

**Dissolving the stiff upper lip: Opportunities and challenges for the mainstreaming of therapeutic jurisprudence in the United Kingdom**

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## **ABSTRACT**

Although therapeutic jurisprudence (“TJ”) is increasingly well-established internationally, particularly within the United States of America (“US”), to date it remains relatively unacknowledged within the United Kingdom (“UK”). This article will explore the opportunities presented within contemporary UK society for the greater promotion, and eventual mainstreaming, of TJ. It will also consider the challenges faced during this process and how best to overcome these. Its first key area of focus will be upon the potential role of legal education in the UK in educating law students (and academics) about TJ, considering which approaches are likely to be most effective in incorporating TJ perspectives, at what stage this should occur and to what extent TJ is likely to impact on the existing curricula at a time when proposed changes relating to entry into the legal profession are heavily influencing the work of Law Schools. The article will then move on to consider the receptiveness of the UK legal profession to the TJ paradigm in light of recent attempts to move to a competency-based approach to practice and to reconceptualise professionalism to meet the challenges of increasing fragmentation and corporatisation. The third key area it will explore is the UK’s recent plans to reintroduce problem-solving courts (“PSCs”) into its criminal justice system. The authors will discuss the downfall of the six UK Drug Court (“DC”) pilots originally established in 2005 theorising upon their failures and reflecting upon whether the current UK criminal justice system is truly able to support a fresh round of PSC initiatives. The article will end with recommendations for ways in which the international TJ community should begin the process of mainstreaming TJ within the UK. It will conclude that there are currently significant opportunities to be utilised, but that this requires significant commitment and mobilisation amongst existing TJ scholars and practitioners.

**Keywords:** Therapeutic jurisprudence; United Kingdom; legal education; legal profession; problem-solving courts.

## **1. Introduction**

Despite Carson raising the question of “Therapeutic Jurisprudence for the United Kingdom?” in 1995, over two decades later it remains largely unacknowledged within UK contexts. There are a handful of legal scholars and practitioners working explicitly within this field (see, for example, Donoghue, 2014 and McIvor, 2009). It is also likely that there are a significant number of others with an emergent interest or an implicit focus on TJ principles. However, the level of UK-focused publications, reports and discussions around TJ are minimal compared to those generated within the US and elsewhere. These international contributions to TJ have developed the field from its origins as a new perspective on mental health law in the late 1980s (Wexler, 2010), through to a heuristic applied in a wide range of areas (see, for example, Wexler, 2012; Wexler, 2008a; Baker, 2008). The core vision of “law as a therapeutic agent” (Wexler, 1990) allows for the questioning of whether any legal rule, procedure or role will have therapeutic or anti-therapeutic effects (Wexler, 2010). In other words, it validates the consideration of law’s impact upon

psychological and emotional wellbeing in a way which had previously been viewed as largely alien to the quasi-scientific rationality of “thinking like a lawyer” (Grossi, 2015; Maroney, 2006).

It would be tempting to suggest that, in the case of the UK, this attachment to such a rigid notion of “thinking like a lawyer” is exacerbated by the presence of a common law system which has been known for prizing practicality and eschewing theory. For example, Atiyah posits that judges and other members of the legal profession in the UK have traditionally had a “general aversion” to theory and a pride in “muddling through” (1987, p.101). Around the same time, Wilson supported this stating that “If putting “legal” in front of “scholarship” is like putting “plastic” in front of “cup”, then adding “English” is like adding “disposable”. (Wilson, 1987, p. 819). However, TJ itself has, from its inception, had a highly practical focus. Indeed, the approach has been summarised by Wexler as “going from practice to theory” (2011, p. 38). TJ has never been promoted as a fully-blown theory but rather as a “field of inquiry”, drawing on insights from behavioural sciences and implementing them into the day-to-day practice of law (Wexler, 2011, p. 33). There is a movement towards a more systematic collection of evidence and there has also been some consideration of the meaning of “jurisprudence” by Winnick (1999) which touches on some of the challenges TJ poses to dominant legal paradigms and philosophies. However, these have arguably been largely peripheral to the practically-focused development of TJ, rather than being the drivers of the movement.

In any event, in the last forty years within the UK there has been considerable development within legal scholarship. Within law schools, academics have engaged with an ever-increasing range of legal theories and inter-disciplinary work, notably through a growth in socio-legal studies (akin to the US’s “law and society” movement) (for discussion of the impact of socio-legal studies in UK academia, see Cownie, 2004, p. 54-58 and Siems and Mac Sithigh, 2012). There is also a significant interest in law and psychology and law and emotion (see, for example, the law and emotion stream run annually at the Socio-Legal Studies Association’s annual conference). Within the UK legal profession, it is difficult to discern whether there has been a more significant engagement with legal theory in recent years. However, there has certainly been a greater interest in the psychological aspects of law, often characterised by discussion of the need to apply “emotional intelligence” and “soft skills” to improve client care (Legal Education and Training Review (“LETR”), 2013, para. 2.93) and an increasing focus on the wellbeing of specific groups, including witnesses classed as “vulnerable” (Solicitors Regulation Authority (“SRA”), 2017) and members of the legal profession themselves (see, for example, [www.lawcare.org.uk](http://www.lawcare.org.uk)).

If (as it appears) an aversion to legal theory or scholarship can be largely discounted as a reason for the lack of engagement with TJ in the UK, perhaps another factor is

the traditional British “stiff upper lip” referred to in this article’s title? As Paxman posits in his book on “The English” (originally written in 1998):

They were polite, unexcitable, reserved and had hot-water bottles instead of a sex life... They were doers rather than thinkers, writers rather than painters, gardeners rather than cooks. They were class-bound, hidebound and incapable of expressing their emotions” (2007, p. 1).

This implies a broader, cultural distaste for terms such as “therapeutic” and “well-being”. A form of desire to keep on carrying on and avoiding something which could be viewed as verging on the sentimental, mawkish or in any way “touchy-feely” (Letts, 2014). However, even in 1998, Paxman could detect clear evidence that the stiff upper lip was beginning to, at least, twitch, citing the public shows of emotion around the death and funeral of Princess Diana in 1997 (2007, p. 240). Certainly, the term “wellbeing” has become well-accepted within the lexicon of the UK, with the Office for National Statistics providing annual updates on their Measuring National Well-being programme, now including 41 different measures, since 2013 (2017, n.d.). It should also be noted that Paxman was referring specifically to the English, whereas the Scottish, Welsh and Irish all have their own, often differing cultural stereotypes even within such a relatively small geographical space as the UK.

To what extent this cultural softening has specifically permeated the English legal arena is perhaps more questionable as the notion of a stiff upper lip seems to chime well with the perceived rationality of “thinking like a lawyer”, often interpreted as requiring emotions and feelings to be disregarded or suppressed. A striking example of this is given in the case of *R v Konzani* [2005] 2 Cr App R 198 in which the judge, in summing up for the jury, states “Make sure that emotion does not enter into your judgment in this exercise that you must embark upon. There is an old saying that, ‘When emotion comes in, sense moves out’. Emotion has its place, of course, but it can mislead judgment” (*Konzani*, summing up, p. 5). Despite the devolution of the 1990’s accelerating the development of a more diverse range of legal systems within the UK in terms of structures, processes and legislation on an ever-increasing range of issues, there is little evidence that the English law’s aversion to emotion (and, by extension, wellbeing) has been significantly challenged. Whereas in the US there appears to have been a significant backlash against the rigidity of legal culture, leading to a sustained and energetic interest in new approaches to law and lawyering, the same impetus does not appear to have been achieved within the UK.

Perhaps one of the reasons for this can be traced to the “age of austerity” that has been the dominant discourse around public finances since its dawn was heralded by the Conservative-Liberal Democrat coalition government in 2010 (Financial Times, 2010). Debates on the legal ramifications of this have largely centred the impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the cuts made to publically-funded legal advice and assistance for those on a low income (The Law Society of England and Wales, 2017). It is perhaps understandable that in a time of continuing financial uncertainty, and gloomy fiscal predictions (Institute for Fiscal Studies, 2017), with the added complications of the UK’s impending exit from the European Union, the introduction of innovative new approaches to law has not been a priority for those in political and legal circles. Another part of the attraction of the *status quo* could also be the sense that the UK’s long democratic tradition, coupled with the protections afforded by the European Union and European Convention of Human Rights, are themselves sufficient protections to ensure positive (or therapeutic) consequences within law-making (Feldman, 2004).

Therefore, this article is being written at a point where the UK contains a range of different social, cultural, financial and legal imperatives. Whereas some older attitudes (notably to legal theory and scholarship) have changed rapidly, others (including permutations of the stiff upper lip in English legal culture) appear to be more deep-rooted and harder to challenge. The impact of austerity also cannot be overlooked or ignored (particularly in relation to PSCs). Within the context of these broader opportunities and challenges, the authors will focus on three key areas where TJ could (and arguably should) begin to challenge the dominant existing paradigms – legal education, the legal profession and the court system.

## **2. Laying the foundations: TJ and UK legal education**

Law schools have a responsibility to remind law students that by studying law they have the power to transform thoughts, policies and lives, and that practising law is not just about financial rewards, but that its greatest reward is contributing to the betterment of society and ultimately to social change. (Fourie, 2016, p. 2)

There are two ways in which TJ can be incorporated into legal education. Firstly, as a discrete topic area, introducing students to its key principles and applications, either as part of a wider course on approaches to law, or in a module wholly focused on TJ itself. Secondly, by using a TJ approach to teaching and learning which is dispersed throughout either all, or at least part of, the law school curriculum, for example, by using it within a clinical education setting (Brooks, 2006; Gould and Perlin, 2000; Berkeiser, 1999) or during the teaching of mooting, legal drafting and other lawyering skills (Fourie and Coetzee, 2012; Goldman and Cooney, 1999). There is some evidence of successful “perspective” courses introducing students to TJ and explicitly bringing it to the forefront (Wexler, 1996, p. 283). However, they also involve significant practical issues. If there is to be a whole course on TJ, this

has considerable implications for resources and also staffing. On the other hand, if TJ is one component of a wider offering, there is a danger that it simply becomes one of a smorgasbord of alternatives being presented, without its key tenets and applications being thoroughly explored. Therefore, King posits that challenging the dominance of the adversarial paradigm within legal education and emphasising the application of approaches such as TJ to a diverse range of legal topics requires them to be “integrated into the teaching of core legal subjects” (2008, p. 1125). Such a holistic approach would seem more likely to embed an understanding and appreciation of TJ within students’ professional identity, although it is also not without practical difficulties, including ensuring that the relevant academic community has a shared appreciation of its relevance.

A key issue for this paper is whether one, or both, of these approaches can be incorporated into UK legal education. Within the UK, law is studied as an undergraduate-level degree (“LLB”). At present, the LLB is inevitably offered as a “qualifying law degree”, one which meets the academic standards for qualification into the legal profession. As such, it must cover specific areas of law – public, European Union, criminal, obligations, property, equity and trusts (Bar Standards Board (“BSB”) and SRA, 2014, pp. 14-16). To qualify as a solicitor or barrister in England and Wales, a student then has to undertake either the Legal Practice Course (for solicitors) or the Bar Professional Training Course (for barristers), both of which are a year full time, and a period of “on-the-job” training (a two year training contract or one year pupillage).<sup>1</sup>

In Scotland, a graduate law student will undertake the one year Diploma in Professional Legal Practice and a traineeship to become a solicitor or can then undertake further examinations and additional work experience to become an advocate. In Northern Ireland, a graduate law student will study and gain work experience for two years to become a solicitor, or undertake the Bar Postgraduate Diploma in Professional Legal Studies and then do a year of pupillage to become a barrister. Therefore, there are some variations in the types of legal education provided across the UK. It should also be noted that within each jurisdiction there are also other potential routes for qualification into the legal profession (for example, as a Legal Executive in England and Wales). However for the purposes of this article the authors will focus on legal education within England and Wales in which the undergraduate LLB represents the entry point to legal education for a significant number of students.

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<sup>1</sup> Solicitors form the largest branch of the legal profession, with 165,484 registered on the English and Welsh “Find a Solicitor” website at the time of writing (January 2018) (The Law Society of England and Wales, 2018). In contrast, there are only around 16,000 barristers employed or self-employed (The Bar Council, 2018).

The undergraduate nature of the LLB, and the separation of the academic and vocational stages of training, have all contributed to longstanding tensions within Law Schools around the purpose of legal education (see, for example, Blake, 2016; Guth and Ashford, 2014). At their core is the debate over whether the LLB should be seen as the beginnings of preparation for legal profession (Savage and Watt, 1996), a form of liberal education separate from any vocational leanings (Bradney, 2003), or some form of compromise or hybrid between the two extremes (the best known proponent of the latter being Twining, 1994). Individual Law Schools within England and Wales often appear to fall somewhere towards the middle of the spectrum, although the research-intensive Russell Group of universities tend to be viewed as positioning themselves nearer the liberal end of the spectrum, with the newer (post-1992) universities, which were formerly Polytechnics, emphasising their vocational credentials. Despite this diversity in approaches, there do seem to be significant imperatives towards a more vocational orientation.

In general terms, since the late 1990's there has been a shift in UK higher education policy towards an emphasis on employability and the need to produce economically active graduates (Lynch, 2006; Levidow, 2002; National Committee of Enquiry into Higher Education, 1997). Specifically within law, the plan to radically over-haul the route to qualifying as a solicitor in England and Wales from 2020 by removing the requirement for a qualifying (or any other form) of LLB will arguably encourage a more vocational slant to the degree.<sup>2</sup> Graduates from any degree will be required to undertake a two part Solicitors Qualifying Examination covering legal knowledge (Part 1) and legal skills (Part 2) and a period of qualifying work experience (SRA, 2017). The types of legal knowledge covered are significantly different from the usual LLB fare, with proposed components including commercial and corporate, wills and dispute resolution in contract and tort. The format is also likely to be based around computerised multiple choice questions – a highly contentious choice given the traditional LLB focus on essays and problem-style questions (SRA, 2017). This leaves Law Schools in England and Wales with the quandary of whether to incorporate a more vocationally-focused type of preparation for the new Part 1 within their LLB provision, to continue with their existing provision or to focus on a more broadly-based LLB. Although currently only a minority of LLB students actually enter either branch of the legal profession, during their first year a significant majority have the intention of doing so, and Law Schools therefore have to be mindful of this fact (Hardee, 2016). Given that either of the latter options would involve many students in incurring additional expense through undertaking some form of further study to prepare them for Part 1, it seems likely most Law Schools will seek to explicitly encompass the requirements for the examination in their LLB and use this as part of their marketing strategy.

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<sup>2</sup> It should be noted that to qualify as a barrister it will still be necessary to obtain a qualifying law degree, adding an additional tension for LLB providers.



This vocational orientation arguably provides some opportunities for the mainstreaming of TJ within UK undergraduate legal education – its practical orientation and practitioner-friendly literature could fit well with a greater emphasis focus on preparation for legal practice. At the same time, as TJ is not yet a well-established part of the lexicon of the UK legal profession, it will require considerable effort to raise its profile and emphasise its relevance to those academics and students who are focused on entering practice. There is also the danger that TJ will be seen wholly as a vocational, client-care orientated, tool, in a manner which impedes its theoretical evolution and belies its paradigm-shifting approach to law as a whole (Winick, 1997). Nevertheless, this potential should be acknowledged and built upon as the LLB evolves in line with the Solicitors Qualifying Examination. Indeed, it is possible to envisage TJ having a role in drawing together vocational and liberal approaches to the LLB, if both its practical relevance and theoretical interest can be harnessed. For example, its use as a heuristic through which to explore dispute resolution processes could encompass the promotion of non-adversarial methods whilst also providing practical guidance on issues such as working with vulnerable clients.

It is therefore necessary to return to a consideration of the specific ways in which TJ could be incorporated into the LLB, now or in the future. In terms of TJ as a discrete option, at undergraduate level the current requirement for coverage of specific core subjects in a qualifying LLB arguably reduces the scope for a wide range of options. It also appears this may be replicated in the future under the Solicitors Qualifying Examination regime if Law Schools do choose to cover the Part 1 specification. At present, those LLB options that are offered often seem to introduce other substantive legal topics such as family or employment law. However, there has also been a gradual shift in emphasis towards options that focus on employability and skills relevant to the legal profession (Harris and Beinart, 2005) and it seems probable this may increase if Law Schools seek to accommodate preparation for Part 1. This appears to offer scope to incorporate TJ, following US examples, but there remains the danger, previously mentioned, of TJ becoming a relatively small, insignificant or overlooked portion of the overall course. The tensions around the purpose of the LLB also mean that this type of course may not be offered by less vocationally-orientated Law Schools. Thus, embedding TJ principles throughout such a course would enable it to form a viable part of the options offered by Law Schools, but still make it potentially only available within a proportion of more vocationally-orientated institutions.

Another possible route could be through TJ's explicit incorporation in teaching around legal ethics and values on the LLB, emphasising the ethic of care that TJ promotes (Cooney, 2005; Wexler, 1999). The LETR report, from which the Solicitors Qualifying Examination stemmed at least in part, did recommend that "legal values" should be incorporated and assessed as part of the academic stage (2013, para. 4.137). However, to date this recommendation has not been implemented at a

national level. Within the proposed specification for the Solicitors Qualifying Examination, Part 1 does contain a reference to “principles of professional conduct” and suggests students will be required to “extract relevant... ethical issues” (SRA, 2017, p. 11/12). Nevertheless, it is unclear to date whether the expectation is this will be dealt with as a discrete topic or, as seems more likely, incorporated into the study of other topics (an approach currently being proposed on the Bar Professional Training Course (BSB, 2017). In either case, there appears to be some potential to integrate TJ’s ethic of care. However, in reality, there is also likely to be a significant focus on preparing students to be assessed on how to act “honestly and with integrity in accordance with legal and regulatory requirements and the SRA Handbook and Code of Conduct” (SRA, 2017, p. 11) and this seems likely to be the main focus.

At the current point in time, it appears that offering a discrete course on TJ at the LLB stage is extremely unlikely. There is potential to encompass TJ within part of a lawyering skills or legal ethics course, but the possible impact of this is unclear. The question then is whether, as suggested by King (2008), TJ can be embedded more widely within the LLB curriculum. Theoretically, this can be done as, although the core subjects of the LLB are currently specified, there are few restrictions upon the content which must be covered and which perspectives or approaches are chosen to explore them. In any event, once the Solicitors Qualifying Examination is introduced, there will be no specified subjects to be covered for qualification as a solicitor, although the likelihood is that the Part 1 topics will be covered by many, if not most, Law Schools.

One issue, which applies under both regimes, is that there is a lack of material on the application of TJ to some of these core subjects, particularly in a UK context, for academics to draw upon when preparing curricula. For example, in relation to contract law, although some UK books take a more relational or radical approach (Mulcahy and Wheeler, 2005) there is nothing specifically applying TJ principles. Even internationally, this is not an area that has been covered in great detail. Although there are aligned fields, in particular the notion of “conscious contracting” (Wright, 2016), that could be drawn on to develop a coherent TJ-approach, this would require an understanding of TJ, a knowledge of the wider literature on approaches such as integrative and comprehensive law, and the time and resources to meld these together into a working curriculum. As the body of TJ literature grows and awareness of new lawyering paradigms becomes more established with the UK, this is not impossible, but at best it will be a gradual process. An easier entry point amongst the current core subjects would be criminal law, where there is a more established body of TJ work (see, for example, Wexler, 2008) but this is still, in the main, US-focused and would require adaptation. Thus the embedding of TJ in the LLB will require a process of conscience-raising, debate and discussion in the UK to garner academic support and awareness and build the capacity to adapt and apply TJ resources to the UK context.

It is arguable that the area with the most immediate potential for the incorporation of TJ into UK legal education is that of clinical legal education. The US body of literature on the application of TJ to this aspect of the Law School has already been referred to. Within the UK, clinical legal education generally is growing. A 2014 survey with responses from 80 UK Law Schools indicated that 96% of these undertook pro bono work with 67 of the 80 engaging in public legal education activities and 45 running general advice clinics (Carney et al, 2014, p. 4). Although there do not appear to be any clinical legal education programmes run along explicitly TJ lines, there is a clear interest in issues such as ethics (Drake and Toddington, 2014; Kerrigan, 2007) and in developing lawyering skills (Hall and Kerrigan, 2011) all of which seems to offer potential for TJ-based clinical programmes, drawing on the existing US examples (see Marson et al, 2018 which exemplifies this within a UK Refugee Clinic). Once again, some of the issues raised by this are around the level of awareness and support within the UK academic community and the potential pressures on resources. However, clinical legal education has already proved itself capable of providing and embracing innovative approaches that go much further than providing simply a form of “work experience” (see, for example, Nicolson, 2015; Nicolson, 2013; Duncan, 2005; Brayne et al, 1998).

Like all forms of active learning, involvement in law clinics has many advantages over traditional forms of learning. By engaging the interest and emotions of students, it has more potential to develop moral commitment. Learning is more profound where student experiences are more personal, immediate and realistic, and relate to the fulfilment of their future social roles. Learning experiences are also likely to be lasting when prior assumptions and settled values jar with experienced reality, causing ‘disorienting moments’, moral crises and cognitive dissonance, and when personal views are challenged by others to create social disequilibrium. Moreover, by encouraging students to see issues from the client’s perspective, clinics may encourage students to develop empathy and other emotional sentiments, which virtue ethicists and others see as so important to morality. (Nicolson, 2015, p. 47)

Incorporating TJ within clinical legal education would thus enable it to be considered both within the development of lawyering skills, but also in relation to ethics and values in a way which applies the abstract to concrete experience. There is a danger that focusing on TJ’s use in clinical programmes could detract from it being mainstreamed within the wider Law School curriculum, as clinical legal education has often been viewed as “something apart” from the wider offering rather than an integral part of the LLB (Hall, 2011, p. 26). However, there is a persuasive argument that challenges this perception and argues such programmes should become “centre

stage” (Hall, 2011, p. 27).<sup>3</sup> This may well be expedited by the possibility that some forms of pro bono activities currently found within UK clinical programmes (particularly, students working in a law clinic) will be eligible to form part of the participants’ period of qualifying work experience under the Solicitors Qualifying Examination (SRA, 2017, 2.1).

LLB offerings within the UK are not homogenous in their purpose and approach and therefore it is unlikely that one route to mainstreaming TJ within legal education will (or should) apply across the board. The clearest potential appears to be offered through clinical legal education, but other opportunities may be present and should therefore be utilised within individual Law Schools as understanding of TJ’s importance grows. It is also necessary to consider whether TJ could be introduced at a postgraduate level as well. The most obvious place within postgraduate law would appear to be within the training offered to aspiring solicitors and barristers/advocates. However, the relatively short nature of these courses and the more heavily prescribed nature of the curricula (see, for example, SRA, 2011 and BSB, 2016/17) militate against this. In addition, the impending arrival of the Solicitors Qualifying Examination means that, in England and Wales, the existing structure of post-graduate legal training appears likely to be radically over-hauled. It is probable that some providers will seek to offer preparation courses for the Solicitors Qualifying Examination Part 1 for non-law graduates (or those law graduates whose LLB did not cover the requisite elements). It may also be that some form of training or support will be offered in preparing for Part 2 of the Examination (focused on competencies required for practice), but the format of these and, therefore, the potential to incorporate TJ is unclear. Although it should not be wholly discounted, at present the lack of clarity around provision from 2020 makes it difficult to predict the opportunities and challenges available.

There is also the possibility of introducing TJ into the academic postgraduate study of law, namely the Master of Laws degree (“LLM”), commonly offered by UK Law Schools. This raises many similar questions to its incorporation into the LLB (although there is arguably less of a vocational imperative at LLM level). At present, it is hard to gauge the potential for this to take place, but as awareness and understanding of TJ grows within the UK, this should not be forgotten as a potential additional route towards mainstreaming.

### **3. Translating theory into practice: TJ and the UK legal profession**

Whilst legal education in England and Wales braces itself for a period of change and possible turmoil, the UK legal profession has already experienced a time of significant development. This has been occasioned partly through domestic

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<sup>3</sup> Northumbria Law School provide an example of this, allowing students to participate in their Student Law Office throughout their LLB (Northumbria University, 2018).

legislation which de-regulated the provision of a significant proportion of legal services, opening up the legal sector to greater competition from a variety of businesses (Legal Services Act 2007), as well as reducing the scope of public funding for advice and representation (Legal Aid, Sentencing and Punishment of Offenders Act 2012). Other imperatives mirror those found across Western societies, including the increasing use of technology to provide solutions to legal problems (Susskind, 2013), a neo-liberal focus on profitability and corporate practices, and the increasing consumerisation of potential clients (Sommerlad, 2015; Boon, 2005). Such pressures have impacted not only on structures and processes within the legal profession, but also on its fundamental values, ethics and notions of professionalism:

Some scholars argue that the changing nature of professional practice signals a “crisis of professionalism,” suggesting that the legal profession has abandoned principle for profit and professionalism for commercialism... (Wallace and Kay, 2008, p.1021)

The extent of this impact can be debated as there are longstanding tensions between narratives portraying the legal profession as servants of the state and others implying less rarefied motivations. See, for example, Dickens’ comment that the legal profession’s “grand principle is to make business for itself” in *Bleak House* (1853, pp. 385-386). However, it is commonly accepted that recent developments have made a significant impact and that the legal profession is now having to adjust to the new challenges and opportunities of the current legal landscape.

One of the key changes that is relevant to the mainstreaming of TJ is the shift towards a competency-based approach to qualifying as a solicitor or barrister within England and Wales. This stems from the LETR who identified a range of competencies required for legal practice under a number of different dimensions and domains. There is the cognitive dimension, including professional ethics and values, communication skills, legal research and advocacy skills and “commercial and social awareness” (2013, pp. 132-135) as well as integrative and contextual elements (both focused on the ability to apply law in practical situations) (LETR, 2013, pp. 135-136). There is also an emphasis on building relationship using intra-personal communication skills and the importance of habits of the mind (LETR, 2013, pp. 136-139). In addition, the affective and moral dimensions are identified as “critical” to legal practice (LETR, 2013, p. 136). The recognition of the affective domain, in what has been a much discussed and influential report, was welcome and potentially significant. In terms of TJ, it can be seen that greater engagement with affect has a direct relationship to its key principles and research focus, offering the possibility for a higher UK profile and a more widespread acknowledgment of the importance of wellbeing. However, perhaps understandably given the wide scope of the LETR, there was little detailed discussion on what incorporating affective competencies

would actually mean in practice, despite both emotional intelligence and empathy both being referred to (Jones, 2018; Westaby and Jones, 2017). Whether it was this lack of detail, an unwillingness or inability to engage with the affective domain in depth, or simply a sense that this domain could be incorporated, implicitly, within skills such as communication, team work and client care, there is no explicit reference to affect within the final statements of competency adopted by both the SRA (solicitors) and the BSB (barristers). The BSB does refer to “empathy” as an element of client care (BSB, 2015) but this concept itself has both affective and cognitive aspects, with the latter often prevailing within its conceptualisation amongst legal professionals (Westaby and Jones, 2017). Therefore, at present, despite the importance of the affective domain being acknowledged, this does not appear to have filtered into the regulation of legal practice in the UK.

At the level of individuals and employers in the UK, there is arguably a growing interest in affect and other aspects implicitly related to TJ. Certainly, the legal press give the impression that wellbeing and emotional intelligence are becoming more visible topics within the legal profession, mirroring their adoption as “buzzwords” of wider contemporary society (Jones, 2018; Ecclestone, 2011). A difficulty appears to be that engagement with these topics may often be as a source of “quick fixes” or “sticking plasters”, focused on “mending” individual legal practitioners and heightening productivity in the legal workplace by enhancing client care skills and thus client retention, rather than considering their wider application within law and legal practice (for further discussion on this see, for example, Collier, 2016). In this sense, TJ offers enormous potential in providing not just a developing theoretical construct, and a way of introducing greater criticality into debates around wellbeing, but also practical templates (through its existing applications) for a more nuanced and broader consideration of these issues. What is arguably preventing this is an unwillingness, or inability, to recognise that the present engagement with affect and wellbeing may be somewhat superficial and narrow. Traditional UK legal norms of objectivity, impartiality and rationality are so deeply embedded within the legal profession that any narratives seeking to challenge them will need to be clearly, coherently and consistently repeated over a significant period of time to encourage recognition and some measure of acceptance, let alone to translate this into positive action and change. It is TJ’s current lack of visibility amongst the overall body of the UK legal profession which must arguably be addressed to enable this process to begin.

In practical terms, one way to tackle the current nature of TJ as a minority interest or legal sub-culture within the UK is to utilise the new Continuing Professional Development (“CPD”) requirements for solicitors and barristers in England and Wales which were introduced alongside the competency-based approach to qualification. Whereas previously such CPD activities revolved around accredited courses and training sessions, now there is a shift towards emphasising self-reflection and an accompanying acknowledgment that a broader range of activities

can account for CPD purposes. This opens the possibility of providing training, resources and even conferences on TJ which could form part of practitioners' CPD whilst at the same time raising the awareness and understanding of TJ in the UK. This does require such resources or events to be easily accessible, visible and also useful to interested practitioners, but it provides a clear focus for those with an interest in TJ within the UK to pursue.

At a less tangible level, the changes within the profession and the consequent questioning around what constitutes professionalism and where values and ethics should be positioned, all also offer a debate into which a TJ narrative could offer valuable insight and perspective. At a time when both the public and members of the profession itself have expressed concern over dwindling (even disappearing) level of legal professionalism (Sommerlad et al, 2015), this suggests that there is potential for the development of new definitions and ideals. Coupled with a growing interest in non-adversarial dispute resolution (in particular, mediation), this offers potential for the exploration of a new, TJ-influenced, paradigm. Indeed, it is possible to see the piloting of PSCs<sup>4</sup> in the UK as a manifestation of this interest in new conceptualisations of, not only professionalism, but also justice as a whole. Therefore, the final part of this paper will consider the lessons that can be learnt from the implementation and (somewhat difficult) progression of this pilot, before going on to draw out key issues that need to be focused on for TJ to be mainstreamed within the UK.

#### **4. A new vision for old problems: TJ and UK Problem-Solving Courts**

Mixed messages, patchy media coverage, and sudden U-turns within political perspectives surrounding UK PSCs have formed a running theme since their first appearance in 1998 (namely two inauthentic DC schemes in Wakefield/Pontefract and West Yorkshire) (Donoghue, 2014). Whilst the last twenty years have certainly given a place to PSCs in the UK's history of court justice innovation, their track record differs significantly to the success and popularity PSCs have experienced in other jurisdictions, such as the US, Canada, Australia, and New Zealand (King, 2011). Critics have speculated that there is a lack of understanding, trust, and drive, mainly by English and Welsh politicians (Bowcott, 2016b), which, combined with a climate of austerity, cutbacks, privatisation and centralisation reforms (Bowen and Whitehead, 2013), and a paucity of reliable empirical evidence (Kerr et al, 2011; Matrix Group, 2008), has led to a series of England and Wales PSC closures; most notably the six DC pilots and Liverpool's Community Justice Centre (Robins 2018; Transform Justice, 2014). Since, to date, little attention has been given to UK PSCs, this section of the paper will discuss their history and current status. It will also consider future directions which may assist in the greater mainstreaming of TJ in the UK.

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<sup>4</sup> We use "problem-solving court" as a broad umbrella term inclusive of: domestic violence courts, drug courts, family drug courts, mental health courts, and beyond.

Following the initial, 1998 schemes, PSCs began to proliferate in the UK (with a strong influence from the US), after publication of the White Paper: Justice for All (Home Office, 2002 cited in Donoghue, 2014). It was officially reported that the UK DC model progressed organically from existing responses to drug-using offenders (Kerr et al, 2011). Some other explanations, which have echoed those in other jurisdictions, posited that UK DCs were established as: i) a response to public and professional dissatisfaction with legal processes and reoffending rates; ii) as a result of an inability to sufficiently deal with causations of crime and; iii) due to compliance issues (Donoghue, 2014). In 2005, England and Wales introduced the first two official DC pilots, located in West London and Leeds Magistrates' Courts (Kerr et al, 2011; Matrix Group, 2008) as well as two Scottish pilots in Glasgow (2001) and latterly Fife (2002) (McIvor et al, 2006). In addition, in 2005, Liverpool's Community Justice Initiative was opened, modelled upon New York's Red Hook Community Centre, aiming to tackle reoffending by developing collaborative, inter-agency working between magistrates, the youth, the Crown Court, Criminal Justice agencies, and a range of social services (Booth et al, 2002).

Between January 2006 and May 2007, England and Wales' Ministry of Justice commissioned the Matrix Knowledge Group (a consultant group specialising in data analysis for health and justice within the criminal justice system) to undertake an independent process evaluation of the two pilot DCs in West London and Leeds, examining their functioning, impact, and value for money, to identify and resolve operational issues and thus enable the wider implementation of DCs (Matrix Group, 2008). The evaluation led to an announcement by the Secretary of State for Justice that four more DCs would be rolled out in Barnsley, Salford, Cardiff, and Bristol, in 2009 (Donoghue, 2014; Kerr et al, 2011). Subsequent years saw the UK DC model expand to UK Mental Health Courts, Anti-Social Behaviour Courts, Domestic Violence Courts, and Family Drug and Alcohol courts (Donoghue, 2014). Against the backdrop of the Labour Government, this looked promising for the future of PSCs in England and Wales and offered significant potential for raising awareness of the TJ paradigm (Donoghue and Bowen, 2013).

The most recent empirical research on the UK DCs was a process evaluation by Kerr et al (2011), which expanded Matrix Group's report by analysing all six UK DCs then in operation simultaneously, with the researchers mapping implementation, operation, and core elements across the models (Kerr et al, 2011). The key (quantitative and qualitative) finding was that judicial continuity, and the nature of the judiciary's interpersonal skills and interactional style remained crucial for successful DC operation, through increased positive offender experience, echoing previous findings from the Matrix Group (Kerr et al, 2011; Matrix Group, 2008). Quite alarmingly, however, unlike many of the high quality international reports, such as KPMG (2014), both UK reports failed to mention or recognise TJ as the underpinning philosophy of DCs (Hora, Rosenthal, & Schma, 1999). The researchers also failed to



acknowledge that their key findings (around the nature and influence of judicial interaction) formed a part of fundamental TJ principles (Winick and Wexler, 2003). This suggests that the UK PSCs may have suffered from an underdeveloped or misplaced ontological understanding by official bodies. Comparatively, the Scottish pilots, which are governed by a different legal jurisdiction, have benefitted from some early data suggesting efficacy (McIvor et al, 2006); and, perhaps most markedly, research that explicitly mentions the usage of TJ principles (and procedural justice) to improve functioning (McIvor, 2009).

Each of the six original England and Wales DCs are now closed. However, the reasons remain unclear as PSCs in the UK have proved to be an underreported area (Gibbs, 2014)<sup>5</sup>. When reporting on the closure of the West London model, Gibbs, (2014, n.p.) stated that: "the closure signals, yet again, how difficult it is for innovation to flourish in our courts system, and how resistant some parts of the system are to the specialist court model". Elsewhere, related enterprises, based on similar principles have also had little prosperity; Liverpool Community Justice Centre closed down in 2013 due to "low workload" but without proper explanation of what had caused this (Robins, 2018; BBC, 2013). In contrast, the Glasgow DC still remains in operation and there has been further expansion into similar initiatives within Scotland (Whitehead, 2017). The proficiency of the Scottish models, in comparison to those in England and Wales, could be attributed to a better-informed understanding of PSC practice on elemental, philosophical, and theoretical levels by officials.

In October 2016, Bowen and Whitehead from the UK's Centre for Justice Innovation (a UK Justice Reform Charity) officially reported that a joint vision statement by the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals sought to explore the implementation of a fresh suite of PSCs in England and Wales. Bowen and Whitehead (2016) put forward a delivery plan to develop ten new pilot projects, anticipating that they could begin to hearing cases during 2017 whilst clear indication of their impact would be provided by 2020. It was reported widely in the media that the then Justice Secretary, Michael Gove, in particular, championed their implementation (Bowcott, 2016a; Tonkin 2015; Leftly, 2016). This appeared to be a "step in the right direction" for not only reigniting the UK's broader rehabilitation revolution, which had faced many difficulties in the years previously (Centre for Social Justice, 2017), but also advancing TJ, which, as previously mentioned, is an under-researched and generally unknown approach in the UK. Whilst neither PSCs, nor the criminal justice context as a whole, are necessary starting points for mainstreaming TJ, the new initiative nonetheless provided fresh possibilities to cross-fertilise its principles during implementation whilst raising its profile amongst UK academics, practitioners and politicians. However, the cabinet reshuffle following the 2017 general election oversaw reassignment of the role of Justice Secretary to Liz Truss, who curtailed the PSC proposal without clear explanation why as the

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<sup>5</sup> The latest close down was Leeds DC in October, 2016.

plans became an underreported and seemingly trivialised objective (Doward, 2016; Bowcott, 2016b). Since then there has been a set of mixed messages. Some reports still suggest that the Ministry of Justice intends to move the action-plan forward (Doward, 2016). Nevertheless, after a further two reassignments of the role of Justice Secretary, firstly to David Lidington and most recently to David Gauke (who so far has remained silent on PSCs), the outcome of Bowen and Whitehead's report still remains to be seen.

Whilst the story for PSC courts in England and Wales so far has been bleak, and currently looks uncertain, there remains promise for a broader shift in UK criminal justice culture as The Centre for Social Justice (2017) attempts to reinitiate the rehabilitation revolution in a report which naturally fuses key TJ principles into the criminal justice mainstream plans. As critics have argued that: "(England and Wales) specialist courts have fallen by the wayside because of lack of official support" (Bowcott, 2016, n.p.), this cultural shift could allow for a more welcoming political climate that, in turn, provides a more viable criminal justice structure for future PSCs. Similarly, in neighbouring jurisdiction, McGrath (2005) posits that Irish courts deal with child protection cases in an anti-therapeutic manner. The author argues that the Irish legal system needs a fundamental "constitutional change" or "major structural reform" to deal with such complex cases by moving towards an inquisitorial rather than adversarial system of justice (similar to in the Netherlands) (McGrath, 2005: 150). What is clear here is that non-adversarialism is prevalent within legal spheres across the British Isles. However, increasingly, there is a need to move towards a system encompassing the therapeutic ideal, especially in cases involving vulnerable individuals. It is also clear is that this change needs to exist on a broader level than simply the practices themselves, and instead should be anchored in a therapeutic legal or political climate.

This could be on the horizon for England and Wales; recent policy documents are already scattered with ideas around punishment reform, asserting that the criminal justice system is currently over-reliant on "hard" punishment and insufficiently committed to rehabilitation-oriented practice (House of Commons Committee, 2016; O'Neil, et al, 2016). According to O'Neil, et al (2016), criminal justice experts have agreed that the criminal justice system has three systemic failures and are working towards advancing key policy reforms in order to address them: i). over-reliance on punishment; ii). insufficient commitment to rehabilitation and; iii). failure of the services beyond the criminal justice system to help facilitate change. Recent reports indicate that UK statutory laws/policy are now increasingly focusing upon restoration, rehabilitation and recovery within criminal justice structures, particularly during offender management (O'Neil et al, 2016; House of Commons Committee, 2016; Offender Rehabilitation Act 2014). One area of particular interest is the use of Drug Rehabilitation Requirements (DRRs), which are designed to address offenders' drug dependency by forming part of a (penal) community order or suspended sentence, funded, overseen and supervised by the Probation Services, who mandate drug

testing and appointments (National Offender Management Service, 2014). The Criminal Justice Act 2003, Section 210, allows courts to impose DRRs on the basis that: i) there is certainty that the offender has a dependency on drugs/a tendency to misuse illicit substances; ii) the court believes that the offender would benefit from treatment; iii) arrangements have/can be made for treatment and; iv) the offender expresses willingness to comply with the DRR/has a desire to pursue recovery (National Offender Management Service, 2014). According to the same section of the Criminal Justice Act 2003, participants with a DRR of over a year are required to attend intermittent court review sessions whereby prosocial behaviours are monitored by magistrates in the inquisitorial manner outlined in McGrath (2005) above (Matrix Group, 2011). Forthcoming research (Kawalek, 2018) will show that, perhaps without knowing it, magistrates must employ a series of TJ-infused styles within their interaction with participants, such as empathy, empowerment and encouragement. Most significantly, however, these courts are not PSCs per se; rather they exist within the broader mainstream punitive court system framework.

Wexler (2014, p. 463) states that TJ asks us to: "look at the law in a richer way by pondering the therapeutic and anti-therapeutic impact of "legal landscapes" (legal rules and legal procedures) and of the "practices and techniques" (legal roles) of actors such as lawyers, judges, and other professionals operating in a legal context". What these changes within the criminal justice system tell us is that whilst England and Wales has undoubtedly been quite hesitant in their implementation of PSCs, there has been a change in thinking more broadly (Donoghue, 2014). This incorporates the TJ approach, as per Wexler's definition, even if it currently only manifests itself in small sections of the mainstream UK criminal justice system. Despite its current small scale, this provides an opportunity for academics and practitioners who support the TJ paradigm to explicate the implicit and valuable links to TJ principles and practice. Leading TJ figures emphasise that: "an inquiry into therapeutic outcomes does not mean that therapeutic concerns 'trump' civil rights and civil liberties" (Perlin 2000, p. 412), demonstrating the synergy between the current calls for cultural change within the existing court system within England and Wales and the key tenets of TJ. Given that the failure of previous PSCs in England and Wales (in contrast to the success of Scottish initiatives) can be attributed, partially at least, to a lack of appreciation of the importance of relevant TJ principles, it is also arguable that mainstreaming TJ more broadly could be the starting point for UK PSC success. Thus effectively providing a "win-win" situation.

### **Conclusion: Future steps towards mainstreaming TJ**

The overarching message of the previous section is that TJ is happening in the UK, if only in small spaces and perhaps without official bodies or the majority of practitioners realising it; it just needs to gain momentum and visibility. In relation to legal education and the legal profession, there are also a variety of opportunities offering significant potential for the introduction of TJ but, once again, a larger, more

explicit discussion is required. In particular, there is a need for a far greater awareness and understanding to be developed within various strata of UK society, including legal academics, law students, legal (and other) professionals and public bodies. The suggested starting point for this consciousness-raising is to build a UK Centre for Therapeutic Jurisprudence. This is something that the authors are currently developing alongside a variety of UK (and other) colleagues, which will be similar to those in international jurisdictions such as the US, Australia and Japan. It aims to build on the international work taking place to mainstream TJ by providing a central hub to foster dialogue and promote collaboration and co-operation amongst a wide range of individuals and organisations in the UK. The Centre's objectives will be threefold: i) to increase the awareness and understanding of TJ generally within the UK; ii) to generate, support and disseminate information, research and discussion of relevance to therapeutic jurisprudence; and iii) to promote the incorporation of a TJ perspective within the UK legal system at the levels of both policy and practice. Given the value of TJ, a broad mainstreaming within the UK should, it is argued, be an intrinsic goal for those involved in and with the UK justice system. In addition, such a mainstreaming will, in turn and in time, give a better social, political and cultural climate for situating PSCs in the wider UK world and for enhancing wellbeing within both legal education and the legal profession. In relation to PSCs, through enhanced philosophical understandings, the lack of political will can hopefully be rectified through increased awareness of TJ's potential, possibilities and outreach. However, for this to happen, it will require work within both legal education and practice to ensure that its benefits are explicitly acknowledged and advocated for.

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