THINKING LIKE A PUBLIC INTEREST LAWYER: THEORY, PRACTICE, AND PEDAGOGY

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ABSTRACT

Law schools must cultivate in future public interest lawyers the combination of intellectual, emotional, and normative thinking required for the complex world of practice. This article presents one such method for teaching critical public interest lawyering: the integration of social theory and public interest practice developed by the Harvard Law School Summer Theory Institute (the Institute). The theory-practice method of the Institute, in which law students engage with theoretical texts while participating in full-time summer internships with public interest organizations, demonstrates the benefits of creating a space where students can draw connections between abstract conceptions of justice and on-the-ground efforts to lawyer for social change. This article uses the theories of Pierre Bourdieu to explore the dichotomy between theory and practice in public interest law, a divide that often inhibits law students' efforts to pursue social justice lawyering. Drawing upon students' discussions about three theorists—Michel Foucault, Friedrich Hayek, and David Couzens Hoy—this article demonstrates how theoretical reflection employed in the practice setting can cultivate the kind of normative thinking necessary to transform law students into inspired, self-reflective, and critically-engaged public interest lawyers and agents of social change.

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INTRODUCTION

Law students are told, famously, that law school will teach them how to "think like a lawyer": how to read a case, make a legal argument, and combine legal reasoning and knowledge so as to be effective litigators.[1] Historically, students have been taught that this kind of thinking is dispassionate and logical, free of morality, norms, and politics.[2] Normative concerns, however, are not only deeply embedded within the law;[3] they are the explicit focus of public interest legal practice.[4] As a result, learning

1. *E.g.*, FREDERICK SCHAUER, THINKING LIKE A LAWYER 1 (2009).

2. *See* Jerold S. Auerbach, *What Has the Teaching of Law to Do with Justice?*, 53 N.Y.U. L. REV. 457, 458 (1978) ("Legal education has been primarily concerned with instilling lawyering skills, with training students to think like lawyers. This endeavor required emphasis on process over substance—on internalizing certain modes of reasoning rather than on the consequences of reasoning by these modes."); Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 254 (1977-78) ("[T]he law school milieu . . . feed[s] value skepticism [and] discourage[s] explicit discussion of values.").

3. *E.g.*, Edward J. Bloustein, *Social Responsibility, Public Policy, and the Law Schools*, 55 N.Y.U. L. REV. 385, 406 (1980) ("[L]aw is itself normative, both in the sense of taking the form of norms and, for some theorists, in the sense of inquiring into social policy to determine what the law is."); Robert M. Hayden, *Social Theory and Legal Practice: Intuition, Discourse, and Legal Scholarship*, 83 NW. U. L. REV. 461, 462 (1989) ("Law is a normative endeavor, dealing with problems in terms of what is right, just, or in some other way correct, whether the legal decision is grounded in express theory or on implicit fairness or intuition."). *See also* Phyllis Goldfarb, *Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory*, 43 HASTINGS L.J. 717, 719 (1992) ("A lawyer's ordinary professional decisions contain political and moral content.").

4. This is best captured in the fraught debates surrounding the definition and parameters of the term "public interest law." *E.g.*, Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337, 338–39 (1978) (noting "the amount of controversy and confusion that has surrounded the designation of a small segment of the bar as 'public interest' lawyers" and describing the range of definitions of public interest law based on areas of focus and methodology); Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of "Public Interest Law,"* 52 UCLA L. REV. 1223, 1224 (2005) (discussing how conservatives have embraced the term "public interest law," generating "substantial

how to think like any kind of lawyer, but especially learning how to think like a *public interest* lawyer, cannot be a value-neutral enterprise. How can one fight for what is good, right, or just if one does not ask what *is* good, right, or just? We propose that the legal education of future public interest lawyers should foster in students the critical faculty to ask and answer such questions, not only while they are students, but also throughout their careers. To do so, legal educators must work in partnership with public interest practitioners to develop methods of normative interrogation with which law students can explore the values and meanings behind the public interest careers to which they aspire.

This article presents one such method for teaching critical public interest lawyering: the integration of social theory and public interest practice developed by the Harvard Law School Summer Theory Institute (the Institute), a program for law student interns at public interest organizations in New York City.[5] Instead of bringing practice to the classroom, the Institute's approach is to bring theory to practice—along with a new conception of what kind of theory is directly relevant to public interest practice. Since we founded the Institute in the summer of 2008, we have brought together twelve to fourteen law students each summer to read and discuss social theory in the context of their day-to-day experiences working for social change through the law. Each week, student participants gather to parse the writings of a different theorist or set of theorists: Pierre Bourdieu on habitus, Cornel West on Afro-American revolutionary Christianity, and Chantal Mouffe on agnostic confrontation, to name a few examples. At every session, we work together with the students to determine how, if at all, these ideas about the social world are relevant to their daily attempts to change that world.[6]

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competition among legal advocacy groups on the left and right over [its] meaning"). *See also* John O. Calmore, *"Chasing the Wind": Pursuing Social Justice, Overcoming Legal Mis-education, and Engaging in Professional Re-socialization*, 37 LOY. L.A. L. REV. 1167, 1169 (2004) (criticizing the "increasingly overinclusive label of 'public interest law'" and arguing that the term is improperly used to describe "conservative and reactionary advocates . . . [who] oppose many of the causes that the earlier public interest lawyers sought to advance").

5. *See* The Public Interest Summer Theory Institute, Program on the Legal Profession, Harvard Law School, http://www.law.harvard.edu/programs/plp/pages/summer_theory_workshop.php (last visited Sept. 6, 2010). For a list of the organizations for which the Fellows interned, see NISHA AGARWAL & JOCELYN SIMONSON, HARVARD LAW SCHOOL SUMMER THEORY INSTITUTE SUMMER 2008: FINAL REPORT TO THE OFFICE OF PUBLIC INTEREST ADVISING AND PROGRAM ON THE LEGAL PROFESSION, at app. B [hereinafter STI 2008 FINAL REPORT], *available at* http://www.law.harvard.edu/programs/plp/pdf/Summer_Theory_Institute_Report_2008.pdf. In determining the reading list for the summer, we employed a broad definition of "social theory," which includes those formalized, abstract ideas about society that can help law students question and explain their values and beliefs regarding the law and legal practice, but we explicitly did not include any law or legal theory within that definition. *See infra* Part II.A.

6. Ideas about the "social world" can be distinguished from ideas about the natural

The students' experiences demonstrate that social theory is not only relevant to their preparation for full-time public interest practice—it is vital to it. Social theory provides students with an external vantage point from which they can raise questions about the movement for social justice, their organizations' roles within it, and their individual contributions to it. Placed in the practice setting, theory that might otherwise function solely as negative critique becomes a positive instrument that aspiring public interest lawyers can use to articulate and hone their conceptions of social justice. The result is that these law students become more thoughtful, more self-aware, and more excited about the prospect of creating social change.

Uncovering the normative conceptions embedded in the practice of law is a long-standing concern of some critical legal educators[7]—and one that has reemerged in recent calls for reform.[8] For example, the 2007 report on legal education published by the Carnegie Endowment for the Advancement of Teaching (the Carnegie Report) calls upon law schools to cultivate the "moral imagination" of their students.[9] According to the Carnegie Report, "For lawyers, just as for other professionals, the practices they learn give them extraordinary powers. But the meaning of the practices—and therefore the object to which the powers are directed—is never morally neutral."[10] If law students are to be better equipped to

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world that emerge out of scientific disciplines as well as from theories about individual human behavior developed in cognitive psychology and similar fields, which some legal scholars have used to explain and understand legal practice. *See, e.g.*, Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313 (1995).

7. *See, e.g.*, Auerbach, *supra* note 2, at 457 ("It may be tempting to consign the practical questions of law to lawyers, leaving the more dangerous inquiries about justice to philosophers or prophets, who float harmlessly at the margins of our culture. But it is worth trying to understand, historically and sociologically, how legal education has so successfully submerged justice . . . ."); Paul N. Savoy, *Toward a New Politics of Legal Education*, 79 YALE L.J. 444, 468 (1970) ("In seeking to develop 'lawyering' skills, we have stubbornly restricted ourselves to the cultivation of 'intellect' and have ignored the affective domain from which creativity springs.").

8. *See* Paula Lustbader, *Walk the Talk: Creating Learning Communities to Promote a Pedagogy of Justice*, 4 SEATTLE J. SOC. JUST. 613 (2006) (arguing that law school does not promote justice and describing a program she developed to create a learning environment within a law school that did promote justice); Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899, 905 (2009) ("Normative arguments are of crucial importance to the rule of law; they are the way we show respect to the losing party in a real world dispute. . . . Both law professors and students are in need of advice about how to think about the nature of morality, fairness, and justice. More importantly, they need vocabulary for talking about normative matters and a set of resources and methodologies for structuring relevant arguments.").

9. *See* WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS 11–12 (2007) (arguing that moral discernment is a key element of legal professionalism).

10. *Id.* at 31.

confront the normative aspects of the profession they will enter, law schools cannot remain wedded to a pedagogical structure focused primarily on value-free analytics learned in the classroom. Instead, the Carnegie Report argues that law schools must expose students to the uncertain situations they are likely to encounter in practice and arm them with the critical tools to think and act effectively in those situations: "The moral development of professionals requires a holistic approach to the educational experience that can grasp its formative effects as a whole."[11]

The goal of such holistic approaches to legal education is not to apply theory learned in the classroom to the practice setting, but rather to engage theory in conversation with the messy realities of practice to the mutual benefit of both.[12] The Carnegie Report proposes that, by bringing theory and practice together, law schools can and should inculcate a deeper sense of professional and civic responsibility in their students:

> It is in . . . situations of intensive analysis of practice that the fundamental norms and expectations that make up professional expertise are taught . . . . The art of such teaching lies in knowing how and when an articulation of the particular meanings and issues in the situation at hand should be in dialogue with conceptual knowledge. In innovative practice, reframing the situation is guided by astute legal and moral perception in order to develop new precedents and new interpretations of the law.[13]

In other words, to become truly capable and socially responsible lawyers, students must learn how to deploy ideas in the midst of action, which requires both engaging with ideas and engaging in action.

While the Carnegie Report discusses the legal profession as a whole, some scholars have suggested that its emphasis on integrating theory, practice, and morality has special significance for those committed to public interest law, given the inherently normative character of public interest legal practice and the marginalized social status of the clients with whom public interest lawyers often work.[14] The Summer Theory Institute's theory-practice method, which we introduce in this article,

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11. *Id.*

12. *See id.* at 10 ("It would be a mistake . . . to take teaching centered on practice as hostile to generalization or theoretical formulation. Rather, careful analysis of intelligent practice reveals a more intricate relationship between theory and practice than in the positivist model . . . ."). For a description of the rise of the positivist model, see *id.* at 5–7.

13. *Id.* at 10.

14. *See infra* note 15 and accompanying text. *See also* Anthony V. Alfieri, *(Un)covering Identity in Civil Rights and Poverty Law*, 121 HARV. L. REV. 805, 839–40 (2008) ("Preparing the next generation of civil rights and poverty lawyers to uncover identity-based differences in legal advocacy and political organizing requires greater theory/practice integration within the law school curriculum. . . . Beyond the integration of normative and empirical disciplines, the law school curriculum should focus on the values and techniques of ethical decisionmaking and moral lawyering.").

contributes to this conversation by providing law schools with a unique strategy to help their students develop the moral and professional acumen they need to be effective practitioners and committed servants of the public good.

The Carnegie Report has stimulated a major rethinking of legal education in law schools across the country, much of it focused on making law school curricula more practice-oriented, whether that be through increased simulations in doctrinal courses, expanded clinical offerings, or newly formed externship programs.[15] Instead of increasing practice opportunities for law students, however, the Institute's approach is to integrate theory into practice that is already occurring. The Institute also presents a new conception of what kind of theory is directly relevant to public interest practice. Frequently, when legal scholars and educators write about "theory," they are referring to legal doctrine.[16] By contrast, the Institute's theory-practice method draws upon social and critical theory, which offers a more patently normative framework within which to view the world and legal practice.[17] In the process of engaging with this kind of theory, students not only develop their moral imagination, but they also learn, implicitly, that being a public interest lawyer requires constant reflection about their work and its goals.[18] Indeed, as full-time

15. *See* Jonathan D. Glater, *Training Law Students for Real-Life Careers*, N.Y. TIMES, Oct. 31, 2007, at B9 (noting that the Carnegie Report has "galvanized reflection at many law schools"). *Cf.* Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597, 603 (2007) (arguing that law schools should move away from analysis of appellate cases toward a more open-ended "facts-forward" case method that mirrors practice); Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 517–18 (2007) (describing new practice-oriented initiatives in law school curricula).

16. *See, e.g.*, Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577, 583–84 (1987) ("[F]or a large segment of legal educators there is still the tendency to consider the case method theoretical. Articles about legal education continue to refer to the case method as theoretical. While none of the authors expressly define theory and its relation to the case method, their use of the term illustrates that the conception of the case method as theoretical is a background assumption that needs no explication.").

17. *See, e.g.*, Singer, *supra* note 8, at 906 ("[I]t is time [for lawyers] to extend our reach to moral and political theory in an equally sustained way. These theories provide some structure for thinking about the basic contours of institutions, laws, and practices in a just society . . . .").

18. As noted in the Carnegie Report:

> [E]ffective pedagogy to address the students' formative development must be a highly self-conscious, reflexive one. . . . These educational emphases—self-reflexivity, the development of understanding of how the past has shaped the present and how one's own situation is related to the larger social world, as well as entertaining and probing possible models of identity—are all important elements of a formative pedagogy for tomorrow's professionals. . . . If this is so—and we strongly agree that it is—recovering the formative dimension of professional education for the law lies in forging more connections with the arts and sciences in the larger academic context. The point is to engage the larger

practitioners and the co-facilitators of the group, we actively engage the theory along with the students and work to connect it to specific experiences from our practice. We recognize that what is modeled for students in their summer jobs shapes the professionals they will become just as fundamentally as the activities that take place on the law school campus.[19] The Institute's method thus disrupts the traditional divide between theory and practice, in which theoretical reflection is abandoned once the law student leaves the campus and enters the world of full-time practice.

In what follows, we use the example of the Summer Theory Institute—and of the personal experiences that led us to found it—to illustrate how it is possible to bring critical reflection into the messy world of practice, and why it is important to do so, both for legal education and for the profession as a whole. We describe the structure and pedagogy of the Institute in the hope of encouraging the growth of similar projects elsewhere and of stimulating conversations about how practitioners and law schools can engage in creative collaborations to educate the next generation of social justice lawyers. Like any good recipe, ours can be adjusted to taste, but only with an understanding of how the key ingredients work together.

We also aim to show how the merger of theoretical reflection and practical experience shapes the moral imagination of the Institute's participants. Accordingly, we provide examples of specific texts that students read in the program's inaugural summer and explain the character of the students' engagement with these ideas. These examples are not meant as prescriptions for how best to interpret particular theories in the context of public interest lawyering. Rather, they are demonstrations of how law students can be effective consumers of social theory and how reading social theory while engaged in full-time practice develops the dynamic and critical faculties necessary for public interest lawyering. Although the Institute's method opens up the possibility of practitioners becoming the producers of theory, articulating their own visions of the social world from the ground up, we focus on the benefits that accrue to students when they consume social theory while engaged in full-time practice.

Part I explains the origins of the Institute, which emerged out of our personal struggles to confront what we experienced as an inhibitive division between the world of ideas and the realm of practice in public interest law. This divide not only seemed to impose upon us a difficult

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academy around the perennial themes of liberal education, *particularly focused on the formation of a life of the mind for practice.*

SULLIVAN, COLBY, WEGNER, BOND & SHULMAN, *supra* note 9, at 32 (emphasis added).

19. As the Carnegie Report itself has noted: "Students are learning not only from the courses they take but also from . . . externships, summer jobs, and other extracurricular activities." *Id.* at 140.

"choice" between thinking like a public interest lawyer and being one, but it also created a false dichotomy between two skills that could mutually reinforce each other. We describe how social theory—specifically, the work of Pierre Bourdieu—helped us recognize the limiting structures of legal education and the legal profession. Reading Bourdieu, we concluded that public interest lawyers who want to challenge inequality and injustice must have access to critical and conceptual tools too often absent from day-to-day public interest practice. At the end of Part I, we locate this analysis of the theory-practice divide within the larger conversation among legal scholars and clinical legal educators about integrating theory and practice in legal education.

Part II tells the story of the inaugural summer of the Summer Theory Institute. Drawing from discussions the Institute's participants had about three theorists—Michel Foucault, Friedrich Hayek, and David Couzens Hoy—we demonstrate how theoretical reflection placed in the practice setting cultivates the critical faculties necessary to make law students effective and inspired public interest professionals. If law schools want to foster a socially responsible "professionalism" that promotes the public interest, the boundaries of legal education must not stop physically at the law school doors or conceptually at doctrinal theory.[20] Rather, law students must learn to engage with difficult normative questions on a theoretical level while simultaneously grappling with them on a practical level. It is at this intersection between theory and practice that a law student learns to think like—and be—a public interest lawyer.

I.
THE THEORY-PRACTICE DIVIDE

The Summer Theory Institute grew out of our own experiences grappling with the dichotomy between theory and practice in public interest law. We discovered this dichotomy in law school, at a time when we were simultaneously practicing law in full-time clinics and reading critical theory on a regular basis in a classroom seminar. It was this combination of experiences that led us to recognize the structural barricade separating theory and practice in legal education and public interest law and the implications of that divide for the profession we were soon to enter. Our story thus serves as both an introduction to the Institute and a specific illustration of the power of combining reflection through social theory with the practice of public interest law. It is also part of a larger dialogue among legal scholars about the burdens of the theory-practice divide in legal education and the potential to overcome that divide. As we enter this conversation, we explain how our understanding

20. *Id.* at 29–33.

of the meanings of "theory" and "practice" may differ from how they are traditionally understood in the debate among legal educators, and the implications of those differences for attempts to overcome the separation between the two.

A. Encountering the Divide in Law School

We first recognized the dichotomy between theory and practice in public interest law during our third year of law school, when we were each enrolled in intensive, year-long clinical programs that required twenty to thirty hours per week of civil or criminal practice, and in an unrelated, year-long seminar called "Theory Workshop." Unlike other classes in law school, Theory Workshop did not have any cases, statutes, or legal scholarship on its syllabus. Instead, we read social and critical theory written by authors such as Pierre Bourdieu, Claude Lévi-Strauss, and Jean-Paul Sartre. Our professors' approach to the study of these theorists was open and exploratory, not didactic. In their words, the goal of the seminar was to "work collaboratively to engage these theorists and understand their relevance to our own commitments to political and legal activism."[21]

At the start of the school year, it was hardly clear whether, let alone how, non-legal theory would be relevant to our clinical practice. We moved between days spent in housing or criminal court with our clients and evenings parsing the concepts of structuralism, existentialism, and habitus. In Theory Workshop, we never discussed our clinical cases, and we certainly did not "apply" the ideas of Louis Althusser or Ferdinand de Saussure to our representation of juvenile defendants or low-income tenants. Yet through the combination—or, more accurately, the coexistence—of "high" theory and on-the-ground practice during our 3L year, we found that our capacity for both activism and criticism was enhanced.

Reading theorists whose work had no obvious relationship to our clinical practice or to public interest law forced us to go through the difficult process of grappling with the texts on their own terms. We had to understand and see the social world through the authors' eyes, and this invariably caused us to reexamine our own worlds from a new perspective. Theory that could have seemed irrelevant or self-indulgent gained vitality when placed in the context of our relationships with clients and cases. Meanwhile, clinical cases that could have seemed narrow in their impact became, through theory, part of a broader intellectual dialogue about social change—our small rebellions writ large. Ultimately, we found that the opportunity to move fluidly between theory and practice energized and

21. Christine Desan & Lucie White, "Theory Workshop" Syllabus Fall/Spring 2005-06, Harvard Law School (on file with authors).

sustained us as two among a small percentage of fellow graduates who would go on to pursue public interest work after graduation.

At the same time, moving between critical theory and clinical practice underscored the sense that, after graduation, we would be required to choose which kind of a lawyer we wanted to be: a scholar who engages with theory or a public interest lawyer devoted to practice—the field of public interest law appeared to be structured such that one could not be both a theorist and a practitioner. We realized that we had been taught, both explicitly and through experience, that while an individual may sometimes practice law and sometimes theorize about it, those two actions are different and incompatible ways of engaging with the law.[22] As we contended with this tension, we found that the work of Pierre Bourdieu, which we read in Theory Workshop, helped us understand the nature of the divide between theory and practice and gave us the confidence to challenge it in our own careers.

B. Pierre Bourdieu and Reflexivity

The work of sociologist Pierre Bourdieu helped us to articulate the theory-practice dichotomy we saw around us. Though Bourdieu's writing provided no direct prescriptions for change, his theories did give us new ways of looking at what was already familiar. Reading Bourdieu, we came to recognize not just that there was a divide between theory and practice in the law, but that that we had internalized that divide in such a way that we felt compelled to make an unnecessary "choice" between the two. To challenge that dichotomy, we needed to push against it in the world around us and in ourselves.

Part of what inspired us about Bourdieu's work is that much of it focuses on uncovering the self-imposed restraints of his own profession. Central to that inquiry is Bourdieu's concept of habitus, which he defines as "a system of schemes of perception and appreciation of practices, cognitive and evaluative structures which are acquired through the lasting experience of a social position."[23] Through habitus, the ordering of any profession or social world—the "rules of the game"—is internalized and becomes part of how we see, perceive, and experience the world.[24]

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22. This "tradeoff" manifested itself in small but meaningful ways: in the advice of a professor-mentor, who insisted that to become a law teacher one must focus fully on writing, often at the expense of time-intensive clinics and political activism, and in the statements of supervisors at public interest internships, who dismissed scholarly and theoretical work as irrelevant to day-to-day practice.

23. Pierre Bourdieu, *Social Space and Symbolic Power*, 7 SOC. THEORY 14, 19 (1989).

24. PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 72 (Richard Nice trans., Cambridge Univ. Press 1977) (1972) (describing habitus as "systems of durable, transposable *dispositions*, structured structures predisposed to function as structuring structures, that is, as principles of the generation and structuring of practices and

According to Bourdieu, "when habitus encounters a social world of which it is the product, it is like a 'fish in water': it does not feel the weight of the water, and it takes the world about itself for granted."[25] In this way, the world's divisions and classifications become embedded in our consciousness and come to seem natural, even unremarkable.[26]

Bourdieu chose to focus his research on his own profession because, for him, subjecting academics to rigorous sociological inquiry was essential to ensure the credibility and vibrancy of social science.[27] To achieve this, Bourdieu introduces the concept of "reflexivity," or the process of turning the tools of the theorist against herself.[28] Through reflexivity, Bourdieu seeks to counter the ways in which factors like power, position, and prestige influence the validity of the work that academics produce.[29] As Bourdieu explains, "thinkers leave in a state of unthought . . . the presuppositions of their thought."[30] Through reflexivity, however, scholars

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representations which can be objectively 'regulated' and 'regular' without in any way being the product of obedience to rules, objectively adapted to their goals without presupposing a conscious aiming at ends or an express mastery of the operations necessary to attain them and, being all this, collectively orchestrated without being the product of the orchestrating action of a conductor"). The phrase "rules of the game" is a term of art for Bourdieu, referring to the ways in which individual actors—the players in the game—internalize the stakes and customs for exchanging social capital in a particular field, thereby endorsing the distribution of power in that field. Pierre Bourdieu & Loïc J.D. Wacquant, *The Purpose of Reflexive Sociology*, *in* AN INVITATION TO REFLEXIVE SOCIOLOGY 60, 98–99 (1992).

25. Bourdieu & Wacquant, *supra* note 24, at 127.

26. *See* PIERRE BOURDIEU, PASCALIAN MEDITATIONS 11 (Richard Nice trans., Stanford Univ. Press 2000) (1997) (describing how habitus is formed "gradually, progressively and imperceptibly," and therefore "passes for the most part unnoticed").

27. PIERRE BOURDIEU, HOMO ACADEMICUS, at xi (Peter Collier trans., Stanford Univ. Press 1988) (1984) ("[M]y sociological analysis of the academic world aims to trap *Homo Academicus*, supreme classifier among classifiers, in the net of his own classifications."). *See also id.* at xiii ("What scientific profit can there be in attempting to discover what is entailed by the fact of belonging to the academic field[?] . . . [A]bove all it reveals the social foundations of the propensity to theorize or to intellectualize, which is inherent in the very posture of the scholar feeling free to withdraw from the game in order to conceptualize it . . . .").

28. A comprehensive discussion of Bourdieu's notion of "self-reflexivity" and related concepts is beyond the scope of this paper. What we provide here are merely the relevant pieces necessary to understand the intellectual impact Bourdieu's work had on us and the practical "use" to which we were able to put it after graduation. For an excellent overview of Bourdieu's thoughts on self-reflexivity and academic life, see Loïc J.D. Wacquant, *Sociology as Socioanalysis: Tales of* Homo Academicus, 5 SOC. FORUM 677 (1990) (describing Bourdieu's book, *Homo Academicus*, and its study of intellectuals).

29. *See generally* Pierre Bourdieu, *The Scholastic Point of View*, 5 CULTURAL ANTHROPOLOGY 380, 381–88 (1990) (explaining how factors like power, position, and prestige interact with forces and stakes unique to the academic community to influence the quality of academic scholarship).

30. *Id.* at 381. In particular, Bourdieu was troubled by "the social division between theory and practice in representations and in practices," which is "deeply rooted in the scholastic unconscious [and] dominates the whole of thought." BOURDIEU, *supra* note 26, at 80.

can begin to uncover the subterranean influences that lead them to defend the status quo, thereby developing an awareness of the ways in which their social positions of power inform their thinking and research.[31]

In parsing the concepts of habitus and reflexivity, we drew inspiration from what Bourdieu describes as his "deeper object" in analyzing his own world of French academia: unearthing "the reflexive return entailed in objectivizing one's own universe."[32] We too wanted to figure out what it was about being law students interested in social justice that made us feel like we had to choose between abstract theory and concrete practice. Starting with a critical analysis of ourselves and the institutions of which we were a part helped us to break down our own "presuppositions of thought" about what it means to be and think like a public interest lawyer.

Using Bourdieu, we began to articulate how lawyers, professors, and law students quietly accept the division between law schools as the domains of theory and law offices as the locations of legal practice. Through the operation of the habitus, all of the participants in the legal field come to view this divide as both necessary and beneficial to the production of knowledge about the law and its practice. We questioned whether the theory-practice divide was either inevitable or useful. If it was not either, then perhaps we, as law students, were like Bourdieu's fishes in the water of public interest legal education, focusing on the choice we felt we had to make between theory and practice without stopping to ask whether the choice itself—the water in which we were swimming—could be acknowledged and changed.

In the context of the social sciences, Bourdieu argues that the thinker's obliviousness to the origins of her worldview, especially her posture as someone "freed from the urgencies of the world," can lead her to misconstrue the reality that she is meant to understand and explain—to undermine, in other words, her own raison d'être.[33] In response, Bourdieu urges his fellow social scientists to take steps to uncover and actively resist those taken-for-granted features of their profession that prevent them from producing the truest portrait of social reality.[34] Reading Bourdieu,

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31. Bourdieu & Wacquant, *supra* note 24, at 73–74 ("We need thoroughly to sociologize the phenomenological analysis of doxa as an uncontested acceptance of the daily lifeworld, not simply to establish that it is not universally valid for all perceiving and acting subjects, but also to discover that, when it realizes itself in certain social positions, among the dominated in particular, it represents the most radical form of acceptance of the world, the most absolute form of conservatism.").

32. *Id.* at 67.

33. BOURDIEU, *supra* note 26, at 1.

34. Specifically, Bourdieu exhorted his fellow social scientists in France to resist the temptation to remain safely removed from urgency, from real life, and to instead "return to the world of everyday existence, but armed with a scientific thought that is sufficiently aware of itself and its limits to be capable of thinking practice." *Id.* at 50. For Bourdieu, this return to the world of everyday existence takes the form of empirical research methods

we wondered about the possible consequences of failing to challenge the separation between theory and practice in the law, one of the background assumptions of our profession. This question seemed particularly important with respect to public interest law, which, no matter how it is defined, is premised on some notion about the inadequacy of the social world and the role of the law in remedying that inadequacy. If those of us committed to public interest law fail to explore or resist the presuppositions of our profession, does that mean that we also risk undermining the very purposes to which we have dedicated our careers? Do we risk not only mis*perceiving* the social world, but also mis*behaving* within it?

C. Confronting the Divide as Practitioners

With questions such as these in mind, we began to formulate strategies for uncovering the "unthought" within our own field of public interest law. From Bourdieu we gained the insight that when our profession imposes arbitrary boundaries on us, we must test those boundaries in order to gain an awareness of how they are limiting us. As we both began our legal careers as public interest lawyers in New York City, we experimented with methods of combining abstract theory and concrete practice. Our aim was to bring the ivory tower's theory to us and to engage with it from the vantage point of lived experience. We approached this goal with a combination of enthusiasm and hesitation: enthusiasm because we knew the benefits of integrating theory and practice in the law, and hesitation because it is rare for a lawyer to read and discuss social theory once formal schooling has been left behind.[35]

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such as fieldwork and data collection—in other words, going out and gathering the material to provide a more fine-grained portrait of the world. *See, e.g.*, *id.* at 4 ("I have never shunned what are regarded as the humblest tasks of the craft of ethnology or sociology—direct observation, interviews, coding or statistical analysis. Without succumbing to the initiatory cult of 'fieldwork' or the positivistic fetishism of 'data', I felt that, by virtue of their more modest and practical content, and because they took me out into the world, these activities, which are in any case no less intelligent than others, were one of the chances I had to escape from . . . scholastic confinement."). By introducing these "practical" methods into the scholarly repertoire, Bourdieu sought to move away from simply taking a theory and applying it to the "real world." Instead, he suggests that, to get closer to the "truth," his fellow social scientists must push against existing structural divides by bringing their theory with them into the world, and then listening when the world talks back. *See id.* at 5 ("The sociologist has the peculiarity . . . of being the person whose task is to tell about things . . . the way they are. . . . [W]hen he simply does what he has to do, the sociologist breaks the enchanted circle of collective denial.").

35. Indeed, the "frontier" between theory and practice only widened after we left the academy. Once we graduated and no longer had an official affiliation with the law school, we lost access to Harvard's online databases for scholarship as well as to the research libraries of sister institutions in New York City. Meanwhile, we found that the public library's collection of social theory and academic works was extremely limited, and all of the "continuing legal education" courses we could sign up for focused on lawyering skills

Our first experiment was the formation of a theory reading group with members from a variety of professions. This critical theory group, which still meets on a regular basis, gives us the space to write and talk regularly about the ways in which social theory influences our public interest practice. Participating in our own "theory workshop" outside of the academy has allowed us to glean a number of insights about the nature of the theory-practice divide in the legal profession. The first is that the demarcation of law schools as the exclusive domains of theorizing about law and of the world outside the law schools as the exclusive domain of practice is not natural or necessary. While it may be challenging to carve out time between caseloads and professional commitments to read and discuss social theory, it is nevertheless quite possible to engage intensively with theoretical texts as full-time practitioners. We are no less competent to engage with these texts now than we were when we were situated within the law school campus. If anything, our location outside the academy has allowed us to better evaluate whether the theories resonate with the realities we experience on the ground.

We have also found that theory is no less relevant or valuable to us now that we are full-time public interest practitioners. To the contrary, reading theory is an effective antidote to burnout, providing us with a way to step back and reflect productively on jobs that place significant emotional, intellectual, and physical demands on the people who hold them. Put in Bourdieu's terms, theory allows us to be temporarily freed from the urgencies of our daily practice.[36] Thus, while the theory-practice dichotomy grew even more pronounced after we left law school, our attempts to bridge that dichotomy were more rewarding than ever.

To give a brief example, one of us (Jocelyn) experienced a change in her practice as a public defender after engaging with theories of performativity and relating those concepts to the ways in which criminal defendants exercise agency through speech, or lack of speech, in the courtroom.[37] These theories of performativity, typically cabined in the academic spheres of linguistics, rhetoric, or literary theory, explore ways in which the utterance of words can have meaning beyond the words themselves—what J.L. Austin calls the "perlocutionary effect" of a speech

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and recent doctrinal developments. There was no equivalent to Theory Workshop for full-time practitioners. We found little interest in abstract thought amid the fast-paced worlds of direct advocacy, public policy, and impact litigation. Within the legal academy, we perceived a stoic acceptance of the fact that the reach of legal scholarship rarely extended to the world of practice. Indeed, we had been counseled as law students that one should not practice for more than four years before entering legal academia, at the risk of being "lost" to the world of practice.

36. *See supra* note 33 and accompanying text.

37. J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (1962).

act.[38] After reading Austin and related texts,[39] Jocelyn reflected on the different effects of words spoken during routine court appearances and found herself altering the advice she gave to clients regarding their decision whether to speak for themselves in the courtroom. Jocelyn began to discuss with her clients the possibility of speaking at times when criminal defendants do not traditionally speak; for example, she encouraged a sixteen-year-old charged with a violent offense to describe his interest in earth science to a judge during a routine court appearance at which the judge was familiarizing herself with the case.[40] This was not a planned change in Jocelyn's practice, but one that happened organically as a result of having thought about Austin and related theorists the night or weekend before.[41] For Jocelyn in this instance, and for both of us throughout our relatively new careers as public interest lawyers, reading social theory has enabled us to maintain a degree of self-awareness about ourselves, our work, and the world we seek to influence that has made our practice dynamic, intellectually engaging, and, we hope, more effective.

It is against this backdrop that we began to formulate the idea of creating the Summer Theory Institute. As we knew from our own experiences, the theory-practice divide is first etched into the lawyer's habitus while she is still in law school. One important way this happens is through summer internships, when thousands of law students fan out across the country to work with public interest organizations. For many, these internships are their first exposure to the challenges and rewards of full-time public interest practice, and an opportunity to use their legal training to "do good." While at these jobs, however, students are unlikely to have the opportunity to reflect in an organized way about whether the

38. *Id.* at 101–08. A full discussion of performativity is beyond the scope of this article. For a description of how Austin's notion of performativity has been used within rhetoric and literary theory, see generally JAMES LOXLEY, PERFORMATIVITY (2007).

39. *See, e.g.*, JUDITH BUTLER, EXCITABLE SPEECH (1997).

40. A number of legal scholars have written critiques of the silencing of criminal defendants in the courtroom. *See, e.g.*, Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449 (2005). At the time that Jocelyn was reading J.L. Austin's theory of performativity, she was familiar with this legal scholarship about silence and found it compelling. But scholarship dealing directly with the silencing of criminal defendants did not, on its own, move her to change her practice. It was not until Jocelyn spent time away from the courthouse thinking and talking abstractly about speech acts as performance and the potential of performative acts to change their surroundings that she found herself talking differently with clients about whether they should speak in the courtroom. Experiences such as Jocelyn's—where inspiration comes not from legal scholarship but from social theory, one step further removed from the realities of practice—informed our decisions about what types of theory to assign at the Institute. *See infra* Part II.A.

41. Nor was it a revolutionary change—many public defenders navigate issues of agency, autonomy, and silence with skill and subtly. But for Jocelyn, this change came about as a result of setting up a space for herself outside of work in which to wrestle with social theory.

work they are doing is, in fact, good, effective, or meaningful. Moreover, many law schools take a largely hands-off approach to students' development during summer internships, providing little to no infrastructure to help students process their summer experiences.[42] The implicit message is that critical reflection and theorizing take place only in law schools, and that the world outside the law school is devoted exclusively to the mechanical practice of law.

In developing the Institute's theory-practice method, we sought to disrupt this prevailing message by offering public interest interns a chance to engage with social theory during their summers. We hoped that doing so would not only enrich their professional experiences, but also cause students to question the physical separation between the intellectual activity of the legal academy and the activism located safely outside the schoolhouse doors. Bourdieu, in advising his fellow social scientists in how to gain a better understanding of their own field of social science, wrote, "If nothing else, let us at least have conflicts!"[43] By giving law students the experience of jumping outside of set ways of practicing, traveling into the realm of ideas, and then jumping back into their practice, we aimed to create the kind of conflict between critical theory and concrete practice that we hoped could produce change.

D. The Broader Context of Legal Education

We are not the first people to have recognized the theory-practice divide in the law.[44] That there is such a divide is widely discussed among scholars of legal education, who have identified a number of ways that the tension manifests itself: in the gap between the training provided in law schools and the skills needed in law offices;[45] in the tension between law

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42. *See* Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 VAND. L. REV. 609, 663 (2007) ("Externship programs . . . are regarded as individual experiences, and most of the faculty has no contact with, or knowledge of, any student's externship activities."). This "hands-off" approach taken during summer internships contrasts with the "hands-on" approach taken when students engage in practice through their clinics while physically *in* law school. The structure of clinical legal education, dating back to Gary Bellow's efforts to build a clinical program at Harvard Law School in the 1970s, has traditionally incorporated a reflective classroom component. *See* Jeanne Charn, *Service and Learning: Reflections on Three Decades of* The Lawyering Process *at Harvard Law School*, 10 CLINICAL L. REV. 75, 78 (2003).

43. Bourdieu & Wacquant, *supra* note 24, at 178.

44. One commentator has described the tension as a "battle between practitioners and academicians [that] has been going on for at least a century." Nancy L. Schultz, *How Do Lawyers Really Think?*, 42 J. LEGAL EDUC. 57, 57 (1992).

45. *See, e.g.*, TASK FORCE ON LAW SCHS. & THE PROFESSION: NARROWING THE GAP, AM. BAR ASS'N, STATEMENT OF FUNDAMENTAL LAWYERING SKILLS AND PROFESSIONAL VALUES 97 (1992) (advising lawyers to assist newly-graduated law students in understanding "the limited nature of their education and background in the law"); Blasi, *supra* note 6, at 316 n.5 ("Law schools seem to be the only professional schools with

schools' clinical and non-clinical programs;[46] and even in the intellectual dissonance that exists within law professors themselves.[47] Indeed, the entire history of legal education can be seen as a negotiation between theory and practice; the modern law school and its case method were born from a desire to move beyond the early apprenticeship model of legal education while still educating lawyers for practice.[48] Ever since, legal scholars—from the Legal Realists of the early twentieth century to the clinical legal educators of today—have tweaked and critiqued the case method to make it more practice-oriented.[49]

The Institute's theory-practice method is a product of this legacy, emerging out of similar frustrations and building upon prior efforts to calibrate the proper balance between theory and practice. In particular, we see ourselves engaging with and expanding upon some of the same concerns that have motivated the movement for clinical legal education since its emergence five decades ago. A product of the social and political ferment of the 1960s,[50] modern clinical education has, from the beginning,

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faculties who see their central function as detached from the preparation of professionals for practice. Nor do professors in those other schools—medicine, engineering, business, architecture—generally view their scholarly work as both more important than, and essentially detached from, the work being performed by practitioners."); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

46. *See, e.g.*, 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 (1989) (describing the dichotomy between teaching legal theory and teaching legal skills); Rubin, *supra* note 42, at 663 ("Most faculty members have only a vague idea of what the clinic is teaching and how those experiences might relate to their own materials.").

47. Thomas F. Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637, 638 (1968) ("[T]he modern law teacher has been suffering from a kind of intellectual schizophrenia for the past twenty-five years—a schizophrenia which has him devoutly believing that he can be, at one and the same time, an authentic academic and a trainer of Hessians.").

48. *See* Anthony Chase, *The Birth of the Modern Law School*, 23 AM. J. LEGAL HIST. 329, 331–40 (1979).

49. For a Legal Realist critique of the case method, see Carrie Menkel-Meadow, *Taking Law and _____ Really Seriously: Before, During and After "The Law,"* 60 VAND. L. REV. 555, 563–68 (2007). For a description of renewed calls for reform following the Carnegie Report, see *supra* notes 8–15 and accompanying text. Clearly, Jerome Frank's seminal critique of legal education as a pioneer of the Legal Realist movement, Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933), remains as relevant as ever.

50. *See, e.g.*, Michael Meltsner & Philip G. Schrag, *Report from a CLEPR Colony*, 76 COLUM. L. REV. 581, 581–82 (1976) ("[B]ut for the peculiar surge of American liberalism in the Johnson administration—that temporary burst, in the midst of war, of middle-class concern for domestic minority and low-income groups—we would surely never have become teachers. But that short flowering sowed many seeds. One of them, known as CLEPR (the Council on Legal Education for Professional Responsibility, Inc.), by funding clinical programs, brought about the first significant innovation in legal curricula since the hegemony of the case method. And in turn, CLEPR also brought into legal education hundreds of new people, ourselves included, who were ill at ease with the teaching goals

had an explicitly normative orientation and has challenged the boundaries of law school by bringing the educational process "outside the strictures of just the classroom."[51]

Clinical education has also been committed to thoughtful practice. Gary Bellow, one of the founders of clinical legal education, argued that clinical teachers "'want to work with [their] students on how one learns to develop a quality, reflective, self-taught practice in a pressured real world setting. . . . Part of clinical education has to involve teaching lawyers how to learn from each other.'"[52] Bellow's text, entitled *The Lawyering Process*, provided the material for a course by the same name, which emphasized rigorous reading and reflection on "lawyering theory"—the lawyer's craft and values, her role and responsibilities.[53] For Bellow, good intentions were not enough; hard work, critical reflection, and a lifelong commitment to skills development were essential.[54]

In recent years, a new generation of clinical legal educators has begun to introduce a different kind of thoughtfulness into clinical teaching. Drawing upon the insights of the critical legal studies movement and other intellectual developments within the law, these clinical instructors work with students to unearth the "multitude of assumptions and biases, values and norms, embedded in law's workings" by asking them to read and reflect on critical feminist, critical race, and other similar works of legal theory.[55] The Carnegie Report's call for practice-oriented legal education

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and methods that they themselves had experienced as students."). *See also* Spiegel, *supra* note 16, at 589–94 (describing the birth of clinical legal education).

51. Nat'l Archive of Clinical Legal Educ., The Catholic Univ. of Am., Transcript of the Oral History Interview with Bill Pincus 25 (June 7, 2000), *available at* http://lib.law.cua.edu/nacle/Transcripts/Pincus.pdf. The Ford Foundation provided the initial seed money for clinical programs at several law schools across the country in the 1960s, and William Pincus was the driving force behind this effort at the Foundation. *See, e.g.*, J.P. "Sandy" Ogilvy, *Celebrating CLEPR's 40th Anniversary: The Early Development of Clinical Legal Education and Legal Ethics Instruction in U.S. Law Schools*, 16 CLINICAL L. REV. 1, 9–10, 12, 14 (2009). For Pincus, the goal was to produce "'publicly responsible' lawyers" and to "expos[e] law students to 'social practice' through internships with welfare agencies, police departments, prosecutors' offices, lower courts, and civil rights groups." RICHARD MAGAT, THE FORD FOUNDATION AT WORK: PHILANTHROPIC CHOICES, METHODS, AND STYLES 109–10 (1979).

52. *Profile of Gary Bellow*, *in* COUNCIL ON LEGAL EDUC. FOR PROF'L RESPONSIBILITY, FOURTH BIENNIAL REPORT 24 (1975-1976) (quoting Bellow).

53. *See* Charn, *supra* note 42, at 81–86.

54. *See* David Grossman, Remarks at Funeral for Gary Bellow (Apr. 2000) (describing how, for Bellow, "a big heart alone was not enough"), *available at* http://www.garybellow.org/people/dgrossman.htm.

55. Goldfarb, *supra* note 3, at 719–20. *See also* Sarah M. Buel, *The Pedagogy of Domestic Violence Law: Situating Domestic Violence Work in Law Schools, Adding the Lenses of Race and Class*, 11 AM. U. J. GENDER SOC. POL'Y & L. 309, 318–25 (2003) (emphasizing the importance of race and class considerations in domestic violence curricula); Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461, 1484 (1998) (describing a "Critical Lawyering Theory" course offered at St. Mary's,

reforms has further advanced the conversation among legal educators,[56] particularly those who advocate for critical pedagogies integrating theory and practice in the clinical setting.[57]

The Institute follows in this vein of critical, clinical education but extends its approach to the world of full-time practice. If law school clinics have "one foot in academia and the other in the practice of law,"[58] the Institute's approach suggests that aspiring public interest lawyers can have both feet in the world of practice and still continue to be both thoughtful and critical. The Institute also demonstrates that it is not necessary to have a full-time faculty member guiding the process of rigorous reflection; lawyers can, in fact, learn from one another. With its focus on social theory and non-legal texts, the Institute broadens the range of critical materials that are "relevant" to public interest practice, enabling participants not only to unpack assumptions but also to articulate their own conceptions of social justice and create their own visions for social change.

We have structured the Institute so that participants engage with theory in a way that is dynamic, not didactic. When clinical legal educators assign critical race or critical feminist theory to their students, the theory is often presented as a framework that can be *used* and *applied* to the situations that the students face in their clinics, helping them to analyze the ways in which race, gender, and class privilege affect their roles as lawyers.[59] While this pedagogical approach can be beneficial, the Institute's approach is different—for the Institute's students, theory's primary value comes not from its content or framework, but from the process of engaging with the theory while also engaging in practice. With the theory-practice method, even a conservative, pro-market theory can profoundly and positively shape the critical abilities of a left-leaning public interest law student.[60] Put another way, the focus is not on what theory can

created to "explore the practical significance and application of critical theory in lawyering for subordinated persons and groups"); Margaret E. Johnson, *An Experiment in Integrating Critical Theory and Clinical Education*, 13 AM. U. J. GENDER, SOC. POL'Y & L. 161 (2005) (discussing the experiences of two legal clinics incorporating critical theory into their curricula).

56. *See supra* notes 8–15 and accompanying text.

57. Anthony V. Alfieri, *Against Practice*, 107 MICH. L. REV. 1073 (2009) (critiquing the Carnegie Report for its failure to emphasize the importance of critical pedagogies in responding to identity differences). *See also* Menkel-Meadow, *supra* note 49, at 480–86 (proposing a model for legal curricula focusing on theory and philosophy as well as practical/clinical education); Sturm & Guinier, *supra* note 15, at 549–50 (commenting on the lack of connection between current legal practice and legal education, and advocating for pedagogical reform that addresses the cultural norms within law schools).

58. Goldfarb, *supra* note 3, at 720.

59. *See, e.g.*, Johnson, *supra* note 55, at 162.

60. *See infra* Part II.B.2 (discussing the Fellows' response to Friedrich Hayek's writings).

give to its reader, but on what the practitioner can *take* from theory *as a practitioner.*

We describe the Institute as embodying a "theory-practice method" in order to signify the importation of abstract, critical thinking into the pedagogy of practice. But we wish to stress that our method teaches students practice, not theory. As discussed above, our method centers on a conception of "theory" that differs in important ways from the manner in which theory is discussed among legal educators, who often refer to legal doctrine and analysis as "theory."[61] The Institute's theory is not legal doctrine; it is writing that contains abstract, normative conceptions of the world and that enables students to sharpen their capacity for moral cognition, which is essential to public interest practice. Because this theoretical engagement takes place while immersed in practice, the Institute's method falls on the side of "practical" education as it is articulated in the Carnegie Report. The theory-practice method provides a tool with which to demonstrate the possibility—and the benefits—of intellectual rigor in the world of practice. It also discards the notion that conceptual development is more comfortably located on the "analytic," or doctrinal, side of legal education. As such, the theory-practice method not only comports with the Carnegie Report's recommendation that law schools should elevate the teaching of practical skills to first tier status within the law school curriculum, but it also presents students with opportunities to experience the overlapping analytical, practical, and normative concerns that they will encounter in practice.[62]

II.
THE THEORY-PRACTICE METHOD

The Summer Theory Institute is our attempt to bridge the theory-practice divide for law students doing public interest legal work for the first time. The Institute creates a space for student participants to think through the role that social theory can play in public interest practice. In this way, the Institute aims to deepen both students' engagement with social theory and their commitment to lawyering for social change. Our theory-practice method does not hand aspiring public interest lawyers the answers to the questions that they face. Instead, we founded the Institute in the hope that reading social theory while practicing full-time would

61. For a discussion of these distinctions in the definition of theory, see *supra* notes 15–19 and accompanying text. Notably, the Carnegie Report itself does not discuss a divide between "theory" and "practice," but instead separates the teaching of "analytical" and "practical" knowledge, thereby drawing a line between doctrine and skills. SULLIVAN, COLBY, WEGNER, BOND & SHULMAN, *supra* note 9, at 12.

62. SULLIVAN, COLBY, WEGNER, BOND & SHULMAN, *supra* note 9, at 87–88. *See also supra* notes 8–15 and accompanying text.

prompt participants to reach an independent understanding of how to relate to clients and the world. By encouraging self-awareness that might otherwise be out of reach in day-to-day practice, the Institute fosters the moral acumen necessary for public interest lawyering. The dynamic practice of reading and reflecting critically on theory can make law students more thoughtful practitioners—and also more invigorated ones.

This invigoration is only possible when students engage meaningfully with the theories to which they are exposed. To that end, we ask the Institute's participants to read excerpts of complex social theories, bringing their real-life experiences to bear on the way they read. The students do not read examples of these theories at work; rather, they provide real-world examples themselves. This method of consciously reading theory as a practitioner with other practitioners forces the participants to think more rigorously about the theories and their practice than they would in an academic vacuum.

Underlying the theory-practice method is our belief in what Susan Carle has called "critical reflective ethics through practice":[63] a responsibility on the part of the public interest attorney to think critically about the way that she lawyers. Theoretical engagement gives aspiring practitioners the confidence to enter the world of public interest law believing that they can make a difference. It also instills in them a sense of obligation to be thoughtful and critical in their practice. We demonstrate this method in the next two sections by examining the Institute's inaugural summer, during which twelve student Fellows met with us weekly to discuss social theory in the context of their experiences working for social change through the law.

A. The Institute's Design

In many ways, the theory-practice method resembles a traditional law school seminar. During the Institute's first summer, the Fellows met with us for two hours each week.[64] We assigned twenty- to thirty-page theoretical readings and asked them to submit a response paper before each session to assist the one or two Fellows who were leading discussion on the readings in a given week.[65] However, it is there that any

63. Susan D. Carle, *Introduction* to LAWYERS' ETHICS AND THE PURSUIT OF SOCIAL JUSTICE: A CRITICAL READER 1, 3 (Susan D. Carle ed., 2005).

64. We chose the students through an informal application process in which each potential participant had to submit a "statement of interest" about why she would like to be a Fellow of the Institute. We made it clear that no prior experience with social theory was necessary.

65. After some initial confusion about the formality of the response paper, we told students that the papers needed to be only one to two pages in length, double- or single-spaced, and that they were meant to be thoughtful reaction papers that connected the readings to the students' practice instead of fully-formulated academic critiques. While

resemblance to the traditional law school seminar ends. The two-hour long "classes" were facilitated not by faculty members of the law school but by practicing lawyers. The Fellows were not sitting in a classroom but in the conference room of a public interest law office. There were no grades. And Fellows were not meeting in the middle of the day as part of a regular class schedule but in the evening, after a long day of practicing law. We emphasize these differences because they underscore the Institute's focus on eliminating the distance between reflection and practice—we wanted to show the Fellows that it is possible for theory to become a regular part of legal practice.

We put a great deal of thought into selecting the readings. On a micro level, our goal was to select twenty or thirty pages of text for each week that would loosely connect to a practice area from among those of the organizations at which the Fellows were interning.[66] For example, for a week on "Immigrant Rights" we assigned two competing papers by Thomas Pogge and David Miller discussing theories of cosmopolitanism, neither of which reference contemporary debates on immigration.[67] Instead, they present a philosophical conversation regarding the moral responsibility that the people of one place bear toward the people of another.[68] On a macro level, we strove for variety. The thinkers we assigned, ranging from Kwame Anthony Appiah to bell hooks to Friedrich Hayek, reflected a variety of ideological and intellectual perspectives, as well as genders, races, and national and historical backgrounds.[69] The decision to include conservative writers in the syllabus reflected our view

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Fellows had mixed reactions to the process of writing the response papers, the Fellows leading the discussion each week invariably commented on how valuable the papers were to their preparation and idea formation. *See* STI 2008 FINAL REPORT, *supra* note 5, at app. A, at iv.

66. We assigned a week of the summer to each of these themes—for example, criminal justice or children's rights—with the first week's conversation focused on general consideration of "theory and practice," and the last week devoted to "reflections on social change."

67. David Miller, *Cosmopolitanism: A Critique*, 5 CRITICAL REV. INT'L SOC. & POL. PHIL. 80 (2002); Thomas Pogge, *Comopolitanism: A Defence*, 5 CRITICAL REV. INT'L SOC. & POL. PHIL. 86 (2002).

68. Miller, *supra* note 67, at 82 ("It's not that I lack any responsibilities to the distant child. But nearly everyone thinks that I have a much greater responsibility to my own child, or to one I am connected to in some other way. . . . This is the point that ethical cosmopolitans miss when they slide from saying that every human being has equal moral worth to saying that *therefore* we are required to treat all human beings equally, in the sense that we have the same duties to each."); Pogge, *supra* note 67, at 89 ("We have a negative duty not to impose an unjust institutional order upon *any* human beings—compatriots or foreigners. We citizens of the powerful democracies would be violating this duty if we used our overwhelming military and economic superiority to impose an unjust institutional order upon the rest of the world or any party thereof.").

69. For the full syllabus of the 2008 Institute, see STI 2008 FINAL REPORT, *supra* note 5, at app. C.

that any kind of critical and social theoretical work, regardless of its political orientation, can help public interest practitioners develop their normative faculties. We also tried to provide balance in terms of the difficulty and accessibility of the texts, structuring the flow of materials so that there were not multiple weeks in a row with very dense readings.

More importantly, we excluded legal theory or works directly addressing the law. We deliberately did not assign any doctrinal theory, critical legal theory, critical race theory, or scholarship published by legal academics. We also did not assign the type of empirical social scientific research that legal realists new and old have argued is crucial to both the theory and practice of law.[70] Instead, we focused on abstract texts that make arguments "about what is just, moral, good, and right"—works that, in Joseph Singer's words, can help law students finish the "because clause."[71] We chose this particular type of reading, which we refer to as "social theory," because of the distinct impact it had on our thinking and practice as clinical law students and full-time public interest lawyers.[72] We wanted to share this experience with the Fellows to demonstrate how engaging with texts that present provocative normative arguments with intellectual rigor and precision can challenge them to improve their thinking about the moral underpinnings of the practice they are entering.

Our approach shares some similarities with the case method and Socratic style of teaching used in the traditional law school classroom.[73]

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70. *See, e.g.*, Brainerd Currie, *The Materials of Law Study*, 3 J. LEGAL EDUC. 331, 332 (1951) (stating that legal realists called "for reorganization of the law curriculum along 'functional' lines and for the broadening of law school studies to include non-legal materials, drawn principally from the social sciences"); Howard Erlanger, Bryant Garth, Jane Larson, Elizabeth Mertz, Victoria Nourse & David Wilkins, *Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 337 ("Like the original Realists, who also sought to use social science in service of advancing legal knowledge, new legal realist scholars bring together legal theory and empirical research to build a stronger foundation for understanding law and formulating legal policy."); Menkel-Meadow, *supra* note 49, at 566 (noting that, for the Legal Realists, law was "a 'social science' of data gathering").

71. Singer, *supra* note 8, at 901–03.

72. *See supra* Part I.C.

73. In the case method, law students are required to learn not from established treatises but by actively engaging with primary case materials and deriving broader legal principles from them. The method was introduced to legal education by Christopher Columbus Langdell, formerly dean of Harvard Law School, in the late nineteenth century to replace earlier models of legal education that were organized around apprenticeships and college-style lectures by part-time practitioners and retired judges. *See* Chase, *supra* note 48, at 329–31. Rather than lecturing students about the formal rules of law, the cases are taught through Socratic dialogue in which professors question, critique, and prod students to pull out for themselves the reasoning underlying a given case or set of cases. *See id.*; Anthony Chase, *Origins of Modern Professional Education: The Harvard Case Method Conceived as Clinical Instruction in Law*, 5 NOVA L.J. 323, 330 (1981) (noting that the Harvard system of legal education was premised on the idea that "[o]nly systematic study of case reports and their mode of reasoning could provide the law student with a professional education").

Part of what makes the case method effective as a pedagogical tool is that, when done well and without "hostility,"[74] it encourages active rather than passive learning. Distilling principles from the ground up, rather than receiving them from the top down, does not teach students "The Law," but it does help them to think through an ever-changing world of legal problems. In this regard, the case method is a very powerful "means of exercising mental muscles and teaching legal reasoning"[75]—an effective teaching tool that even the Carnegie Report has recognized positively.[76] Whereas the case method provides a way to teach analytical precision with rigor, the Institute's method provides a way to teach normative precision with rigor. We provide Fellows with primary texts from which they can make their own connections to legal practice, instead of giving them legal scholarship in which those connections have already been made.[77]

In contrast to the classroom-based case method, however, the Institute's theory-practice approach provides space for reflection while Fellows are practicing, thereby requiring them to stretch their minds even further to connect what is happening on the pavement to the page. As the discussion facilitators for each workshop, we helped Fellows develop these skills for the first time by asking them to engage directly with the theoretical text and identify the lens through which the theorist was asking the reader to view the world. After articulating the lens, we encouraged the Fellows to examine what the existence of that particular way of seeing the world can tell them about their roles as public interest lawyers.

Some of the theories invited self-reflection, while others led the Fellows to discuss public interest law in the context of larger social issues. At most sessions, the Fellows drew provocative connections between the theories they were analyzing and their views about lawyering for social change. This is not to say that the discussions did not fall flat at times—but when they did, we found that the surest way to reengage the group was to ask them to reflect on whether the assigned text spoke to them as lawyers working towards change. We also inserted ourselves into the conversation throughout the summer, drawing on our experiences as full-time practitioners to model how public interest lawyers can employ social

74. Duncan Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION 71, 72–75 (1971).

75. Robert W. Gordon, *The Geologic Strata of the Law School Curriculum*, 60 VAND. L. REV. 339, 342 (2007).

76. *See* SULLIVAN, COLBY, WEGNER, BOND & SHULMAN, *supra* note 9, at 60–63.

77. To be clear, we believe it is important for law students and practitioners to engage with legal scholarship and other forms of non-legal and non-theoretical academic work. However, we have found that non-legal social theoretical texts are very effective for achieving our pedagogical goal of helping Fellows learn to think like public interest lawyers. Sometimes, as will be discussed below, students make connections between these texts and their practice that have been articulated in the legal literature. In those instances, we refer students to legal readings for them to explore further.

theory in their day-to-day practice.

Thus, when Fellows were struggling with Chantal Mouffe's notion of agnostic confrontation,[78] Nisha shared how reading Mouffe led her to question whether she and her non-English-speaking clients were being bold enough in their campaign for improved interpretation and translation services. In Chantal Mouffe's conception of politics, there is a constant, inherent potential for conflict because of the plurality of collective identities that human beings share, as a result of which "we are always dealing with the creation of a 'we' which can exist only by the demarcation of a 'they.'"[79] Nisha referenced this portion of Mouffe's text during the group discussion and then began to tease out its implications for the campaign for improved interpretation and translation services, which had been framed as a fight for language *access*—a fight to allow the "we" to be part of "they." Nisha explained that after reading Mouffe, she could imagine a more aggressive framing of her campaign, in which linguistic difference is treated as central to collective identity, and the demand for language assistance services is meant to foster equity between "we" and "they" rather than assimilation. By modeling the connections between social theory and practice in this way, we were able to move participants away from an academic quest for the "right" answer and refocus them on the question of how a theory might be in conversation with their practice.[80]

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78. CHANTAL MOUFFE, ON THE POLITICAL 10–19, 29–34 (2005). In these excerpts, Mouffe argues against a consensus-based vision of global democracy in which individuals freed of their communal ties, differences, and partisanships engage in rational deliberation toward a common goal. Instead, Mouffe argues that politics is characterized by conflict, not consensus, and that the task of those concerned with political issues is to create spaces where such conflict can be openly engaged.

79. *Id.* at 15.

80. In addition to drawing explicit connections between the theory and our practice, we would point out to Fellows when we discovered insights within the texts that were new or different from when we had read the text previously. Thus, in the Mouffe example, Nisha noted how she had read Mouffe with our practitioner theory group the previous year, but at the time she had not drawn much significance from the "we/they" distinction. When she re-read that portion of the text in preparing for the Institute, however, the nature of her legal practice had changed, and she found that elements of the text seemed more significant and clearer to her because of the way in which they seemed to resonate with her current practice. Fellows could thus see how the engagement with theory was an ongoing one, and how changes in practice could shape new understandings of the text which, in turn, could provoke new questions about the practice. Indeed, during the Mouffe discussion, once Fellows were able to see how one full-time practitioner was able to link the theory to practice, they began to open up to similar connections in their own lives and work. The Fellows began to explore the relationship between Mouffe's we/they distinction and the adversarial process of litigation. They also began to unpack whether, as students at public interest organizations, they saw themselves as being oppositional to students who chose to work at corporate law firms, and whether the creation of such a we/they distinction was inevitable to the process of forging a public interest identity. While Mouffe had nothing explicit to offer the Fellows about the law or legal practice, their facilitated reading of the text allowed them to draw intriguing connections between the theory and their lives as public interest practitioners.

At the end of the inaugural summer, the Fellows completed an online, anonymous survey. The participants were nearly unanimous in their conclusion that the Institute allowed them to reflect upon their own public interest work in ways that they would not have otherwise been able to over the course of the summer.[81] The Fellows found themselves engaging in self-critique and forming nuanced ideas about the work that they were assigned as interns. One Fellow's response reflected a number of themes mentioned by other students:

> "Participating in [the Institute] had a very noticeable impact on how I viewed my role as a public interest lawyer-in-training this summer. Our readings and conversations made me . . . much more conscious about the choices I was making as I represented my organization to our clients and as I collaborated with our clients as part of their legal team . . . . On a larger scale, my participation in [the Institute] gave me some of the language and ideas I needed to think more broadly about the justice system my organization was working within; it gave me ways to voice my dissatisfaction and to think creatively about alternative solutions to the problems I saw. Because of [the Institute], my critique became productive, rather than simply a negative reaction."[82]

Many students described a similar phenomenon: discussing theory during the Institute meetings gave them the space to think more critically about their public interest work, and, in turn, that critical thinking created renewed excitement about the possibility of social change through the law.[83]

As we hoped, many Fellows discovered from their experiences not only that abstract, social theory can be useful as a practitioner, but also that theory is important to being an innovative and engaged public interest lawyer. In this vein, one student's response regarding the relationship between theory and practice was particularly thoughtful:

> "I would say that I came away from this summer believing that theory is crucial to my thoughtful and productive practice in public

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81. For the complete results of the anonymous evaluation, see STI 2008 FINAL REPORT, *supra* note 5, at 3.

82. *Id.* at 3–4 (second and third alterations in original).

83. While the Fellows are students and have not yet begun their full-fledged public interest careers, their experiences demonstrate the connection between combining abstract theory with practice and the sustainability of a public interest career. As one student wrote:

> "[The Institute] has reinforced to me the importance of connecting the day-to-day practice with theory, and the benefit of doing so in a supportive group. I think this would really help prevent 'burn out' and would help keep our priorities in check, instead of having our priorities dictated solely by the agenda of our individual organizations at the expense of the larger picture."

Id. at 4.

> interest law. Theory can help identify what justice looks like or should look like, and to whom, potential ways to achieve social justice, potential threats to achieving it, and how various parties or stakeholders might interact during that process, among many other things. . . . Practice can ground theory, in terms of who reads the theory and how it can impact practitioners' work. I would not suggest that theory should not expand beyond what is currently thought to be relevant or possible, just that practice can offer theory some perspective in terms of audience and strategy. . . ."[84]

Coming to such conclusions about the ways in which theory can lead to social change through lawyering is difficult without a structured, open space for discussion outside of the Fellows' own public interest organizations. As this same student commented:

> "Theory can seem far away from practice, particularly when it is dense or when it offers a program that seems unrealistic. Having a group of peer practitioners with whom to discuss it made it much more possible to see how it might impact my work or my ideas about public interest law in general."[85]

B. Integrating Theory and Practice: Three Illustrations

To better illustrate the Institute's theory-practice method and the impact it had on participants, we now turn to three examples of how Fellows engaged with specific theories in light of their experiences working full-time in public interest internships. The Fellows' reactions to three theorists—Michel Foucault, Friedrich Hayek, and David Couzens Hoy—demonstrate a range of ways in which the method of reading theory as practitioners enabled the Fellows to develop their capacity for thoughtful public interest practice. Grappling with difficult, value-laden texts independently and then as a group, the Fellows sharpened their capacity for and comfort with rigorous normative arguments.[86] Because the Fellows struggled with these abstract normative claims while immersed full-time in practice, the theory was enlivened by experience and provided a framework within which to understand that experience. Indeed, in the

84. *Id.* at 5 (alterations in original).

85. *Id.*

86. *Cf.* Singer, *supra* note 8, at 904 ("[Law students] quickly learn to make sophisticated arguments about interpreting precedent and statutes, making analogies and distinguishing cases, debating the judicial role (active or restrained), and discerning the advantages and disadvantages of rigid rules versus flexible standards. . . . But students are mute when I ask them to make or to defend arguments based on considerations of rights, fairness, justice, morality, or the fundamental values underlying a free and democratic society.").

best moments of the Institute, the distinction between theory and practice all but vanished.

1. *Michel Foucault*

The Fellows read an excerpt from the chapter entitled "Illegalities and Delinquency" in Michel Foucault's *Discipline and Punish* during the second week of the Institute.[87] This encounter with Foucault's writing early on in the summer revealed the questioning and self-critique that flow from reading a work of critical theory while engaged in day-to-day lawyering for social change. "Illegalities and Delinquency" is one of the final chapters of *Discipline and Punish*, Foucault's genealogy of the shift at the end of the eighteenth century from the practice of state-sponsored public torture ("punishment-as-spectacle") to the modern prison state.[88] In this chapter, Foucault suggests that the expansion of the prison and police systems in the modern period created a class of individuals labeled as "delinquent," and, through that labeling, relegated to lives of delinquency.

When many of the Fellows encountered Foucault for the first time, their natural reaction was to take the reading at a descriptive level, asking whether Foucault's explanation of the function of prisons in modern society rang true.[89] A majority of the Fellows' response papers began, for instance, by reacting to Foucault's description of the rhetoric surrounding the development and expansion of prisons. Specifically, several of the Fellows reacted to what Foucault calls "utopian duplication": the process through which reformers denouncing the failure of the prison nevertheless solidify the function of the prison as an apparatus used by the dominating classes to define a subclass of delinquents as "other."[90] According to Foucault's account, reformers have, time and again, issued the same "monotonous critique" of prisons as ineffective either at rehabilitating prisoners or curtailing crime.[91] As a result, "[t]he answer to these criticisms was invariably the same: the reintroduction of the invariable principles of penitentiary technique."[92] For Foucault, utopian duplication flows from this discourse—he sees calls for prison reform as part of the carceral system itself. Reformers thereby reinforce this hegemonic system

87. *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 257–92 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975).

88. *See id.* at 3–31.

89. Many of the Fellows had little or no background in social or critical theory before participating in the Institute. Specifically, eleven of the twelve Fellows described their background with social/critical theory as limited to one to two classes in college. *See* STI 2008 FINAL REPORT, *supra* note 5, at app. A, at ii.

90. FOUCAULT, *supra* note 87, at 264–71.

91. *Id.* at 268.

92. *Id.*

by encouraging the dominating classes to rework their methods of labeling others as "delinquent" under the illusion of idealistic public policy.

Upon reading this description of the rhetoric of reform, a number of Fellows recognized "utopian duplication" in the ways that practitioners with whom they interacted spoke about criminal justice. For example, one of the Fellows had been working on litigation relating to government raids on businesses suspected of employing undocumented workers. This Fellow drew parallels between Foucault's description of "utopian duplication" and how reformers were talking about the "failures" of U.S. immigration policy.[93] More generally, Foucault's argument raised questions for the Fellows about how best to articulate their goals as practitioners in a world in which power struggles are so often hidden beneath policy arguments based on normative principles.[94] Foucault's writing thus enabled the Fellows to explore connections between how we talk about legal systems and the hidden functions of those systems, between policy arguments and actual change.

Foucault's concept of power in relation to the production of delinquency proved relevant not just for those Fellows working at organizations focused on the criminal justice system, but for all the Fellows interested in maintaining a critical eye towards the possibility of social change through the law. When it came to discussing these concepts as a group, the Fellows engaged in more intense reflection about how Foucault's critique of the discourse of reform could or should affect their roles as public interest lawyers, some of which involved advocating for reform of public institutions. A number of Fellows expressed concern about the lack of agency afforded in *Discipline and Punish* to individuals working within the system, and they took note of the implication that lawyers may not have the agency or capacity to change the system within which they operate. As one Fellow articulated in his written response: "In Foucault's world neither the judge (who seems to be a mere cog in the bureaucratic wheel) nor the accused (whose delinquency is the creation of the administrative system) considers questions of individual fairness and justice. They are both chess pieces within a broader power struggle."[95]

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93. This Fellow wrote in her response paper that "the 'exploitation of illegalities,' in terms of immigration has allowed business owners and the government to profit off of the cheap(er) labor of undocumented immigrants while managing to manipulate and pass off the 'criminal' responsibility onto the immigrant population." Harv. Law Sch. Summer Theory Inst. 2008, Response Paper No. 0207 (on file with authors).

94. *See* FOUCAULT, *supra* note 87, at 272 (describing how reformers' "apparent cynicism of the penal institution" can be seen as part of the larger "mechanisms of domination" represented by penality).

95. Harv. Law Sch. Summer Theory Inst. 2008, Response Paper No. 0203 (on file with authors). *See also* FOUCAULT, *supra* note 87, at 282 ("Judges are the scarcely resisting employees of this apparatus. They assist as far as they can in the constitution of delinquency, that is to say, in the differentiation of illegalities, in the supervision,

This Fellow then wondered at the end of his response, "What position are we in as lawyers, players that Foucault seems to indicate are mere helpless pawns in the system of incarceration and surveillance, to ensure that people accused by our criminal justice system receive a just outcome?"[96] Another student, who worked with children in the juvenile justice system, was bothered by the lack of agency that Foucault ascribes to "delinquents," writing:

> Foucault leaves little room for the individuality of the delinquents themselves, given their primary role as a source from which the ruling class derives its power and dominating status. Reading this section, I find myself thinking that Foucault's description appears to deny potential delinquents agency or decision-making power. He portrays them as a symptom or result of a larger power struggle. Within Foucault's framework, it appears that there is little point in advocating on behalf of individual clients who might enter or have come from the prison system.[97]

This Fellow's reading of Foucault was particularly problematic for her work because she was interning for the summer at an organization that practiced "client-centered advocacy," one central goal of which is the preservation of client autonomy and agency.[98]

Indeed, Foucault's genealogical explanations in *Discipline and Punish* pose a famous problem for individuals trying to use his theory to work towards social change; namely, that it is difficult to locate examples of individual or collective agency in his work, in which even the powerful do not deliberately wield their power. Discipline is used and policies are intended to reinforce power structures, but we are left to speculate as to the identity of the subjects doing the using and the intending.[99] In

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colonization and use of certain of these illegalities by the illegality of the dominant class."); *id.* at 281–82 ("[A]ll the results of non-rehabilitation (unemployment, prohibitions on residence, enforced residences, probation) make it all too easy for former prisoners to" become prisoners again.).

96. Response Paper No. 0203, *supra* note 95.

97. Harv. Law Sch. Summer Theory Inst. 2008, Response Paper No. 0206 (on file with authors).

98. *See* Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 371–72 (2006).

99. A number of critics, as well as fans, of Foucault have noted this initial problem with his work in *Discipline and Punish*. *See, e.g.*, DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 170 (1990) ("[Foucault's] failure to identify agents and decision-makers—or even any recognizable process of policy-making—makes it difficult to accept his use of terms like 'strategy' and 'tactics', even though these terms are often crucial to his argument."); CORNEL WEST, *On Prophetic Pragmatism*, *in* THE CORNEL WEST READER 149, 163 (1999) ("By downplaying human agency—both individual and collective human actions—Foucault surreptitiously ascribes agency to discourses, disciplines and techniques."); David Ingram, *Foucault and Habermas on the Subject of Reason*, *in* THE CAMBRIDGE COMPANION TO FOUCAULT 215, 236 (Gary Gutting ed., 1994)

addressing this aspect of the theory, the Fellows confronted a problem particular to the experience of reading Foucault while practicing public interest law full-time—they were reading a theory that, at first glance, did not appear to give them individual agency as lawyers and denied agency to their clients as well. The question was asked, not so subtly: how can this theory be useful as we act in the real world of public interest lawyering? Although the Fellows did not reach a definitive resolution by the end of our discussion that week, they had discovered that responding to a claim that one lacks agency to change the world can itself be an agency-generating exercise.

A detailed look at one student's experience helps illustrate this phenomenon. Anthony was a Fellow during the summer after his 1L year, during which he participated in an internship at an organization committed to representing "only those clients who are actually innocent of the crimes for which they were convicted."[100] He spent much of his summer reading through case files to find people with strong innocence claims and assisting attorneys writing articles about policies and procedures that lead to wrongful convictions.[101] Early in his summer with the Institute, Anthony found that reading Foucault changed his perspective on the work he was doing. The week after reading *Discipline and Punish*, Anthony was asked to assist with the writing of an article at his organization about a particular criminal procedure and its effect on wrongful convictions. As Anthony did this work, he found that our discussion of the ways in which power permeates policy decisions affected his approach to the project—he began to think about the interaction between power structures and institutional reform, and found himself critiquing his organization's focus on actual innocence at the expense of exploring power inequalities that criminal procedures perpetuate.[102]

(noting that in *Discipline and Punish* and other of Foucault's "positivistic" writings, "the agent is a wholly determined object" and "individual autonomy is but an illusory mask concealing coercively programmed ethical roles"). It is important to note in this context that, for Foucault, power is not synonymous with agency. For instance, Foucault is clear in his contention that power can be exercised by the dominated. *See* FOUCAULT, *supra* note 87, at 27 ("[P]ower is not exercised simply as an obligation or a prohibition on those who 'do not have it'; it invests them, is transmitted by them and through them; it exerts pressure upon them, just as they themselves, in their struggle against it, resist the grip it has on them.").

100. *See* Anthony Kammer, The Exoneration Initiative—A Case Study 1 (Aug. 2009) (on file with authors).

101. *Id.* at 5.

102. Telephone Interview with Anthony Kammer, former Harvard Law Sch. Summer Inst. Fellow (Dec. 22, 2009). These critiques of the innocence movement, which Anthony reached on his own through his reading of Foucault, are certainly echoed elsewhere. *See, e.g.*, Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587 (2005). For our purposes, the significance of Anthony's critique is that he reached it independently, while immersed in practice, and without the

Anthony also found himself making similar observations about his individual casework at his internship, especially the task of screening the many letters sent to the organization by inmates asking for help. As he describes it, having our discussions of Foucault fresh in his mind did not give him any answers as to what to do when screening these cases, but rather gave him "the humility to think about" what he was doing and whether it was what he "want[ed] or should be doing."[103] Ultimately, Anthony decided that he "wanted to be at a place that would have a different impact on society, at a place where there would be more structural change rather than individual advocacy. The theory made me realize that I wanted to have more of an impact."[104] In the short term, then, reading Foucault gave Anthony the confidence to think about issues of power in relation to his work and to take risks by expressing his doubts about his organization's methods, even as an intern. Anthony believes that his experience with the Institute, and especially his reading of Foucault, also had an effect on his long-term career goals, steering him towards a job examining larger structural issues with the criminal justice system rather than focusing only on wrongful convictions.[105]

Anthony's experience demonstrates that once the Fellows began to ask questions about power and agency in our group discussion, they were able to turn their own versions of Foucault's theory towards themselves and reflect critically on their own public interest practice. Before the Fellows read *Discipline and Punish* and discussed it with a group of peer practitioners, they may not have been thinking about whether or not they had individual agency in their capacities as lawyers—more likely, as students of an elite law school, they assumed that they did. They also may not have probed as deeply, if at all, the extent of their clients' autonomy or the validity of long-established advocacy models. Yet these kinds of issues are precisely the ones that emerge in the "real world" of public interest law, and law students often feel ill-prepared to confront them. The Fellows thus gained exposure to the type of contextualized, normative thinking necessary to be effective lawyers for social change, and, like Anthony, they gained the courage to ask out loud the difficult questions that followed.

2. Friedrich Hayek

A second particularly fruitful discussion revolved around the Fellows' reading of a chapter of Friedrich Hayek's *The Mirage of Social Justice*.[106]

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benefit of having it presented to him before experiencing the work on his own.

103. Telephone Interview with Anthony Kammer, *supra* note 102.

104. *Id.*

105. *Id.*

106. FRIEDRICH A. HAYEK, *'Social' or Distributive Justice*, *in* 2 LAW, LEGISLATION

In this book, Hayek vigorously rejects the ideas about justice that motivated most, if not all, of the Fellows' public interest work. Reading the text thus generated, in the beginning, predominantly negative reactions. Nonetheless, working through their instinctive reactions to Hayek's views on social justice forced the Fellows to confront the motivations and justifications that drew them to the full-time practice of public interest law.

In the chapter that the Fellows read, Hayek presents an unsparing critique of the idea of "social or distributive justice," which he sees as a fundamental misunderstanding of what it means to pursue change in the "public interest."[107] Hayek argues against efforts by progressive reformers to equate justice with equality or to ensure equality—or justice—via the collective redistribution of economic resources through government channels.[108] Instead, he urges reliance on the "spontaneous ordering" of free markets, which, for him, represent the culmination of a process through which society's customs and culture have carefully developed over time so as to benefit the greatest number of people in the most efficient ways.[109] Hayek argues that the natural, market-driven distribution of resources is not the result of deliberate individual actions, but of greater market forces. As a result, "[t]o demand justice from such a process is clearly absurd, and to single out some people in such a society as entitled to a particular share evidently unjust."[110]

We chose to read Hayek so that the Fellows could reflect on the role that class plays in their work by examining Hayek's critique of efforts to remedy class inequalities through redistribution. Hayek's work is also relevant to the Institute's mission of developing a conversation between theory and practice, for Hayek's larger goal was to demonstrate the importance of abstract rules and theoretical thinking when designing legal and political systems; as a result, he subjected his theories to rigorous self-critique.[111] According to Hayek, "we can protect ourselves only by subjecting even our dearest dreams of a better world to ruthless rational dissection."[112]

As law students with distinct commitments to their own notions of

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AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE 62 (1976).

107. *Id.* at 62–100.

108. *Id.* at 86 ("[D]istributive justice . . . is . . . irreconcilable with the rule of law, and with that freedom under the law which the rule of law is intended to secure.").

109. *Id.* at 62.

110. *Id.* at 6–7, 65.

111. Throughout *The Mirage of Social Justice*, Hayek attempts to undermine what he sees as the intellectual errors of proponents of distributive justice with logical argument and critique. *See e.g.*, *id.* at 136 (arguing that socialism is "based on an intellectual error which makes its adherents blind to its consequences").

112. *Id.* at 67.

social justice, the Fellows' initial reactions to Hayek were sweeping and dismissive, with many finding Hayek to be as clearly absurd as he believes the term "social justice" to be. In their written responses, the Fellows primarily engaged with Hayek's claim that efforts at distributive justice inevitably interfere with an ordered world that evolves naturally to the benefit of all. In other words, the Fellows began their responses by disagreeing with Hayek's main premises—a disciplined, rational way to begin engaging with the text, but one that did not lead to especially nuanced critique. As one Fellow wrote, quite logically:

> Any challenge to this author's paper, and to its doctrines, necessitates a challenge to the author's postulates, and how they are formulated. If one accepts the author's positions with regard to the ultimate desired end, one is forced to agree—therefore, if one disagrees (as do I), the appropriate response is to challenge the author's premises.[113]

Another Fellow put it more succinctly: "This Hayek reading really got my goat! . . . I think it's important to question Hayek's starting point . . . ."[114]

Invariably, the Fellows found that they had difficulty drawing lessons from Hayek's theory when engaged in such full-scale disagreement with its fundamental premises. More than in any other week, the initial written responses submitted by the Fellows to the Hayek reading lacked substantial reflection on the relationship between the text and the Fellows' actual public interest practice. It is not that the Fellows did not try to draw lessons from the reading—indeed, it was their assignment to do so every week—but they also commented that they were unable to locate prescriptions for themselves within Hayek's theory.[115]

The Institute's method of discussion, however, eventually allowed the Fellows to reach a more incisive understanding of how Hayek could be of use to them. When the Fellows met in person to discuss their reactions to the text, the conversation moved away from the theoretical disagreements that had been the subject of the written responses and focused instead on Hayek's description of the ways in which people cling to notions of "social justice" that may, when analyzed closely, turn out to lack a specific or universal meaning. As Hayek writes, "Though people may occasionally be perplexed to say which of the conflicting claims advanced in [social

113. Harv. Law Sch. Summer Theory Inst. 2008, Response Paper No. 0606 (on file with authors).

114. Harv. Law Sch. Summer Theory Inst. 2008, Response Paper No. 0610 (on file with authors).

115. One Fellow commented, for example, that one of the reasons she felt "disappointed" by the Hayek reading was because she found no lessons she could take from it. Harv. Law Sch. Summer Theory Inst. 2008, Response Paper No. 0605 (on file with authors).

justice's] name are valid, scarcely anyone doubts that the expression has a definite meaning, describes a high ideal, and points to grave defects of the existing social order which urgently call for correction."[116] One student suggested that it could be worth examining whether public interest lawyers fit Hayek's description, assuming that they held shared conceptions of social justice that were just and good and definite.

In the interest of exploring that question, we asked the Fellows to think about whether their organization characterized social justice with a "definite meaning" or "high ideal"; and, if so, whether that "definite meaning" was discussed explicitly within the organization or was part of a more subtle, underlying belief structure. Some Fellows were frustrated to discover that their public interest organizations did not have clear conceptions of social justice, or that a concept was never expressly articulated. Others found that their organizations did have well-formed ideas of social justice but were uncomfortable with how uncritically those ideas were absorbed and propagated or how narrowly the idea of "social justice" was defined. As facilitators, we shared with the Fellows our own discoveries that our organizations had either amorphous or avowedly uncritical views on social justice. After breaking down the definitions of social justice employed by their own public interest organizations, the Fellows truly began to contextualize the theory that they were reading in relation to their own, concrete practices. The Fellows moved beyond simply dissecting the meaning of Hayek's theory; instead, they began to use his theory to help them clarify the purposes behind their own forms of practice and their own ideas of justice.

After sharing their realizations about their organizations' relationships to the term "social justice," many of the Fellows began to take Hayek's critique of the term more seriously, resulting in a sharper and more productive discussion of the term "social justice." Jumping off from their own experiences, the Fellows found buried within their organizations' mission statements and attitudes a discrete and discernable "other," or enemy, who was to blame for the injustice that the organization sought to remedy. The Fellows discussed how this tendency to pinpoint an opponent contrasted with Hayek's argument that, though many people suffer within a free market system, it is rarely possible to blame particular individuals for that outcome.[117] Teasing through Hayek's arguments, the students thus took a text that they would have otherwise dismissed and drew from it lessons for both their theory and their practice. As one Fellow commented

116. HAYEK, *supra* note 106, at 66.

117. *Id.* at 69–70 ("We are of course not wrong in perceiving that the effects of the processes of a free society on the fates of the different individuals are not distributed according to some recognizable principle of justice [but w]here we go wrong is in concluding from this that . . . somebody is to be blamed for this.").

later: "'Our discussion on the definition of social justice was a perfect example of how we can bring theory to bear on our work. This involved engaging the reader, thinking about an issue and then discussing it in the context of what we were doing everyday.'"[118]

Grappling with Hayek's theory of social justice allowed the students to confront aspects of their own work that made them uncomfortable—even if, in the end, they still rejected many of Hayek's conclusions about social policy.[119] Analyzing their own organizations' definitions of social justice forced the Fellows to figure out whether they, as public interest lawyers-to-be, could satisfactorily articulate a conception of social justice that they could justify and with which they could expect others to agree. Failure to find a definite concept of "social justice" need not lead to defeat, but the discomfort that it causes can move a public interest lawyer to set aside automatic references to a vague concept of "justice" and instead search for a more refined description of her work and her goals.[120]

It is this discomfort that led one Fellow, David, to begin asking difficult questions about his role as a legal intern in relation to the clients he worked with at a community-based non-profit organization committed to "community lawyering." At its core, community lawyering is an approach to the practice of law that calls upon lawyers to question their dominance in the process of social change by, among other things, emphasizing the need for lawyers to be thoughtful about their role vis-à-vis their clients.[121] For David, discussing Hayek's theory made the critical

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118. *See* STI 2008 FINAL REPORT, *supra* note 5, at 2.

119. Interestingly, this is a conclusion that a number of legal scholars have reached as well. *See, e.g.*, Samuel Taylor Morison, *A Hayekian Theory of Social Justice*, 1 N.Y.U. J. L. & LIBERTY 225, 225–27 (2005); Brian A. Tamanaha, *The Dark Side of the Relationship Between the Rule of Law and Liberalism*, 3 N.Y.U. J. L. & LIBERTY 516, 532–47 (2008) (describing the inextricable connection between Hayek's theories of the rule of law and of social justice, and concluding that Hayek's use of liberalism to restrict the valid use of government to redistribute wealth in the name of the rule of law is itself the "dark side of the rule of law").

120. This kind of rigorous self-critique becomes all the more important if one takes seriously Hayek's claim that "the conviction that one is arguing in a good cause [can] produce[] more sloppy thinking and . . . intellectual dishonesty than perhaps any other cause." HAYEK, *supra* note 106, at 80. Indeed, it is possible to agree with this statement and still disagree strongly with Hayek's underlying premises and ultimate conclusions.

121. *See, e.g.*, Raymond H. Brescia, Robin Golden & Robert A. Solomon, *Who's in Charge, Anyway? A Proposal for Community-Based Legal Services*, 25 FORDHAM URB. L.J. 831, 832 (1998) ("A community-based program will avoid the top-down, lawyer-dominated priorities that we believe now exist."); Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 450–69 (2001) (outlining the emergence of community lawyering out of a critique of lawyer-centered public interest advocacy); Zenobia Lai, Andrew Leong & Chi Chi Wu, *The Lessons of the Parcel C Struggle: Reflections on Community Lawyering*, 6 ASIAN PAC. AM. L.J. 1, 28 (2000) ("To be effective, community lawyers should be cognizant about presumptions they may have about the community they serve."); Gerald P. López, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603, 1608 (1989) ("[T]hose

posture of community lawyering—and the challenges of the community lawyer's role—more intuitive and real. David explains that, "coming in, I expected that [the Institute] would give me tools for how I wanted the world to look, but I actually ended up thinking about my own role, and how I interacted with other attorneys, clients, and community members."[122] David became particularly interested in the tension between his desire to help underprivileged communities change hierarchies around them and the risk of perpetuating hegemonic structures by coming into a disenfranchised community from a position of privilege. Reading Hayek thus pushed David to be more self-reflective about the assumptions that informed his economic justice work. He brought this self-criticism into his internship. David remembers the discomfort that he felt when he went to work the day after the discussion, asking himself what he should do now that his notion of social justice had been called into question. This discomfort spurred David to explore ways in which he could *act differently* as a result of his awareness of his position of privilege, rather than just think about it.[123]

By struggling through their initial reactions to Hayek, David and the other Fellows demonstrated how theory can help public interest practitioners locate and question embedded assumptions about themselves and their work, but only when they move beyond their initial reactions and towards a deep engagement with that theory. Once again, the Fellows discovered that a theory does not have to provide a prescription with which they agree in order for it to be useful. The Fellows did not necessarily "buy into" the theories or remedies proposed by either Michel Foucault or Frederich Hayek. Instead, they found those theories were the most useful when they created a sense of discomfort that inspired them to remain self-critical and open to new ideas, new actions, and the overlapping of the two.

3. David Couzens Hoy

In the last session of the summer, the Fellows transformed this sense of discomfort into a sense of responsibility to retain a critical stance towards their work. At this final session, the Fellows discussed an excerpt from David Couzens Hoy's *Critical Resistance*, a challenging work in which Hoy explores the ways in which the writing of post-structural thinkers such as Foucault allows for the possibility of active, critical

operating in the rebellious idea of lawyering must situate their work in the lives and in the communities of the subordinated themselves, constantly re-evaluating the likely interaction between legal and 'non-legal' approaches to problems.").

122. Telephone Interview with David Seligman, former Harvard Law Sch. Summer Inst. Fellow (Dec. 22, 2009).

123. *Id.*

resistance in the world.[124] In *Critical Resistance*, Hoy explores whether social theories traditionally labeled "post-structuralist" provide an opportunity for individuals to resist power and domination in a way that "is not merely reactive" but instead is "able to identify its injuries and to articulate its grievances."[125] We asked the Fellows to read an excerpt in which Hoy analyzes how the work of Michel Foucault, particularly *Discipline and Punish*, allows for this kind of critical resistance. We chose this reading because it enabled the Fellows to re-engage with Foucault at the end of their summers through a theorist who is explicitly concerned with the use of theory to create social change. The Fellows' reactions to Hoy's text led to a session that was, by far, the most exciting discussion of the summer. With nine weeks of the Institute's theory-practice method behind them, the Fellows were able to re-engage with a theorist whom they had encountered earlier in the summer and use his ideas to begin formulating a more nuanced sense of responsibility through self-critique.

In approaching Foucault's work, Hoy's central inquiry is "whether [Foucault's] theories . . . account for the possibility of critical resistance to domination given that their concrete analyses are often assumed to portray individual agents as powerless and ineffective in bringing about social transformation."[126] Hoy argues that these analyses can generate resistance by showing the historical conditions under which these systems of power and subjugation came to be. For Hoy, the usefulness of Foucault's theory for someone trying to work towards social change comes from its "reduc[tion of] the power that the illusion of ahistorical inevitability would otherwise have over us."[127] Hoy thus takes Foucault's description of a world in which the powerful inevitably dominate over the less powerful and tells us that even if that description feels true, we can still use that realization to reduce inequalities: "there is no society without power relations and without some domination, [yet] it can still have the emancipatory aspiration of reducing the asymmetrical relations of domination to a minimum."[128]

Many of the Institute's Fellows recognized that, for a lawyer working within a legal system that seems to entrench rather than reduce inequality, recognizing the forms of domination at play around her and her clients can serve an emancipatory function. The process of identifying when the structures of domination around us limit opportunity does not require that

124. DAVID COUZENS HOY, CRITICAL RESISTANCE: FROM POSTSTRUCTURALISM TO POST-CRITIQUE (2004).

125. *Id.* at 6. Hoy discusses in detail the possibility of critical resistance in a number of social theorists, including Friedrich Nietzsche, Pierre Bourdieu, Emmanuel Levinas, and Jacques Derrida. *See generally id.*

126. *Id.* at 59.

127. *Id.* at 68.

128. *Id.* at 83.

we surrender to that domination or give up on the possibility of working toward social change. Indeed, the Fellows realized that they could use their recognition of the limits of the system to challenge those very limits. What begins as an abstract exercise can transform into a basis for reinvigorated action when a lawyer meets with a client, enters a courtroom, or sits down with colleagues to devise the strategy for a campaign.

The Fellows thus found inspiration in the idea that, by uncovering hidden meanings in the world, critical theory can help free up room to think and speak in innovative ways. This concept was particularly relevant in light of the excerpt from *Discipline and Punish* the Fellows had read earlier in the summer, in which Foucault explores the role that prison reformers play in the establishment and reproduction of the disciplinary penal system he critiques. As many Fellows recognized, Foucault's theory suggests that everyone who interacts with the prison system is complicit in its forms of domination.[129] At the same time, recognition of the system's forms of domination gives those very people a unique power to resist and make change from within.[130]

Conceptualizing theory in this way, one need not agree entirely with Foucault's analyses in order to use them. For example, one Fellow wrote that she took from her reading of Hoy and Foucault a desire to adopt a "vigilan[ce] against co-optation" as a public interest lawyer, despite her sense that Foucault's claims about the entrenchment of power may be slightly exaggerated.[131] This Fellow, Julia, felt that by engaging with Foucault's viewpoint, recognizing some disagreement, and then going to work the next day, she would do her work with a heightened "vigilance."[132] Julia felt that the lawyers at the public interest organization where she worked were so "narrowed to a tiny mission" that they had lost the ability to critique the ways in which their mission—to defend the rights of children at all costs—impacted families and communities of color.[133] For the first time, Julia began to have disagreements with other public interest students and lawyers about how they approached their work; yet she found that these conversations were "constructive, mak[ing] me a more effective advocate."[134] Julia believes that her participation in the Institute led her to change career paths within the world of public interest law by pushing her

129. *See supra* Part II.B.1.

130. *See* HOY, *supra* note 124, at 81 (discussing the "strategy of turning the system back against itself").

131. Harv. Law Sch. Summer Theory Inst. 2008, Response Paper No. 1202 (on file with authors).

132. *Id.*

133. Telephone Interview with Julia Hildreth, former Harvard Law Sch. Summer Inst. Fellow (Dec. 22, 2009).

134. *Id.*

to search out a type of advocacy, indigent defense, in which disagreements were welcome and even encouraged. As she explained:

> [T]hose of us who go into public interest [law] have a very constructed mindset about what you believe in, what you care about. And the only way I've found to break through that and challenge my own rigid belief system is to look at theory—otherwise I get too comfortable in my own mindset.[135]

The primacy of the vigilance that Julia recognized can only last for so long. For a public interest lawyer, "vigilance against co-optation" is most useful—and most powerful—when one is in the midst of practice. In our experience as practitioners, we have found that our fellow public interest lawyers are often too quick to reject abstract principles as irrelevant and theoretical critique as vapid. The Fellows came to a different conclusion than those practitioners about the role that theory could play in their public interest work; many of them highlighted their agreement with Hoy's pithy comment and nod to Kant that "critique without resistance is empty and resistance without critique is blind."[136]

Nonetheless, in attempting to theorize from within the systems they were theorizing about, the Fellows were confronted with the difficult question of how to act within a system of domination without perpetuating its power structures. One Fellow grappled with this question in his final response paper, concluding: "Perhaps it is best to see the paradox but not to resolve it—to recognize the importance of criticism as a process that colors our day-to-day practice without providing discreet [sic] notions of how we should pursue our practice."[137] Indeed, as Hoy points out, Foucault himself—albeit in later works—urges his readers to use his "critical ontology of ourselves" not as a "theory" or a "doctrine," but as an "attitude" or an "ethos."[138] When reading theory and remaining critical about the world becomes an ethos, responsibility follows.

By using the work of abstract social theorists like Foucault to reexamine the relationships between themselves and their clients, between their lawyering and the world around them, the Fellows inevitably experienced a renewed sense of responsibility to be self-reflective and

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135. *Id.*

136. HOY, *supra* note 124, at 6.

137. Harv. Law Sch. Summer Theory Inst. 2008, Response Paper No. 1209 (on file with authors).

138. Foucault goes on to explain that what he means by "'an attitude, an ethos'" is "'a philosophical life in which the critique of what we are is at one and the same time the historical analysis of the limits impressed on us and an experiment with the possibility of going beyond [or exceeding] them.'" HOY, *supra* note 124, at 91 (quoting Michel Foucault, *What is Enlightenment?*, *in* 1 THE ESSENTIAL WORKS OF FOUCAULT, 1954-1984: ETHICS: SUBJECTIVITY AND TRUTH 319 (Paul Rabinow ed., Robert Hurley trans., 1997) (alteration in original)).

critically-engaged lawyers. The final written reflection of another Fellow speaks to this point: "There is room for resistance within any power scheme, and with that comes the responsibility of agitation and resistance to the power structures that we face each day."[139] To be sure, we were not the first group of lawyers to explore the uses of Foucault's theories for achieving social change through the law or reflecting critically on their relationships to their clients.[140] Importantly, however, the Summer Theory Institute's Fellows came to these conclusions *on their own*, with only the help of each other and their facilitators.[141]

Through the theory-practice method, the Institute's Fellows went through the intellectual process of understanding and connecting the writing of Foucault, Hayek, Hoy, and the other theorists to their particular experiences, without the benefit of a legal scholar or theorist pointing out the connection for them. As a result, the payoff came not just in their understandings of a particular set of theories, but also in their articulations of their own conceptions of the world, their capacities for critical thinking about their public interest work, and their senses of fulfillment in that work.[142]

CONCLUSION

This article began by situating the Institute's theory-practice method within recent calls for fostering "the moral imagination" of law students and "humanizing" legal education.[143] These calls for a normative turn in legal education are not just about the quality of the education; they are about the quality of the lawyers who emerge from that education.[144]

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139. Harv. Law Sch. Summer Theory Inst. 2008, Response Paper No. 1207 (on file with authors).

140. *See e.g.*, Ascanio Piomelli, *Foucault's Approach to Power: Its Allure and Limits for Collaborative Lawyering*, 2004 UTAH L. REV. 395; Lucie E. White, *Seeking the Faces of Otherness*, *in* LAWYERS' ETHICS AND THE PURSUIT OF SOCIAL JUSTICE, *supra* note 63, at 41.

141. As a whole, the Fellows' interpretations of and reactions to the writing of Michel Foucault and David Couzens Hoy underscored the relevance of their work for practicing lawyers—not just lawyers attempting to craft new methods of advocacy, but also those engaged in more "traditional" methods of public interest lawyering. Our suggestion is not that Foucault's ideas are a perfect fit for all lawyers interested in social change—our Fellows' reactions themselves demonstrated that they are not—but we have no difficulty concluding that the exercise of working through Foucault's and Hoy's ideas was both useful and energizing.

142. While we are focusing here on the benefits Fellows experienced in their practices, which we contend make them more innovative lawyers, in the future we would like to study the impact of the theory-practice method on the students' clients and on legal practitioners who regularly engage with theory.

143. *See supra* notes 7–9 and accompanying text.

144. SULLIVAN, COLBY, WEGNER, BOND & SHULMAN, *supra* note 9, at 4 ("Professional schools are not only where expert knowledge and judgment are communicated from advanced practitioner to beginner; they are also the place where the profession puts its defining values and exemplars on display, where future practitioners can begin both to assume and critically examine their future identities.")

Today, public interest lawyers practice in a world full of daily questions about which clients to serve, what legal methods to use, and what role lawyers can play in bringing about social change.[145] Law students must learn that questions about who, what, where, when, how, and why are an ever-present reality of public interest practice, and they must be taught how to meet the challenges that reality poses.

With the theory-practice method, we propose a strategy for preparing future public interest lawyers to confront the moral, emotional, and intellectual rigors of their chosen profession. One component of our method is providing public interest law students with a space where they can wrestle with complex normative ideas and hone their ability to articulate what they mean when they invoke concepts such as fairness, equality, and justice. The second component is addressing these ideas in the context of public interest practice—not (just) in the classroom, but on the ground. When future public interest practitioners participate in a dialogue between theory and practice, they begin to ask fundamental questions about what it means to be a public interest lawyer; these questions may be sparked by an abstract concept but are sometimes best answered from the context of lived experience. Such questions and answers do not come from any one text, but from the daily interaction of social theory and the practice of lawyering. Indeed, one of the main lessons of the theory-practice method is that theorizing can gain vitality upon exiting the classroom precisely because of its interplay with public interest practice.

We hope that our experiences with the Summer Theory Institute will inspire legal educators and public interest practitioners to find similar ways of stimulating reflective practice among law students planning public interest careers. We believe that the Institute's theory-practice method can be replicated in a wide variety of educational environments, as long as the pedagogical focus remains on creating that space in which students can jump between social theory and practice, drawing their own connections and generating their own inspiration. In transporting the theory-practice method into other settings, we encourage replicators to keep in mind a number of features that we believe are key to the success of the method: our pedagogy;[146] the centrality of practitioners;[147] and the use of social

145. *See* Scott L. Cummings & Ingrid V. Eagly, *After Public Interest Law*, 100 Nw. L. REV. 1251, 1254–55 (2006) (describing the many challenges facing public interest lawyers in the contemporary era).

146. *See supra* notes 75–79 and accompanying text.

147. *Id.* We hope that we have made clear the important benefits of involving practicing public interest lawyers from outside the academy in our pedagogy—involving them not just as supervisors in practice settings, but also as leaders of discussion groups where students grapple with applying theory to practice. Practitioner involvement literally situates these discussions within the world of practice, rather than in that of academia. Law

theory.[148]

With respect to the use of social theory, legal educators have asked us whether our method can be replicated with creative works such as films or poetry. Indeed, we have asked ourselves whether students could analyze works of poetry together and still arrive at similarly inspirational results. While a poetry discussion group might indeed be provocative and valuable for public interest lawyers, the skills being developed may be different, and educators or practitioners seeking to use these media should be attentive to the potentially different pedagogical goals and outcomes.

The questions we have received about whether works of poetry or film can substitute for social theory dovetail with questions regarding the accessibility of the theory-practice method. Specifically, law professors have asked us whether the Institute can realistically be replicated in non-elite institutions, where students may not have backgrounds in or inclinations towards theoretical readings—essentially, readers have asked whether the Institute it is a luxury reserved for elite institutions like Harvard Law School. We believe strongly that our method is not just for privileged students or elite institutions, and that teaching the critical faculties necessary for reflective public interest practice should not be considered a luxury in the budget-strapped world of legal education. The students at the Earle Mack School of Law at Drexel University are proving this point for us. After hearing about the Summer Theory Institute, a group of students began a "Summer Theory Institute" of their own at Drexel.[149] The Drexel Summer Theory Institute is launching in the summer of 2010, co-facilitated by a student, a supportive faculty member,

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professors are certainly capable of leading provocative discussions about practice. But practitioners can explain the importance of an intellectually stimulating practice and model ways of incorporating social theory into practice, so that students can see for themselves how rigorous theoretical discussion need not spring from the academy alone.

148. *See supra* notes 70–74 and accompanying text. Our syllabi may be useful to those wishing to replicate the Institute's method, but there is no need for any particular reading to be included. Instead, we encourage those interested in using the method to select social theories that inspire them, or ones that seem relevant to the work of the participating students.

149. We include the Drexel example within the discussion of accessibility because it was a Drexel faculty member who initially questioned us regarding the accessibility of the method. During a presentation to Drexel's law school faculty, a few faculty members commented that they did not think the method would be appealing to Drexel's students, who do not have the same elite backgrounds as many Harvard Law Students. The same day, we had lunch with a handful of public interest-minded Drexel students, who within days initiated a Summer Theory Institute of their own, craving the critical, reflective opportunities that such a program would allow.

We encourage others who have doubts about the replicability of the theory-practice method to do the same as the students at Drexel and try it first. We ask that anyone replicating the theory-practice method please keep in touch with us so that we can develop a network of similar programs, share ideas, and put students in touch with each other. We can be reached at jocelynsimonson@post.harvard.edu and agarwal@post.harvard.edu.

and a public interest practitioner.[150]

We have argued in this paper that the divide between theory and practice in legal education and legal practice is neither necessary nor useful. However, recognizing this theory-practice dichotomy is only the beginning. As Pierre Bourdieu contends, "To denounce hierarchy does not get us anywhere. What must be changed are the conditions that make this hierarchy exist, both in reality and in minds."[151] The Institute's theory-practice method, in which law students wrestle with abstract theory while engaging in full-time practice, shows law students how combining theory and practice can lead to both personal fulfillment and critical lawyering. It disrupts the separation between theory and practice, both in reality and in their minds.

150. WORKSHOP: Drexel Summer Theory Institute 2010, http://www.kalhan.com/2010/04/drexel-summer-theory-institute-2010/ (last visited Sept. 6, 2010) ("The Drexel Summer Theory Institute is a new initiative for 2010 for Drexel students with public interest law internships in the greater Philadelphia area. The Institute is modeled on a similar program established by two public interest lawyers, Nisha Agarwal and Jocelyn Simonson, for Harvard law students with public interest internships in New York City. Institute Fellows will meet with the facilitators one evening a week to discuss works of social and critical theory as they relate to the Fellows' public interest work. Although the conveners will seek to tailor the readings to the interests of the group, some examples of the kinds of thinkers we might engage with include Michel Foucault, F.A. Hayek, bell hooks, Martha Nussbaum, and Pierre Bourdieu.").

151. Bourdieu & Wacquant, *supra* note 24, at 84. *See also id.* at 181 ("[T]o kill a dualism, it is not enough to refute it—that is a naive and dangerous intellectualist illusion.").