BY JEREMY PAUL

Talk to any practicing lawyer about his or her law school experience and you will hear the same story: "When I graduated, I didn’t know anything about practicing law." It’s a great one-liner that provokes many knowing smiles. It’s also completely ridiculous.

Highlighting the gap between classroom and workplace does capture a well-understood truth. There’s much more to learn about lawyering than one can absorb in three years poring over casebooks. Law schools are wisely moving to speed the learning process with creative new approaches to experiential legal education. And law firms have adopted innovative training programs that introduce new lawyers to subjects often neglected in law schools, such as basic finance and business strategy.

These salutary developments arise from the near universal consensus that many law graduates are unprepared to assume significant client responsibilities from day one.

But the over-emphasis on the divide between theory and practice lurking within today’s calls for law school reform obscures a far more basic reality. Grounding in “theory” is what makes successful lawyering possible in the first place. No one would expect a novice driver to be comfortable merely because she had aced the written driving test. But neither would we let someone get behind the wheel with no knowledge of the rules of the road. Which side of the highway should one drive on? What should she do when a light turns yellow? How far behind should she be from the car ahead of her? Understanding the basic structure of your situation is crucial to the practice of any meaningful skill or profession.

No dean at Northeastern University would question that law schools should go beyond conceptual frameworks to empower students to test drive classroom lessons in clinical and workplace settings. Students here acquire nearly a full year of actual practice as part of the J.D. degree. But law schools that read current conditions as justifying departure from a strong theoretical foundation are making a fatal mistake. Such an approach is reminiscent of newspapers that struggled to streamline and simplify content to compete first with television and then the Internet. Rather than playing up their comparative advantage, they sought to compete solely on their competitors’ turf. Consider the fate of many once proud dailies.

The American Bar Association Task Force on the Future of Legal Education risks taking law schools down this same unfortunate road. Its recent report repeats the frequent criticism that law schools have become too focused on “academic work/scholarship, etc.” and not enough on actual law practice. Implicit in this criticism is the long-standing idea that much of what goes on in law school is focused on “so-called theory” instead of the nuts and bolts of day-to-day lawyering. This critique is perhaps best summarized in the familiar quip: “In theory there is no difference between theory and practice, but in practice there is.”

Where does all this anti-theory bias originate? Much of it is as old as the hills, and most of it beside the point. Consider three well-taken observations that constitute ways lawyers can miss the mark if they focus on theory not wholly relevant to a client or a potential legal reform. Theory falls down when it is too abstract. The
grand theory of political reformers may fail when it underestimates practical realities. Theory is also often no match for the improvements on the ground enforcers can make to the work of statutory drafters who don’t leave the halls of the capitol.

Rather than serving as examples of law school’s over-emphasis on theory, recognition of theory’s limitations are widely discussed in the nation’s classrooms. Students know they are far more likely to get paid for analyzing the meaning of “worker” under overtime statutes than the meaning pursuant to Marxist analysis. Students are taught that theory can prove over-idealistic in light of real-world complications. One famous example involves armchair drafters of municipal housing codes who underestimated the problems of enforcement via inadequate and sometimes corruptible housing inspectors. Seeing how law worked “in action” helped lead to the different approach to housing safety implicit in the warranty of habitability. And theory can fail to account for on-the-ground situations where tinkering can lead to improvements. Racecar pit crews sometimes make favorable adjustments that the car designers never conceived. Regulators may similarly find ways to streamline requirements too tightly drawn within a statute. These examples of gaps between theory and practice nonetheless provide critics the chance to mock theory as irrelevant, naïve and remote.

Cataloguing theory’s potential inadequacies in this way, of course, is just the sort of useful conceptual exercise that law schools prepare graduates to accomplish. The key point is that each of these characteristic complaints about the chasm between theory and the real world represents merely a case of poorly drawn theory—one that does not fit the circumstances to which it was meant to apply. That theorists make mistakes provides no more reason to blame theory than a pianist hitting a wrong note would suggest we should castigate music.

What, then, is good theory and why, in today’s fast-paced, rapidly changing economy, is a sound conceptual education a key component in preparing law graduates to be practice ready? In essence, the greatest accomplishment of the contemporary law school is that it teaches newly minted professionals how to draw lessons from experience. This process begins far earlier in life, but it is the hallmark of what law schools must accomplish.

Imagine a 17-year-old boy who wishes to travel to Asia for six weeks with a friend. Three years earlier his older sister had asked their parents for permission to do the same thing and received an unequivocal no. Now he seeks to persuade them to say yes. Several approaches readily come to mind. He might emphasize that international travel is safer for boys, and thus his situation is not really the same. This empirical claim may be true or false, but it also risks enraging his parents who can predict how his sister will react if they give this as their reason for reaching a different conclusion. He might argue that international travel is safer now than it was three years ago. Alternatively, perhaps the family recently came back from an adventurous vacation in which they agreed as a group that the family should embrace a motto of “taking risks.” Letting the boy go to Asia could fit within this new credo. Perhaps during the summer that his sister was forced to stay home, her friend had a great time in Asia with someone else while she tripped on a rug and broke her arm. Or perhaps the parents’ original decision was based on their own anxieties, not grounded in reality. They should not now repeat their mistake.

What does this family story tell us about theory and contemporary lawyering? The son’s lines of argument grow from a checklist that should be familiar to any law student after his or her first year. When faced with an “unwelcome precedent,” a few standard moves are readily available to persuade the decision maker to reach an alternate conclusion: (1) distinguish the earlier case (gender differences; changed safety conditions); (2) appeal to a conflicting agreed-upon principle (our family should take risks); (3) investigate the consequences of the earlier choice (trip worked out, staying home did not); and (4) only as a last resort, attack the wisdom or fairness of the original decision (reining in his sister was self-indulgent). Knowing how to craft and operate using such checklists is just the sort of theory that law
schools have long imparted. To be fair, learning such things involves a slightly higher level of abstraction than the mere rules of the road for driving. But this sort of abstraction is what law schools have always captured within the phrase “thinking like a lawyer.” Similar concepts such as the elements of due process, the value in separation of powers, the challenge of tying culpability to mental states, or the tension between form and substance are tools of the legal trade that law schools have an obligation to impart.

Contemporary conditions render understanding this sort of legal theory more important rather than less. The rules of law have become increasingly accessible to everyone at the click of a mouse. Clients can locate cases, statutes, regulations and legal commentary relevant to their situation, and are becoming increasingly suspicious about how lawyers add value. Accordingly, what law school provides cannot be an encyclopedic knowledge of vast numbers of rules. Instead, clients count on lawyers to have acquired conceptual lenses that enable them to sort quickly through what otherwise would be a maze of conflicting legal obligations. The theorist’s eye that restraints a client from inappropriate action is just the value for which clients will continue to pay. It’s not knowledge of any specific law that enables lawyers to remind clients that it might be unwise to force clarification of a legal directive if the rule is likely to be clarified against the client.

The real challenge for contemporary law schools is to devise ways to teach legal theory more explicitly and more effectively. Jurisprudence, for example, rather than being cast as an esoteric (albeit fascinating) course about the legitimacy of judicial decisions, should be a foundational course that builds a glossary of core concepts crucial to the tasks of lawyering. Every lawyer should work through the pros and cons of solving real-world problems with clear rules (associates who bill 2,200 hours get a bonus) versus flexible standards (bonuses go to associates who best meet the needs of clients). Every lawyer should know that when you seek to solve a problem via categories, you cannot avoid close cases and hybrids. (If only family members are in the wedding photos, what about fiancées or full-time nannies?) And law schools should be working to develop better appellations for familiar problems that arise often but are seldom noted. If you tell your teenage he can go to the prom if he finishes a term paper or cleans his room by Saturday, do you give him the car keys if the paper is three-quarters done and the room is three-quarters clean? Conceptual challenges such as this are part and parcel of the daily work of lawyers, which no legal employer has time to explore with new attorneys.

Focusing explicitly on the conceptual lenses new lawyers must acquire in law school is crucial for two reasons. First, if we are to rise to the challenge of reducing the cost of legal education, whether via shortening the calendar or otherwise, we cannot succeed by continuing the status quo’s vast number of credits devoted to doctrinal courses. Without understanding more precisely how we get students to “think like lawyers,” we are left either ignoring the demands for reform or simply lopping off key parts of the curriculum. Second, even if law schools faced no cost pressures, contemporary employers have insufficient use for graduates who develop only those lenses that marked successful lawyering in the 20th century. Today’s lawyers must also grasp the basics of finance, the value of strategic thinking, the virtues of teamwork, the essence of project management, and the strength of diversity. Fitting these concepts into an already crowded curriculum further demands a distillation of the classic legal education into more transparent modules in which legal theory is directly imparted rather than accidently absorbed.

Theory is also fundamental to experiential legal education upon which law schools should increasingly rely. Professional experience is necessary because only a rare person can readily deploy classroom concepts the first time they become relevant in a practical setting. The value of co-ops or externships is that they present an opportunity to develop habits in which application of theory becomes second nature. But not every professional experience will speed such habits along. Law schools can improve learning by developing templates for students to bring to their real-world experiences. What is the mission of the organization in which I am working? What is the business model? What skills are rewarded? What are the organization’s values? What career trajectories did the leaders follow? How are decisions here made? A checklist is as important to the workplace as it is for the final exam.

Lawyers also play important societal roles as educated citizens to whom we turn to design fair institutions, to facilitate mutually advantageous transactions, and to resolve thorny disputes. Law schools have a role to play here as well. Students should explore what makes our legal institutions and our judicial decisions legitimate. They should discuss the justifications for government control over individual life and they should receive guidance on developing a moral compass to help navigate the complex world in which they will spend their professional lives.

It would be a tragic and self-destructive mistake, however, for law schools to be baited into believing that legal theory serves only the broader public value of training our graduates to be statesmen and stateswomen. Only a professional who can grasp the essence of an individual or organizational challenge through lenses that enable the client to navigate legal terrain can successfully bill by the hour.