

ANGLOPHONE LEGAL CULTURE, HUMAN RECALICTRANCE, MALTHUSIAN CATASTROPHES, AND THE IRREFUTABLE PREMISE OF GLOBAL WARMING

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Abstract:

This paper will not directly engage the question of global warming. It will neither attempt to confirm nor deny the reality of such an atmospheric condition. Instead, this paper has to do with an architecture of authority intended to preside over all peoples in all localities of the earth. It examines the necessity of a transcendent law to curb the excesses and impulses of humankind.

In its approach, the paper will discuss the present-day idea of global warming as a successor to the eighteenth century idea of the Malthusian Catastrophe. Viewed that way, the question actually becomes whether the human race, as a whole, has the capacity for ethical progress, or whether human nature is so inherently defective that, if unrestrained, it will destroy itself.

That topic arose in the eighteenth century when Continental jurists ridiculed the Common law as a medieval relic tied to the interests of hereditary privilege and merchant wealth. The Europeans asserted that both its harsh legal method and its pejorative view of human nature were vestiges of Medievalism and Puritanism. This affront to English ways called for a rebuttal.

An exchange began in 1795 with the publication of a book by Nicolas de Condorcet, *Progress of the Human Mind*, perhaps the single most influential summation of ideas from the Age of Reason and its Optimistic view of human capacity. Thomas Malthus answered that hopeful view with a more pessimistic appraisal set forth in his *Essay on Population*, published in 1798.

In his book, Malthus attempted to prove that the natural greed and depravity of human beings would eventually end—not in a world utopia—but in a tragedy of despair and death. The widely understood implication of his thesis was that the only way to forestall such a fate was to impose on the perverse appetites of humankind the strictures of transcending legal authority.

This paper will conclude that, whatever the facts about global warming, there are fundamentally two types of solution: those imposed from the top down by coercive authority, and those from the bottom up by public cultivation and learning. The Anglophone solution for a Malthusian Catastrophe is to impose upon humankind an elevated global Rule of Law.

KEY WORDS: Condorcet, Malthus, global warming, population.

1. The question

There are many ways to understand and address the issue of global warming. It may be engaged as an environmental issue, as a matter of public health, as an economic question, or as a political issue. But aside from the practical and scientific frame in which conventional discussions of this question usually take place, it has important and deeper implications as well. It has moral and ethical dimensions that run to the basic assumptions and methods on which a twenty-first century way of life is being constructed, a way of life that potentially includes all peoples and all regions of the earth.

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Taken on that level, the question of global warming has a great deal to do with attitudes, habits, and values that provide both the foundation and the rationale for a regimen of living that has come to be thought of as normal and conventional. Viewed from this perspective, the question also has to do with a choice between two alternatives in the Western approach to ordering human life and shaping human thought, alternatives that have, jointly, come to predominate around the world. Those two foundations can be described as the philosophic versus the empiric, the principled versus the pragmatic, or in legal terms, the Civilian versus the Anglophone.

The idea of an impending worldwide catastrophe brought on by the excesses of human rapacity and recalcitrance has a precedent in Christian theology. But it also has antecedents in a debate from the nineteenth century that further set apart the two Western traditions of law, Continental and English. That debate, which posed the promise of future hope against an expectation of impending doom, ultimately turned on assumptions about human nature. One side posited the human capacity for individual growth and development, and the importance of cultivation and learning as the basis of human society. The other side asserted a need for the coercive power of law to bring oversight and authority to tendencies of human behavior that could eventually bring a massive self-destruction.

However, that debate was only superficially about whether such a massive catastrophe actually threatened human existence. Nor was it primarily concerned with gaining consensus among world leaders and agreement among the public, to have them see an immediate and obvious threat. Instead, unlike discussions of global warming today, discussion of the actual form and substance of that catastrophe was of less importance, and of less immediate urgency. What that encounter did confront on a deeper level, unlike discussions in the present situation, was a difference that separated two alternative foundations for modern life. It made clear a distinction between two possible choices for bringing peace and order to a troubled world.

The first discussion of a possible catastrophic episode facing humankind was the *Essay on Population* set forth by an English writer, Thomas Malthus in 1798. His immediate purpose for writing it was as a response to the recent book by the French writer Nicolas de Condorcet, who, in his *Progress of the Human Mind*, in 1795, had celebrated the bountiful future to which mankind might aspire. What ensued in this contest of ideas was not so much the beginning of a useful exchange, as it was a clarification of the division between two wholly disparate legal realms that were coming into conflict with one another. The work of Condorcet, still considered to be a monumental summation of eighteenth century ideas, was philosophical in its approach, while the countering polemic set forth by Malthus was wholly empiric.

In the grim future he predicted, Malthus made clear the urgent and practical need for coercive oversight to protect all peoples in all localities of the world from their own excesses and impulses. In fact, the legal importance of his work was not restricted to the problem of population, but instead, to any catastrophic event brought on by the natural greed and depravity of human beings. This underlying purpose can be seen in the legal significance that surrounds the question of global warming today. Viewed from the Malthusian perspective it is useful to view global warming, not so much as a specific type of threat, but rather as a crisis being caused by the specific source of human recalcitrance.

In discussing this legal importance, the purpose here is not to directly engage the question of global warming. It is not necessary to examine its various scientific dimensions and implications. Nor is it even necessary to discuss the question of whether

such atmospheric conditions actually exist, or if they do exist, whether they warrant the level of concern widely expressed. Instead, what is addressed here is the differing nature of two legal cultures, their application to human life, especially to understand the logic of a transcendent English law by comparing it with a universal Continental law. In such an approach, it becomes a discussion about human nature as the basis upon which a regimen of global order will necessarily be constructed: will it be an atmosphere of cultivation and learning from the bottom up, or will it be by a coercive authority from the top down.

2. Religion and retribution

The two predominant legal traditions of the West were born at almost the same moment during the eleventh century, nearly a thousand years ago. Historians mark the beginning of the Civil law tradition with the founding of the University of Bologna in 1088, and the origin of its Anglophone counterpart with the Norman Conquest of England in 1066. But the circumstances of their two origins were very different, just as the nature of the two legal regimes would be equally disparate. Those differences remained fundamental throughout their parallel development insulated from one another, over centuries and to the nineteenth century.

There are many ways to understand the great gulf that separated the two legal regimes. Perhaps it is easiest to think of the Continental tradition as being philosophically based, evolving from the scholarship at the center of its development. It purported to adhere to rational principles, with a strong claim to being predictable and logical in its operation. By contrast, the English method, founded as a guild of trade, was collegial in its makeup, operating under the oracular authority of its judges. Because its methods were guided by the principle of consensus among its members, its great virtue was its flexibility and adaptability to changing circumstance.

However, major changes began to occur within both traditions at the onset of the modern age. Beginning around 1500 the educative unity of all Christendom began to break down, as the primacy of the Roman Church and Empire was challenged. Kingdoms and states began to reconstitute themselves as independent polities, often with their own national religions. One of the most influential forces in this national transformation was that of Calvinism. In the pattern of the era, its doctrines combined the realm of jurisprudence with the realm of theology. Its fundamental premise was twofold: first was a pejorative view of human nature as being inherently corrupt and predestined to hell. But along with that condemnation, it sought to establish a *Repubblica Hebraeorum* with a Chosen Elect of ministers and magistrates. They would fulfill the Divine Plan of human redemption by the punitive methods of a Biblical legalism.

The effects of its dogmatic, often merciless, approach to maintaining public order, however, led to a general revulsion against religion as the educative instrument of governance. During the seventeenth century, when the religious wars finally ended with a settlement at Westphalia in 1648, public sentiment on this matter had already begun to change. By the turn of the eighteenth century, governments on the Continent began to abandon the old ways, and instead began to construct an approach to governing based on secular principles of philosophy and science. But among the English, where the teachings of John Calvin took the form of Puritanism, that religion had established a permanent hold.

Just as Westphalia had been the turning point for Europe, the Glorious Revolution of 1688 was a turning point for England. Although the monarchy was re-established on a

new foundation, its new frame of governance retained many of the unitary elements of Norman Kingship, just as it retained the spirit of Puritanism. England continued as a dynastic monarchy with a hereditary peerage, but it also included both the Common law and a national church as basic constituents. The new form of rule with its famously Unwritten Constitution and its omnipotent High Court of Parliament became deeply rooted in the island realm and eventually became the center of a world empire.

The rationale for this new basis of rule was given expression most famously by the legal philosophers Thomas Hobbes, John Locke, and Bernard Mandeville. In the Hobbesian view human beings were by nature brute and savage, and required a strict discipline. For Locke, the common man was best conceived of, for purposes of rule, not so much a human being, but as an objective composite, an aggregate of abstract legal rights. Finally, because the strength of the Kingdom was the accumulated landed and monetary wealth held by the ruling classes, the role of incentives and production by the laboring multitude was set forth by Mandeville. Taken as a whole, rather than lamenting the wayward tendencies of humankind, the British attempted to harness those impulses to impose a more complete and stable basis of rule.

3. Rational progress

However, during the eighteenth century, England became to some extent an object of ridicule among observers on the Continent. They looked with disdain upon the English combination of a medieval law, hereditary opulence, together with a large and destitute population living in squalor and disease. Even within the ruling hierarchy there was deep division about the methods of law and a system of rule and its effect on the vast and impoverished multitude. In the spirit of the times, the discussion went to fundamental ideas of existence and the nature of man. Those ideas put forth in England by the Earl of Shaftesbury, Lord Bolingbroke and later, in Scotland, by Francis Hutcheson and Thomas Reid closely resembled philosophical ideas that were prevalent on the Continent.

Although varying in detail, numerous philosophers and writers set forth an affirmative view of human potential that characterized the eighteenth century Age of Reason. It was a belief in the common humanity of all races, a belief in the human capacity to learn and develop, and a belief in the faculty of reason shared by all persons. It asserted that if a people were favored with cultivation and learning they would be able to enjoy a prosperous and peaceful existence and be competent to order their own affairs. These ideas were expressed variously as the Optimism of Leibnitz and Wolff, the General Will of Rousseau, the Common Sense philosophy of Thomas Reid and Thomas Paine, and the *Sensus Communis* of Kant.

The optimistic philosophy of Common Sense, in fact, had many similarities to its ancient precursor, Roman Stoicism, and even had traces of Confucian influence, a philosophical view widely admired in eighteenth century Europe. Like those ancient Roman and Oriental teachings, this new Humanist view, although not religious in itself, had a religious sensibility, given expression in the teachings of Deism. Like the ancient Stoics, its followers recognized a divine source of all natural phenomena, while it asserted the potential for human development toward a prosperous and peaceful world. This attitude was sometimes expressed and sometimes ridiculed as the principle of Perfectibility.

However, the single most influential discussion of these ideas came at the end of the eighteenth century by Nicolas de Condorcet in his seminal work on the *Progress of the*

Human Mind, published in 1795, he set forth what he thought was a realistic hope for humankind based on principles of humanity and reason. He affirmed the notion of an enlightened people able to arrive at a state of existence less troubled by sectarian strife, diplomatic intrigue, and wars of mass destruction. He proposed a universal instruction among all persons in all locations. In his view, like that of the Stoics and the Confucians, all of humankind could be lifted by a universal process of cultivation and learning.

4. Empirical reality

These ideas, of course, were an affront to the practical and pragmatic English jurists who sought to be transcendent in their application of law. As a legal regime they comprised a hierarchy that, despite the spirit of the times, worked as a medieval guild of trade within the courts. It was premised on a pejorative view of human nature as requiring strict and continuous oversight. It assumed the necessity of a ruling strata held together and imposing an order on an otherwise anarchic population. With the unsettling impact that followed the publication of Condorcet's book in England, Malthus was compelled to provide an answer.

Malthus was not interested in lofty speculations about the possibility of elevating the traits of the mass of men by instruction. Nor was he interested in abstract speculations about nature or philosophical niceties, or ideals and principles by which men could be taught to govern themselves. Instead, he was able to provide a clear rationale for the necessity of an overarching rule based on what would be the provable and inevitable fate of humanity, if men were left to their own devices. It was that human beings unrestrained, driven by their own compulsions would eventually destroy themselves in a crush of overpopulation and the inability of nature to provide them with subsistence.

If the premise set forth by Malthus was accepted, the question would then move to a practical consideration of when such necessary restraints should be placed on the world multitude to forestall and prevent such a bleak ending. Certainly, the foreboding depiction set forth would only be realized far into the distant future. Yet, for the sake of prudence, the application of restraint should not be postponed, but, instead, should begin immediately. With one stroke Malthus had seemingly eradicated the thought of a legal regimen based on an idealized human capacity for good, and he did so by setting forth an irrefutable argument.

However, viewed another way, the impending population crisis was only one potential outcome of the real underlying problem. If persons were allowed to live uncontrolled they would inevitably come to meet a catastrophic end of their own making, that fate had already been determined by their own fallen makeup, their natural depravity. The Essay became one of the most important books in the history of the English legal tradition. It set forth a premise that demonstrated how the ordering of human life and the shaping of human thought was required by an imposed authority, what came to be called a Rule of Law. Malthus was often condemned for his bleak pessimism, even by the English, but his logic concerning the crisis of population could not be denied.

5. Universal and transcendent

There are many ways to compare and contrast the two Western traditions of law in relation to the encounter between Condorcet and Malthus. But in the time of a global age perhaps the most useful is to view them in relation to the means by which they each might become applicable to all regions and all peoples across the world. That is, to examine the way each is capable of extending not merely an order of authority, but also the way it would engender an atmosphere of understanding in a regimen of global life.

In fact, the two would accomplish such a purpose in very different ways. Although it would not be accurate to pose them as precise opposites, taken in the aggregate and according to what is basic to the nature of each method, they can be described as being dramatically and fundamentally unlike. Their essential differences are related to their historic origins and connected to their differing compositions: one is philosophically based and the other is collegial in nature. One is universal in its perspective, the other is transcendent. One operates on a unity of knowledge while the other operates on a division of knowledge.

The Continental approach, despite its current secular composition, follows on its historically theological past. It was so in that it was fundamentally universal in its outlook, and it was so in two ways. First, its principles and ideals, its conception of humanity was intended to be applicable to all persons of every race, of every rank and status. Second, for its method of law to work, all persons, high and low, rich and poor, had to be schooled in that structure of theological or Humanist principles in which it was based. These included the essential equal humanness of all persons, the potential for growth and development of all persons, and the faculty of reason possessed by all persons.

The educative half of the Civilian legal tradition entailed, therefore, a high level of instruction among the public generally. The Continental method of legal oversight could not function without a general understanding of its principles by all members of the public—including both those in authority and those of the public. Hence, unsurprisingly, Europe became known across the world as a center of culture and learning, as this educational premise in its many forms distinguished the various peoples on the Continent. In such a way of life the philosopher who shaped this inclusive basis of learning was a central figure in its perpetuation. At the same time, the secular university came to be the central institution in its operation. The Civilian tradition prided itself on being a rationally self-existent mode of law, applicable to all persons. It required no external or supernatural doctrine to support it.

By contrast the Anglophone tradition was transcendent in its outlook. The realm of law, of judicial knowledge and authority, occupied a place elevated above the public generally. From this high place it was able to act independently and confer an impartial form of justice upon all persons within its jurisdiction. This overarching construction would make it possible to provide an umbrella of authority over the many localities and peoples of the earth, regardless of ethnic or cultural differences. Because the basis of public order rested on the strength and stability of its legal institutions, a high level of cultivation and widespread learning was not as important for the purpose of legal rule.

What was important, however, was a framework of understanding that connected the realm of unified privilege and authority above with the realm of conflicting rights and obedience below. Historically that frame of understanding was supplied by religion and by that device the workings of each law court was surrounded by an aura of sanctity. Equally important, just as their legitimacy was based on a religious faith, the vestige of Calvinism also provided a logic for the punitive measures they employed. Even into the

global and secular age of the twenty-first century the importance of religion in the Anglophone legal regimen remained crucially important. This religious element has conventionally taken the form of the Christian or Judeo-Christian tradition.

6. Technology and governance

Both legal traditions, Civilian and Anglophone, began within a medieval atmosphere, a simple, rustic, and agrarian way of life. During the sixteenth century a wave of technical and scientific innovations provided the means for transforming the legal and religious order of Christendom into its modern form. Then during the nineteenth century, a new period of invention and discovery provided ways of transporting and imposing the Western modes of law and learning on every continent of the world. In the twenty-first century, with seemingly miraculous technological advances, the way is now opening to once again transform human life around the globe. It is now possible to extend the authority of law, and its necessary correlate, a standardized atmosphere of understanding, across every nation and people of the earth.

For purposes of legal rule, however, it is no longer necessary to instill a uniform structure of knowledge, to shape the thinking of a vast global public. It is not necessary to indoctrinate with a fixed and complicated framework of ideas about either theology or ideology, or even history and government. That old approach to education, with its laborious process of inculcating a fixed pattern of knowledge by rote learning, is no longer necessary. Instead, it is now possible to provide a continuous and immersive atmosphere of electronically transmitted sound and image. By this means a constant flow of information can shape the understanding of a worldwide public, efficiently, with minimal effort, and in the normal transactions of everyday life.

Moreover, the European tradition of culture and learning, its respect for human brotherhood, its confidence in human possibility, the importance it attached to human reason, no longer seems relevant. In fact, those ideas from the eighteenth century seem almost quaint in the post-human or trans-human discussions of the twenty-first century. Instead, attention has moved away from an innate human nature and its capacity for development and improvement. Focus has instead shifted to the mechanical topic of cognition, and a search for how the technical and the human might be made to converge—or at least replicate one another. The aspiration to a future destiny built on the cultivation of human attitude and habit, as Condorcet saw it, has little place in an era when even the cognitive architecture of the human mind might be mechanically recalibrated.

In the age of Big Data, algorithms, and Deep Learning, questions of human volition become overshadowed by the more urgent and immediate hope that the next generation of technical development, combined with measures of enforcement, will alleviate the problems of the present—including the problem of global warming. The world is a very different one from that inhabited by Malthus and Condorcet, and its challenges are much different. That is to say, the challenges of the mediated reality which has come to circumscribe human life are unique. But viewed another way, the prevailing mode of understanding through the lens of technology and legality, is an artificial one, created and constructed. Condorcet might assert that there is a pre-existing and natural perspective large enough to see that this combination of instrumentality and authority represents merely one alternative among many.

7. A climate of understanding

Public discourse occurring around the world today generally includes two assumptions on which there is widespread agreement. First, that there is an increase in temperature across the globe caused by the many factors inherent to a modern Western way of life, a way of life that has been adopted by peoples in all regions of the earth. Moreover, the effects of this rising temperature will almost certainly be catastrophic, possibly very soon. The second point of agreement involves an almost uniformly agreed upon answer to this problem. That is, to construct a regimen of oversight and enforcement that, with the mobilization of technical advance, can bring a correction. Ultimately, this solution rests on the legal instruments of a transcendent adjudicative authority able to compel peoples, industries, and governments into a uniform compliance.

What is less emphasized, or is perhaps dismissed as an unrealistic alternative, is a program of change in habits and attitudes, in the material and commercial values that have come to prevail among the global population. The conventional remedy offered does not rely on the cultivation of thought and deed, the human potential for assuming responsibility. It is not based on confidence that a dramatic change in human behavior is possible. To the extent there is an appeal for the public to turn away from habits of consumption and waste, it might be introduced as a symbolic gesture, as an aside to the more realistic and central legal-technical solution.

This shift from the *Sensus Communis* of the eighteenth century, away from the Optimistic potential of human beings—to the extent Global Warming is viewed in immediate practical terms, instead of ultimate and ethical terms—shows a change in the atmosphere of world opinion. The current set of assumptions and conclusions demonstrates a clear abandonment of the values of the eighteenth century and its affirmation of the potentials of humankind. That is, a confidence in the idea of culture as cultivation in thought, word, and deed. The guiding object of that time, as summarized by Condorcet, was the progress of a world public to more enlightened ways of ordering human life and shaping human thought. It presupposed a universal atmosphere of learning, not merely information, and an assumption of human strength and capacity, not merely weakness.

An enforced legal approach will not necessarily elevate the level of cultivation and learning among a global population. Nor can it be claimed, with certainty, that legal and technical measures can be trusted to actually solve the problem of global warming. After all, the existing combination of legality and technology was fundamentally complicit in bringing the imbalance between human beings and nature in the first place. The one outcome of certainty--in the prevailing answer to global warming--will be the construction of a transcendent mode of enforcement, in the form of an enveloping legality and technology. By contrast, the other approach might bring much wider benefits, not only in the matter of global temperature, but in the atmosphere of human development. Taken on this level, the question of global warming becomes a moral and ethical question, a question of cultivation and learning, more than a scientific or legal question.

The purpose here is not to address the scientific question of global warming. It is not to advocate for any political position in regard to that question. Nor is it an attempt to argue against any combination of legality and technology as a solution to this question. Finally, and especially, this is not an attempt to advocate for ideas and attitudes that were prevalent two hundred years ago. Instead, the purpose here is to show an alternative or enlarged approach to a public question, an approach that goes deeper than the merely pragmatic terms in which it is normally framed.

That is, to pose the question as it might have been understood in the atmosphere of profundity that made the eighteenth century so unique—its overriding discourse began with matters of human capacity and human potential. Taken in that light, perhaps the question becomes, will human understanding solve the problems of the world, or will technology and law solve the problem of humans. That could be the twenty-first century version of the debate between Malthus and Condorcet, and it could be the larger question in the matter of global warming. Taking one approach might only result in an expanded Rule of Law. Taking the other approach, might work a transformation in human existence around the globe.

Sources

- Condorcet, Nicolas de 2012: *Political Writings*, Cambridge University Press
- Condorcet, Nicolas de 2012: *Outlines of an Historical View of the Progress of the Human Mind*, Forgotten Books
- Dupuy, Jean-Pierre: *The Mechanization of the Mind: On the origins of cognitive science*, Princeton University Press
- Giddens, Anthony 1991: *Modernity and Self-Identity*, Stanford University
- Giddens, Anthony 2012: *The Politics of Climate Change*, Polity Press
- Grubb, Michael 1999: *The Kyoto Protocol: A guide and assessment*, Royal Institute of International affairs
- Habermas, Jurgen 2001: *The Structural Transformation of the Public Sphere*, MIT Press
- Habermas, Jurgen 2008: *The Divided West*, Polity Press
- Lambropoulos, Vassilis 1993: *The Rise of Eurocentrism*, Princeton University Press
- Lesaffer, Randall 2010: *European Legal History*, Cambridge University Press
- Malthus, Thomas 2010: *An Essay on the Principle of Population*, Cambridge University Press
- Minsky, Marvin 2006: *The Emotion Machine: Commonsense thinking, artificial intelligence, and the future of the human mind*, Simon & Schuster
- Misa, Thomas 2011: *Leonardo to the Internet: Technology and culture from the Renaissance to the present*, Johns Hopkins University
- Murphy, Kevin 2012: *Machine Learning: A probabilistic perspective*, MIT Press
- Wendt, Alexander 2015: *Quantum Mind and Social Science*, Cambridge University Press