cover situation where defendant is not present for any portion of trial), *cert. granted,* 112 S. Ct. 1261 (1992). While, as a practical matter, the court could not execute a sentence against an absent defendant, there does not appear to be any prohibition against imposing a sentence, to be executed upon the service of a bench warrant.

As the judge was wondering out loud about sentencing the defendant *in absentia,* I considered whether we would *want* him to do so. Normally, a defense attorney would not want to urge sentencing of a client *in absentia,* on the assumption that the judge's displeasure at the defendant's absence could not possibly work to the client's advantage. Under the circumstances of our case, however, it appeared that the judge was searching for an alternative to issuing the bench warrant, and he might have been hinting that he would be amenable to a sentence equal to the time already served in the mental institution. Nevertheless, we could not be sure on this point, and the risks of *in absentia* sentencing seemed significant. Thus, I said nothing.

leaned over to the clerk and told her to tell the sheriffs not to look too hard for the defendant. The judge said he hoped Mrs. Smith would find help, observed to the students that the case had certainly turned out differently from what they must have expected, and thanked us. We left the courtroom. The case was over, the story of the trial complete—at least for now. Of course, the story was not really over. We do not know what had happened to Mrs. Smith, and for all we know she may yet be picked up on the bench warrant. Nor do we know how our client felt about the ultimate turn of events. However much we might have hoped for a tidy resolution, we have not gotten one.

II. The Story and the Theoretics of Practice

What does all this have to do with the theoretics of practice movement and its incipient literature? My thoughts here are necessarily tentative, but I hope they will provide an initial critique and a suggestion for one direction in which this literature might head.

We have to distinguish between several concepts that represent different aspects of the theory/practice "spiral," or dialectic, that characterizes law in action.[17] Some people talk about the need for more theory in practice and more practice in theory.[18] Others suggest that there needs to be an overarching theory or theories *about* practice.[19] Still others apparently focus on the degree to which law practice reflects an understanding of a particular theory or set of theories about society.[20] Each of

17. *See generally* Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education,* 75 MINN. L. REV. 1599 (1991); Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education,* 34 UCLA L. REV. 577 (1987).

18. *See* Carrie Menkel-Meadow, Welcome Message, Ass'n of American Law Schools Mini-Workshop on Theory and Practice: Finding Bridges for the Classroom (Jan. 4, 1992) (on file with the *Hastings Law Journal*). Given the importance of both theory *and* practice, it is striking, as some legal educators have commented, that legal education is neither sufficiently practical nor sufficiently theoretical. *See* John S. Elson, *The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?,* 39 J. LEGAL EDUC. 343, 351 (1989) (traditional legal educators ignore both students' need to understand theoretical components of practice and the enriching opportunities practice offers for discussions of theory); Gerald P. López, *Training Future Lawyers to Work With The Politically and Socially Subordinated: Anti-Generic Legal Education,* 91 W. VA. L. REV. 305, 325-26 (1989) (arguing that law schools are inadequate in teaching practice skills and theoretical concepts).

19. *See* PIERRE BORDIEU, OUTLINE OF A THEORY OF PRACTICE (Richard Nice trans., 1977); MICHEL DE CERTEAU, THE PRACTICE OF EVERYDAY LIFE (Steven F. Rendall trans., 1984); Rosemary J. Coombe, *Room for Manoeuver: Toward a Theory of Practice in Critical Legal Studies,* 14 LAW & SOC. INQUIRY 69 (1989); López, *supra* note 5, at 1604 & n.5.

20. *See, e.g.,* Alfieri, *Reconstructive Poverty Law Practice, supra* note 1, at 2120-21 (arguing for application of critical theory, critical race, feminist, and continental theory concepts to poverty law practice).

these definitions has different consequences for our understanding of the relationship between theory and practice.

As a necessary first step, we need to define the term "theoretics." The Oxford English Dictionary defines theoretics as "theory, *as opposed to practice*; theoretical matters."[21] Another dictionary defines the term as "that part of any field of knowledge which deals in theories or speculations."[22] These definitions suggest an unfortunate dichotomization of theory and practice.[23] If this dichotomy is to be overcome it is critical that the writing about theoretics not perpetuate false distinctions. Unfortunately, I fear some of the literature does just that.

If one of the goals of the theoretics writers is to attract practitioners to what they have to say, their writing must be accessible and clear. The theoretics literature has not always met this standard. Laden with the obligatory citations to other law review articles and arcane philosophical texts, the theoretics articles too often bury their interesting ideas under a mass of recondite prose and authority.[24] The articles can be tough going for even the most ardent aficionados of the genre. For those yet to be convinced of the need for a theoretics literature, the task is overly and unnecessarily daunting. As one of my colleagues has noted in a different context:

> Practicing poverty lawyers read [*The*] *Clearinghouse* [*Review*]—and that's it. Any article in *Clearinghouse* is short, has few footnotes, and does what poverty lawyers need most: succinctly presents research which they don't have time to do, in support of new theories which they are too exhausted to conceptualize.[25]

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21. 2 OXFORD ENGLISH DICTIONARY 227 (Compact ed. 1971) (emphasis added).

22. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 1893 (2d ed. 1971).

23. *Cf.* Spiegel, *supra* note 17, at 578-79 (division of different forms of legal education into theoretical and practical categories not inevitable and reflects frequently obscured definitional choices).

24. Consider, for example, the following passage from Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment,* 16 N.Y.U. REV. L. & SOC. CHANGE 659 (1987-88):

> Attributable to the cultural pull of dominant hegemony, buttressed by legal education and professional elan, poverty lawyer allegiance to the perceived historical logic of the practice of dependent-individualization redounds to the detriment of the poor. Individualization blankets class antagonism and shrouds community in Darwinist-tainted liberal theory, a theory inimical to the evolution of class consciousness and too often impoverishing of community.

Id. at 684-85 (citations omitted).

25. Memorandum from Susan Bennett to Barlow Burke, Chair, Rank and Tenure Subcommittee of the American University, Washington College of Law (Dec. 16, 1991) (on file with author).

When compared to other recent law review articles, the theoretics literature is not uniquely abstruse. In many cases, the articles are well-written and likely to foster the authors' academic reputations. But given the needs of one of the presumed audiences for this work—practicing poverty lawyers and other progressive practitioners—the opacity of the literature is especially troublesome.

Critiques of practice are not only necessary, they ultimately demonstrate the value of practice by suggesting that it is a subject worth thinking and writing about. This ought to be an unassailable proposition when discussing a profession such as law, but the estrangement between the legal academy and the practicing bar is such that—as clinical teachers know only too well—an academic concern with practice remains controversial.[26] But if the price of academic respectability for theoretics writers is the production of overly academic literature, the cost may be too dear.

Of even greater concern is the stance that some theoretics literature adopts toward law practice in general and poverty law practice in particular. In an effort to critique the practices of poverty lawyers—including, admirably enough, some of the authors' own conduct when they were in practice—some of the literature reflects an apparent antipathy toward practice. Many poverty lawyers may indeed dominate their clients, as Tony Alfieri and others before him have told us.[27] But is it accurate to characterize these lawyers primarily as professional oppressors of their clients?[28] Or is it more likely that while many poverty lawyers may dominate their clients, they in turn are dominated by the legal system in which they practice (a system that undervalues their work psychically, professionally, and, of course, economically)? If academics are to forge connections with progressive practitioners, we need to understand the pressures on practitioners that negatively influence the content of their

26. *See generally* Harry T. Edwards, *The Role of Legal Education in Shaping the Profession,* 38 J. LEGAL EDUC. 285 (1988) (criticizing legal academics for indifference to and naïveté about law practice).

27. In addition to Alfieri, *Reconstructive Poverty Law Practice, supra* note 1, and Alfieri, *Speaking Out of Turn, supra* note 1, see EVE SPANGLER, LAWYERS FOR HIRE: SALARIED PROFESSIONALS AT WORK 167 (1986); Gary Bellow, *Turning Solutions Into Problems: The Legal Aid Experience,* 34 NLADA BRIEFCASE 106, 108-09 (1977).

28. *See, e.g.,* Alfieri, *Reconstructive Poverty Law Practice, supra* note 1, 2123-30 (various practices of poverty lawyers combine to silence clients and deny them access to empowering strategies). To be sure, Tony Alfieri's critique implies that poverty lawyers may be victims as well as victimizers, in that their practice of fostering client dependency can be seen as an unnecessary constraint on their advocacy (even as lawyers silence clients in part because of a belief that client stories are unhelpful to legal advocacy). But the article's pungent criticism of poverty lawyers' dominance over their clients speaks more to the inherent problems of client infantilization than to the difficulties of lawyering in the poverty law area.

practices even as we point out the ways in which, consciously or otherwise, they improperly strong-arm and silence their clients.

The question is fairly posed: Do theoretics writers *like* practice and the untidy world of practitioners, with its real-life problems and foibles? Or is our presence in the academy—even in its unfinished clinical wing—indicative of our retreat from and repugnance toward practice? William Simon observed over a decade ago that clinical scholarship de-emphasized the political aspects of law practice because clinical teachers had burned out from practice.[29] Simon's critique may have been overstated,[30] but the vehemence of the critique of practice suggests the question is a legitimate one.

The call for a meaningful dialogue between academics and practitioners is more than a plea simply to be nice to each other. At a fundamental level, the best of the theoretics literature recognizes that just as theory has something to offer practice, so, too, does practice have something to offer theory. As Elizabeth Schneider has written, "theory emerges from practice and practice then informs and reshapes theory."[31] Practitioners may not always talk about ideas in the same manner as academics, but there are often striking similarities between the two if one pierces the rhetorical surface. For example, the recent focus in feminist, critical, critical race, law and literature, and clinical scholarship on client narratives[32] has at bottom much in common with the more popular, practitioner-oriented writing that long has emphasized the storytelling possibilities in trial practice.[33]

Theoretics writers must also be careful not to substitute one set of problematic or incomplete concepts for another. If the theoretics literature accurately charges some poverty lawyers with silencing client narratives, it also sometimes suggests that client stories represent either objective truth or, at a minimum, some kind of pristine Rousseauian pu-

29. William H. Simon, *Homo Psychologicus: Notes on a New Legal Formalism,* 32 STAN. L. REV. 487, 556 (1980).

30. I have so argued in Dinerstein, *supra* note 9, at 519 n.84.

31. Schneider, *supra* note 14, at 604; *see also* DONALD A. SCHÖN, EDUCATING THE REFLECTIVE PRACTITIONER 78-79 (1987) (discussing the desirability of reflective conversation between theory and practice). Theory, of course, can also limit our observations of practice through its ability "to render 'obvious' facts nearly invisible, by denying them a sensible context." STEPHEN JAY GOULD, BULLY FOR BRONTOSAURUS: REFLECTIONS IN NATURAL HISTORY 292-93 (1991).

32. *See, e.g.,* Robert D. Dinerstein, *Clinical Texts and Contexts,* 39 UCLA L. REV. 697, 723 n.98 (1992) (citing some of this literature).

33. *See, e.g.,* James W. McElhaney, *The Story Method,* LITIG., Fall 1991, at 49; Laura Gardner Webster, *Telling Stories: The Spoken Narrative Tradition in Criminal Defense Discourse,* 42 MERCER L. REV. 553 (1991).

rity. But client stories may be no more "true" (perhaps the better word is "complete") than lawyer stories. If law really were *only* literature, the search for an authentic client voice would be unexceptionable. But only certain client stories are likely to succeed. Clients need lawyers not only to hear their stories, but also to help them shape those stories to make them as effective as possible within the existing legal milieu, or to collaborate with them to devise the best means to transform it.[34] Put differently, lawyers and clients must of necessity look at client stories in an at least somewhat instrumental manner.

The clinic case I described in Part I of this Essay brought home to me this instrumental side of client narrative. Clearly, it was not enough merely to have the client tell her story to the jury. Just as clearly, not attending to the client's story would have frustrated her legitimate goals, whatever the strategic and tactical merits of such an approach. My familiarity with the theoretics literature on client narrative was useful in helping the students and me conceptualize the client's role in the development of case theory and presentation.[35] But if understanding the importance of client narrative was a necessary component of our lawyering effort, it was hardly sufficient. In particular, it did not answer the vexing problems of lawyer-client conflict; the client's volatile mixture of irrationality and certitude; and the real-world constraints on our ability to craft a creative legal argument on the client's behalf.

The theoretics movement must also avoid its own form of essentialism in which poor clients are seen as all-powerful individuals awaiting only their lawyers' assistance to unleash their potency. Clients who are poor, like most of us, are relatively powerful in some ways and relatively powerless in others.[36] To see these clients as solely powerful is to deny a very real part of their lived, frequently tragic, experience. As individuals enmeshed in welfare and other stifling bureaucracies, poor clients oscil-

34. Gerald López describes this process eloquently:

> The core of the process is the representative's effort to understand the client's story in his own terms and use her own knowledge and experience to help the client refine his understanding, while beginning to think about the stories she might tell on behalf of the client (or coach the client to tell on his own behalf) to various audiences.

López, *supra* note 5, at 1613.

35. Clark Cunningham nicely captures the schizophrenia that many clinical teachers feel when they are caught between the intensely practical world of client representation and student supervision on the one hand and the academic world of law review writing and reading on the other. *See* Cunningham, *supra* note 5, at 2469-70.

36. Or as Howard Lesnick writes from the opposite perspective, "the state of being oppressed and disempowered always exists in relation to others, and . . . few of us are oppressed so pervasively that there are not contexts in which we are privileged as well, even illegitimately so." Lesnick, *supra* note 1, at 451-52 (citation omitted).

late between being dominated by and resisting governmental bureaucracy.[37]

Those in the theoretics movement also have to be careful that, in their effort to critique aspects of practice, they do not proffer unnecessarily complex explanations while ignoring other problematic aspects of the practice experience. In some of the literature, there is a tendency to propose macrocriticism where microcriticism is at least as plausible. For example, in Clark Cunningham's otherwise interesting article on lawyer translation of client narratives, he describes the two cases his clinic handled as "The Case of the Silenced Client" and "The Case of the Silenced Lawyer."[38] In the former case, the lawyer-teacher and students entered a preliminary plea of not guilty on behalf of the client even though he told them, in Spanish, that he was "culpable."[39] In "the Case of the Silenced Lawyer," the client objected to the clinic's representation because the lawyer-teacher and students did not present to the court the arguments he wished to have presented.[40] In each case, the title of the story may suggest macroproblems of silencing and domination that might just as well be characterized more prosaically as reflecting a basic failure to counsel the client on his options (perhaps because of a lack of time, the students' lack of experience, or, in the first case, because of an inability to speak the client's language).

Our clinic's experience in the case described in Part I raises this same concern for me. How much of what went on could be explained by our inadequate representation of the client? Assuming that some of the problems stemmed from the students' lack of experience, did I compensate for that deficiency sufficiently? Is our clinic adequately structured to prepare students to handle the cases we take? Is there time enough between receipt of the case and trial for the students to develop both the technical skills and underlying attitudes and concepts they need to provide not just adequate but superior representation for their clients? A strong commitment to self-reflection and analysis requires the clinical supervisor and students to ask and re-ask these questions. The theoretics of

37. *See* Austin Sarat, "*. . . The Law is All Over": Power, Resistance, and the Legal Consciousness of the Welfare Poor,* 2 YALE J.L. & HUMAN. 343, 346-47 (1990). Tony Alfieri recognizes insightfully that the contradictions in the client's world (and her need to attend to the concerns of those in a position to retaliate against her) may render the client's narratives inconsistent and unreliable, at least as conventionally understood. *See* Alfieri, *Reconstructive Poverty Law Practice, supra* note 1, at 2141.

38. Cunningham, *supra* note 5, at 2463-69.

39. *Id.* at 2463-65. To the lawyers, it was not clear whether the client meant that he was guilty as a matter of law or merely blameworthy.

40. *Id.* at 2465-69.

practice literature would be more helpful if it also systematically asked these questions.

Even when the theoretics literature emphasizes the importance of client narratives, empowerment, and collaboration, there is a serious problem caused by the inability to convey the client's perspective except through the prism of the lawyer-writer's prose and attitudes. Thus, in Lucie White's wonderful article about Mrs. G.'s hearing,[41] we know what the lawyer-writer's perceptions are about her client and why she might have acted the way she did, but we do not know what the client's actual thoughts were, nor her views on why she made the choices she did.[42] To her credit, White recognizes this problem and describes it with nuance and sensitivity,[43] as does Tony Alfieri in his theoretics articles.[44] But recognition does not eliminate the obstacle entirely. Ultimately, the theoretics literature must forge links with empirical work about lawyers and lawyering to fully ground its observations about the world of practice.[45]

The absence of the client's perspective from the theoretics literature renders even the best articles necessarily speculative in nature. Thus, even Gerald López's richly-textured and sensitive evocation of public interest lawyering, with its lengthy lawyer-client dialogues and file memoranda, has the lawyer making numerous assumptions about the client's concerns in the case.[46] And while Lucie White's most recent call for

41. *See* White, *supra* note 5.

42. *See, e.g., id.* at 46 (lawyer's speculations on why the client decided to have a hearing); *id.* at 47 (lawyer's speculations on nature of client's strategizing in the hearing itself). In addition, White indicates that the lawyer did not know why the county decided to drop its case against her client. *Id.* at 52. Thus, while the article argues that the client's subtle strategy might well have saved the day, there is really no way to confirm this assertion.

43. *See id.* at 33, n.96.

44. *E.g.,* Alfieri, *Reconstructive Poverty Law Practice, supra* note 1, at 2111 & n.11 (article presents a "distillation of [client's] *spoken* narratives," while recognizing that client's unspoken thoughts are inaccessible). To the extent Alfieri and others have produced partial transcripts of proceedings with clients, *see, e.g.,* Alfieri, *Speaking Out of Turn, supra* note 1, at 643, the problem of the "absent client" is alleviated, but the noncourtroom parts of the client's experience remain at least somewhat inaccessible. And even Alfieri's imaginative reconstruction of events is a reconstruction that inevitably shapes if not determines the story's meaning.

45. Articles such as Austin Sarat's, *see* Sarat, *supra* note 37, with their excerpts from actual lawyer-client interactions, *see id.* at 349-51, provide some of the necessary context for examination of client attitudes. The legal literature on such actual interactions, however, remains relatively sparse. *See* Dinerstein, *supra* note 9, at 577 n.342.

46. *See, e.g.,* López, *supra* note 5, at 1646, 1693, 1698, 1710 (examples where lawyer in case makes assumptions about client's concerns or belatedly recognizes need to include client perspective or refashion lawyer-client relationship). López clearly recognizes that the lawyer's failure to consult sufficiently with the client creates a problem, *see, e.g., id.* at 1657, and the overall thrust of his article is to present a reasonably sophisticated, though not perfect, example of what he calls rebellious lawyering. But by consistently focusing on the *absence* of ade-

poverty lawyers to serve clients as learners and friends rather than as expert advisors[47] has an intuitive appeal, one does wonder whether the clients in question would choose to have their lawyers function in such a manner. I am not suggesting that inclusion of an authentic client perspective is an easy task. Rather, I would argue that a true theoretics of practice literature faces difficult problems unless it can find creative ways to illuminate the client perspective on lawyer practices.

Finally, to return to the definitional question raised at the beginning of this Part: When we talk about the theoretics of practice, we should not only define our terms but also recognize that there are any number of theories that may animate law practice. For example, feminist theory, with its emphasis on, *inter alia,* contextual reasoning, the incoherence of dichotomous thinking, and the importance of the perspective of the powerless, already has provided theoretics writers with a number of rich insights into lawyering and clients.[48] Undoubtedly, we have only begun to scratch the surface of feminism's possible contributions to the theoretics project. Critical and critical race theories also have much to offer. But there are other theories immanent in practice as well. For example, as I noted in my discussion of our clinic's case, clinical theory, with its emphasis on client-centered decisionmaking and the importance of case theory, provides another contextual lens through which to analyze practice.[49] Sociological, psychological, and political theories also all have implications for law practice.[50] The theoretics of practice movement can and should be broad enough to encompass a multitude of theories about practice.

Conclusion

I believe the theoretics of practice movement has much to offer thoughtful practitioners and writers about legal practice. Yet if the

quate lawyer-client interactions, the article leaves to the reader's imagination what the contours of a more collaborative relationship would be like.

47. Lucie E. White, Goldberg v. Kelly *on the Paradox of Lawyering for the Poor,* 56 BROOK. L. REV. 861, 887 (1990).

48. *See, e.g.,* Alfieri, *Reconstructive Poverty Law Practice, supra* note 1, at 2120-21 & nn.44, 47; White, *supra* note 5, at 50; Goldfarb, *supra* note 17, at 1625-46.

49. Stephen Ellmann's essay in this symposium, Stephen Ellmann, *Empathy and Approval,* 43 HASTINGS L.J. 991 (1992), is an excellent example of an attempt to plumb the depths of client-centeredness theory and its assumptions about lawyering. *See also* David R. Barnhizer, *The Clinical Method of Legal Instruction: Its Theory and Implementation,* 30 J. LEGAL EDUC. 67 (1979) (clinical theory); Stephen Ellmann, *Lawyers and Clients,* 34 UCLA L. REV. 717 (1987) (client-centeredness theory).

50. *See* Carrie Menkel-Meadow, *The Legacy of Clinical Education: Theories About Lawyering,* 29 CLEV. ST. L. REV. 555 (1980); Spiegel, *supra* note 17, at 600-03.

movement is to fulfill its potential, it must confront honestly the difficulties that inhere in writing about the open-textured world of law practice: it must speak plainly to those practitioners who most need its insights; it must strive to capture the authentic voices of clients.

Clinical teachers may be uniquely situated to view the world of law practice, especially poverty law practice, with the mixture of detached perspective and passionate engagement that can elevate the theoretics literature to the status of a true movement. But for all our struggling with the difficult concepts of lawyer dominance, client narrative, and critical theory, we must not lose sight of the cases of people such as Mrs. Smith, who make the lessons of lawyering excruciatingly painful. If the theoretics movement can make sense of such cases, it will truly have accomplished a great deal.