Epilogue: Courts as 'Low Trust' Environments: Repurposing Francis Fukuyama

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ACADEMIC ARTICLE

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Twenty-five years ago, the eminent political scientist Francis Fukuyama published his best-selling book about the economic utility of trust,[1] a concept that he defined as 'the expectation that arises within a community of regular, honest, and cooperative behaviour, based on commonly shared norms, on the part of other members of that community.'[2] Grounded in an analysis of the comparative economic status of national economies, Fukuyama identified trust as the key variable shaping social, political and economic fortunes.

Fukuyama accepts the utility of Neo-classical economic assumptions — that individuals make rational decisions, on the basis of independent, informed choices, with the intention of maximising utility to themselves. However, he maintains that this is certainly not the full story. The rational, utility-maximising individual is, as we well know, also capable of 'irrational' behaviour including altruism, heroism, idealism and a raft of non-self-interested behaviours motivated by goals such as recognition, honour, and justice.

According to Fukuyama, 'social capital' understood as knowledge, skills and human social interaction, is 'the crucible of trust',[3] and trust is the twenty per cent 'secret ingredient' which allows economies to grow, adapt and thrive, with the remaining eighty per cent of economic behaviour being explained by Neo-classical economics.[4] Fukuyama's thesis is not new, and was even mooted in different ways by Adam Smith[5] and Jeremy Bentham,[6] but his perspective provides a novel way of comparing different economic trajectories across vastly different social systems.

Fukuyama theorised that national economies could be categorised according to whether they were situated in either 'High Trust' or 'Low Trust' societies. The characteristics of these two typologies are, he said, shaped by a variety of diverse historical and cultural forces.[7] He identified 'High Trust' as the unifying feature in the success of the unlikely triumvirate of nations — the USA, Japan and Germany — which became economic powerhouses in the post war years. By contrast, Italy, France and China had a more chequered economic path because, according to Fukuyama, they were 'Low Trust' societies.

While there have been critiques of Fukuyama's thesis as macro-economic analysis, his observations about the significance of trust in human affairs has given his thesis new life in the 2020s, as societies across the globe grapple with widespread mistrust in

1 F. Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity*, Free Press, New York 1996.

2 Ibid, p. 26.

3 Ibid, p. 33.

4 Ibid, p. 13.

5 Arguably, a central part of Smith's *Wealth of Nations* thesis is that trust is required for the free market to function well – for such an interpretation, see J. Evensky, Adam Smith's Essentials: On Trust, Faith and Free Markets. *Journal of the History of Economic Thought* 33(2) p. 250.

6 Though Bentham is more often read as having encouraged distrust in public institutions, there are also those who interpret him as having encouraged trust, but only where institutions have proved themselves worthy of it; see, e.g., J. Bruno, Vigilance and Confidence: Jeremy Bentham, Publicity, and the Dialectic of Political Trust and Distrust. *American Political Science Review* 111(2) p. 296.

7 Fukuyama, supra note 1, outlined in Part II 'Low-Trust Societies and the Paradox of Family Values', pp. 61–148 and in Part III 'High-Trust Societies and the Challenge of Sustaining Sociability', pp. 149–268.

institutions.[8] More particularly, Fukuyama's insistence on the cultural foundations of trust and the significance of social affiliation can also be applied at the micro level; for instance, to understand of the nature of a family business, of a professional grouping or guild, and, I suggest, the institutions that make up civil society, such as courts.

What insights does Fukuyama's concept of trust afford the courts as they increasingly navigate their own crises of legitimacy and public confidence or 'trust'? In addressing this question, I suggest we need to consider the nature of legal professional culture, as well as the functions of, and the sometimes competing demands placed on, the courts.

LAWYERS AS PROFESSIONAL PESSIMISTS

While everyone is cheering the bride and groom at a wedding, and happily popping champagne corks at the start of a new business venture, lawyers busy themselves anticipating the gloomy future of soured relationships. Lawyers are the natural handmaidens of the English philosopher Thomas Hobbes, who theorised that human beings are in a permanent state of war with everyone else and always act in their own self-interest.[9] In complex societies, lawyers are necessary to systematically anticipate and protect the (self) interest of their clients. In part, this may explain our ambivalence to the legal profession. Economics might be the 'dismal science'[10] but lawyers can just as convincingly be characterised as 'paid pessimists'.

This is somewhat of a paradox, since the accepted economic orthodoxy is that it is precisely the strength of institutions, like the law and the courts, which gives social systems stability and confidence. Strong institutions promote trust because they provide a bulwark against 'free riding', corruption and exploitation. The Rule of Law encourages risk taking because it establishes the framework and patrols the boundaries of social and economic life.

Fukuyama accepts that property rights and commercial law were indispensable to the creation of a modern market-oriented economic system.[11] The development of legal rules governing commercial agreements, for instance, enabled perfect strangers to comfortably enter into business relationships, which, in turn, supported the development of large corporations.[12] In short, law is good for business.

In this way, according to Fukuyama, the legal apparatus serves as a substitute for trust, a development that has accelerated as lawyers have codified and spelled out in increasingly elaborate and detailed systems the unwritten rules governing social relationships which were otherwise based on informal moral obligations. However, the web of rules and regulations of a modern legal system come at a very high price, including an inordinate increase in the transaction costs of doing business. This is

8 2021 Edelman Trust Barometer <*https://www.edelman.com/trust/2021-trust-barometer*> [accessed 14 October 2021].

9 R. Crisp, *Sacrifice Regained: Morality and Self-Interest in British Moral Philosophy from Hobbes to Bentham. Oxford University Press*, Oxford 2019, pp. 13–14.

10 A pejorative usually sourced to the English historian, Thomas Carlyle in his *Occasional Discourse on the Negro Question* (1849), see Beggs, Jodi. "Economics as the "Dismal Science"." Thought Co, Feb. 16, 2021, <*https://www.thoughtco.com/economics-as-the-dismal-science-1147003*> [accessed 14 October 2021].

11 Fukuyama, supra note 1, p. 336.

12 Ibid, p. 338.

particularly the case in 'Low Trust' societies where, according to his analysis, much higher levels of legal oversight are required, and this 'imposes a kind of tax on all forms of economic activity'.[13] So, for example, increasing levels of litigation —evident for some decades in the USA at the time he wrote — were, he thought, a marker of declining levels of trust, which resulted in an increasing need for reliance on legal regulation.[14]

In the popular mind it is all too easy to confuse cause and effect—distrust leads us to law and lawyers, but we then resent and blame lawyers for the high costs of all this social mistrust. 'Low Trust' might be a boon for lawyers as a profession, but it comes at a high price. Public opinion surveys across a range of countries and legal systems consistently show that the legal profession generally does not enjoy high levels of public trust. Most recently, a 2019 survey of levels of trust in professions across 23 countries indicated that only 25% of respondents ranked lawyers as trustworthy, while 32% rated them as untrustworthy.[15] The profession that bears responsibility for the regulatory framework intended to remedy a lack of social trust is, ironically, a 'low trust' profession.

Judges generally enjoy higher levels of trust than lawyers, again borne out in the recent IPSOS survey.[16] However, given that judges share at least a common educational background, and, in common law countries, usually a professional background, with lawyers, it might be expected that there are consequences for judges as individuals of spending their careers working in a low trust profession and in a low trust milieu like the courts.

COURTS AS TEMPLES OF LOW TRUST

It is well accepted that courts are intimidating places for lay participants – litigants, defendants, witnesses and juries. It is a truism that people do not enjoy going to court. A Fukuyama perspective would see this as inevitable, since courts are intrinsically 'low trust' cultures and environments.

Courts are places of last resort, designed to adjudicate in circumstances where people have lost trust in each other, or have offended against socially determined internalised ethical rules, given effect in laws and regulations, on which social life depends. "Hierarchies are necessary because not all people within a community can be relied upon to live by tacit ethical rules alone...[they] must ultimately be coerced by explicit rules and sanctions."[17] In carrying out this role, the function of the courts is to promote trust and reinforce the affiliative social fabric.

However, in exercising their power, courts themselves also have to *earn* the trust of two discrete audiences— the wider community and the parties before them. Court processes and systems need to be robust enough to convince the wider community that they can trust that they live in just society where rule breakers are punished and/

13 Ibid, p. 28.

14 Ibid, p. 11.

15 IPSOS *Global trust in professions* (August 2019) <*https://www.ipsos.com/sites/default/files/ct/news/documents/2019-09/global-trust-in-professions-trust-worthiness-index-2019.pdf*> [accessed 14 October 2021] p.2.

16 Ibid.

17 Fukuyama, supra note 1, p. 25.

or rehabilitated and wronged individuals are appropriately heard and compensated. Individuals who come to court also have to trust that the 'system' is impartial and fair to them personally. In legal ideology, 'fairness' is the proxy, as well as the measure, of 'trust'.

That juggling act for the two trust audiences inevitably involves further layers of ever more elaborate rules. So, for example, court procedures and rules of evidence typically address considerations of due process designed to assure defendants in criminal trials and parties in civil matters of fair and impartial treatment. While legal systems differ, typical components might include procedures that ensure a party has details of the case against them and of the evidence to be relied on; has the right to be heard, and the right to call and to question witnesses; and is provided with a reasoned decision. To bolster trust in the court by the wider community, court rules typically provide for transparency around the conduct of court proceedings (the 'open court'), media access, and the publication of court decisions. Some procedures, for example, those that enable judges to be challenged on the ground of perceived or actual bias, as well as judicial codes of ethics and the establishment of disciplinary procedures for breaches of those codes, are intended to build trust among both the wider community and parties appearing before the court.

The operation of these rules is, in some jurisdictions, handled by executive governments, which face their own fiscal and political challenges. The pressure being placed on courts by those governments is, in turn, threatening the ability of courts to successfully carry out the balancing act required to meet competing trust expectations.

POLITICAL INTERFERENCE V. TRUST

Recent years have seen renewed efforts by governments in some countries to interfere with the independence of the judiciary. One of the more egregious examples of this development has occurred most recently in Poland and has been well-documented in this journal and elsewhere.[18]

The impact of this type of direct action on trust in the courts might be expected to be relatively simple to assess. Certainly, the consistent campaign over the past six years by the right-wing populist Polish government to undermine the judiciary appears to have had a measurable reduction in public levels of trust and confidence in Poland's courts.[19] It is interesting to note, however, that one of the outcomes has also been to spur judges to more direct engagement with the community, even embarking on 'road trips' to explain their role and defend the rule of law.[20]

However, trust in the courts can also be undermined less directly, in ways that may not always reflect an intention by government to interfere with their independence. The

18 K. Jońśki and W. Rogowski, 'Legislative Practice and the 'Judiciary Reforms' in Post-2015 Poland – Analysis of the law-Making Process. *International Journal for Court Administration* (2020) 11(2), p. 3. DOI: *http://doi.org/10.36745/ijca.315*; Allyson Mason and John Duncan, 'The Collapse of Judicial Independence in Poland: A Cautionary Tale,' *Judicature* (Fall/Winter 2020–21) 104(3) pp. 41–50

19 European Commission, *EU Justice Scorecard* (2021) p. 41.

20 L. Von Holt, 'Last Stop for Democracy: On Tour with Poland's Rebel Judges' *The Guardian* 10 September, 2021 at <*https://www.theguardian.com/world/2021/sep/20/last-stop-for-democracy-on-tour-with-polands-rebel-judges*> [accessed 14 October 2021].

implications for trust may sometimes be difficult to discern beneath other apparently worthy objectives.

EFFICIENCY V. TRUST

The quest for efficiency in the conduct of court operations is not necessarily antithetical to the ability to maintain or indeed to build trust among court users and the general public. The careful and proportionate use of court and judicial resources, the assurance that litigation is concluded and decisions provided within reasonable time-frames, and quality decision-making that avoids the risk of multiple appeals, might all be seen as part of an efficient approach to court operations and to the judicial role, which contribute to building trust.

However, there is an increasing tendency in many countries, through the economic calculus which underscores interest-based politics, for executive government to attempt to use 'efficiency' considerations, generally defined in terms of the speed of resolution, to displace the time-consuming and elaborate processes which used to characterize court proceedings. The political perspective on trust focuses on the bottom line— the key goal must be speed of resolution which in turn seemingly reduces the calls on the public purse. Judges and court time are expensive— the tax of low trust. Given that executive government often controls the purse strings, this is an imperative which is difficult for courts to ignore.

In many jurisdictions it has led to the 'conveyor belt' model of adjudication – where cases (and people) are reduced to numbers and ever faster 'throughput' becomes the measure of success. In Australia, for example, while government purports to assess the annual performance of Commonwealth, State and Territory courts on a range of measures that include 'equity' as well as 'effectiveness' and 'efficiency', the vast majority of the data that is collected is directed to case numbers, case-processing times and backlogs.[21]

This rationalising tendency of managerial justice is reminiscent of Taylorism or the efforts at 'scientific management' of the factory production line in the 1960s critiqued by Fukuyama. Despite its apparent early success, the model was ultimately a failure because breaking down a process into ever smaller discrete tasks ultimately deskilled the workforce and crushed both morale and innovation. Attempts to retrofit solutions not addressed at the source – that is, on the assembly line itself – proved, in the end, to be inefficient and far more costly. Taylorism was superseded by the Lean Model of factory management, which gave back control to individual workers who collaborated in agile teams explicitly tasked with problem solving. That even meant giving workgroups the power to shut down the whole production line if necessary to fix a particular problem.[22]

Somewhat ironically, this seemingly perennial quest to make courts more 'efficient' may give further impetus to developments in quite different directions

21 See, for example, Australian Government, Productivity Commission, *Report on Government Services, 2021: Part 7 Courts* at <*https://www.pc.gov.au/research/ongoing/report-on-government-services/2021/justice/courts*> [accessed 14 October 2021]. 'Equity' is assessed solely by means of a measure directed to 'access to interpreters'. 'Effectiveness' also encompasses 'affordability' (measured solely by reference to court fees) and 'quality' (measured solely by reference to the integrity of the court file).

22 Fukuyama, supra note 1, pp. 256–266.

that are intrinsically related to building trust. The growing appeal of Therapeutic Jurisprudence and the trend of establishing 'problem-solving courts'[23] can be seen, at least in part, as the court system's own solution to the anomie of court adjudication and process-driven justice administration. Restorative justice approaches, another recent development in criminal sentencing,[24] give weight to re-establishing relationships between people and are the antithesis of objective, rule-based modes of formal adjudication.

The efficiency-driven quest to remove cases from the court system has also arguably accelerated the move away from court-based processes to Alternative (Appropriate) Dispute Resolution fora for all kinds of disputes. While this development is usually justified as an attempt to lower legal costs and thereby enhance access to justice for ordinary people, it is just as much an attempt to reinstitute less formal trust-based mechanisms which lie at the heart of effective social interaction.[25] In its way, lawyers are going 'back to the future' of earlier, less rule bound dispute resolution forms.

These developments are also influencing approaches to legal practice; with an emphasis on finding holistic solutions to legal problems that address the underlying issues for clients. Such approaches are also thought to provide more personally rewarding work for lawyers, using approaches that can counteract the adverse impacts on the well-being of legal professionals that are thought to result from constantly working in contested, or 'adversarial' environments,[26] that can be characterised as 'low trust'.

THE CONSEQUENCES FOR LAWYERS AND JUDGES

Increasingly, courts and the legal profession are becoming painfully aware of the human costs to lawyers and judges of working in a high stress, low trust environment. A recent study conducted for the United Kingdom Law Society found that over 69% of the 1700 legal professionals responding to the survey had experienced mental ill-health including stress, anxiety and depression in the previous 12 months.[27] In Australia and New Zealand, a recent survey found that 63% of lawyers had experienced depression themselves in the past 12 months, or knew someone in the workplace who had, while this figure was 85% with regard to anxiety.[28] In recent years legal professional associations around Australia have developed a suite of wellbeing

23 See, e.g., D. B. Wexler and B. J. Winick (eds.), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts.* Carolina Academic Press, Durham 2003; B. J. Winick, Therapeutic Jurisprudence and Problem Solving Courts. *Fordham Urban Law Journal* 30(3) p. 1055; A. Freiberg, Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism. *Law in Context: A Socio-Legal Journal* 20(2) p. 6.

24 M. S. King, Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice. *Melbourne University Law Review* 32(3) p. 1096.

25 M. King, A Freiberg, B. Batagol, R. Hyams, *Non-adversarial Justice (2nd ed.)*. Federation Press, Annandale 2014, p. 13.

26 E. Richardson, P. Spencer and D. B. Wexler, The International Framework for Court Excellence and Therapeutic Jurisprudence: Creating Excellent Courts and Enhancing Wellbeing. *Journal of Judicial Administration* 25 p. 148.

27 LawCare *Life in the Law 2020/21* p.6.

28 *Meritas Australia and New Zealand Wellness Survey 2009* <*https://www.swaab.com.au/assets/download/Meritas-Wellness-Survey-Report.pdf*> [accessed 14 October 2021] p. 4.

programs designed to support the mental health of their members,[29] mirroring similar developments overseas.[30] With the suicide of two magistrates in Victoria in the last two years,[31] the toll on judicial mental health has come to the fore in this jurisdiction with a number of support services developed to address the problem.[32] Judicial stress as a phenomena is being researched[33] and there are increasing moves by judicial education bodies to provide training and support to judges in relation to their mental health.[34] Increasingly, although often in an inchoate way, judicial officers are becoming aware of the toxic (low trust) environment in which they have to work.

The most ubiquitous explanations for the increasing mental health burden on those working in courts is that cases have become more complex and, in an under-resourced setting, court personnel struggle with all the extra demands placed upon them. A Fukuyama perspective though, provides a further gloss. In Low Trust societies, he contends, the family provides support to weather the vicissitudes of life (the warm hearth in a cold, cruel world). In High Trust societies, Fukuyama maintains, it is the sociability afforded by loose spontaneous associations, or what we would now describe as informal networks, that both sustains and protects social capital.

According to Fukuyama, the old guilds were the bête noir of liberal economic reformers and were, accordingly, abolished by the French during the French Revolution. They were seen as representing "hidebound tradition and a hindrance to modernizing economic change".[35] Fukuyama though, takes a revisionist position, maintaining that whatever their shortcomings, the guilds were positive 'intermediate organisations' which ably supported civil society throughout the Middle Ages. Through their self-governing practices and independence, guilds were a counterfoil to the power of princes and facilitated the growth and prominence of cities.

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29 See, e.g., Law Institute of Victoria, LIV Wellbeing <*https://liv.asn.au/Professional-Practice/Supporting-You/Health-and-Wellbeing*> [accessed 14 October 2021]; Law Society of New South Wales, Mental Health and Wellbeing <*https://www.lawsociety.com.au/resources/mental-health-and-wellbeing*> [accessed 14 October 2021].

30 See, e.g., UK Law Society Wellbeing <*https://www.lawsociety.org.uk/topics/wellbeing*> [accessed 14 October 2021]; D. W. Denno and B. A. Green, Symposium: Mental Health and the Legal Profession (Foreword and Dedication). *Fordham Law Review* 89 (6) pp. 2415–25.

31 T. Mills and A. Cooper, Overworked and Burdened, Death of a Magistrate in a Judiciary Under Pressure. *The Age,* 7 August 2020 <*https://www.theage.com.au/national/victoria/overworked-and-burdened-death-of-a-magistrate-in-a-judiciary-under-pressure-20200807-p55jpf.html*> [accessed 14 October 2021].

32 See, e.g., Judicial College of Victoria, Judicial Wellbeing Resources <*https://www.judicialcollege.vic.edu.au/resources/judicial-wellbeing-resources*> [accessed 14 October 2021].

33 See, e.g., C. Schrever, C. Hulbert and T. Sourdin, Where Stress Presides: Predictors and Correlates of Stress Among Australian Judges and Magistrates. *Psychiatry, Psychology and the Law* 2021 (ahead-of-print) DOI: *10.1080/13218719.2021.1904456*; C. Schrever, Australia's First Research Measuring Judicial Stress: What Does it Mean for Judicial Officers and the Courts? *Judicial Officers Bulletin* 31(5) p. 41.

34 Judicial College of Victoria, supra note 32; National Center for State Courts and the National Judicial Taskforce to Examine State Courts' Response to Mental Illness, *Addressing the Mental Health and Well-Being of Judges and Court Employees: A Pandemic Resource* ('Resources and Research') January 2021 <*https://www.ncsc.org/__data/assets/pdf_file/0023/59603/Addressing-the-Mental-Health-and-Well-being-of-Judges-and-Court-Employees-Final.pdf*> [accessed 14 October 2021].

35 Fukuyama, supra note 1, p. 245.

DECLINING SOCIABILITY IN THE LEGAL PROFESSION: HAVE LAWYERS LOST THEIR SOCIAL CAPITAL ANCHOR?

At a micro level, the legal profession and its thriving guild-like social organisations of practitioners and advocates exhibited the defining element of 'spontaneous sociability' identified by Fukuyama — autonomy, high levels of discretion, and organisations that were widely trusted to, among other things, self-regulate. This level of collaboration took place despite the otherwise strong individualistic tendencies of lawyers themselves.

This type of individualistic/affiliative paradox was considered by Fukuyama. In his analysis, in the High Trust economic system that once characterized the USA, individualism came to be regarded as synonymous with "creativity, initiative, entrepreneurship and proud unwillingness to bend to authority".[36] But, as Fukuyama saw it, the USA's Protestant roots simultaneously instilled a strong sense of community and the obligations (and pleasures) of collective and collaborative association which led to very high levels of membership in organisations of all kinds—churches, certainly, but also bowling clubs and professional bodies. These circles of affinity, or what Fukuyama terms 'spontaneous sociability' allows individuals who, in other contexts actively compete against one another, to also trust one another and so work efficiently and well together.

Guilds and professional associations which subscribed to a shared ideology undoubtedly became cosy 'clubs' of privilege which restricted entry to their ranks and thus artificially increased the income of their membership. But from the inside, they provided a haven which afforded members their social identity as well as affiliation—all key elements of social capital.

There is a "shared expectation that arises in a community of regular, honest and co-operative behaviour based on commonly shared norms, on the part of other members of that community. These norms can be about key 'values' questions like the nature of God or justice, but they also encompass secular norms like professional standards and codes of behaviour."[37] At the micro level, Fukuyama understands the power of such internalized cultures as the basis for action, efficiency and success.

The insider familiarity which allowed lawyers and judicial officers to work together smoothly was until relatively recently, the prevailing culture of the courtroom. There was a shared language, protocol, and ideology based on 'habits, traditions and norms'. There was a level of comfort, and indeed trust, in the way things were done and therefore in how they turned out. The self-represented party or litigant,[38] a phenomenon common to many Western legal systems,[39] together with, in Australia at least, a 'self-help' approach to law and to other community information services,[40] has arguably converted courtrooms from 'wholesale' to 'retail' environments[41] where

36 Ibid, p. 271.

37 Ibid, p.26.

38 K. Laster and R. Kornhauser, The Rise of 'DIY' Law: Implications for Legal Aid, in: A. Flynn and J. Hodgson (eds.) *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need*, Hart Publishing, Portland, Oregon 2017, pp. 123–40.

39 E. Richardson, G. Grant and J. Boughey, *The Impacts of Self-Represented Litigants on Civil and Administrative Justice: Environmental Scan of Research, Policy and Practise.* Australasian Institute of Judicial Administration 2018, p. 4.

40 Laster and Kornhauser, supra note 38, pp. 132–3.

41 Ibid, p. 135.

many defendants and litigants appear for themselves, and upset that cosy collegiality. Ways of doing things have had to change, and a new level of incomprehension and, consequently, distrust, has unsettled the established order. Lawyers and judges now need to manage less ordered, sometimes chaotic, environments; work which is unsettling and destabilising. Their ability to adjust to the new order is further exacerbated in that they work in 'low trust' environments deprived of the comforting bonhomie of shared understandings.

Fukuyama's take on 'what works' for sociability is essentially conservative. He contends that "a people's ability to maintain a shared 'language of good and evil' is critical to the creation of trust, social capital, and all the positive economic social consequences that follow from these attributes. Diversity, in his analysis, can surely bring real economic benefits, but past a certain point, it erects new barriers to communication and co-operation with potentially devastating economic and social consequences".[42] Increased diversity, in the form of higher numbers of women, people of colour and indigenous peoples, among senior members of the legal profession and the judiciary, is seen as a signifier of a legal system that is more representative, more inclusive, and perhaps therefore more trustworthy.[43] However, it may also, according to Fukuyama's thesis, be one of the causes of this loss of solidarity and comfort among established members of those institutions.

CONCLUSION: THEORY AND SENSE-MAKING

'If you are a hammer everything looks like a nail' is a homespun aphorism that can be applied beyond the day to day to theory of all kinds. All good theory (big picture, mid-range or micro) provides us with a powerful, albeit myopic, lens, through which we can analyse the social world.

The heuristic value of good theory lies not in whether it is right or wrong. Rather, the test of the usefulness of a theory is whether it can reveal a new perspective or afford us surprising insights by, for instance, facilitating unexpected connections between apparently unrelated phenomena. Trust, as we have seen throughout this collection, seems to be one such theory.

'Trust' as a concept might be too broad, sweeping up all kinds of discrete phenomena in its path. On the other hand, as Fukuyama's analysis of widely divergent economies attests, it may just help us see and explain patterns across diverse social systems and cultures.

The focus in this collection has been on trust in the context of common law adversarial legal systems (which themselves exhibit more differences than similarities). Yet, the trust lens somehow works. But while trust itself might be thought to be an essential component of any legal system, in discerning how it applies in other jurisdictional contexts we might have to articulate taken for granted assumptions about legal cultures forged under different circumstances.

Those working in the courts are often inclined to view courts, not without some foundation, as entirely independent social worlds. It is tempting to imagine that the courts themselves can control and manipulate their own environments. But futurists

42 Fukuyama, supra note 1, p. 270.

43 R. Hunter, More than Just a Different Face? Judicial Diversity and Decision-Making. *Current Legal Problems* 68 pp. 122–3.

such as Richard and Daniel Susskind for instance, ascribe the inevitable changes in courts and lawyering to greater outside forces such as new technology and the corresponding collapse of hierarchies of all kinds.[44] It is thus not lack of solidarity that is failing to deliver prosperity but rather economic forces which cannot be contained and controlled by the culture itself. Already, the social isolation dictates of COVID-19 have seen the development of new protocols and processes for 'virtual courts', explored in the previous edition of this journal.[45] These changes are probably the harbinger of even more dramatic changes to court processes and culture. Whether the newer forms will elicit more or less trust from court participants and the wider community remains to be seen.

Courts cannot remain impervious to wider forces beyond its doors. As the authors in this collection have asserted in various ways, community trust is the essence of courts' legitimacy. That trust is fragile, dynamic and can never be taken for granted.

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COMPETING INTERESTS

The author has no competing interests to declare.

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44 R. Susskind and D. Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts*, Oxford University Press, Oxford 2016, p. 107.

45 M. Fabri, D. Kettiger, A. Lienhard, A. Sanders and A. Wallace (eds.), The COVID-19 Crisis – Lessons for the Courts, special issue of the *International Journal for Court Administration* 12(2).

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