IN DEFENCE OF THERAPEUTIC JURISPRUDENCE: THREAT, PROMISE AND WORLDVIEW

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ABTSRACT

Therapeutic jurisprudence has inspired and influenced a range of criminal law and justice reforms which offer some light at the end of the tunnel for traditionally wicked socio-legal problems such as offender recidivism. Prominent among these reforms are the rise of the specialist sentencing (problem solving) courts and court supervised treatment programs. But in a policy terrain dominated by regular ideological and political swings, and by significant economic pressures, there are proposals for these reforms to be more widely adopted, not by the convening of more specialist courts, but by mainstreaming their practices and procedures. This paper examines some significant resistance to those proposals.

The adversarial legal paradigm is grounded in a deeply entrenched political and economic, liberal worldview. This worldview, heralded by Fukuyama as 'the end of history', manifests itself in the legal system as a normative adversarialism—with an assumption that contests are normal and necessary modes of social organization. Within Western cultures, the liberal political order, with its almost exclusive focus on the rights and liberties of the individual as the benchmark for human flourishing, is seen as the most natural for human societies and, if we accept Fukuyama's perspective, the best to which we can aspire.

Within this worldview, some scholars (from across a range of disciplines) argue that legal adversarialism and an associated 'culture of conflict' have become seen as not only endemic but as paradigmatic, to the extent that to question them is to attack the very core of modern liberal society. In that context, some of the most trenchant critics of therapeutic jurisprudence see it as 'profoundly dangerous' in that it threatens the rejection of 'fundamental constitutional principles that have protected us for 200 years.' These critics are, in some important senses, correct. But the veracity of these critical observations speak to the strength and promise of therapeutic jurisprudence as part of a wider, therapeutic worldview. One person's threat is another's promise.

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Therapeutic jurisprudence represents, not just a tinkering with the edges of legal practice and procedure, but a powerful diagnostic lens through which to view adversarialism and its intimate dependence upon the liberal worldview. It hints at a more robust and mature worldview which can give us a clearer understanding of the existing legal order. This paper explores why this creates fear for opponents of therapeutic jurisprudence. It argues that adversarialism may be very difficult to replace as the core ethos of common law legal systems because, in a number of senses it is perceived of as part of what it means to be human.

Introduction

The question as to whether the adversarial legal system continues to be relevant and that which is best able to oil the machinery of justice is ubiquitous. As such is the subject of a considerable body of literature.[2] To question the continued relevance and usefulness of adversarialism, is to acknowledge its paradigmatic status and the fact that it has been at the defining core of our legal institutions for centuries. Without tying ourselves down to too narrow a definition or conception of the 'adversarial paradigm', we can readily acknowledge that despite the multitude of rules, processes and roles spawned within the common law legal jurisdictions[3], the adversarial paradigm nevertheless embraces a core of identifiable disciplinary principles, methods and values[4]. If we grant that adversarialism is a paradigm,

[2] Some useful examples are: MICHAEL ROBERT KARLBERG, BEYOND THE CULTURE OF CONTEST: FROM ADVERSARIALISM TO MUTUALISM IN AN AGE OF INTERDEPENDENCE (2004).; Lindsay Farmer et al, *The Trial on Trial Volume 1: Truth and Due Process* (2004); Davies, Geoffrey, 'Why We Must Abandon the Essential Elements of Our System' (2003) 12(3) *Journal of Judicial Administration*; Duff, Anthony, Galanter, Marc, and Marc Galanter & Mark Allan Edwards, *Introduction: The Path of the Law Ands*, WIS REV 375 (1997).; . L. Handa, *Peace paradigm: Transcending liberal and Marxian paradigms*, *in* INTERNATIONAL SYMPOSIUM ON SCIENCE, TECHNOLOGY AND DEVELOPMENT, NEW DELHI, INDIA (1987); JOHN HOSTETTLER, FIGHTING FOR JUSTICE: THE HISTORY AND ORIGINS OF ADVERSARY TRIAL (2006).

[3] In this category I include (non-exhaustively) those jurisdictions (such as the US, England, Australia, New Zealand, Canada, Israel, India) in which the criminal and civil court system allows for the assertion of prior court decisions as having authoritative precedent value, manifesting the stare decisis principle – in contrast to civil law jurisdictions in which courts must adjudicate according only to legislation and where procedures are more inquisitorial than adversarial. Certainly there are a number of civil law jurisdictions which are experimenting, and implementing therapeutic jurisprudence inspired innovations (such as France which has a range of problem solving courts and lists) but for the purposes of this paper I want to examine the adversarial quality of the common law in a political context. A useful comparison of the structure and operation of these courts between international jurisdictions can be found in James L. Nolan Jr, *International Problem-Solving Court Movement: A Comparative Perspective, The*, 37 MONASH UL REV 259 (2011). Interestingly, Nolan concludes that a comparison of the development of problem-solving courts internationally reveals an important difference between an American disposition characterised by enthusiasm.
boldness and pragmatism and the contrasting penchant of the other countries
toward moderation, deliberation and restraint.

[4] For a discussion of the great variety of adversarial and inquisitorial approaches in legal procedure, see: Oscar G. Chase, *American exceptionalism and comparative procedure*, 50 AM J COMP 277 (2002)..

then we must also grant *ipso facto* that other legal paradigms are possible.[5] This is an important starting position on which to agree, for the purposes of this paper, given that I will argue that there is something akin to a symbiotic relationship between the adversarial legal paradigm and the liberal democratic worldview – to the extent that legal processes which are seen as sitting outside of that adversarial paradigm are sometimes seen as implied rejections of the liberal worldview.

Given the ubiquity referred to above, we ought not to be surprised that some proposed and actual reforms to adversarial practice seem to be keenly anticipated and successfully implemented. But these tend to be reforms which are not seen as going to the heart of the legal system. They are usually based on either express or implied representations (by those implementing them) that they are intended to optimise or improve existing adversarial processes which might otherwise fail to adapt to changed social conditions, or to sit alongside those existing processes as the 'junior partner'.

A useful example of this dynamic, are those reforms which are said to be 'less adversarial' rather than 'non-adversarial'. This consigns the new or innovative process to an ontologically subordinate position, not just in terms of practice but also in terms of underlying jurisprudence. One example of this was the decision of the Family Court of Australia to modify its approach to family law matters involving families with children, to allow judges to become far more involved in the process, rather than simply adjudicating upon submissions from parents and their lawyers. This reformed court process is known as the 'less adversarial trial'.[6]

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[5] I use the term 'paradigm' here, not in the general and somewhat colloquial sense which seems to have permeated much research in the social sciences and in the humanities, but in the sense meant by the philosopher of science Thomas Kuhn. A 'Paradigm' was first described by Kuhn as '*models from which spring particular coherent traditions of scientific research*'. An emphasis on cultural factors is made more explicit when Kuhn later suggests a paradigm is '*what the members of a scientific community share*' or '*a scientific community consists of men who share a paradigm*'. The definition narrows to '*a constellation of group commitments*' and the community to '*those who share a disciplinary matrix*' or a '*shared example*' from which a member of that community derives their understanding of the field. This notion of the paradigm as an exemplar (or of a group of shared/agreed examples) is probably that which makes its way most often into broader academic discourse – we hear and read very often of practitioners pointing to something as a 'paradigm example'. THOMAS S KUHN, THE STRUCTURE OF SCIENTIFIC REVOUTIONS (1962)

[6] The *Less Adversarial Trial Handbook*, which informs judges and parties how these proceedings are to progress can be found at: http://www.familycourt.gov.au/wps/wcm/resources/file/eb08eb04841dff4/LATReport_100609.pdf. The changes are legislated in terms of being expressly 'less adversarial' in: Principles for conducting child-related proceedings Division 12A of Part VII of the *Family Law Act 1975* (Cth). Arguments that these 'less adversarial' ought to be expanded to the wider civil courts have been made by the Deputy Chief Justice of the Family Court of Australia: John Faulks, *Natural Selection-The Potential and Possibility for the Development of Less Adversarial Trials by Reference to the Experience of the Family Court of Australia, A*, 35 UW AUSTL REV 185 (2010).

I have argued elsewhere[7] that therapeutic jurisprudence may represent something much greater than a mere 'pragmatic incrementalism'[8] which motivates important, but fairly narrow reforms to the law and how it operates. It may, itself, represent an alternative juristic paradigm[9] to the dominant adversarial system of the common law world, or (more likely) be part of some wider therapeutic or non-adversarial paradigm. If we grant, for the sake of argument, that a non-adversarial paradigm (of which therapeutic jurisprudence is part) is possible, then the issue of adversarialism's relationship to the liberal political order becomes even more important. It may have implications for compatibility (between the liberal worldview and therapeutic jurisprudence), for commensurability (between adversarialism and therapeutic jurisprudence)[10] and currency (of the adversarial system). If therapeutic jurisprudence is incommensurable with the dominant conception of the liberal democratic worldview, is it inconsistent with, or even a 'threat' to that worldview? We should not

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[7] Nigel Stobbs, *Nature of Juristic Paradigms: Exploring the Theoretical and Conceptual Relationship between Adversarialism and Therapeutic Jurisprudence, The*, 4 WASH U JURISPRUD. REV 97 (2011).

[8] A phrase first coined in this context by Freiberg: Arie Freiberg, *Therapeutic jurisprudence in Australia: Paradigm shift or pragmatic incrementalism*, 20 LAW CONTEXT 6–23 (2003).

[9] There is a body of literature which posits 'the law' (including legal institutions, professionals, rules and processes) as conforming to some 'juristic model' which has the qualities of a Kuhnian paradigm. Vilhelm Aubert, 'The Structure of Legal Thinking' in *Legal Essays: A Tribute to Frede Castberg*, eds. J. Andenaes et al. (1963) 41-63; and also Vilhelm Aubert, 'Researches in the Sociology of Law' (1963) 7 *American Behavioural Scientist* 16,18 where he concludes that 'legal methods, legal conceptualisations and the underlying theory share an identity or internal coherence which has, indeed, remained constant over time'. See also: Colin M. Campbell, *Legal Thought and Juristic Values"(1974)*, 1 BR. J. LAW SOC. 13–22. and Stobbs Ibid.

[10] I refer here to the sense of incommensurability intended by Thomas Kuhn which holds that advocates for competing paradigms cannot fully comprehend the other's perspective because they are observing elements of a literally different phenomenological and social world (which are contingent upon their worldview, training and experience) and describing them in a different professional language: see THOMAS S KUHN, THE STRUCTURE OF SCIENTIFIC REVOUTIONS (1962) (first published 1962, 3rd ed, 1996) at 103,112,148,150 and also Postsrcript 174-210. This is a phenomenon with a long pedigree in linguistics. There is a body of research which suggests that certain analytical or cognitive concepts (and perhaps even some emotions) are unique to particular cultures due to the uniqueness of their language and grammatical lexicon. The argument is, in its simplest form, that where two cultures do not share a common language, it may be impossible for the members of one of them to fully share in the experienced and felt world of the other. This is part of the wider communicative context in which: 'Meaning is determined in part by: who the author was, the purpose of the communication, for whom the information was intended, the relationship between the author and the audience, the culture within which the information was generated, the degree of commonality between source and receptor'. MILDRED L LARSON, MEANING-BASED TRANSLATION: A GUIDE TO CROSS-LANGUAGE EQUIVALENCE (1998).at 141. According to one major study of this phenomenon: 'The worldview implicitly held by the author and that of the audience can call for special attention. Information from another culture assuming the value of authority structures runs the risk of appearing meaningless'. 'Review of Frameworks for the Representation of Alternative Conceptual Orderings as Determined by Cultural and Linguistic Contexts' in *Project on Information Overload and Information Underuse (IOIU) of the Global Learning Division of the United Nations University* (1986) Mildred Larson et al.. The authors give the following example: 'In Melanesia there is a fundamental recognition of the network of powers influencing a person. This would render information from other cultures of limited significance unless the relationship to such powers was made clear. To render information meaningful in Japanese, distinctions of social status must be rendered explicit, even though they may not be present in the original form of the information'.

underestimate the emotive potential of opposition to such a threat, be it perceived or actual, to create a barrier to the mainstreaming agenda of the therapeutic jurisprudence movement.

Therapeutic Jurisprudence as Promise

The reception of, and reaction to, therapeutic jurisprudence in the academic literature, among legal practitioners and among policy makers and legislators is overwhelmingly, but not universally, positive.[11] Given the potential benefit which is promised by a movement which seeks to identify and remedy the emotional and psychological harms done to people as a result of interacting with the institutions of law, an area which the law itself has traditionally ignored, this is not surprising. The practical applications and legacy of the movement are already significant and it has attracted scholars and practitioners in significant numbers and of considerable stature.

In terms of the movement's practical success, the flagship contribution that therapeutic jurisprudence has made is arguably its influence on practice and procedure in the problem solving courts, especially in the US.[12] Largely as a response to what Drucker refers to as 'the epidemiology of mass incarceration in America',[13] increasingly desperate court and correctional systems have advocated for an expansion in the type and number of specialist sentencing courts in most states. These courts generally do not operate with respect to offences attracting federal jurisdiction. The number of inmates in Federal prisons increased by 788% between 1980 and 2011, compared to a growth of 353% in State prisons and that State rate is now in decline. The difference in growth rates was complemented by a growth

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[11] Hundreds of journal articles, books and other resources supporting the work of therapeutic jurisprudence scholars and practitioners are available online at the *International Network on Therapeutic Jurisprudence*: http://www.law.arizona.edu/depts/upr-intj/. A project to mainstream therapeutic jurisprudence techniques and practices across international jurisdictions and into general trial courts can be accessed at http://www.innovatingjustice.com/innovations/integrating-the-healing-approach-to-criminal-law?view_content=intro.

[12] This is not to suggest that the drug courts could not exist without therapeutic jurisprudence and in fact, therapeutic jurisprudence arose independently and at about the same time. But the connection between the two is widely acknowledged and explored. Bruce Wininck said of the connection 'we saw problem-solving courts and therapeutic jurisprudence as having a symbiotic relationship.' Expanding on this in the same interview Wexler said that "problem-solving courts really were developed by judges as a practical, intuitive, creative way of addressing the problem of revolving-door justice. They were largely intuitive and atheoretical, and they developed at about the same time as therapeutic jurisprudence. In contrast, therapeutic jurisprudence developed as an academic interdisciplinary perspective that is interested in what works, in a therapeutic or rehabilitative sense, in terms of legal arrangements and therapeutic outcomes. So there's an obvious overlap and now they are really starting to pay a lot of attention to each other." See: Centre for Court Innovation, Interview with Bruce J. Winick, Professor, University of Miami School of Law and School of Medicine, and David B. Wexler, Professor, University of Arizona Law School, transcript available online at < http://www.courtinnovation.org/research/bruce-j-winick-professor-university-miami-school-law-and-school-medicine-and-david-b-wexler>.

[13] [13] ERNEST M DRUCKER, A PLAGUE OF PRISONS: THE EPIDEMIOLOGY OF MASS INCARCERATION IN AMERICA (2013).

in the number of drug courts from only 1 in 1989 to nearly 3,000 by 2012. Media reports suggest that the success of the drug courts in the state jurisdictions has now motivated legislators who were once opposed to their operating philosophy to seek funding for more such courts.[14]

Apart from the significant take-up of therapeutic jurisprudence and its influence on a wide range of courts and organisations, the fact that Wexler and Winick have always contended that neither they nor the movement they have nurtured, advocates for a therapeutic state, makes the movement less paternalistic and less likely to attract opposition. Wexler allows that therapeutic jurisprudence does raise questions that produce answers that are both empirical and normative, but that the proper task of the legal scholar is not to 'generate data', but to use data in framing recommendations and then to perhaps 'suggest important and relevant lines of inquiry to social scientists'.[15] In other words, the agenda is to identify possible areas for reform (and perhaps to responsibly advocate for such reform) but not to prescribe or impose them.[16] As a therapeutic jurisprudence apologist, this seems to me, to be a worthy goal, expressed in measured terms.[17]

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[14] 'As Prisons Squeeze Budgets, GOP Rethinks Crime Focus' – Report in *The Wall Street Journal* Friday, June 21, 2013. Available online at http://online.wsj.com/article/SB10001424127887323836504578551902602217018.html.

[15] Wexler expresses it more fully in this way: "Whether therapeutic ends should prevail is a normative question that calls for a weighing of other potentially relevant normative values as well, Therapeutic jurisprudence assumes that, *other things being equal,* the law should be restructured to better accomplish therapeutic values. But whether other things are equal in a given context is often a matter of dispute. Therapeutic jurisprudence, although it seeks to illuminate the therapeutic implications of legal practices, does not resolve *this* dispute, which requires analysis of the impact of alternative practices on other relevant values. David B. Wexler, *Putting mental health into mental health law*, 16 LAW HUM. BEHAV. 27–38 (1992), 32.

David B. Wexler, *Therapeutic jurisprudence and changing conceptions of legal scholarship*, 11 BEHAV. SCI. LAW 17–29 (1993). David Yamada has recently written and spoken on the notion of responsible advocacy for academics, acknowledging that 'scholarship and research can open ways to engage in social change initiatives' but that advancing 'the public interest' is a nebulous concept.

Yamada, David C., If It Matters, Write About It: Using Legal Scholarship to Effect Social Change (August 1, 2013*). Bearing Witness: A Journal of Law and Social Responsibility*, Forthcoming; Suffolk University Law School Research Paper No. 13-28. Available at SSRN: http://ssrn.com/abstract=2304975.

[16] David B. Wexler, *Therapeutic jurisprudence and changing conceptions of legal scholarship*, 11 BEHAV. SCI. LAW 17–29 (1993) at 19.

[17] 'Apology' being used here in the dialectic sense ascribed to the process of 'apologetics'. 'Apologetics' derives from the Greek *apologia*, which described the legal process of making a systematic theoretical defence of a position by assuming and advocating the key weaknesses or faults in the position as a means to suggesting how these faults can be repaired or reconciled (such as Plato's *Apology of Socrates*). A paradigmatic example is GH Hardy's 1940 essay *A Mathematician's Apology*, in which Hardy defends the value of the study of pure mathematics as being independent of any practical value that it generates. He argues, inter alia, that the 'uselessness' of pure maths meant it could not be used to create harm (at a time when applied mathematics was being used to produce formulae for the production of nuclear weapons). Available online at: <http://archive.org/details/AMathematiciansApology>.

Therapeutic Jurisprudence as Threat

Most critiques of therapeutic jurisprudence are constructive. These have led to refinements and improvements in its conception and theoretical basis, to its methodology and to its relationship with legal practitioners and judges. To some extent, this sort of critic sees therapeutic jurisprudence only as a threat if it remains static, inflexible or ideological. It has always been an organic phenomenon.[18]

This is especially evident in the continuing refinements of court procedures which are directly inspired by therapeutic jurisprudence principles.[19] There have been criticisms of the trend, for example, by which some courts and legislatures make too much of cherry picked social science data and research in order to support reforms which were motivated by strong desires to make a particular legal process or rule less anti-therapeutic. There is always a danger that the desire and need for therapeutic reform can result in poor policy based on shallow analysis of interdisciplinary data. Rathus, for example, has examined the context in which the Australian legislature introduced, in 2006, significant reforms to family law legislation which created a rebuttable presumption that it is in the best interests of children for their parents to have 'equal shared parental responsibility' when determining custody issues.[20] The social science data on which this significant assumption was made was far more nuanced than was suggested by the amendment. The resulting policy seemed to assume that it was a 'social science fact or truth' that sharing responsibilities and duties between parents after separation is in children's best interests. In fact the reality is, unsurprisingly, far from that simple. What the wider body of research showed was that shared care time can be very beneficial for children within certain families, but can in fact be quite harmful for children in others.[21]

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[18] There is, in fact, some interesting ontological drift in Wexler's own articulations of the nature and scope of therapeutic jurisprudence. His conception seems to expand and contract between two key identifiable parameters: 'to identify—and ultimately to examine empirically, relationships between legal arrangements and therapeutic outcomes' and to critique the 'roots of the law' and to inform calls for 'fundamental, transformative societal change'. Research and innovations clustered around the first of these parameters are easy to identify; they are prolific. Work with direct links to the broader parameter is not so common as yet, probably as a result of the dynamic I explore in this current paper. This drift and diversity is, to some extent, reflected in the general body of therapeutic jurisprudence scholarship. Compare for example[18] David B. Wexler, *Reflections on the scope of therapeutic jurisprudence.*, 1 PSYCHOL. PUBLIC POLICY LAW 220 (1995). with David B. Wexler, *Two decades of therapeutic jurisprudence*, 24 TOURO REV 17 (2008).

[19] Diana Bryant & John Faulks, *The "Helping Court" Comes Full Circle: The Application and Use of Therapeutic Jurisprudence in the Family Court of Australia"(2007)*, 17 J. JUDIC. ADM. 93.

[20] The *Family Law Act 1975* (Cth).

[21] Rathus argues that 'there is a gap between the complex and nuanced social science research on when shared care time actually works and the 'lego-science' of the Act. Zoe Rathus, *A Call for Clarity in the Use of Social Science Research in Family Law Decision-Making'(2012)*, 26 AUST. J. FAM. LAW 81–100.

In a watershed paper within therapeutic jurisprudence scholarship, Slobogin articulated some of the most important jurisprudential and practical challenges that therapeutic jurisprudence faced in gaining widespread credibility among legal practitioners. He noted that experience with other contextual approaches to the law had been perceived as 'self-referential "pie in the sky" scholarship read by a small coterie of devoted groupies and no one else.' The 5 'dilemmas' posed in his paper have been subsequently explored and acted upon within the movement and it has become much the stronger for it. Slobogin's critique was not meant not to trash or to present any knock down arguments which were intended to demonstrate that therapeutic jurisprudence was somehow untenable. Slobogin concluded that:

> "The potential for TJ to support paternalistic results should be frankly recognized and not considered a bad thing; instead, therapeutic values should be carefully segregated from and balanced against other individual-centered interests and the interests of society, ideally using an identifiable analytical framework, so as to increase TJ's chances of being taken seriously."[22]

It is the critics who are not constructive that I am generally concerned with here though. The opposition of therapeutic jurisprudence's most trenchant critics, although virtually always seeking to ground itself in the objective frameworks of constitutionality and due process, is just as frequently expressed in quite emotive terms. One such critic, Judge Morris Hoffman (writing extra-judicially) expresses the view that:

> The therapeutic jurisprudence movement is not only anti-intellectual, it is wholly ineffective. The treatment is a strange combination of Freud, Alcoholics Anonymous, and Amway, whose apparent object is not really to change behaviours so much as to change feelings…In fact I suspect that is the improved feelings of the treaters and not of the treated, that it is really driving judges' infatuation with therapeutic courts[23]…… Judges are a bizarre amalgam of untrained psychiatrists, parental figures, storytellers, and confessors.[24]

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[22] Christopher Slobogin, *Therapeutic jurisprudence: Five dilemmas to ponder.*, 1 PSYCHOL. PUBLIC POLICY LAW 193 (1995).
[23] Morris B. Hoffman, *Therapeutic jurisprudence, neo-rehabilitationism, and judicial collectivism: The least dangerous branch becomes most dangerous*, 29 FORDHAM URB LJ 2063 (2001)at 2069. See also: Morris B. Hoffman, Essay, *Problem-Solving Courts and the Psycholegal Error*, 160 U. PA. L. REV. PENNUMBRA 129 (2011), http://www.pennumbra.com/essays/12-2011/Hoffman.pdf.
[24] Ibid at 2066.

The desire of Judge Hoffman to so starkly, and pejoratively, contrast the role of the therapeutic judge with that of the orthodox judge, hints at a range of deeply entrenched motivations. The nature of those motivations and the values and beliefs they manifest are important to understand and grapple with if we are to meaningfully respond.[25] Additionally, a deeper consideration of these views can tell us things about the wider relationship between adversarial versus non-adversarial trends in the law.

Cohen[26], who considers the drug courts to be at 'the cutting edge of therapeutic jurisprudence'[27] fears that therapeutic jurisprudence has promised not only a doomed 'panacea in the ongoing war on drugs' but that it advocates for a therapeutic state in which an explosion in the prison population will be replaced with an explosion in the patient population.[28] He acknowledges that we have a responsibility to 'help drug offenders become decent citizens, that the present 'system of revolving door of drugs and crime is in need of reform' and that there are pragmatic and sensible procedures at work in drug courts.[29] What concerns him about therapeutic jurisprudence is his belief that advocates for drug courts and therapeutic jurisprudence 'see drug courts as the first step in the transformation of the courts into a wholly therapeutic enterprise' and that there is something fundamentally troubling about suggesting that a judge can be anything other than a 'dispassionate, disinterested magistrate'. He concludes that 'this is not an outcome that a free society should welcome.' This fear or belief - that allowing the therapeutic jurisprudence position that some therapeutic and interventionist functions should complement the traditional roles of judges, is somehow antithetical to a free society – seems to underpin much of the more trenchant criticism. It is not clear, on the surface, why that might be.

Kates, a family law practitioner at the Florida Bar, asserts that a problem with the rise of therapeutic jurisprudence has been an increase in the number of 'non-legal systems' and 'non-legal professionals' intruding into the courts, resulting in 'the subtle denigration of long-established precepts of lawyer independence and due process'. She also asserts that it is of concern that more social science research is impacting on the family court system because 'the field of applied psychology is overrun with political machinations, nonsensical theories

[25] I have never met Judge Hoffman ,nor those I refer to in this paper as the 'trenchant' critics of therapeutic jurisprudence. I do not presume to make comment on what may, or may not, motivate them personally in their opposition or to have any familiarity with their work outside of their published commentary on therapeutic jurisprudence.
[26] Adjunct Fellow at the Ethics and Public Policy Centre < http://www.eppc.org/fellows-scholars/eric-cohen/>.
[27] Cohen, Eric, 'The Drug Court Revolution: Do We Want Theory Rather Than Justice to Become the Basis of Our Legal System?', *The Weekly Standard*, 27 December 1999 p.20.
[28] Ibid at 23.
[29] Ibid at 23.

and outright misrepresentations'.[30] Again, the linking of criticisms relating to due process and independence seem to be closely associated, in the mind of the critic, with some very passionate and negative views of the value of social scientists informing what happens in a court.

There are critics of therapeutic jurisprudence who are less dramatic in their articulation of the perceived dangers and threats of the movement, who nevertheless adopt a position of trenchant opposition based on similar beliefs in the apparent inviolability of the adversarial ethos. Larsen and Milnes[31] seem to be of the view that therapeutic jurisprudence practitioners blame adversarialism for offender recidivism[32], that it is over-focused on 'perceived shortcomings of the Australian adversarial system'[33] and that 'a judiciary that concerns itself with offenders' social and psychological problems may undermine established legal principles'.[34]

Freckleton has produced the most often cited cautionary note relating to the ambit and aspirations of therapeutic jurisprudence.[35] In a balanced and intelligent analysis of the relationship of therapeutic jurisprudence to both its advocates and detractors. He articulates the main criticisms of the movement and responds objectively to each of them.
He discusses a paper by Brakel[36] which Freckleton labels 'the most mordant critique of therapeutic jurisprudence thus far'. Brakel claims that therapeutic jurisprudence:

> '..is at best redundant, needless perhaps except as a cure for self-induced blindness. More critical it has all the attributes of a *willed departure from a more direct, common sense approach to the pertinent law* [emphasis added].'

Brakel's accusation that therapeutic jurisprudence goes against a 'common sense' approach to law echoes a long tradition of equating adversarialism with being rational. The coroloray being, perhaps, that to be less adversarial is be less rational, and that to be non-adversarial is to be non-rational (a theme unpacked a little later in this paper). He spends quite a bit of

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[30] Kates, Elizabeth, 'Why Therapeutic Jurisprudence Must be Eliminated from Our Family Courts' (2008) 13 *Domestic Violence Report* 65.
[31] Ann-Claire Larsen & Peter Milnes, *Cautionary Note on Therapeutic Jurisprudence for Aboriginal Offenders, A*, 18 ELAW J 1 (2011).
[32] Ibid at 5.
[33] Ibid at 2.
[34] Ibid at 1.
[35] Ian Freekelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented Price and Risks of Influence*, 30 T JEFFERSON REV 575 (2007).
[36] Samuel Jan Brakel, *Searching for the therapy in therapeutic jurisprudence*, 33 NEW ENG J CRIM CIV CONFIN. 455 (2007).

time asserting why it is that therapeutic jurisprudence breaches all sorts of traditional legal values and protections. Freckleton's response is to remind the reader that an agenda of hijacking of due process and personal liberties is not one that therapeutic jurisprudence has ever contemplated. Some of its methods and principles are certainly evident in the ethos of, and essential to the workings of such tribunals as the drug courts but, as Freckleton concludes:

> 'What he [Brakel] fails to acknowledge is that therapeutic jurisprudence does not offer itself as anything more than an approach to law which recognises, highlights and explores, often through sociopsychological insights, the multifarious potential for positive and negative impacts upon stakeholders The fallacy to whch Brakel subscribes is one of positivism and expectation.[37]

In this regard, Freckleton is surely right. And in that goal, the stock of therapeutic jurisprudence has continued to burgeon. But what interests me more here is the tone of the trenchant (or what Freckleton refers to as 'mordant) critics and the depth of feeling and sense of grave ideological offence they seem to take to therapeutic jurisprudence. Brakel says that therapeutic jurisprudence simply 'lacks content, that is just 'spurious verbal assocation', that it is in 'epsitemological freefall', 'mystical, if not occult' and 'a paen to 'holistic' law, if not whole-earth law'.[38]

Despite the assurances of therapeutic jurisprudence advocates that their agenda is modest and that the existing rights and obligations of people according to law trump therapeutic considerations if there is a conflict, the intensity of the scepticism expressed by the trenchant critics is worth exploring at a deeper level. Not just in terms of assessing whether any particular criticism has merit (which assessment has largely already been done in the significant weight and quality of therapeutic jurisprudence literature), but also to try and understand what really informs and motivates the level of scorn in this scepticism. In the following sections I argue that we can better understand and respond to such scepticism if we consider it from the context of worldview. Particularly the liberal democratic worldview, which is marked by a sense of inevitability, hubris and fatalism. [39]

The Importance and Ubiquity of Worldview

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[37] Ibid at 589.
[38] Brakel above n.33 at 467-468.
[39] The irony of responding to scornful comments in lnaguage which itself may appear scornful is not lost on me here. But I am intending that terms such as 'fatalsim' and 'hubris' be taken in an objective way. The following sections of this paper will attempt to provide some objective context for these terms in particular.

Liberalism as a political philosophy is ubiquitous in that it is the product of a strong and resilient worldview and because it has produced successful and iconic systems of government. I want to explore the extent to which liberalism as both political philosophy and worldview might help to contextualise, or to partly explain, the tone and depth of feeling evident in the views of the trenchant therapeutic jurisprudence critics. There is a long and organic history to the concept of the 'worldview' in scholarship within the humanities and the social sciences. A common element throughout that history has been a focus on how worldviews shape values and the emotive dimension which accompany judgements about whether particular elements of the social and cultural environment conform to a given worldview. Non-conforming elements or events are often rejected, not just in an objective sense, but with a concomitant, negative emotional response.

French social and cultural historians of the 1970's dabbled with the concept of mentalité'[40] as a way of capturing the underlying, corporate way of seeing the world that, they asserted, transcended social class and persisted for historically significant periods of time. The term 'mentalité' itself can be traced back to the 17th Century appearance in English academic writing of the word 'mentality' which seems to have originally been of narrow ambit, referring generally to a psychological state of individuals.[41] At some stage, however, the term broadened into a wider conception of a collective psychology or 'ways of thinking and feeling which are peculiar to a people or a given group of people'.[42] The concept as employed by these later continental scholars is broader still and, unsurprisingly perhaps, linked to the work of Enlightenment philosophers and historians who discuss the 'changed mentality

[40]Sometimes referred to more fully as *l'historie des mentalitiès*.
[41] Harvey A. Farberman, *Mannheim, Cooley, and Mead: Toward a Social Theory of Mentality**, 11 SOCIOL. Q. 3–13 (1970).
[42] Jacques Le Goff (translated by David Denby) 'Mentalities: a history of ambiguities' in COLIN LUCAS, JACQUES LE GOFF & PIERRE NORA, CONSTRUCTING THE PAST: ESSAYS IN HISTORICAL METHODOLOGY (1985), p.171.

brought about by the Encyclopaedists'.[43] As used by 20th Century social scientists[44], the concept has a sense of inevitability[45] (in a seemingly pejorative way) in how it applies to a group of people. Le Goff describes it as 'the world vision of all members of a society' and as a 'mental universe which is both stereotyped and chaotic'. He says that it 'refers above all to a depraved [distorted] vision of the world, a kind of surrender to the inevitability'.[46] Darnton refers to it as a sort of holistic cultural history 'how they construe the world, invest it with meaning and infuse it with emotion'.[47] The mentalité is the representation of the world that a group has as a result of their integration of everyday events and processes into a meaningful, teleological narrative – rather than some sort of cultural identity born of momentous events such as wars, famines revolutions etc.

Social and cultural historians seem to have a related interest in aspects of a society which involve what their citizens assume to be either autonomous or spontaneous assessments, observations or actions but which are products of long ingrained systems of popular thought rather than 'improvisation or reflex'.[48] The search for the mentalité of an era is a process familiar to the ethnologist. It is a search for the most stable and least mobile level of a community's or society's common beliefs and values, and qualities of stability and certainty are of course highly attractive to the jurisprudence of the common law legal systems. According to Labrouse 'the social changes more slowly than the economic and the mental

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[43] Ibid at 171. The *encyclopédistes* were 18th Century French intellectuals whose writings, collated and edited by Denis Diderot and later Jean le Rond d'Alembert were anthologised and published as *Encyclopédie, ou Dictionnaire raisonné des sciences, des arts et des métiers, par une société de gens de lettres, mis en ordre par M. Diderot de l'Académie des Sciences et Belles-Lettres de Prusse, et quant à la partie mathématique, par M. d'Alembert de l'Académie royale des Sciences de Paris, de celle de Prusse et de la Société royale de Londres* ('Encyclopedia: or a Systematic Dictionary of the Sciences, Arts, and Crafts, by a Company of Men of Letters, arranged by M. Diderot of the Academy of Sciences and *Belles-lettres* of Prussia: as to the Mathematical Portion, arranged by M. d'Alembert of the Royal Academy of Sciences of Paris, to the Academy of Sciences in Prussia and to the Royal Society of London'). Akin to what we normally think of as an encyclopedia, this 28 volume behemoth sought to condense all of human knowledge across a range of areas into a digestible and coherent whole, for a broad professional and lay readership. One of its unique features was the categorisation of material not by categories of the perceived or natural world (or of theology), but by categories of human thought and experience. In that sense it was one of the first major works to manifest the Enlightenment ethos of putting man at the centre of the universe. The world is seen as sense data ordered by human reason and all that influences that reason.

[44] The concept retains little traction in contemporary social science research apart from mention in ethnography and historiography. It does not appear to be an area that has sparked the interest of psychologists.

[45]. Le Goff at 171.

[46] He also notes the pejorative contemporary use in colloquial English in which a person may be described as being 'mental'.

[47] ROBERT DARNTON, GREAT CAT MASSACRE: AND OTHER EPISODES IN FRENCH CULTURAL HISTORY (1999).p.3.

[48] Le Goff at 168-170 sees the morphing of feudal Europe into capitalist Europe reflected in what its citizens have seen as natural ways of relating to each other and to 'property'.

more slowly than the social'.[49] This is an important insight when we seek to grapple with the relationship between changing economic environments and social policy which is dependent upon worldview. The feudal concept of service, for example, and its associated political mentalité characterised by a mystical conception of monarchy, based on analyses of coronations, miraculous healings and such, in the minds of the population goes a long way to explaining the central place religion played in pre-Enlightenment communities. Seen within the theistic worldview of the European Middle Ages, the apparently wide held belief that the plague was divine punishment seems not just reasonable, but perhaps natural or even inevitable. Do some within the law see a strict conception of due process as equally natural and inevitable on the basis of a liberal worldview? It is at least arguable.

The nature of a worldview, in the social science literature, is also often discussed by reference to the *Weltanschauung* – 'the fundamental cognitive orientation of an individual or society encompassing natural philosophy, fundamental existential and normative postulates or themes, values, emotions, and ethics'.[50] This can be more simply expressed as the set of experiences, beliefs and values that affect the way an individual or community perceives reality and responds to that perception. Note that, as for the mentality concept, the *Weltanschauung* infuses the world not just with objective meaning, but with emotion. It informs our sense of how we ought to react to things and events in the world. So we ought not to be surprised that reforms or changes which seem to conflict with, or amend the objective meanings we embrace as a result of a particular worldview, generate emotional as well as intellectual responses.[51] That something we disagree with should trigger an emotional as well as intellectual reaction is probably healthy and unavoidable. But unpacking the source of that emotive response is surely just as healthy.

In the social sciences, and in fact in some jurisprudential research, complete paradigm shifts within a particular discipline are said to be inevitably related to shifts in how a community or society goes about organizing and understanding reality. Kuhn devotes a whole chapter of his The *Structure of Scientific Revolutions* to the importance of worldview in paradigm shift.[52] He claims that led by a new paradigm, scientists adopt new instruments to look in new places and 'the historian of science may be tempted to exclaim that when paradigms

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[49] Cited in Le Goff at p.167 from Labrouse, E., preface to GEORGES DUPEUX & ERNEST LABROUSSE, ASPECTS DE L'HISTOIRE SOCIALE ET POLITIQUE DU LOIR-ET-CHER, 1848-1914 (1962), http://library.wur.nl/WebQuery/clc/459493 (last visited Nov 7, 2013) at p.xi.
[50] GARY B PALMER, TOWARD A THEORY OF CULTURAL LINGUISTICS (1996) 114.
[51] In fact, arguably the greatest value and insight of therapeutic jurisprudence is that it seeks to both lay bare and engage with, in a positive way, the emotional context and effects on all of us of the legal system.
[52] SSR Chapter X: *Revolutions as Changes of Worldview*.

change, the world itself changes with them.[53] Since scientists see the world through the lenses of their disciplines, so the argument goes, this is understandable.[54] The role of a new paradigm as the harbinger of a changed world, inevitably casts the paradigm as threat or a promise. If a changed world is seen as a threat then we ought not to be surprised if is accompanied by fear.

The Liberal Democratic Worldview

If we accept that the nature and structure of our community's social institutions (such as courts) are inevitably influence by how we corporately 'see the world', then it seems uncontroversial to suggest that the common law legal system is a product of a liberal democratic worldview. Proposed and extant changes to that system which are perceived as inconsistent with the worldview from which it springs may be assumed, especially by those who criticise those changes, to be advocating for a polity which is both illiberal and undemocratic.[55] For that reason, it is worth briefly considering how 'liberalism' and 'democracy' are defined in political and jurisprudential thought. These are concepts which, although they have commonalities, have separate and distinct meanings, albeit meanings which are sometimes conflated.

Political liberalism of the kind espoused by Fukuyama, with which this paper is concerned[56], tends to be defined largely by reference to its rather lean and libertarian, American manifestations. Fukuyama proposes that: 'Political liberalism can be defined simply as a rule of law that recognizes certain individual rights or freedoms from government control'.[57] As will be argued below, this essentially libertarian conception of political liberalism informs and influences (to a large extent) both the vigour with which adversarial principles of due process and the adjudication of competing rights are advocated and the strength of the objections and suspicions directed towards therapeutic jurisprudence. To advocate for a process which is seen as contrary to existing due process rights, or lacking in judicial

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[53] SSR at 111.

[54] This is why, Kuhn suggests, the familiar demonstrations of a switch in visual gestalts prove so compelling or novel - such as that of the famous duck and the rabbit gestalt: see <http://commons.wikimedia.org/wiki/File:Duck-Rabbit_illusion.jpg>

[55] Levitsky and Way discuss whether there are any 'illiberal democracies' and come to the conclusion that such societies would be better described as governed by 'competitive authoritarianism'. How much more potentially abhorrent then, would be competitively authoritarian state which was also 'illiberal' in nature? According to the Oxford English Dictionary 'illiberal' means: "opposed to liberal principles; restricting freedom of thought or behaviour: *illiberal and anti-democratic policies archaic* uncultured or unrefined. Steven Levitsky & Lucan Way, *Assessing the Quality of Democracy*, 13 J. DEMOCR. 51–65 (2002)..

[56] In the sense that the 'liberal democratic worldview' is said to inform a certain type of polity and its institutions.

[57] FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (2006).

independence, detachment and objectivity, in a sense invites claims that some of our freedoms are being eroded or eradicated.

Fukuyama insists that the fundamental rights which are the legitimate subject of liberal concern are the rights which individuals have to control their own person and property, religious rights and political rights. He provides that for this latter class of rights we can accept Lord Bryce's description as 'exemption from control in matters which do not so plainly affect the welfare of the whole community as to render control necessary' (including, Fukuyama asserts, the right to freedom of the press).[58] Fukuyama rejects arguments for the inclusion of any wider conception of liberal political rights – referring to attempts to provide a statutory basis for such things as rights to employment, housing or health care as the practices of 'socialist countries to press for the recognition of second and third-generation economic rights'.[59]

According to Fukuyama, democracy is basically just the manifestation of an additional liberal right, namely 'the right held universally by all citizens to have a share of political power, that is, the right of all citizens to vote and participate in politics'. But in determining which countries are democratic, he uses a more stringent definition and limits these to those nations which allow citizens (by right) to choose government at regular intervals, by means of a secret ballot at multi-party elections.[60] He warns against a less stringent, formal definition of democracy which runs the risk of an abuse of these fundamental rights for the sake of a more substantive definition which has allowed dictators and autocrats to rule 'in the name of' the people.[61] The more interesting implication of the libertarian rights based conception of democracy is that we can have a particular nation which is liberal or democratic yet not both.[62] The possibility of decoupling the qualities of 'liberal' and 'democracy' in terms of the structure of a polity will become important later in this discussion as we consider what Fukuyama, and others, consider to be the ultimate form of political governance, that is the 'liberal democracy'. An attack on some perceived liberal right or

[58] Ibid at 43 citing JAMES BRYCE, MODERN DEMOCRACIES, VOL. 1 OF 2 (CLASSIC REPRINT) (2012).
[59] Ibid at 43. He claims that these so-called second and third-generation rights are that they are 'not clearly compatible with other rights like property or free economic exchange'.
[60] Given that there is no constitutional right to expect elections based on candidates with any party affiliation in Australia, nor any constitutional right to a secret ballot, this begs the question as to whether Australia would qualify as a democracy for the purposes of the definition.
[61] He uses the example of the justification appealed to by Lenin and the Bolshevik party to dismantle the Russian Constituent Assembly so that purportedly less corrupt individual leaders could carry out the democratic will of the people.
[62] Fukuyama suggests 19th Century Britain as an example of a liberal society which was not particularly democratic, that is, it enforced a number of liberal rights but the voting franchise was very limited. The Islamic republic of Iran, on the other hand, has fairly regular elections, but very few of the other liberal rights.

guarantee, in a society where these two qualities are seen as politically symbiotic, implies that there is a de facto attack on democracy.

Ronald Dworkin proposes a less overtly libertarian definition of a democracy as 'government according to the will of the majority expressed in reasonably frequent elections with nearly full suffrage after political debate with free speech and a free press'. [63] Dworkin's definition is, of course, consistent with all sorts of liberal rights and guarantees, but does not go so far as to prescribe them or to predicate them to the extent that Fukuyama does.

It is more common, across the literature in a range of disciplines, to read discussions of the relationship between the narrower, so-called 'neo-liberalism' and the functions of the state and its institutions and organs. Although neo-liberalism is used in such wide range of academic contexts that it has a notoriously vague meaning and ambit[64], most all would agree that it revolves around the assumption that what is good for the economic wellbeing of a community is that they are free to pursue their material self-interest via the operation of a minimally regulated free market and that this economic freedom is the best insurance of its social well-being (other things being equal).[65] This assumption has come under some significant pressure as a result of the Global Financial Crisis of 2009 and the well documented failure of a number of public policies based on neo-liberal postulates.[66] Many law and justice researchers and peak economic bodies[67] conclude that the subjugation of public policy to market structures and forces across a broad spectrum of portfolios, leads to elevated levels of social inequality and all of the associated social problems that we know inevitably follow from such inequality (such as higher crime rates and demographic

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[63]. Ronald Dworkin *Justice for Hedgehogs* (2011) 347-348.

[64] Dag Einar Thorsen, *The Neoliberal Challenge. What is Neoliberalism?*, CONTEMP. READINGS LAW SOC. JUSTICE 188–214 (2010)..

[65] Ryan claims that all forms of political liberalism manifest four fundamental properties: "It is *individualist*, in that it asserts the moral primacy of the person against the claims of any social collectivity: *egalitarian*, inasmuch as it confers on all men the same moral status and denies the relevance to legal or political order of differences in moral worth among human beings; *universalist*, affirming the moral unity of the human species and according a secondary importance to specific historic associations and cultural forms; and *meliorist* in its affirmation of the corrigibility and improvability of all social institutions and political arrangements. It is this conception of man and society which gives liberalism a definite identity which transcends its vast internal variety and complexity." Ryan, Alan (1993): "Liberalism"; pp. 291-311 ROBERT E. GOODIN, PHILIP PETTIT & THOMAS W. POGGE, 105 A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY (2012).

[66] A thorough and accessible discussion of the causal mechanisms that explain the association between social inequality and crime, in the context of market driven public policy, can be found in: Matsueda, Ross L., and Maria S. Grigoryeva. 2013. Chapter 29 "Social Inequality, Crime, and Deviance." In *Handbook of the Social Psychology of Inequality*, edited by J. D. McLeod, E. J. Lawler, and M. L. Schwalbe

[67] See for example: OECD Divided We Stand, *Why Inequality Keeps Rising*, PARIS ORGAN. ECON. CO-OPER. DEV. (2011). Available online at < http://www.oecd.org/els/soc/49499779.pdf>

friction).[68]

It is increasingly common, however, for governments in liberal democracies to willingly intervene in markets and to regulate them, in order to both attempt to prevent dysfunction and to repair fundamental problems rather than to punish individual transgressions by corporations. This might, to some extent, be related to the phenomenon of the problem-solving courts, where judges are far more interventionist and managerial than would be the case in a mainstream court (informed by traditional liberal principles), in an attempt to resolve the causes of offending and to identify and repair dysfunction. It is far from certain that intervention by the state (or by its agents) cannot be tolerated, or that such intervention necessarily foreshadows further erosion of individual liberties.[69]

Despite the rhetoric of freedom from state interference and coercion in liberal democratic states, the social contract empowers the State to abstract offences committed by citizens towards other citizens as offences against itself. 'Offences' or 'crimes' are often legislatively defined in common law jurisdictions as acts or omissions liable to state sanctioned and imposed punishment.[70] Extra-curial punishment and vigilantism are generally prohibited and are themselves offences against the state.

It is one thing to view the operation of a minimally regulated free market, which informs and provides a model for public policy, as a society's best insurance of social well-being and to conclude that such a market is intrinsic to the workings of a liberal democracy. But some say that is a mistake to think that this form of political organisation is simply the result of historical trial and error, or that is just one way of achieving the best balance between the

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[68] There is, of course, a significant body of literature in sociology and criminology which suggests that even where people make rational choices about engaging in conduct which they know to be criminal, those choices are made in the context of 'unequal power, resources and opportunities for upward mobility'. Torsen and Lie above n.36 at 51.

[69] And in fact, support for interventionist judging and therapeutic jurisprudence is increasingly coming from some quite conservative sources. It does not appear to be the case, nor am I arguing here, that a libertarian worldview entails ideological resistance per se to therapeutic jurisprudence. The fact that support for problem solving courts and alternative dockets are gaining support from conservative policy bodies, judges and legislators in some places highlights the strong possibility of a more even policy terrain in law and justice which is more resistant to ideological swings between jurisdictions and between administrations. See for example: *A Conservative Case for Prison Reform*, published by the Tea Party aligned Conservative HQ who propose that: 'Right on Crime exemplifies the big-picture conservative approach to this issue. It focuses on community-based programs rather than excessive mandatory minimum sentencing policies and prison expansion. Using free-market and Christian principles, conservatives have an opportunity to put their beliefs into practice as an alternative to government-knows-best programs that are failing prisoners and the society into which they are released.' Available online at <http://www.conservativehq.com/node/13765>

[70] See for example: Definition of offence*:* An act or omission which renders the person doing the act or making the omission liable to punishment is called an *offence* s.2 *Criminal Code 1899* (Qld);

interests of the state and of the individual. Some say that its emergence is both inevitable and optimal and that, therefore, so are its essential institutions. The stronger sense one has of the inevitability and infallibility of an institution, the more vigorously one is likely to react to perceived changes to it.

The Purported Teleological Inevitability of the Liberal Worldview

There is, in fact, a powerful and pervasive narrative which conceives of the liberal democratic state, as sitting at the apex of some teleological[71] inevitability. This narrative has intimate connections to the ways in which peoples of the West have perceived themselves and of their place in the natural world for millennia. It also has within it, a clear and inseparable thread of beliefs about competition, rights and adjudication. In other words, of beliefs about the role of adversarialism. To put this narrative in perspective, it is worth considering that a belief in conflict, competition and punishment as being a necessary, utilitarian property of both physical and political life has an ancient and somewhat visceral origin according to a growing body of research in evolutionary psychology. According to Petersen and Sell *et al*[72]:

> As in other species, the social world of our ancestors contained individuals who were poised to exploit others if such acts were self-beneficial. This selection pressure favoured the evolution of psychological mechanisms designed to counter exploitation

[71] Teleology being the belief that just as human behaviours are engaged in with some end in mind, so natural phenomena and objects are ingrained with some ultimate end or purpose. The telos of a thing being it's natural end point (sometimes claimed to be a 'goal' in a nonanthropomorphic sense). Human societies, therefore, are imbued with a natural tendency towards political organisation, the ultimate form of which is the liberal democratic state. That is not to argue that any particular state, or any state at all, will achieve that telos, but that in ideal conditions where a political community is allowed to flourish, this will be the inevitable end point. Teleology has its origins in the natural philosophy of Plato and Aristotle. See: ALASDAIR C. MACINTYRE, FIRST PRINCIPLES, FINAL ENDS AND CONTEMPORARY PHILOSOPHICAL ISSUES (1990),, in idem., *The Tasks of Philosophy: Selected Essays, Volume 1*, Cambridge University Press, 2006; Falcon, Andrea, "Aristotle on Causality", *The Stanford Encyclopedia of Philosophy* (Winter 2012 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/win2012/entries/aristotle-causality/>.

Michael Bang Petersen et al., *To punish or repair? Evolutionary psychology and lay intuitions about modern criminal justice*, 33 EVOL. HUM. BEHAV. 682–695 (2012). 682. Others have examined empirical evidence for the hypothesis that a desire to punish those we perceive as wronging us is mitigated by a desire for restoration of relationships which we perceive as having future and continued benefit. Michael E. McCullough, Robert Kurzban & Benjamin A. Tabak, *Evolved mechanisms for revenge and forgiveness*, UNDERST. REDUCING AGGRESS. VIOLENCE THEIR CONSEQUENCES 221–239 (2010); and that this phenomenon colours our perceptions of, and attitudes towards, criminal justice institutions: Paul H. Robinson, Robert Kurzban & Owen D. Jones, *Origins of Shared Intuitions of Justice, The*, 60 VAND REV 1633 (2007). 1633–1688.

of one's self, family, and social group through punishment.[73]

Given that early humans operated in a small-scale social world characterised by dense social networks with inevitably high levels of interdependence, we ought not to be surprised that various strategies designed to counter exploitation are likely to have been subject to selection mechanisms in ways similar to many other social and physical characteristics of people.[74] Data from across cultures evinces a high level of consistency in how people assess the seriousness and gravity of various sorts of conduct and offences. According to the received view in evolutionary psychology, this reflects an 'evolved sense of justice such that individuals prefer sanctions that are proportional to the seriousness of the crime'.[75]

According to the recalibration theory of counterexploitation[76]there is a counterbalancing element within this algorithm. Although how we judge the seriousness of an offence informs the severity of our response to an exploiter/offender, our perception of how socially related we are to them (in terms of the offender's potential value as an associate) informs our opinion of whether we prefer to respond by punishing them or by 'repairing'.[77]

If the recalibration theory is correct, then punishment may have a very privileged place indeed in our social and political psyche. It may also form part of the explanation as to why the perception of being vulnerable to exploitation by others and the emergence of a rights discourse, as both a prophylactic and a remedy, form such a definitive part of the liberal worldview. To define interpersonal tension as something other than a problem, to be 'resolved' by an adjudication of the relevant personal rights of those involved in the problem may be seen as unnatural or irrational to the extent that it sits outside the recalibration theory. To refrain from punishment or to take a non-punitive approach to a perceived exploiter might seem unnatural in that it runs counter to attitudes which have been 'selected'. There is also evidence for this perspective, on the link between punitiveness and a sense of what is rational, in the historical evolution of the liberal nation state itself.

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[73] See also: ohn T. Jost & David M. Amodio, *Political ideology as motivated social cognition: Behavioral and neuroscientific evidence*, 36 MOTIV. EMOT. 55–64 (2012); Ryota Kanai et al., *Political orientations are correlated with brain structure in young adults*, 21 CURR. BIOL. 677–680 (2011).
[74] Eyal Aharoni & Alan J. Fridlund, *Punishment without reason: Isolating retribution in lay punishment of criminal offenders.*, 18 PSYCHOL. PUBLIC POLICY LAW 599 (2012).
[75] John M. Darley & Thane S. Pittman, *The psychology of compensatory and retributive justice*, 7 PERS. SOC. PSYCHOL. REV. 324–336 (2003).
[76] Petersom and Sel et al above n.33.
[77] Petersen, M. B., Sell, A., Tooby, J., & Cosmides, L. (2010). Evolutionary psychology and criminal justice: a recalibration theory of punishment and reconciliation. In H. Høgh-Olesen, Ed. *Human morality and sociality: evolutionary and comparative perspectives* (pp. 72–131).Hampshire: Palgrave Macmillan.

In a political context, we can trace this connection at least as far back as the emergence of the Greek *polis* (city state). By the process of 'Synoecism' (literally 'dwelling together in the same house') smaller Greek communities incorporated themselves into larger political and economic commonwealths, characterised by a governing oligarchy drawn from a newly emergent class of land owners.[78] This incorporation was driven, primarily, as a response to external threats and competition. Although fundamentally autonomous and independent, Greek city states had to continually fight for survival. This political reality became an integral part of the Greek worldview. Conflict was seen as inevitable and natural, and therefore manifest in all parts of their culture – even into their perceptions of what manner of being they were. Rational man must continually struggle against brute irrationality[79], hence the inevitable disputes between city states were clothed in the language of conflicts between the rational and the irrational, between the moral and the immoral.[80] The significant costs paid by citizens in defence of the state were inevitable and accepted.[81] Even today, those who are perceived as risking their life in the name of the state are usually given privileged status as heroes and patriots. Those who criticise the state, and by implication its organs and

[78] According to the Simon Hornblower and SIMON HORNBLOWER, ANTONY SPAWFORTH & ESTHER EIDINOW, THE OXFORD CLASSICAL DICTIONARY (2012),) in the Greek world 'Synoecism' was the process involving a morphing of several smaller communities to form a single larger community. Sometimes the union was purely political and did not affect the pattern of settlement or the physical existence of the separate communities: this is what the Athenians supposed to have happened when they attributed a synoecism to Theseus. NICHOLAS P WHITE, INDIVIDUAL AND CONFLICT IN GREEK ETHICS (2004).

[79] Plato had a particularly pessimistic view about the nature of man. Although he did not see people as innately evil or vicious, he did consider them to be corrupted and fundamentally irrational. In *The Republic* he characterises them as controlled by their base appetites and egoistic passions. These troubling characteristics are even more dangerous, he believed, given that people are generally poorly informed and shallow thinkers.

[80] Thracymachus, a key protagonist in the first book of The Republic, argues a worldview defined by the primacy of self-interest (*pleonexia*). Far from being a vice, this *pleonexia* (akin to the objectivism of an ancient Ayn Rand) is a natural force which shapes and gives meaning and value to human existence. According to Fissell: 'This creates an order in which the strongest thrive and the weak die off, which is the way Thrasymachus believes things *should* be according to the ways of the universe. Thrasymachus goes beyond inconsistency, descriptive observation, legalism, and amoralism..'. Brenner Fissell 'Thrasymachus and the Order of Pleonexia' (2009) 19(1) *Aporia* 35. Fissell notes that Thrasymachus is making a proto-Darwinian argument about the order of the cosmos and is thereby is the obvious conceptual precursor to Callicles, who asserts that: "Nature itself reveals that it's a just thing for the better man and the more capable man to have a greater share than the worse man and the less capable man" (*Gorgias* 483d).'If one has strength and knowledge, then his *pleonexia* is legitimate. If he can somehow manage to get more than others, he is entitled to keeping it. *Pleonexia* creates its own order through competition in which there is survival of the fittest. Interestingly for the purposes of the current paper, Fissell concludes with a trite but useful statement that Thrasymachus could well be describing a "law of the jungle" that many American capitalists would likely agree with.

[81] . P.148 History World 100 objects. As were perhaps both corporal and capital punishment. It is certainly of interest that the nation which currently engages in the highest level of capital punishment is also the icon of the liberal democracy.

institutions, are more likely to be derided as anarchists and cowards - or perhaps as 'a bizarre amalgam of untrained psychiatrists, parental figures, story tellers and confessors'.[82]

A teleological view of human social organisation continues to resonate with contemporary political theorists The failure of Marxism, fascism, totalitarianism and even of constitutional monarchies over the past century or so is evidence, according to this view, not just of the inability of these political and economic systems to effectively manage and sustain a civil society in the long term, but it is also evidence that:

> What we may be witnessing is not just the end of the Cold War, or the passing of a particular period of post-war history, but the end of history as such: that is, the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government. [83].

Such explicit claims appear startling at first blush. Is Fukumaya really suggesting that Western liberal democracy is the inevitable political manifestation of the natural social order? He certainly is. And it is a theme which is very seductive to the conservative thread in law and jurisprudence which embraces libertarian values as not only inalienable but hardwired. In fact, the very nature of a written constitution guarantees that the relationship is reciprocal; that is, that law is linked to the liberal worldview in the very coercive fabric of the Rule of Law. Rhetoric about the Rule of Law forms something of an Urtext in writings and scholarship about American social and political history, and this is particularly apparent in the apologia some legal scholars and judges produce in relation to the adversarial system. Kagan observes that:

> [t]he rhetoric of law is deeply rooted in American consciousness, and has been so embedded since the founding of the country, as captured by John Adam's oft quoted description of the American polity as a government of law, not of men.[84]

Political tradition, according to this perspective, has operated to socialise citizens with a sense that an adversarial adjudication of disputes, and prosecution of alleged offences, backed by comprehensive government assurances and resources for the institutions of adjudication are what makes a liberal society safe to live in. It is the best mechanism we can aspire to reduce stresses and tensions within a community. The State, according to Kagan,

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[82] Hoffman above n.11 at 2069.
[83] Fukuyama, Francis, 'The End of History?' (1989) 16(1) *The National Interest* 3, 18. FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (2006).
[84] R Kagan, *American Legalism: The American Way of Law* (2002) 18.

provides incentives for citizens to resort to adversarial legal weapons but does relatively little to convene or resource institutions that effectively channel contending parties and groups into less expensive and more efficient ways of resolving disputes. The default position of privileging adversarial processes gives this process an air of inevitability and natural authority. Yet a deeply ingrained distrust of government power, says Kagan, results in a fragmentation of political authority that must be held accountable via judicial review and civil suits.[85]

This is not to say, so the argument goes, that some less ideologically mature societies may not still be struggling towards the prize of liberal political stability. The so-called Arab Spring is perhaps a stark reminder that some peoples have a way to go before they can aspire to the political and economic environment which spawned the much vaunted American exceptionalism. The utopian visions of the Western liberal democracies which the Arab nations (and in previous decades those of the Eastern bloc nations) who wanted to escape communist and totalitarian oppression were somewhat naïve. They wanted political and economic emancipation but to retain a significant social welfare safety net. France, Britain and the US went through particular bloody civil wars and decades of social unrest to evolve their modern political orders. But even where the desire for the liberal endpoint manifests itself in struggle, and where that struggle fails, the liberal endpoint is the best compromise between the desire for personal autonomy and for a stable community.[86]

According to Fukuyama, we have reached the zenith of human political development. That zenith, he suggests, is manifested in the values and institutions of the liberal democratic state. All the other major modes of political and social organisation which have been

[85] Ibid at 108. This does sound significantly comparable to the style of administrative law and of government regulation, accountability and oversight in the liberal democracies, including Australia. The exponential growth of the tribunal system as a means of obtaining redress against public authorities is some evidence of this as in an increasing reliance on sanctions among regulatory bodies. There is quite a bit of empirical support for this in Kagan's research. He finds that regulatory authorities and public interest matters are much more likely to be collaborative in the civil law jurisdictions than in those with an adversarial system of law evolving from the Westminster system.

[86] Zizek notes the obvious in reminding us that an immature conception of a capitalist, liberal political order ignores the fact that a market inevitably produces losers. The lure of competition as a vehicle for just and equitable outcomes which provides the greatest chance for the most to flourish is seductive but inevitably results in disillusionment for some. Although it is beyond the scope of the current paper, Zizek also sees the modern liberal state as a sort of end point. He is less sanguine about this than Fukuyama however. For Zizek the sort of liberal democratic state which Fukuyama considers to be an end point in terms of being the best we can hope for, is in fact, a political and social apocalyptic end point. He claims that there are four factors which are contributing to the end of the liberal state, all of which are products of liberalism. They are: (1) The 'ecological crisis', (2) The consequences of the biogenetic revolution, (3) Resources imbalances (including raw materials, energy, food, water and intellectual property) and (4) An 'explosive growth' of social divisions and exclusions. SLAVOJ \vZI\VZEK & SLAVOJ ZIZEK, LIVING IN THE END TIMES (2011), at p.x (Introduction).

experimented with in the course of our history have failed, along with the world views which informed them. Some, like fascism, totalitarianism and communism, took a terrible toll of human suffering in order to demonstrate their failings. But the liberal state is more robust, more tolerant of deviance and therefore more widely accepted by its citizenry. In fact the relationships between citizens and between citizens and property are at the very heart of the liberal ethos. It evolved as a natural extension and manifestation of the hope that a more educated and prosperous middle class placed in the power of rationality and empiricism which Enlightenment intellectuals promised would reconstruct our conceptions of nature and man's place in it.[87] This manifestation of the liberal ideals of personal rights and autonomy are of course iconic within some of the foundational political documents of the 18th and 19th Century, including the American Declaration of Independence, the United States Bill of Rights and the French Declaration of the Rights of Man and of the Citizen.

Fukuyama is no theoretical outlier. He traces the intellectual heritage and genesis of the belief in the liberal state as political telos back through the political and social theories of Kant and Hegel. Kant took a teleological view of the vagaries of human history, claiming that our civilisation was on a trajectory characterised by the citizenry's awareness of personal liberty or, as Hegel put it, 'The History of the world is none other than the progress of the consciousness of Freedom'.[88] Echoing the somewhat convergent thoughts of the mentalité' theorists who held that a worldview involves a 'kind of surrender to the inevitability'[89], Fukuyama is fatalistic about the nature of a civilisation which has, in fact, fully realised its political telos. He opines that:

> The end of history will be a very sad time. The struggle for recognition, the willingness to risk one's life for a purely abstract goal, the worldwide ideological struggle that called forth daring, courage, imagination, and idealism, will be replaced by economic calculation, the endless solving of technical problems, environmental concerns, and the satisfaction of sophisticated consumer demands. In the post historical period there will be neither art nor philosophy, just the perpetual care taking of the museum of human history.[90]

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[87] For an interesting discussion of the relationship between the faith placed in rationality and reasoning in managing relationships and the argument that a rational approach is inexorably linked to a perspective that involves the domination of things and persons, see: AXEL HONNETH, ENLIGHTENMENT AND RATIONALITY (1987), http://www.jstor.org/stable/10.2307/2026776 (last visited Nov 7, 2013).692.

[88] Georg Wilhelm Friedrich Hegel, *The Philosophy of History. 1837*, TRANS J SIBREE NEW YORK DOVER PUBL. INC (1956), 19.

[89] Above n.18.

[90] Francis Fukuyama The End of History? *The National Interest, Summer 1989*. This is a strikingly similar view to Kuhn's contrast between periods of normal science and of crisis within a field, whereby practitioners are engaged in mere puzzle solving by manipulation of exiting paradigmatic exemplars and processes, rather than being faced with problems which challenge those exemplars. Kuhn, of

A recognition of the intimacy of the relationship between a conception of the liberal ideal, of the kind Fukuyama articulates, and the adversarial juristic paradigm may well play out in a fatalistic attitude towards the perennial or 'wicked' problems[91] experienced by the legal and justice systems in the common law world, such as offender recidivism, rising prison populations and the over-representation in the justice system of the poor, those with mental illness and those from particular indigenous or ethnic groups.[92] Once political and social theory become grounded in some sense of the natural order of things, the institutions and processes generated by them become cloaked in the cloth of orthodoxy and inevitability and tend to be advocated and protected with an almost fundamentalist zeal.[93] Kant's assertion that history would have a teleologically defined end point, characterised by ' a society in which freedom under external laws is associated in the highest degree with irresistible power i.e. a perfectly just civil constitution and its universalisation, is the highest problem Nature assigns to the human race'.[94] Rather ominously, but instructively for our purposes, Kant did not see rationality as the catalyst for the rise of the liberal democracy as the end point of social evolution. That role he ascribed to competition and man's essential 'asocial sociability'.

Kant essentially viewed human interpersonal conflict as a positive force. He claimed that it

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course, never held that the process of paradigm shift had any natural direction or end point – for him, paradigms shift based more on the sociology of the field in question rather than on the basis of any natural features of the world. Above n.40, articulated with greatest clarity in the 1969 postscript.

[91] The concept of a 'wicked problem' as one which seems to resist all attempts at a solution from within the prevailing disciplinary or political orthodoxy was first ventilated in: Rittel, Horst W. J.; Melvin M. Webber "Dilemmas in a General Theory of Planning" (1973) 4 *Policy Sciences* 155–169.

[92] In an often cited paper addressing the relationship between wicked problems and the credibility of a discipline, by reference to critical criminology, Young observed that: "he trouble with criminology is that it cannot explain crime. And being unable to explain the phenomenon, its persistent, if diverse, suggestions as to how to tackle the problems, grind to a halt in a mire of recidivism, overcrowded prisons and failed experiments". Jock Young 'The tasks facing a realist criminology' (1978) 11 *Contemporary Crises* 337, 356.

[93] Some judicial defences of the primacy of adversarial processes are strong but measured: 'Courts are courts; they are not general service providers who cater for 'clients' or 'customers' rather than litigants. And if courts describe themselves otherwise than as courts, they run the risk that their 'clients' and their 'customers' will regard them, correctly in my view, as something inferior to a court'. Anthony Mason, 'The Future of Adversarial Justice' (Paper presented at the 17th Annual AIJA Conference, Adelaide, Spring 1999) 5 <http://www.aija.org.au/online/mason.rtf>. Others are less measured: 'I chuckle at problem-solving enthusiasts who claim they are get-ting at the "causes" of the problems, while we in problem-creating courts are just dealing with the "effects." It is simply not true. One link in the causal chain does not a cause make. No teen court judge thinks he can solve the aching loneliness inherent in adolescence, even though a nice judicial pep talk might make everyone feel good for a while. Even the boldest of veterans court judges do not think they have a mandate to end war in an effort to stop war-related post-traumatic stress disorder': Morris B. Hoffman Problem-Solving Courts And The Psycholegal Error (2011) 160 *University of Pennsylvania Law Review* 129.

[94] *Idea for a Universal History from a Cosmopolitan Point of View* (1784). Translation by Lewis White Beck. From Immanuel Kant, "On History," The Bobbs-Merrill Co., 1963. Fifth thesis. Accessed online at < http://www.marxists.org/reference/subject/ethics/kant/universal-history.htm#n1>

was, in fact, essential for each particular individual's self-development. He was convinced of the natural 'antagonism' among men in a society, which seems to have been an almost unbroken (although of course not universal) theme in political thought since the days of the Greeks. He defines man's natural attitude as 'asocial sociability', meaning "their tendency to enter into society, combined, however, with a thoroughgoing resistance that constantly threatens to sunder this society".[95] But Nature intends man to live in harmony, according to Kant, and the struggle to survive in the face of irrational aggression awakens his efforts to build a robust polity. He says that: "Man wills concord; but nature better knows what is good for the species: she wills discord" – and that "This resistance wakens all of man's powers, brings him to overcome his tendency towards laziness".[96] This striving to overcome the lazy capitulation to aggression, competition and resistance, is part of Nature's goal, he claims, for man to survive, flourish and reach his natural 'ends'.

Conclusion

Is this thread of deterministic and naturalistic thinking, so often reflected in the sort of teleological liberal democratic worldview espoused by Fukuyama, a useful backbaord against which to highlight the emotive views of the more trenchant critics of therapeutic jurisprudence, the drug courts and other non or less adversarial tribunals and processes? I believe it is.

There is little doubt, I think, that liberal democracy is probably the most robust form of human political and social organisation that we have experienced because, as Fukuyama suggests, it has a wide appeal derived from a greater tolerance of deviance than other forms of social governance. As a consequence, the institutions of a liberal democracy, including its legal systems, are fairer and more equitable because of a relatively strict observance of due process as a touchstone of tolerance. The liberal democracies survive longer, perhaps, because a reasonable diversity of views and values are 'permitted' to flourish. The founding of, arguably, the greatest of the liberal democracies (the United States of America) is of course deeply entrenched in historical events (both actual and mythical) that are steeped in the form and language of liberty and egalitarianism. It is unsurprising, therefore, that lawyers and judges would want to vigorously respond to reforms and procedures which they perceive as inconsistent with, or as a threat to, these values – whether they acknowledge or are consciously aware of that perception or not.

[95] Kant, Immanuel. *Perpetual Peace and Other Essays*. Translated 1983. Ted Humphrey at p.31.
[96] Ibid at 32.

But as I have suggested, the level and intensity of the rhetoric engaged in by some of the more trenchant critics of therapeutic jurisprudence points to something more than a simple defence of due process. It hints at a certain level of jurisprudential fundamentalism (usually identifiable by a degree of hyperbole and emotive language which would not normally be tolerated in academic literature) which, if not unmasked and called to account, has the potential to not just muddy the waters of court reform, but to derail it.

Surely there is scope within the ambit of the liberal democratic worldview, for some flexibility in the nature of courts and of what it means to be a judge. Due process need not be a procedural nor ideological tyrant. The flourishing of the problem solving courts is clear evidence of that. But a worldview which is adhered to with a sense of inevitability, hubris and fatalism does not bode well for a positive evolution of the law as one of the key institutions of civil society.

Poet Laureate Ted Hughes provides a wonderful metaphor for the dangers of hubris that accompany overconfidence in the status quo, in his poem 'The Pike'.[97] The carnivorous fish has no real competitors in 'its world' and is therefore 'stunned by its own grandeur' and is 'a life subdued to its instrument'. We must avoid the risk of our legal institutions (and their perceived symbiotic relationships with libertarian democracy) becoming so stunned by their own grandeur that they become institutions subdued to their own instrument and terrified of change for fear of becoming weak.

[97] Ted Hughes Collected Poems (2003)