



# Open Research Online

---

The Open University's repository of research publications and other research outputs

## Does Clinical Legal Education Need Theory?

### Journal Item

How to cite:

McFaul, Hugh (2020). Does Clinical Legal Education Need Theory? Asian Journal of Legal Education, 7(2) pp. 152–163.

For guidance on citations see [FAQs](#).

© 2020 The West Bengal National University of Juridical Sciences

Version: Version of Record

Link(s) to article on publisher's website:

<http://dx.doi.org/doi:10.1177/2322005820916891>

---

Copyright and Moral Rights for the articles on this site are retained by the individual authors and/or other copyright owners. For more information on Open Research Online's data [policy](#) on reuse of materials please consult the policies page.

---

[oro.open.ac.uk](http://oro.open.ac.uk)

# Does Clinical Legal Education Need Theory?

Asian Journal of Legal Education  
7(2) 152–163, 2020  
© 2020 The West Bengal National  
University of Juridical Sciences



Reprints and permissions:  
[in.sagepub.com/journals-permissions-india](http://in.sagepub.com/journals-permissions-india)  
DOI: 10.1177/2322005820916891  
[journals.sagepub.com/home/ale](http://journals.sagepub.com/home/ale)



Hugh McFaul<sup>1</sup>

## Abstract

Clinical legal education (CLE) is an increasingly common feature of legal education programmes in higher education around the world. The growth in this area has led to a developing academic literature facilitated by specialist journals and conferences, which have produced a largely pragmatic and practice-orientated discourse, with relatively little discussion of wider theoretical issues and their relevance to this area of academic practice. This conceptual study contextualizes the growth of CLE in the UK by considering the influence of two neoliberal policy drivers: marketization and the decline in publicly funded legal advice and representation. It proceeds to consider how these policies have helped to shape the practice-oriented focus of the literature on this area before making an argument that giving more explicit focus to theoretical issues has the potential to enrich the growing body of CLE literature.

## Introduction

An outline of a theory of education is a noble ideal, and it does no harm if we are not immediately in a position to realize it. One must be careful not to consider the idea to be chimerical and disparage it as a beautiful dream, simply because in its execution hindrances occur.<sup>2</sup>

The fear of speculation, the ostensible rush from the theoretical to the practical, brings about the same shallowness in action that it does in knowledge. It is by studying a strictly theoretical philosophy that we become most immediately acquainted with Ideas, and only Ideas provide action with energy and ethical significance.<sup>3</sup>

Recent decades have seen considerable expansion in the number of clinical legal education (CLE) programmes in UK law schools.<sup>4</sup> While this growth can be seen as part of a global clinical movement, the extent and shape of this growth within the UK has been influenced by two streams of neoliberal

<sup>1</sup> Hugh McFaul, The Open University, UK.

<sup>2</sup> IMMANUEL KANT, FRONTMATTER. IN R. LOUDEN & G. ZÖLLER (EDS.), *Anthropology, History, and Education* (THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT, PP. 1–6). CAMBRIDGE: CAMBRIDGE UNIVERSITY PRESS (2007).

<sup>3</sup> Friedrich Schelling quoted in J. HABERMAS, *KNOWLEDGE AND HUMAN INTERESTS* (1971).

<sup>4</sup> DAMIAN CARNEY ET AL., *LAWWORKS LAW SCHOOLS PRO BONO AND CLINIC REPORT 2014* (2014) LAWWORKS, <https://www.lawworks.org.uk/solicitors-and-volunteers/resources/lawworks-law-school-pro-bono-and-clinics-report-2014>.

## Corresponding author:

Hugh McFaul, The Open University Law School, Michael Young Building, Walton Hall, MK76 AA, UK.

E-mail: [h.j.mcfaul@open.ac.uk](mailto:h.j.mcfaul@open.ac.uk)

policy development: the marketization of higher education and the retrenchment in the provision of state-funded legal services.<sup>5</sup> The increased interest in CLE has prompted the production of a body of literature on the application of clinical principles to a variety of areas of legal practice across a wide range of jurisdictions<sup>6</sup>. However, there has been relatively little attention paid to the theoretical dimensions of this approach. A pragmatic and practice-oriented discourse is often favoured over consideration of more abstract or theoretical approaches. What accounts for this focus and is there anything to be gained by giving more emphasis to theory?

This conceptual study will consider factors that have encouraged the growth of CLE in the UK and explore how some of these have mitigated against an explicit engagement with theory. It will make the case that the theoretical approaches, broadly defined, have the potential to enrich the teaching and practice of CLE. Part I will define CLE and situate its growth in the context of the decline in state provision of legal services and the marketization of higher education. Part II will argue that these influences, in addition to the position of CLE as an insurgent, experiential approach to law teaching, have led to a focus on the practical over the theoretical. This, it will be argued, can be usefully understood in terms of wider tensions between theory and practice that exist within UK higher education. Part III will explore definitions of theory and consider the potential for a more positive conception of theory in relation to legal education in general. Part IV will offer some concluding remarks on ways in which more explicit attention to theoretical issues has the potential to enrich the growing body of CLE literature.

## Part I: Policy and the Growth of Clinical Legal Education

Along with the majority of law schools in the USA, Australia, New Zealand, Canada and a growing number of institutions in Europe, South America, Africa and Asia, most UK law schools have now incorporated CLE pedagogy into their undergraduate curricula.<sup>7</sup> The most recent comprehensive survey of the sector suggested that 73 per cent of UK law schools have some involvement in CLE, the equivalent of approximately 10 000 law students.<sup>8</sup> Wizner defines CLE as follows:

On the most basic level, the law school clinic is a teaching law office where students can engage in faculty-supervised law practice in a setting where they are called upon to achieve excellence in practice and to reflect upon the nature of that practice and its relationship to law as taught in the classroom and studied in the library. It is a method of teaching law students to represent clients effectively in the legal system, and at the same time to develop a critical view of that system. Law students in the clinic learn that legal doctrine, rules, and procedure; legal theory; the planning and execution of legal representation of clients; ethical considerations; and social, economic and political implications of legal advocacy, are all fundamentally interrelated.<sup>9</sup>

Wizner's remarks show that a law school-based legal advice clinic represents the paradigmatic example of CLE. However, it is now used as an umbrella term to describe experiential learning experiences where students take responsibility for legal or law-related work for real or simulated clients in

<sup>5</sup> ORLA DRUMMOND AND GRÁINNE MCKEEVER, *Access to Justice through University Law Clinics*, ULSTER UNIVERSITY LAW SCHOOL (2015).

<sup>6</sup> See FRANK S. BLOCH, *THE GLOBAL CLINICAL MOVEMENT: EDUCATING LAWYERS FOR SOCIAL JUSTICE* (2010); JEFFREY MICHAEL GIDDINGS, *PROMOTING JUSTICE THROUGH CLINICAL LEGAL EDUCATION* (2013); CARNEY ET AL., *supra* note 4.

<sup>7</sup> BLOCH, *supra* note 6.

<sup>8</sup> CARNEY ET AL., *supra* note 4.

<sup>9</sup> Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 *FORDHAM L. REV.* 1929, 1930 (2001).

collaboration with a supervisor.<sup>10</sup> Clinical activities range widely from advice, referral and representation for individual clients to public legal education projects, internships with charitable advice agencies and legal policy work.<sup>11</sup>

Originally conceived as a pedagogical challenge to the dominant case method of teaching law, American legal realists aimed to expose students to the practical application of legal knowledge and thereby allow them to conceive of legal knowledge not in the abstract, but as existing within the wider social world.<sup>12</sup> Jerome Frank's call for a clinical law school took inspiration from the real-world approach taken by medical schools in their education and training of doctors.<sup>13</sup> Students are often invited to use the experience to develop professional skills and to reflect on the ethical dimensions of the law and legal system, commonly utilizing some form of reflective journal.<sup>14</sup> By encouraging students to reflect on the ethical and social dimensions of the practical application of legal knowledge, it goes beyond skills training and facilitates critical engagement with the law as an open-ended discipline.<sup>15</sup> Given the wide variety of activities that come under the CLE umbrella, the term resists strict definitional parameters and is better understood in terms of a family resemblance to a broad range of legal and law-related learning opportunities, which usually have an emphasis on active participation and reflective learning.

The growth of CLE in the UK has its roots in the influence of the global clinical movement, spearheaded by American practitioners. However, the extent and tempo of its flourishing within the UK can usefully be seen in the context of two domestic policy drivers: state policies regarding the provision of free legal assistance and the marketization of higher education, each of which will be discussed in turn below.

### *Decline in State-funded Legal Services*

The availability of state-funded legal services in the UK has declined significantly over recent decades. The Legal Aid, Punishment and Sentencing of Offenders Act 2012 is the most recent in a line of legislative and policy initiatives that have had the effect of reducing the scope of legal work that can be funded and the level of funding provided.<sup>16</sup> The result of this retrenchment in legal services leaves the civil justice system increasingly unable to secure fair access to justice, particularly for disadvantaged parts of the public. Pleasence and Balmer conclude that the current civil justice system is unable to ensure fair and equal access to justice for vulnerable parts of the population who lack the capability and resources to successfully negotiate the complexities of the legal system.<sup>17</sup>

<sup>10</sup> GIDDINGS, MELBOURNE: JUSTICE PRESS *supra* note 6 at 14, <https://www.justice-press.com/publications/432-promoting-justice-through-clinical-legal-education-jeff-giddings>.

<sup>11</sup> Vicky Kemp et al., *Clinical Legal Education and Experiential Learning: Looking to the Future*, 16 (2016).

<sup>12</sup> Wizner, *supra* note 9.

<sup>13</sup> Jerome Frank, *Why Not a Clinical Lawyer-School?* 81 UNIV. PA. LAW REV AND AM LAW REGIST 907 (1933).

<sup>14</sup> GIDDINGS, *supra* note 6 at 15; Lynn Welchman, *The International Human Rights Clinic at SOAS*, in *REINVENTING LEGAL EDUCATION* 247–271, 256 (Alberto Alemanno & Lamin Khadar eds., 1 ed. 2018), [https://www.cambridge.org/core/product/identifier/9781316678589%23CN-bp-13/type/book\\_part](https://www.cambridge.org/core/product/identifier/9781316678589%23CN-bp-13/type/book_part).

<sup>15</sup> Drummond and McKeever, *supra* note 5.

<sup>16</sup> Hilary Sommerlad & Peter Sanderson, *Social Justice on the Margins: The Future of the Not for Profit Sector as Providers of Legal Advice in England and Wales*, 35 J SOC WELF FAM LAW 305–327 (2013); House of Commons Justice Committee, *Impact of Changes to Civil Legal Aid Under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, 15 EIGHT REPORT OF SESSION 88–89 (2014).

<sup>17</sup> PASCOE PLEASENCE & NIGEL J BALMER, *HOW PEOPLE RESOLVE 'LEGAL' PROBLEMS* (LEGAL SERVICES BOARD 2014).

Drummond and McKeever identify a correlation between the growth in CLE with the decline in state funding for legal services; arguing that the proliferation of law clinics in the UK reflected a concern for the constitutional imperative of providing legal services for the poor as much as for educational reasons.<sup>18</sup> Giddings makes a similar point about the development of CLE in Australian law schools, and the US supreme court has recognized the role of CLE in providing access to justice in the USA.<sup>19</sup> The contemporary patchwork of CLE practice across the UK does reflect a strong theme of social justice-focused clinical programmes, including free legal advice services for those who would not otherwise be able to pay.<sup>20</sup> The extent to which CLE should provide quality legal services to the disadvantaged, or quality educational experiences for law students, remains a live issue within the literature.<sup>21</sup> The evidence of the growth of CLE across the UK shows that after early forays by the University of Kent and Warwick in 1973 and 1976, which was followed by a handful of other Universities in the 1980s, the movement gained greater traction in the 1990s when the retrenchment of state-funded legal services began to be felt and the resultant imperative to provide services to meet the unmet legal needs of the poor was felt more keenly.<sup>22</sup>

### *The Marketization of Higher Education*

Providing services that are of sufficient quality to be of real use to members of the public requires significantly more investment in staff and facilities than is required for the standard seminar and lecture model used for most other UK law school programmes. For the majority of law schools in the UK, this funding is not provided by external bodies, philanthropic or otherwise, rather it is dependent on the decision of university administrators to provide the necessary financial support.<sup>23</sup> The marketization of higher education provides a policy driver that presents a self-interested motivation for investment in CLE programmes.<sup>24</sup>

Akin to other developed economies, the UK higher education sector has been subject to the influence of marketization resulting from the increasing influence of neoliberal economic policies.<sup>25</sup> This has resulted in the increased influence of human capital theory in shaping education policies, prioritizing the need to develop a workforce able to compete in an increasingly deregulated and globalized labour market. Human capital theory supports:

the enhancement of labor flexibility through regulatory reform in the labor market, as well as raising skill levels by additional investment in education, training, and employment schemes, and immigration focused on attracting high-quality human capital.<sup>26</sup>

<sup>18</sup> Drummond and McKeever, *supra* note 5.

<sup>19</sup> In *Argersinger v Hamlin* (1972) the US Supreme Court stated that that ‘law students can be expected to make a significant contribution... to the representation of the poor in many areas.’

<sup>20</sup> CARNEY ET AL., *LAWWORKS* *supra* note 4, <https://www.lawworks.org.uk/solicitors-and-volunteers/resources/lawworks-law-school-pro-bono-and-clinics-report-2014>.

<sup>21</sup> Drummond and McKeever, *supra* note 5; Kemp et al., *supra* note 11; D Nicolson, *Legal Education, Ethics and Access to Justice: Forging Warriors for Justice* (2015).

<sup>22</sup> Kemp et al., *supra* note 11.

<sup>23</sup> Drummond and McKeever, *supra* note 5; CARNEY ET AL., *supra* note 4.

<sup>24</sup> James Marson et al., *The Necessity of Clinical Legal Education in University Law Schools: A UK Perspective*, *INT’L J. CLINICAL LEGAL EDUC.* 29–43 (2005).

<sup>25</sup> Mark Olssen and Michael A. Peters, *Neoliberalism, Higher Education and the Knowledge Economy: From the Free Market to Knowledge Capitalism*, 20 *J EDUC POLICY* 313–345 (2005).

<sup>26</sup> Patrick Fitzsimons, *Human Capital Theory and Education*, in *ENCYCLOPEDIA OF EDUCATIONAL PHILOSOPHY AND THEORY* 1–4 (Michael Peters ed., 2017), [https://doi.org/10.1007/978-981-287-532-7\\_331-1](https://doi.org/10.1007/978-981-287-532-7_331-1) (last visited Aug 27, 2019).

This approach is illustrated in the promotion of an employability agenda within university teaching that views higher education as subordinate to the needs of the economy, an industry rather than a social institution.<sup>27</sup> The impact of these policies has led to an increasingly consumerist approach by students when selecting their preferred institutions and an imperative for universities to seek competitive advantage in the marketplace.<sup>28</sup> The introduction of centrally managed metrics, in the form of the Research Excellence Framework and the Teaching Excellence Framework, serve to exacerbate competition between providers. These policies have had a significant impact on the development of law schools, along with other parts of the higher education landscape.<sup>29</sup>

Several features of CLE make it an attractive pedagogy for the promotion of an employability agenda in the context of a marketized higher education sector. The emphasis on the development of professional skills in real-world contexts makes it easier for law schools to trumpet their links with professional practice.<sup>30</sup> Several of the externship models, in addition to many of the in-house law school clinics, rely on the co-operation and active engagement of members of the legal profession, which provides links to the legal services market. Engagement in these activities is encouraged by a series of CLE awards, sponsored by the legal profession and the government, which allow further opportunities for law schools to seek competitive advantage in the eyes of students.<sup>31</sup> These factors combine to provide a clear economic impetus for law schools to invest in the development of CLE, if not to stay ahead of the competition, but at least not to fall behind.<sup>32</sup> Therefore, increasing marketization, along with the social justice imperative discussed above, can help account for the proliferation of CLE in the UK in the last two decades.<sup>33</sup> The following section will consider how this developmental history is one of several influences that have helped to shape the approach to theory within the CLE literature.

## Part II: Barriers to Engaging with Theory

Unsurprisingly, the influences on the development of CLE in the UK is reflected in the practice focused approach of the published scholarly literature on CLE. The general approach is to prioritize pragmatic considerations of how CLE programmes can develop professional or ‘lawyering skills’ and provide effective services to the public, which is reflective of both the human capital approach to education and the concern for social justice outlined in Part I. It often seeks to describe and evaluate experiences of teachers utilizing clinical methods, in particular, thematic and jurisdictional contexts. This approach can be seen in

<sup>27</sup> Louise Morley, *Producing New Workers: Quality, Equality and Employability in Higher Education*, 7 *QUAL. HIGH. EDUC.* 131–138 (2001).

<sup>28</sup> Drummond and McKeever, *supra* note 5 at 13.

<sup>29</sup> MARGARET THORNTON, *PRIVATISING THE PUBLIC UNIVERSITY* (Routledge 2011).

<sup>30</sup> Marson et al., *supra* note 24.

<sup>31</sup> For example LawWorks and Attorney General Student Pro Bono Awards 2019 | LawWorks, <https://www.lawworks.org.uk/solicitors-and-volunteers/get-involved/lawworks-and-attorney-general-student-pro-bono-awards-2019> (last visited Aug 30, 2019).

<sup>32</sup> Welchman, *supra* note 14 at 257.

<sup>33</sup> Drummond and McKeever, *ULSTER UNIVERSITY LAW SCHOOL* *supra* note 5 at 13–14.

a growing number of edited collections on the subject<sup>34</sup> and in the specialist academic journals.<sup>35</sup> CLE conference papers also are likely to have an explicit practice focus.<sup>36</sup>

There are a number of other potential reasons for the pragmatic and practice focused-emphasis in the literature, some of which are peculiar to the historical development of CLE and others, which are better understood in the context of the broader culture of the UK universities in which clinicians work. As outlined in Part I, CLE's roots are counter cultural in the sense that Jerome Frank's call for a Clinical Law School was an attempt to challenge the prevailing orthodoxy of classroom-based case method of teaching typical in US law schools of the time.<sup>37</sup> This created a need for practitioners to experiment with this new pedagogy and the resulting practice-focused analysis and reports of pilot projects were a way of sharing good practice and supporting novices. The growth of CLE in the UK followed this pattern of developing a mode of delivery, which differed from orthodox approaches to teaching. The UK legal professions' separation between the academic and vocational stages of training means that the practice-focused, experiential pedagogy utilized in CLE is significantly different from that used in teaching substantive or academic content. This led to university teachers being recruited with experience of and interest in the practical application of legal skills and knowledge. Typically, this resulted in ex legal-practitioners, or part-time practitioners, being recruited, the majority of whom were selected on the basis of professional experience, rather than a formal academic research or teaching background. Arguably, this has a dampening effect on the development of a theoretically engaged discourse around CLE. CLE practitioners have not routinely received the research training afforded by PhD level study and are therefore less likely than their colleagues with more traditional academic career profiles to be equipped to engage in researching the theoretical aspects of their CLE practice. The key priority is therefore pragmatic: to find out what types of CLE activity work best, and this is reflected in the concerns of a large proportion of the CLE literature.

Other potential reasons for the theory practice gap in CLE can be found in the wider culture, both within the professions (from where clinicians are often recruited from) and within UK higher education (where clinicians are recruited to). Arguably, the absence of theory in CLE literature echoes a wider ambivalence apparent among professionals:

The ambivalence, about the role of theory, about its character and about the relationship between theory and practice, leads to difficulties and tensions, to turf wars, between educators and practitioners about the very nature of professional education.<sup>38</sup>

<sup>34</sup> BLOCH, *supra* note 6; RICHARD J. WILSON, *THE GLOBAL EVOLUTION OF CLINICAL LEGAL EDUCATION: MORE THAN A METHOD* (2017); RICHARD J. WILSON, *REINVENTING LEGAL EDUCATION: HOW CLINICAL EDUCATION IS REFORMING THE TEACHING AND PRACTICE OF LAW IN EUROPE*, (Alberto Alemanno & Lamin Khadar eds., 2018), <https://www.cambridge.org/core/books/reinventing-legal-education/0EADB1F620C277DAC365EFFD23A4311D>; LINDEN THOMAS ET AL., *REIMAGINING CLINICAL LEGAL EDUCATION* (2018).

<sup>35</sup> For example, the *International Journal of Clinical Legal Education* and the *Clinical Law Review*. Representative titles include David E. Zammit & Alina Kislova, *Clinical Legal Education in Malta: Learning from Experience and Identifying the Challenges*, 26 INT J CLIN LEGAL EDUC 149–176 (2019); Michal Urban & Tomáš Friedel, *Ten Years of Prague Street Law: Lessons to Learn from Our First Decade*, 26 INT J CLIN LEGAL EDUC 177–208 (2019).

<sup>36</sup> 'Sustainability as the impact-factor for Clinical Legal Education. Lessons learned from Polish experience' and 'Navigating the Muddy Waters of Pro Bono Advice—How LegalTech can Improve the Access to Legal Advice' are illustrative examples from the 2019 European Network of Clinical Legal Education conference. 'IJCLE Timetable', <https://www.northumbria.ac.uk/about-us/news-events/events/2019/07/ijcle-2019/ijcle-timetable/> (last visited 21 August 2019).

<sup>37</sup> Frank, *supra* note 13.

<sup>38</sup> P. A. Jones, *Theory and Practice in Professional Legal Education*, 7 INT J LEGAL PROF 239–259, 240 (2000).

Halpin argues that practitioner scepticism towards theory is based on three assumptions: ‘practice has no need of theory; practice has only a limited need for theory; and theory is diametrically opposed to practice’.<sup>39</sup> Other authors have identified a sceptical attitude to theorizing, which pervades much of the UK’s intellectual life, which supposes that theorization obscures or oversimplifies more than it illuminates.<sup>40</sup>

This background of scepticism towards theory that exists, both within the profession and the academy in general, is compounded by a gap between theoretical engagement and legal education within law schools. Many authors have identified legal education to be undertheorized due to legal academics reserving their research efforts for substantive law rather than the teaching of law.<sup>41</sup> Sheer and Sugarman point to a ‘gulf between theory, the specific fields of law (contracts and family law, etc.), and legal education’.<sup>42</sup> Cownie has argued that the gulf arises partly as a result of the dominance of research activity within UK universities buttressed by perceptions that research is valued more highly than teaching and ‘promotion, status and peer approval are all strongly correlated with research output’ and the view that teaching does not require the same level of academic attention as substantive legal issues.<sup>43</sup>

Cownie maintains that the subservient position of teaching contributes to an anti-intellectual approach to the process of teaching in law schools; this has been described by others as resulting in legal education discourse, which is ‘mostly anecdotal or platitudinous’.<sup>44</sup> This negative view was echoed by the report on the last Research Excellence Framework exercise in 2014. The sub-panel convened to assess the quality of legal research commented that they were ‘pleased to receive submissions relating to legal education but the methodological rigour and significance exhibited by some of these outputs was uneven’.<sup>45</sup> Arguably, the difficulties experienced by legal education scholarship are magnified in relation to the sub-discipline of CLE and its consequent position, a novel and therefore junior member within the legal academy, as Welchman points out:

one of the challenges facing CLE remains its scholarly place in the academy with a home discipline, law, that has had to struggle to establish its own intellectual corner recently enough to be prickly about developments that might appear to associate it too closely with “practice.”<sup>46</sup>

This analysis of the culture of legal education provides a useful context to understand the pragmatic, or anti-intellectual, approach in the CLE literature. The culture of anti-intellectualism to legal education is compounded by staff having been recruited to CLE roles for their legal professional experience, rather than specific competence in, or appetite for, research. In Part III, this article will consider how theory might be conceived positively in relation to legal education in general before outlining the potential benefits of giving an increased focus on theory for CLE practice in Part IV.

<sup>39</sup> Andrew Halpin, *Law, Theory and Practice: Conflicting Perspectives?*, 7 INT J LEGAL PROF 205–223, 215 (2000).

<sup>40</sup> Avrom Sherr & David Sugarman, *Theory in Legal Education*, 7 INT J LEGAL PROF 165–177, 168 (2000).

<sup>41</sup> The introduction of the UK Professional Standards Framework may go some way to addressing this deficit. Through it university academics are encouraged to gain professional recognition for their teaching and to do so, under criteria V3, they must show they utilise ‘evidence-informed approaches and the outcomes from research, scholarship and continuing professional development.’ UK Professional Standards Framework (UKPSF) | Advance HE, <https://www.advance-he.ac.uk/knowledge-hub/uk-professional-standards-framework-ukpsf> (last visited Nov 14, 2019).

<sup>42</sup> Sherr and Sugarman, *supra* note 40 at 167.

<sup>43</sup> Fiona Cownie, *The Importance of Theory in Law Teaching* 7 INT J LEGAL PROF 225 and 230 (2000).

<sup>44</sup> Jay Feinman & Marc Feldman, *Pedagogy and Politics*, GEO. L. J. 875, 875–930 (1984).

<sup>45</sup> REF, ‘Main Panel C Overview Report : REF 2014’ (2014) 71, <https://www.ref.ac.uk/2014/panels/paneloverviewreports/> (last visited 29 August 2019).

<sup>46</sup> Welchman, *supra* note 14 at 252.



### Part III: Reclaiming Theory

The preceding sections have identified a gulf between theory and legal education. This gulf can be seen in the context of the unequal status of research and teaching within UK universities and a degree of scepticism towards theory among professionals. In this section, this article will explore the origins of the term before considering a more positive conception of theory in relation to legal education in general. Part IV will then offer some comments on possible routes towards a more theoretically engaged approach to CLE.

The etymology of theory reveals the term is based on the ancient Greek word *theoria*, referring to attentive observation, *horos* (attentive) and *thea* (observing).<sup>47</sup> Habermas points out that the word has religious origins and became associated with contemplation:

The theoros was the representative sent by Greek cities to public celebrations. Through *theoria*, that is through looking on, he abandoned himself to the sacred events. In philosophical language *theoria* was transferred to contemplation of the cosmos.<sup>48</sup>

Iannone explains that the Greek understanding of this contemplative aspect of *theoria* was understood to involve:

the highest form of life of life pursued by philosophy... that curiosity which starts with wonder, not about the colossal, unusual or freakish, but about the familiar, the ordinary we take for granted in everyday life: a vision or attentive, careful observation.<sup>49</sup>

This etymology, which emphasizes careful attention and curiosity, is interestingly at odds with the conception of theory being necessarily totalizing and impenetrably abstract.

Turning to the Oxford English Dictionary for a more contemporary account of the term's use several definitions are offered, some of which make it clear that theory is to be defined in contradistinction to practice, including, 'the conceptual basis of a subject or area of study. Contrasted with practice' and 'abstract knowledge or principles, as opposed to practical experience or activity; theorizing, theoretical speculation'.<sup>50</sup> This usage would appear to be consistent with the theory sceptic's approach outlined in Part II. However, there is another, less polarizing, cluster of definitions that are closer to the original Greek spirit of careful attentiveness:

A conception of something to be done, or of the method of doing it; a systematic statement of rules or principles to be followed.

An approach to the study of literature, the arts, and culture that incorporates concepts from disciplines such as philosophy, psychoanalysis, and the social sciences; esp. such an approach intended to challenge or provide an alternative to critical methods and interpretations that are established, traditional, and seen as arising from particular metaphysical or ideological assumptions.<sup>51</sup>

<sup>47</sup> A. PABLO IANNONE, 'Theory', *DICTIONARY OF WORLD PHILOSOPHY—CREDO REFERENCE* (1st ed. Routledge 2001), <https://search-credoreference-com.libezproxy.open.ac.uk/content/entry/routwp/theory/0> (last visited 27 August 2019).

<sup>48</sup> HABERMAS, *supra* note 3 at 301.

<sup>49</sup> A. Pablo Iannone, *supra* note 47.

<sup>50</sup> Oxford English Dictionary, "*theory, n.*", <https://www.oed.com/view/Entry/200431?redirectedFrom=theory>.

<sup>51</sup> *Id.*

This second cluster does not imply a necessarily binary relationship between theory and practice, but points to the role of theory in informing practice and utilizing insights from other disciplines to challenge and provide alternatives to dogmatic approaches. It is with this conception of theory, combined with the careful attentiveness revealed by its etymology, that this article's argument for the greater use of theory in CLE is made.

A theoretically informed approach to practice has been suggested in relation to other disciplines where the tension between theory and practice is also evident. Given the adoption of the clinical pedagogy developed in medical schools that has been utilized by CLE, examining how this issue is approached within the medical context is potentially illuminating. Defending the role of theory within bioethics, Arras makes the following transferable observations:

Determining the precise nature of the relationship between bioethics and ethical theory is complicated by the absence of a canonical definition of "theory." ... So when we inquire into the nature of the relationship between bioethics and moral or political theory, it will obviously matter a great deal whether we define "theory" narrowly—restricting it to a small cluster of paradigmatic examples, such as classical or contemporary versions of utilitarianism or Kantianism—or more broadly so as to encompass many different modes of moral reflection ... The broader our definition of "theory," the more commonsensical will be the claim that theory should play an important role in bioethics.<sup>52</sup>

Arras goes on to point out that, in addition to the absence of a canonical definition, certain features of the practice of bioethics make a binary view of the relevance of theory unhelpful. This, he argues, is because bioethics is 'not a monolithic field; it encompasses a variety of distinct but interrelated activities, some of which might be more amenable to the deployment of philosophical theory than others'.<sup>53</sup> There is the immediacy of the application of bioethical concepts at the micro level of the clinical setting, where the treatment of individual is at issue, the application at the meso level where bioethical principles are used to inform the development of policies that could impact on a larger number of patients and, finally, a macro level where the bioethicist is engaged in the academic business of the 'theoretical pursuit of truth'.<sup>54</sup>

Arras's observations resonate with the consideration of the role of theory in CLE. CLE also has potential to engage with theory at the micro, meso and macro levels. It is concerned with the micro level of facilitating and preparing students to deal with the needs of individual clients. At the meso level, CLE practitioners and educators are engaged in the development of policy regarding the education and training of legal professionals, and at the macro level, there is the opportunity to contribute and engage with the broad sweep of the interdisciplinary theoretical discourse on the nature of education and professional practice. Reflecting Arras' diagnosis of a lack of a canonical definition of 'theory' in bioethics, Sherr and Sugarman make a similar observation in relation to legal education. They argue that legal education theory can be conceptualized and applied in different ways, 'theory takes many forms, that it operates at diverse levels, and that legal theory and legal theorization can be viewed through sets of different lenses'.<sup>55</sup>

How then, should theory be defined in relation to legal education? Given the absence of a canonical definition and its relevance to different levels of practical activity, it seems wise to avoid falling into the

<sup>52</sup> JOHN ARRAS, *Theory and Bioethics*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2016 ed. 2016), <https://plato.stanford.edu/archives/win2016/entries/theory-bioethics/> (last visited 22 August 2019).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Sherr and Sugarman, *supra* note 40 at 168.

trap of developing an all-encompassing definition. Rather, a more pragmatic response might be more fruitful, which sees theory not as a monolith, but as ‘as an indispensable tool (or a tool kit) for questioning, clarifying, and understanding’.<sup>56</sup> Theory in this sense should be fit for purpose and sensitive to context. For example, following Arras’ observations, different tools or approaches to theory would be relevant depending on whether your subject of investigation operates at the micro, meso or macro levels. In this way, some of the suspicion of the relevance of theory to the development of CLE can be overcome.

There is space for two additional points in defence of a theory in relation to professional education. First, this conception of theory is not consistent with a binary conception of theory and professional practice. Professionals depend upon specialized knowledge for their status:

Professionals are not just practitioners; they are practitioners of a particular kind, practitioners who have exclusive access to the body of theory that informs their work. It is this, their possession of theory, which leads them to define themselves as professionals.<sup>57</sup>

Second, as members of universities, clinicians are working to support the core purpose of a university, which involves the generation of knowledge, ‘the dominant view in the relevant Western literature has been that the pursuit of knowledge, and a concern with theory, are central to the university’.<sup>58</sup> Therefore, the argument goes that academics in universities, including those with an interest in legal education, and by extension CLE, should be concerned with the acquisition of knowledge about these endeavours and it is ‘theory which allows knowledge to be organised in ways which bring new insights, and thus theory itself is a central concern of the university’.<sup>59</sup> Not ‘that all legal academics should be knowledgeable about theory and should be concerned with it *as a matter of course* in their research and teaching; theory should be a natural and integrated part of their thinking and teaching about law’.<sup>60</sup>

This section has demonstrated that it is possible to reclaim a positive conception of theory that is relevant and important to legal education. In the final section of this article, consideration will be given about how this reclaimed conception of theory could be applied profitably applied to CLE in particular.

## **Part IV: Towards a Theoretically Engaged Discourse on Clinical Legal Education**

Part III of this article has made the case that legal education should reclaim a more positive conception of theory. The final section will argue that these insights are particularly relevant to the discourse on CLE, before offering an outline of what form a more theoretically engaged approach to this sub-discipline of legal education might take.

Considering the discussion in Part III, a number of arguments can be made in support of a more theoretically engaged approach to scholarship in CLE. First, the preceding discussion shows that theoretical considerations are an important, if not exclusive, element of the life and purpose of a university. This provides a firm basis for the assertion that by engaging in theory, CLE practitioners will themselves be contributing to that purpose. Second, theory can assist CLE in organizing that knowledge

<sup>56</sup> *Id.* at 169.

<sup>57</sup> Jones, *supra* note 38 at 239.

<sup>58</sup> Cownie, *supra* note 43 at 226.

<sup>59</sup> *Id.* at 226.

<sup>60</sup> *Id.* at 227.

at micro, meso and macro levels. Theoretical engagement with the experience of preparing and facilitating experiential learning (the micro level) can assist in the transfer of particular instances of good practice into sound policy frameworks for developing this pedagogy (at the meso level) and contribute to broader interdisciplinary research into education at the macro level. Third, clinicians delivering CLE programmes are often uniquely in the position of straddling university and professional practice, ‘clinicians are the legal academics who occupy the space within the academy that systematically bridges theory and practice’.<sup>61</sup> Operating in this potentially fertile liminal space between the profession and the academy presents an opportunity to develop insights that will have direct relevance to both. This point is echoed in Hall and Sylvester’s call for a reimagined CLE:

reimagined clinical education demands a reflexive turn in which the experience and the theory are consciously brought into dissonant contact so that the nature of these practices and practice communities can emerge. An outsider to Higher Education might wonder why this is in any way problematic.

What form might a more theoretically engaged approach to CLE take? It is hoped that this question will prompt wider discussion in several future research papers, but there is space here to sketch out areas of CLE, which may benefit from greater engagement with theory. Theoretical positions are implicit in at least three areas of CLE: social justice, ethics and reflective practice. The extant literature on CLE has considered the relationship between CLE and social justice and explored the tension between providing useful educational experience to benefit students and the need to offer a beneficial service to members of the public in need of legal information, advice and representation.<sup>62</sup> However, there is space here for greater engagement with the theoretical discourse on the nature of social justice. Likewise, CLE is often cited as an appropriate pedagogy for engaging students in issues around legal ethics. Here, the literature has engaged with wider theoretical discourse on ethics, but there is the potential for greater and more nuanced engagement.<sup>63</sup> Fourth, the use of reflective methods in assessment is commonplace in the assessment practice of CLE programmes.<sup>64</sup> Such approaches to assessment often take inspiration from the work of Donald Schön, but there is more space here for a critical engagement with the theoretical discourse based on this approach. This point is well made by Jones who argues that two principles that are now applied to CLE: the idea of the ‘competent practitioner’ and that of the ‘reflective practitioner’ have both been uncritically absorbed into pedagogical practice, but both are heavily theory laden and would benefit from robust critical analysis.<sup>65</sup>

There is a wealth of theoretical insights on which to inform this type of investigation, which requires a level of interdisciplinarity and engagement with wider academic discourse than is currently in evidence in the majority of CLE literature. As Jones argues in the context of legal education in general, this approach requires a degree of triangulation, where the researcher draws on a broad range of theoretical insights that can inform practice and also contribute to wider academic discourse.<sup>66</sup> This way of using theory, as a set of tools by which the practice of CLE can be explored, understood and developed, shows

<sup>61</sup> WILSON, *supra* note 34 at 128.

<sup>62</sup> See NICOLSON, *supra* note 21; GIDDINGS, *supra* note 6; Drummond and McKeever, *supra* note 5.

<sup>63</sup> See Julian Webb, *Being a Lawyer/Being a Human Being*, 5 LEGAL ETHICS 130–151 (2002); ADRIAN EVANS, *THE GOOD LAWYER BY ADRIAN EVANS* (Cambridge Core 2014), /core/books/good-lawyer/97FA9332F4FBD517269BBA3FB393012E (last visited Apr 25, 2019); G. M. Dickinson, *Moral Development Theory and Clinical Legal Education: The Development of Professional Identity*, 22 UW ONTARIO L. REV. 183 (1984).

<sup>64</sup> Cownie, *supra* note 43 at 236.

<sup>65</sup> Jones, *supra* note 38 at 241.

<sup>66</sup> *Id.* at 258.

that good theory should inform and enrich practice. Therefore, the starting point for engagement in theory can be from the particular to the abstract, from the puzzle of a particular practical issue to a solution aided by the reflections and insights of others.<sup>67</sup>

Such an approach would have a direct benefit on the student experience by raising the quality of student learning but will also be a means by which legal clinicians ‘take seriously their position as academics, as members of a university, which is a place concerned with “the theory of things”.’<sup>68</sup> The origins and development of CLE show that this recourse to theory is not an unnecessary overcomplication of the true role of the legal clinician. Rather, it amounts to a reconnection with the original aims of the legal realist tradition, a tradition that first called for a clinical law school, which would give primacy to the teaching of law as subject that is bedded within a wider social reality.

## Conclusion

This conceptual investigation has demonstrated that the burgeoning field of CLE has the potential for greater engagement with theory. It has identified a number of factors that have so far inhibited such engagement. These include a scepticism about the relevance of theory to the professions, a seam of suspicion about theory within UK higher education and cultural attitudes to the teaching of law as not being a fitting subject for theoretical enquiry. This article has argued that theory, reclaimed and properly conceived, does more than simply present an unnecessary distraction from the proper business of teaching and practising law. Rather, it seeks to show that engagement with theory is integral to the flourishing of professional education and is key to reclaiming CLE’s original purpose of embedding the study of law as a living discipline within the wider social world.

This article has argued against the view that theory is diametrically opposed to practice. Rather an engaged, attentive and curious approach to practice is the basis for productive engagement with theory. Theory can make a valuable contribution to practice if it is open to the experience of practitioners and to the insights of other disciplines. Used in this way, theory offers a means to challenge dogma, to facilitate critical engagement with the social realities students will face as citizens and as professionals, and lays the foundation for a vibrant, relevant and enriching CLE literature.

## Acknowledgements

I am grateful to the anonymous reviewers of ALE and Dr Anne Marie Houghton, University of Lancaster, for their helpful comments on an earlier version of this article.

## Declaration of Conflicting Interests

The author declared no potential conflicts of interest with respect to the research, authorship and/or publication of this article.

## Funding

The author received no financial support for the research, authorship and/or publication of this article.

<sup>67</sup> William Twining, *Rethinking Legal Education*, 52 *LAW TEACHER* 241–260 (2018).

<sup>68</sup> Cownie, *supra* note 43.