GLOBAL ISSUES

CLIMATE CHANGE, MALTHUSIAN CATASTROPHE, AND A GLOBAL RULE OF LAW

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The paper will not directly engage the scientific question of global warming. Instead, it will discuss the present-day idea of global warming as successor to the nineteenth-century idea of the Malthusian Population Catastrophe. Viewed that way, the question becomes whether the human race, by cultivation and learning, has the capacity for ethical progress, or whether human nature is so inherently malevolent that, if left unregulated, it will inevitably bring destruction. A book by Nicolas de Condorcet, published in 1795, Progress of the Human Mind*, was the single most influential summation of ideas from the Age of Reason and its* Optimistic *view of human capacity. In 1798 Thomas Malthus offered in rebuttal with a pessimistic appraisal of human possibility, in his* Essay on Population*. Malthus asserted that human history would eventually end – not in a world utopia – but in starvation and death. The only way to prevent such a fate was to impose a strict legal regime. This paper concludes: whatever the facts about global warming, there are fundamentally two types of solution: those enforced from the top down by coercive authority and those from the bottom up by public cultivation and learning. The Anglophone solution is to impose upon humankind an elevated global Rule of Law.*

Keywords: *Condorcet, Malthus, global warming, population, law.*

1. The Question

There are many ways to address the issue of global warming. It may be engaged as an environmental cause, 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 (Firor 2002; O'Neill 2001).

Taken on that level, the question of global warming has a great deal to do with Western attitudes, habits, and values, because Western ideas have come to provide the foundation and rationale for a regimen of living that is thought to be normative and conventional around the world. However, viewed from this perspective, the question of climate change must also confront a choice between two alternative methods of regulating human affairs that exist within the Western tradition. That dichotomy of the West

can be described as the rational versus the empirical, the principled versus the pragmatic, or expressed in conventional legal terms as the Civilian versus the Anglophone (Habermas 2008).

The idea of an impending worldwide catastrophe brought on by the excesses of human greed and corruption has precedent in Christian theology. But it also has antecedents in a debate from the nineteenth century that further clarified differences between the two rival traditions of Western 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 affirmed the human capacity for individual growth and development, and the importance of cultivation and learning as the basis of human society. The other party asserted a need for the coercive authority of law to regulate and limit inherent tendencies of human behavior, tendencies that could eventually bring massive self-destruction (Rose 1990).

However, that prediction of catastrophe was not meant to alert world leaders or to alarm the public to an immediate threat. Instead, unlike the atmosphere of urgency and protest that surrounds the topic of global warming today, discussion of the actual form and timing of that expected catastrophe was of less importance and was less specific. What that debate 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 a clear distinction between two possible destinies of humankind, one of created possibility, the other of a pre-determined fate.

This warning of a worldwide catastrophe facing humankind was set forth in the *Essay on Population*, in 1798, by an English cleric and professor, Thomas Malthus. His immediate purpose for writing it was to discredit a recent book by the French writer Nicolas de Condorcet, *Progress of the Human Mind.* In that book, published in1795, the Frenchman had celebrated the bountiful future to which all peoples might aspire. What followed out of this contest of ideas was not so much the beginning of a useful dialogue, 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, might be described as philosophically Rousseauean in its approach, while the countering polemic set forth by Malthus was empirically Hobbesian. It also established Malthus as the virtual founder of the English school of *Political Economy* (Condorcet 2012a).

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 humanly excesses and impulses. In fact, the legal importance of his work was not limited to the problem of population, but instead, could be relevant to any catastrophic event brought on by the natural avarice 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 only as an enormous climatic threat, but also as a crisis caused by the inevitable tendencies of human excess (Malthus 2010).

In discussing this legal importance, the purpose here is not to directly engage the question of global warming. There will be no attempt to examine its various scientific dimensions and implications. Nor will there be a discussion of whether such atmospher-

ic conditions actually exist, or if they do exist, whether they warrant the level of concern widely expressed. Instead, what is addressed here are the essential differences between two legal cultures, their different applications to human life, and especially to understand the logic of a *transcendent* Anglophone legality by comparing it with its *universal* Civilian counterpart. In such an approach, it becomes a discussion about a conception of human nature as the basis upon which an Anglicized regimen of global order will be constructed. It becomes a question of whether a human future could lie in the possibilities of cultivation and learning among a global public from the bottom up, or whether that future must lie in a direct resort to coercive authority from the top down (Riley 1996).

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. The beginning of its Anglophone counterpart is marked from the advent of a highly centralized Norman Kingship that followed on the Conquest of England in 1066. Although they began almost exactly simultaneously, the circumstances of their two origins were very different, just as the method of the two legal regimes would develop in very different ways. Those differences remained fundamental throughout their parallel development insulated from one another, over centuries and into the modern era (Baker 2002; Brundage 2008).

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 academic scholarship at the center of its development. It purported to follow rational principles and offered the distinct advantage of being highly predictable and logical in its operation. By contrast, the English tradition, 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 internal consensus among its members, its great virtue was its flexibility and adaptability to changing circumstances (Lesaffer 2010).

However, major changes began to occur within both traditions at the onset of the modern age. Beginning around 1500 the unity of all Christendom began to break down, as the primacy of the Roman Church and Empire was challenged. Kingdoms, commonwealths, and republics began to constitute themselves as independent polities, often with their own national religions and national systems of law. One of the most influential forces in this sweeping transformation was that of militant 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 second, and weighted against that, was the premise of a Chosen Elect, a theocratic polity following on Talmudic principles. The Calvinists sought to establish a *Republica Hebraeorum* presided over by a stratum of ministers and magistrates. By this means they would fulfill the Divine Plan of human redemption using the punitive methods of a strict Biblical legalism (Nelson 2010).

The effects of Calvinism, its dogmatic, often merciless, approach to maintaining public order, however, led to warfare, repression, and unspeakable cruelties. Over time

there developed a general revulsion against religion as the educative instrument of governance. During the seventeenth century, when the civil and religious wars finally ended with a settlement at Westphalia in 1648, public sentiment on this matter had already begun to take a turn. By the beginning of the eighteenth century, governments on the Continent were abandoning the old theocratic ways, and instead began to construct an approach to public order based on educative principles of secular philosophy and science. But among the English, where the teachings of John Calvin took the form of Puritanism, a deep religiosity continued to underlie its method of legal rule (Shoulson 2001).

Just as Westphalia in 1648 had been the turning point for Europe, the Glorious Revolution of 1688 was a turning point for England. The British Monarchy was re-established on a new foundation, but the new frame of governance retained 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 now also incorporated both the Common law and an Established English Church as basic constituents. The new form of rule with its famously Unwritten Constitution and its omni-competent High Court of Parliament became deeply rooted in the island realm and eventually provided the foundation for a world empire (Potter 2015).

The rationale for this new basis of rule – deeply Puritanical in its view of human nature – was given expression most famously by the legal philosophers Thomas Hobbes, John Locke, and Bernard Mandeville. Hobbes took the view that men were by nature savage brutes, morally abject, and requiring a severe discipline. Yet, rather than lamenting their wayward tendencies, the plan of Hobbes was to harness their natural savagery as the impetus to rule by one class over another. Later, a regimen to implement this regimen of strict oversight was provided by Locke. His legal method was an impersonal and mechanical approach with no moral content: Each man would be conceived of as an individuated composite of abstract legal rights by which his actions could be evaluated and regulated (Women had no status in the Common law.) (Locke 2003; Tigar 2000).

Finally, in acknowledging that the strength of the New Kingdom rested on its accumulated riches, a policy to enlarge the wealth of the ruling classes was formulated by Mandeville. He advocated an inducement to production by the laboring multitude, based on their natural tendency to envy and greed – as famously stated by him, private vices would serve a public good. Taken as a whole, English legal culture rested on three narrow purposes: First, it worked to forcibly control the base impulses of natural man by harsh punishment while it employed human pathology as a basis of rule. Second, for legal usage it redefined the human being as an objectified composite of entitlements and obligations. Third, it mobilized an entire population to the single purpose of wealth accumulation, the essential basis of power for the Kingdom. A new way of life concentrated on the production of wealth eventually made England the historic birthplace of what came to be known as Capitalism (Goldsmith 2001).

3. Rational Progress

Not surprisingly, during the eighteenth century, England became to some extent an object of ridicule among observers on the Continent and in Scotland. It was looked upon with reproach as a servile kingdom based on an antiquated legalism, with all property

concentrated in an opulent ruling class, and presided over by a foreign monarch. Its large and destitute urban populations had been wrested from their farmsteads and villages to live in squalor, just as they had been condemned to ignorance under a policy of enforced illiteracy. In fact, within the ruling hierarchy of England there were deep divisions about the method of law and the system of rule with its impact 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. But especially in the Scottish North which followed a Civil tradition of law, a more egalitarian idea was put forth by Francis Hutcheson and Thomas Reid. It closely resembled the humane philosophical ideas coming to prevail on the Continent (Walker 1992).

By their varied works, the more rationalist philosophers and writers – especially in France, the German principalities, and Scotland – were advocating an affirmative view of human potential that eventually characterized the eighteenth century *Age of Reason*. They espoused 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 was asserted that if a people were favored with cultivation and learning they would be able to enjoy a prosperous and harmonious existence and be competent to order their own affairs, with a minimum of legal oversight. These ideas were expressed variously as the *Optimism* of Leibnitz and Wolff, the *General Will* and *Bon Sens* of Rousseau, the *Common Sense* philosophy of Thomas Reid and Thomas Paine, and the *Sensus Communis* of Kant (Hadot 1995).

Both the *Optimist* and *Common Sense* philosophies, in fact, had many similarities to their ancient precursor, Roman Stoicism. They even had a strand of Confucian influence, the Chinese approach to public order based on respectful conduct and practical wisdom, teachings widely admired in eighteenth century Europe. Like both those ancient Roman and Oriental teachings, the humanist view, although not religious in itself, had a religious sensibility, given expression in the teachings of Deism. Following on the ancient Stoics, the Deist recognized a divine source of all natural phenomena, while he asserted the potential for human development toward a prosperous and peaceful world. This attitude was sometimes expressed – and sometimes ridiculed – as the principle of human *Perfectibility*. Such a doctrine reflected the spirit of the times that later historians came to call *The Enlightenment*, a label of oriental derivation (Mungello 1977).

Perhaps, the single most influential summation of these ideas came at the end of the eighteenth century in a book by Nicolas de Condorcet. In this seminal work, *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, less preyed upon by the subtlety and intrigue of those who ruled, and less ravaged by the violence of perpetual war. He proposed universal literacy and instruction among all persons of every rank and status, and on every continent. In his view, like that of the Stoics and the Confucians, all of humankind could be lifted by an inclusive program of cultivation and learning. His work was one of the most widely translated and widely influential of the eighteenth century, with a great impact on, among others, Thomas Jefferson (Condorcet 2012b).

4. Empirical Reality

These ideas, of course, were an affront to the practical and pragmatic English jurists who sought to maintain their closed method of legal commerce. As a legal fellowship they comprised a hierarchy that, despite the tenor of the times, still worked within the courts as a medieval guild of trade. During the eighteenth century, England had over three hundred criminal offences – from petty theft to trespassing – that were punishable by execution, usually hanging. To administer such policies required a closely united ruling stratum that could impose order without compunction. Even so, with the unsettling impact that followed the publication of Condorcet's book in England and Scotland a defense of English law was required. Although the excesses of that law had been widely condemned, even among its practitioners, no one of them provided a clear and convincing rebuttal. Moreover, those ethical qualms increased in the early nineteenth century when a rancorous adversary technique came to be formally adopted by which trials of criminally accused were to be conducted (Hostettler 2009).

Eventually, it was someone within the ruling class, but outside the fellowship of law who provided an answer to Condorcet. Not by direct engagement, but by indirection and implication, Thomas Malthus applied a very credible logic. He was not interested in lofty speculations about the possibility of elevating the mass of humanity by programs of enculturation. Nor was he interested in metaphysical speculations about the nature of existence or philosophical ideals and principles by which men could be taught to govern themselves. Instead, Malthus was able to provide a concise rationale for the necessity of an overarching rule based on what he set forth as a clearly demonstrable fact. It was that human beings, if left unrestrained, driven by their own base compulsions would eventually destroy themselves in a crush of overpopulation. As resources of the world became insufficient to provide sustenance, all of humankind would end in a vast scene of starvation and death (Malthus 2010).

If the premise set forth by Malthus was accepted, the question would then move to a practical consideration of when the necessary restraints should be placed on the world multitude to prevent such a bleak destiny. Certainly, the frightening prediction would only be realized far in the distant future. Yet, in his view, for the sake of prudence, the measures of restraint should not be postponed, but, instead, should be put in place immediately. From the English perspective Malthus had silenced any argument for a legal regimen based on an innate human capacity for good. Moreover, a mound of evidence proving the depravity of humankind could easily be brought forth. With the acceptance of his premise there had been constructed, on the level of empirical practicality, an irrefutable argument: the human impulse to reproduction, driven by lust, must be regulated by legal authority or the end result would be an unthinkable disaster (Colley 2012).

In fact, the impending crisis Malthus described was only one potential outcome of the real underlying problem – the problem of human nature. If human beings were allowed to live uncontrolled they would inevitably come to meet a catastrophic end of their own making, whether by starvation, disease, or warfare. That fate had already been determined by their fallen makeup, their innate turpitude, and their natural voracity. *The Essay on Population* by Malthus became one of the most important books in the history of the English legal tradition – especially, as the British Empire began to impose its authority over large populations around the world. The Malthusian premise demonstrated

how the ordering of human life and the shaping of human thought was required by an imposed authority, what came later in the nineteenth century to be called a *Rule of Law*. The author was often criticized for his deep pessimism, with Thomas Carlyle, among others, condemning his *Political Economy*, with its premise of strict oversight and incessant labor, as *the dismal science*. But the logic of the Malthusian argument concerning a future crisis of overpopulation, brought on by inborn human impulses, could not be denied (Cosgrove 1980).

5. Universal and Transcendent

There are many ways to compare and contrast the two Western traditions of law as expressed through the literary encounter between Condorcet and Malthus. But in the twenty-first century global age, perhaps, the most useful way is to view them as alternate methods by which a legal regime might be made applicable to all regions and all peoples across the world. That is, to examine the means by which each tradition of law is capable of extending not merely an order of authority around the globe, but also the way it would engender an atmosphere of understanding among a global public. In the project of globalization the two methods are converging. Or more precisely, Civilian principles are being subsumed by a process of Anglicization. Yet, despite the blurring of differences between them, it is still useful to view the two as representing distinct traditions of legality (Benton 2016).

In fact, the two would establish a global regimen of law in very different ways. Although it would not be accurate to pose them as being precise opposites, taken in the aggregate and according to what is historically basic to the nature of each method, they can be described as being dramatically and fundamentally unalike. Their essential differences are related to their historic origins and arose from their differing compositions: one was based on explicit principle and the other was based in pragmatic consensus. One was all-inclusive and *universal* in its method, the other was elevated and *transcendent* in its approach. One operated on a unity of knowledge while the other operated on a division of knowledge (Kennedy 2016).

The Continental approach, despite its current secular composition, still retains an imprint of its Roman theological past. It does so in that it is fundamentally *universal* in its outlook, and in the way it aspires to a heightened standard of qualitative human good. In its principles and ideals, its conception of humanity was understood to include all persons of every race, of every rank and status. The study of law was considered to be an inseparable part of the single great continuum of knowledge that was taught at the university. For its method of law to work, all persons, high and low, rich and poor, had to be schooled in the structure of philosophical or ideological principles on which it was based. These included the essential human equality of all persons, the potential for growth and development of all persons, and the faculty of reason possessed by all persons (LaPiana 1994).

The educative half of the Civilian legal tradition entailed, therefore, a high level of instruction among the population generally. The Civil method of legal oversight could not function without a general understanding of its principles by all members of the public – including both those who administered authority and those subject to it. Hence, unsurprisingly, Continental Europe became known across the world as a center of culture and learning, even as this educational premise in its many languages divided the

population into various nationalities. In such a way of life the philosopher who shaped this inclusive reality of learning was a primary figure in its legitimacy. At the same time, the secular university came to be the central institution in its operation. The modern Civilian tradition, influenced by *The Enlightenment*, prided itself on being a rationally self-existent mode of law, requiring no external or supernatural doctrine in support of itself (Habermas 2001).

By contrast the Anglophone tradition was *transcendent* in its outlook. The realm of law and judicial knowledge comprised a separate and artificial realm. It was taught privily, in schools separated from the university and according to its own esoteric language and logic. Its judicial authority occupied a place elevated above the public generally. From this high position it was able to act independently and confer an impartial form of justice upon all persons within its jurisdiction. In the imperial nineteenth century this overarching construction would also allow it to provide an architecture of enforcement across many localities and peoples of the earth, regardless of ethnic or cultural differences. Because the basis of public order rested exclusively on the strength and stability of its legal institutions, a high level of technical expertise was crucial among those who ruled. At the same time, however, the complexity of legal method was assumed to be unknowable among the broader public (LaPiana 1994).

However, in the English tradition the two strata of ruler and ruled, both the fellowship of privilege and authority above and the realm of common rights below, were united by a distinct atmosphere of understanding. Historically, within Anglophone legal culture, an enveloping outlook was preserved by the doctrines of an established church. By that supernatural device the judicial office was surrounded by an aura of sanctity and the workings of law were understood within the context of a religious morality. Equally important, just as the foundation of legitimacy was based in religion, the vestige of Calvinism also provided a logic for the punitive measures employed by the courts. Even into the global age of the twenty-first century the theme of church and state remains crucially important in the Anglophone legal regime. Its educative element has conventionally taken the form of the Christian or Judeo-Christian tradition, manifest in an amorphous religiosity and expressed as faith in the judicial process (Coquillette 1999).

6. Technology and Governance

Both legal traditions, Civilian and Anglophone, began within a medieval atmosphere, a simple, rustic, and agrarian way of life, a world of bishops, monks, knights, and kings. During the sixteenth century a wave of technical and scientific innovation – especially, the maritime compass, gunpowder weapons, and printing press – began to transform the legal and religious order of Christendom into its modern form. Then during the nineteenth century, a new period of invention and discovery – symbolized by the steamship, railroad, and telegraph – provided ways of transporting and imposing Western modes of law and learning to every continent of the world. Now, in the twenty-first century, with seemingly miraculous technological advances, the way is opening to once again transform human life around the globe. It may now be possible to extend a single authority of law, and its necessary correlate, a standardized atmosphere of understanding – creating what Foucault called *governmentality* – across every nation and people of the earth (Misa 2011; Cohn 1996; Foucault 2005).

For purposes of post-modern legal rule, however, it is no longer necessary to instill a uniform structure of knowledge, to instill a pattern of ideals or beliefs, to create a unified mind across a vast global public. It is not necessary to indoctrinate with a fixed and explicit framework of ideas, either theological or ideological. That old approach to education, with its laborious process of inculcating a structure of concepts and factual 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 cognitive awareness of a worldwide public, efficiently, with minimal effort, and in the normal transactions of everyday life (Minsky 2006).

In the age of technology the European tradition of culture and learning, its respect for a common humanity, its confidence in human possibility, the importance it attached to human reason, have become less relevant. In fact, those ideas, so widely embraced from the eighteenth century, seem almost quaint in the post-modern or post-human discussions of the twenty-first century. Instead, attention has moved away from an innate human capacity for development and improvement to a focus on technical advance and a search for how the technical and the human might be made to converge – or at least augment 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 structure of the human mind might be recalibrated mechanically or medically (Giddens 2006).

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 adequate means of enforcement, will alleviate the problems of human existence – including the problem of global warming. The world is very different from the one inhabited by Malthus and Condorcet, and its challenges are much more complex. This is especially true to the extent that a mediated reality has come to circumscribe human life – and caused it to be understood in wholly different ways. However, the prevailing mode of understanding through the lens of technology and legality, is an artificially created and constructed one. Condorcet would 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 (Dupuy 2000; Rose 1990).

7. A Climate of Understanding

The mainstream public discourse around the world today generally rests on two assumptions about which there is widespread consensus. First, that there is an increase in temperature across the globe caused by many factors, including private consumption and waist, inefficient agricultural methods, and the corporate pillage of natural resources. Moreover, the effects of this rising temperature will almost certainly be catastrophic, possibly very soon. The second point of agreement involves an almost uniformly unchallenged answer to this problem. That is, to construct a regimen of oversight and enforcement that, with the mobilization of technical advance, will bring a correction. Ultimately, this solution rests on the legal instruments of a *transcendent* adjudicative au-

thority able to compel peoples, industries, and governments to a strict compliance (Bodansky 2017).

However, there is an irony in these assumptions that is usually overlooked. It is that to the extent the developing global way of life is patterned on the Western way of life, there is particular importance attached to the legal basis that provides its foundation. Especially, as the basis of its legal order becomes more Anglicized, the strength and stability of its legal method requires a continuous and ever-increasing aggregation of wealth. This necessary focus on material increase – whether expressed as the elimination of poverty, raising the standard of living, the progress of economic development, or simply as monetary gain – requires the implementing of policies that harness the energies of all peoples and regions for purposes of production. By the inducement of gain the population of the earth necessarily becomes more and more mobilized to satisfy these ever-increasing and unceasing requirements. The result becomes a paradox or contradiction inherent to an Anglicized legal regimen, as a solution to a climate crisis: a cycle of labor and consumption, spurred by the incentives of personal gain, are necessary to advance a regimen of global law founded on aggregated wealth. Hence, the law that is mobilized to solve a crisis of global warming, has the effect of exacerbating the material excesses that are thought to be the source of the problem (Firor 2002; Tigar 2000).

What is less emphasized, or is perhaps dismissed as an unrealistic alternative, is a change in habit and attitude, in the material and commercial values that have come to prevail among the global population. The conventional remedy for climate change does not rely on the cultivation of thought and deed, the human potential for assuming responsibility for the self or for seeking to live in harmony with nature. 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 materialism, consumption, and waste – and the single life-object of wealth production – it might only be introduced as a symbolic gesture, as an aside to a more realistic legal-technical solution (Giddens 2012; Morozov 2011).

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 of human limitations, instead of human possibilities – shows a direction in the tendencies of world opinion. The current set of assumptions and conclusions demonstrates a clear abandonment of the values of the eighteenth century with its affirmation of human possibility. That is, a loss of confidence in 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, and a public that required little oversight by instruments of law. This was very different from a *governmentality* based on passive cognizance and the instilled appetites of electronically transmitted sound and image. Instead, he looked to the possibilities of human strength and capacity, not merely weakness and venality (Foucault 2007; Farber 2017).

An enforced legalism 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

established combination of legality and technology – and a way of life based on the accumulation of wealth – was a fundamental cause of the imbalance between human beings and nature in the first place. The one outcome of certainty in the prevailing answer to global warming today, will be the construction of a *transcendent* mode of enforcement, in the form of an enveloping legality. By contrast, the alternative – what might be called *The Enlightenment* approach – could bring much wider benefits, not only in the matter of global temperature, but also 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 technical or legal challenge (Joerges 2005; Slaughter 2004).

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 problem. 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 alternate or enlarged approach to this public question, an approach that goes deeper than the merely pragmatic terms in which it has come to be framed (Grubb 1999).

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 beginning with ultimate matters of human capacity and human potential not within an instrumental premise of maximized wealth production fundamental to the Anglophone legal tradition. Taken in that light, perhaps the question becomes about whether human understanding will solve the problems of the world, or whether technology and law will solve the problem of human beings. That could be the twenty-first century version of the debate between Malthus and Condorcet, and it could be the larger, less obvious question in the matter of global warming. Taking one approach might only result in the global authority of a juridic fellowship able to rule by the instruments of law. Taking the other approach, might work to transform human existence in the age of globalization (Slobodian 2018; Domingo 2010).

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