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Thoughtfulness and the Rule of Law

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British Academy Law Lecture, read 1 February 2011

1. Law's obtuseness

We want to be ruled thoughtfully. Or, to put it in a democratic idiom, we want our engagement in governance to be thoughtful and reasoned, rather than rigid or mechanical. Thoughtfulness – the capacity to reflect and deliberate, to ponder complexity and to confront new and unexpected circumstances with an open mind, and to do so articulately (and even sometimes argumentatively) in the company of others with whom we share a society – these are some of the dignifying attributes of humanity, man at his best (men and women at their best) in the governance of their society.

But does the quest for thoughtfulness in government mean endorsing the rule of men rather than the rule of law? To be ruled by laws rather than by men has been an aspiration – indeed an imperative – of the Western political tradition since the time of the ancient Greeks. But it was the Greeks who noticed – or some of them – that rule by law might be something opposed to thoughtfulness in government. Law, said Plato's visitor in *The Statesman*, 'is like a stubborn, stupid person who refuses to allow the slightest deviation from or questioning of his own rules, even if the situation has in fact changed and it turns out to be better for someone to contravene these rules.'¹ Thoughtfulness – when we get it – is an attribute of human rulers, of people (the few or the many) participating in government. And maybe it is one of the things we turn our back on when we say we want to be ruled by laws – categorical, inflexible laws (laid down, in many cases, centuries ago) – rather than ruled by men. For the sake of the benefits that the Rule of Law provides, we swallow the costs of a certain diminution of intelligence in government.

Of course, in many ways this distinction between rule by men and rule by laws is a false contrast. Laws are

human artifacts. They are made by men (made by people), interpreted by people, and applied by people. Rule by law seems to be rule by people all the way down. And in some of those capacities human thoughtfulness *is* paramount. Law-making, when it is done explicitly, is a thoughtful business and often it represents a paradigmatic exercise of reason in policy conception, in drafting, and even (sometimes) in legislative deliberation. Though every legislator no doubt hopes his works will endure, the legislative mentality at its best represents the agile and flexible application of human intellect, on a collective scale, to the shifting problems and challenges faced by a society. That's what I have argued in *The Dignity of Legislation* and elsewhere.²

Historically, though, proponents of the Rule of Law have tended to be suspicious of legislation for that very reason. It's too clever by half, particularly in democratic politics; it changes too quickly; in an assembly of representatives, said Hobbes, it changes haphazardly with every variation in the political composition of the legislature – different men, different laws.³ If the idea of the Rule of Law is to be credible, law needs to be relatively constant in the face of changes of personnel among those who are thinking about how the society is governed.

The same point was made 20 years ago by the Supreme Court of the United States in 1992 in the great case of *Planned Parenthood v. Casey*.⁴ What would happen, said Justice O'Connor in the plurality opinion, if precedents changed as often as changes in personnel on the court? Wouldn't people infer that this was rule by those who happened to be judges rather than rule by law? We can't go round overturning our past decisions too often, said the Court, certainly not our important decisions. (They were talking about *Roe v. Wade*⁵ – which some of them had previously disclosed a thoughtful inclination to revisit.)

¹ Plato, *The Statesman*, ed. Julia Annas and Robin Waterfield (Cambridge University Press), p. 59.

² Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press, 1999) and Jeremy Waldron, 'Principles of Legislation' in *The Least Examined Branch: the Role of Legislatures in the Constitutional State* ed. Richard Bauman and Tsvi Kahana (Cambridge University Press, 2006).

³ In many cases, says Hobbes, where legislative disagreement is resolved by voting, 'the Votes are not so unequal, but that the [defeated party] have hopes by the accession of some few of their own opinion at another sitting to make the stronger Party [They try therefore to see] that the same business may again be brought to agitation, that so what was confirmed before by the number of their then present adversaries, the same

may now in some measure become of no effect ... It follows hence, that when the legislative power resides in such convents as these, the Laws must needs be inconstant, and change, not according to the alteration of the state of affaires, nor according to the changeableness of mens mindes, but as the major part, now of this, then of that faction, do convene; insomuch as the Laws do flote here, and there, as it were upon the waters.' – Thomas Hobbes, *De Cive*, ed. Howard Warrender (Oxford University Press, 1983), pp. 137-38.

⁴ *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992).

⁵ *Roe v. Wade* 410 U.S. 113 (1973).

There is ... a point beyond which frequent overruling would overtax the country's belief in the Court's good faith. ... There is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.⁶

With that sort of changeability, it would be less convincing for a thoughtful court to present itself as guardian of 'the character of a ... people who aspire to live according to the rule of law.'⁷

In any case, whether or not laws are made and changed thoughtfully, there is still the issue of thoughtlessness in the way they are applied. Intellectual agility in the making of law is one thing; intelligence in its application is another. I said a moment ago that laws don't interpret and apply themselves; it is people who interpret them and people who apply them, and if we are looking for thoughtfulness in that process, it might well seem that we are looking for something other than the Rule of Law. Many would say that the discipline of the Rule of Law aims to ensure that law is applied with as little independent input from the judge as possible. Whether she is thoughtful or not, she is not supposed to bring her subjective views into play; she is supposed to be bound rigidly and mechanically by the literal text in front of her.

Indeed, our law schools are full of people who say that the only way to respect the thoughtfulness of our law-makers is to be literal-minded in the way we apply their work product to changing circumstances. In the United States, this reaches its apogee in constitutional originalism. We celebrate the thoughtfulness of the Founding Fathers – James Madison, Alexander Hamilton, and so on: all very thoughtful men – but we do so, 240 years later, either by substituting what we know of their eighteenth century thoughtfulness for our twenty-first century kind, or by sticking rigidly to the text that they produced, even though we know that its calligraphy was framed for utterly different circumstances (a few colonies clinging to the edge of a largely unexplored continent with a population less than that of modern New Zealand).

Even if it is modern legislation that is being interpreted, the textualists among us insist that judges cannot be trusted with adding independent input. And a connection is made not just between thoughtfulness and change, but thoughtfulness and variability, maybe even thoughtfulness and subjectivity. Different people think in different ways. And we say 'subjective' because we want to

emphasise the point that one thoughtful judge may come up with conclusions that are quite different from those that another thoughtful judge comes up with. One man's thoughtful judge is for another man the political partisan of a rival set of ideals. The Rule of Law is supposed to mean that a party coming to law can expect to have his fate determined by the law itself – the law the legislature has enacted – not by the vagaries (even the thoughtful vagaries) of whoever is wearing a wig in the courtroom he happens to be assigned to.⁸

2. Clarity and certainty in the Rule of Law

Law can be obtuse, rigid, stubborn and in its application mechanical – but, people will say, 'At least it is *predictable*; at least we know where we stand with a law that does not often change and which is applied, constantly and faithfully whether the subjective opinions of the judiciary.' And this, it is said, is not just an effect of the Rule of Law. Many will say that it is as close as we can get to the essence of the Rule of Law. 'The rule of law,' said Thomas Carothers, 'can be *defined* as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone.'⁹ There is a tradition of trying to capture the essence of the Rule of Law in a laundry list of principles: Dicey had three, John Rawls four, Dick Fallon five, Cass Sunstein came up with seven, Lon Fuller has eight, Joseph Raz eight, John Finnis eight, Lord Bingham eight in his excellent book on *The Rule of Law*¹⁰ (I don't know why eight is the magic number: but it's a slightly different eight in each of these four cases); Robert Summers holds the record, I think, with eighteen Rule of Law principles.¹¹

So: at the top of Lord Bingham's list we find a principle that seems incontestable in what it requires: 'The law must be accessible and so far as possible intelligible, clear and predictable.' Who could disagree with that: accessible, clear, predictable? The rule of law has consistently been associated with the value of predictability in human affairs. The most important thing, we are told, that people need from the law that governs them is predictability in the conduct of their lives and businesses. Tom Bingham quoted Lord Mansfield:

In all mercantile transactions the great object should be certainty: and therefore it is of more consequence that a rule should be certain, than whether the rule is established one way rather than the other.¹²

and went on to observe in his own voice that '[n]o one would choose to business, perhaps involving large sums of money, in a country where parties rights and obligations were undecided.'¹³

⁶ *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992), at p. 866.

⁷ *Ibid.*, p. 868.

⁸ See Jeremy Waldron, 'Lucky in your Judge', *Theoretical Inquiries in Law*, 9 (2008), 185.

⁹ Thomas Carothers, 'The Rule of Law Revival', *Foreign Affairs*, March/April 1998, p. 96.

¹⁰ A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th edition of 1915 (Liberty Classics, 1982) 120-1; John Rawls, *A Theory of Justice*, Revised edition (Harvard University Press, 1999), 206-13; Richard Fallon, 'The Rule of Law as a Concept in Constitutional Discourse', *Columbia Law Review*, 97 (1997), 1; Cass Sunstein, *Rules and Rulelessness*, John M. Olin

Law & Economics Working Paper (2nd series), no. 27 (University of Chicago Law School, 1994); Lon L. Fuller, *The Morality of Law*, Revised Edition (Yale University Press, 1969), 38-9; Joseph Raz, 'The Rule of Law and its Virtue', in his collection *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), pp. 214-9; John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 270-3; and Tom Bingham, *The Rule of Law* (Allen Lane, 2010), *passim*.

¹¹ Robert S. Summers, 'Principles of the Rule of Law', *Notre Dame Law Review*, 74 (1999), 1691.

¹² *Vallejo v. Wheeler* (1774) 1 Cowp. 143, 153; cited by Bingham, *The Rule of Law*, at p. 38.

¹³ Bingham, *The Rule of Law*, p. 38.

Lord Bingham does not speak of Hayek in his book, but in many ways Hayek's work – especially his early work on the Rule of Law – has been decisive in pushing this element of predictability to the fore. 'Stripped of all technicalities,' said Hayek in Chapter 6 of *The Road to Serfdom*, the Rule of Law requires that 'government in all its actions [must be] bound by rules fixed and announced beforehand, rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.'¹⁴ It is a passage that has been quoted in many of these studies since, notably at the beginning of Joseph Raz's discussion.¹⁵ This element of predictability, this ideal of 'formal rules [which] tell people in advance what action the state will take in certain types of situation, defined in general terms, ... provided as a means for people to use in making their own plans'¹⁶ – it is this aspect of the Rule of Law that has been most prominent in law and development studies, with the World Bank and other global institutions treating it as indispensable for the creation of a secure environment for investment in developing countries.¹⁷

Philosophically, the idea here – again, elaborated most thoroughly by F.A. Hayek – is that there may be no getting away from legal constraint in the circumstances of modern life, but freedom is possible nevertheless if people know in advance how the law will operate and how they have to act if they are to avoid its application. Knowing in advance how the law will operate enables one to make plans and work around its requirements.¹⁸ It creates a stable and calculable environment for business and investment. Not only that, but predictability is the basis of security: whether we think of personal rights or property rights, determinate legal rules applied according to their terms are supposed to give each citizen certainty as to what he can rely on in his dealings with other people and the state.

Accordingly, the Rule of Law is supposed to highlight the role of rules rather than standards (I am thinking of Justice Scalia's famous article, 'The Rule of Law as a Law of Rules'),¹⁹ operationalised determinacy rather than open-ended language, literal meanings rather than systemic inferences, direct applications rather than arguments, closure rather than continued deliberation, and *ex ante* clarity rather than laboured interpretations.

The Rule of Law is violated, on this account, when the norms that are made public to the citizens do not tell them in advance precisely what to expect in their dealings with officialdom. It is violated when outcomes are determined thoughtfully by official discretion rather than by the literal application of rules with which we are already familiar.

And it is violated when the sources of law leave us uncertain about what the rules are supposed to be: Lord Bingham's book has a useful discussion of the problem posed by multiple judgements in the House of Lords in a single case (and presumably this continues to be an issue in the UK Supreme Court also): dissents and concurrences that can leave people unsure about what principle of law has actually emerged from a given case.²⁰ If discretion, vagueness and uncertainty become endemic in our system of government, then not only are people's expectations disappointed, but increasingly they will find themselves unable to *form* expectations on which to rely, and the horizons of their planning and their economic activity will shrink accordingly.

So there you have it. A dominant conception of the Rule of Law that seems to cherish values and features of law and legal administration like certainty and predictability, and a conception of thoughtfulness, which seems likely to disrupt that. The contrast is clearest of course in the continuing debate about the relation between law and discretion; and since Dicey, the Rule of Law has been viewed as an anti-discretion ideal, attacking and discrediting the proliferation of discretionary authority in the agencies of the modern administrative state. There is a lot to be said in defence of discretion, and a lot of it has been said over the years in the response to Dicey's work, not least in the excellent critique of Dicey's argument in Kenneth Culp Davis' book, *Discretionary Justice*, first published in 1969.²¹ But that is not where my argument today is located. Instead of defining the need for discretion against the claims of the Rule of Law, I want to indicate ways in which the predictability conceptions sell short the idea of the Rule of Law itself. There is more to law and more to what we value in legality under the heading of the Rule of Law than regularity, rules, determinacy, closure, and certainty. That's what I want to argue.

Now normally, when people say that, what they are promising to do is to develop a more substantive conception of the Rule of Law, imbued perhaps with convictions about substantive justice held by them and their friends. Predictability is associated with a formalist conception of the Rule of Law; so thoughtfulness must be associated with a substantive conception of the Rule of Law entangled with substantive justice.²² I can't emphasise enough that that is *not* my approach. No doubt there is a debate to be had about whether the Rule of Law should include a substantive dimension: Lord Bingham is unashamed about including fundamental human rights under the auspices of the Rule of Law in Chapter 7 of his book. But before we even get to that, there are important

¹⁴ F.A. Hayek, *The Road to Serfdom* (Routledge Classics, 2001), p. 75.

¹⁵ Raz, 'The Rule of Law and its Virtue', p. 210.

¹⁶ Hayek, *Road to Serfdom*, p. 78.

¹⁷ See, for example, the following essays by Ibrahim Shihata, 'The World Bank and "Governance" Issues in Its Borrowing Members', in F. Tschofen and A. Parra (eds), *The World Bank in a Changing World: Selected Essays* (Martinus Nijhoff, 1991), 53, and 'Legal Framework for Development' and 'Relevant Issues in the Establishment of a Sound Legal Framework for a Market Economy', both in F. Tschofen and A. Parra (eds), *The World Bank in a Changing World*, Volume 2 (Martinus Nijhoff, 1995).

¹⁸ See F.A. Hayek, *The Constitution of Liberty* (London: Routledge and Kegan Paul, 1960), pp. 153 and 156-7.

¹⁹ Antonin Scalia, 'The Rule of Law as a Law of Rules', *University of Chicago Law Review*, 56 (1989), 1175.

²⁰ Bingham, *The Rule of Law*, pp. 44-6.

²¹ Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry*, New edition (Greenwood Press, 1980).

²² Laurence Tribe of Harvard Law School is on record as saying that he rejects Justice Scalia's exaltation of an ideal of legal formalism under which regularity and predictability and closure count for more than substantive justice. 'That,' says Tribe, 'is not my notion of the Rule of Law at all.' See Lawrence Tribe, 'Revisiting the Rule of Law', *New York University Law Review*, 64 (1989), p. 728.

formal features and particularly procedural features of the Rule of Law that are much more amenable to legal thoughtfulness than the predictability conceptions would indicate. And it is these formal and procedural aspects of legal thoughtfulness that are my subject today.

3. Lay, academic, and professional views

I am acutely conscious that in talking about these features of the Rule of Law ideal, I am referring primarily to a body of academic literature written by scholars, who are on the one hand detached from the actual practice of law but detached also, to a certain extent, from the way in which the Rule of Law circulates outside legal philosophy, in the populace at large.

This does not mean, by the way, that the academic studies have no influence. Let me give one example. In recent years, scholars have turned their attention to the possible application of the Rule of Law to international governance, meaning not just the presence and importance of international law, but the suggestion that international law and international law-making should be subject to Rule-of-Law requirements. The whole area remains under-theorised, but I am afraid that a great deal of the work that has been done on it simply adopts uncritically the perspective of those who say, at the national level, that the Rule of Law requires clarity, predictability, and determinate rules. And people working in the international area might be impressionable enough to be brow-beaten into accepting this, even though as lawyers they know very well that there is a lot more to law and legal practice than this. I believe there is much more to be said on this. They might be overly impressed by a report that my NYU colleague Simon Chesterman produced, entitled *The UN Security Council and the Rule of Law: The Role of the Security Council in Strengthening a Rules-Based International System*, which in my view, in its exclusive emphasis on rules, is way too narrow a conception to develop in this area.²³

I have written elsewhere about the dissonance between academic and lay understandings of the Rule of Law.²⁴ The pages of the law journals devoted to this often read like a set of footnotes to the scholarly work of Lon Fuller, and they emphasise the formal features that Fuller drew attention to: clarity, constancy, prospectivity, consistency, practicability, and generality.²⁵ It is understandable that philosophers will focus on these formal attributes: it enables them to show off their special talents in abstract, analytic argument. But, important as they may be, the formal ideas are not always what ordinary people, newspaper editors and politicians have in mind when they clamour for the Rule of Law. Often what they are concerned about are procedures and institutions. When people demanded a restoration of the Rule of Law recently in Pakistan, their concern was for the security and the

independence of the judiciary. When American and foreign lawyers demand the Rule of Law for detainees at Guantanamo Bay, what they are calling for is not clarity or prospectivity, but an adequate system of hearings in which they detainees would have an opportunity to confront and examine the evidence against them, such as it is. It is wrong to neglect these procedural and institutional aspects of the Rule of Law and they are key to the case that I want to develop in this lecture.

The gap between academic and practitioners' understandings of the Rule of Law is also troubling. Though practitioners will often join in the demand for certainty and predictability of legal rules, they know very well that anything approximating 'mechanical jurisprudence' is out of the question. Law is an exceedingly demanding discipline intellectually, and the idea that it consists or could consist in the thoughtless administration of a set of operationalised rules with determinate meanings and clear fields of application is of course a travesty. It is curious that we philosophers underestimate both the technicality and the effort of intricate thought that mastery of law represents, and practitioners and judges in the room may feel amused as this legal philosopher struggles to find a home within an overly abstract account of the Rule of Law for an acknowledgment of the thoughtfulness that is required to fulfil the intellectual demands that law makes on its real-world practitioners – a fine example of what Jeremy Bentham once called 'a grandmother egg-sucking instruction'. All I can say is bear with me if I am stating the obvious – because it is important to state it clearly in the environment in which the principle of the rule of law is reflected upon and made explicit.

So: what are the more thoughtful aspects of the Rule of Law? There are many things we could consider. There is time today to focus on only three aspects of modern legal practice that are, I think, wrongly neglected or denigrated in philosophical discussions of this ideal. The first is the use of standards, as opposed to rules, to occasion and channel thoughtfulness in the application of law. The second is the way in which the rules of legal procedure – the rules of adjudicative procedure in particular – sponsor and orchestrate forms of *argumentative* thoughtfulness. And the third is the way in which *stare decisis* provide something like shared premises, or a way of arriving at shared premises, for the sort of thinking-in-the-name-of-us-all that distinguishes legal thinking from say the tendentious and partisan thinking of an individual participating in politics. So: standards, procedures, and precedents. These are my headings.

4. Rules versus standards

Cass Sunstein once remarked that '[l]aw has a toolbox, containing many devices,'²⁶ and it is probably a mistake to

²³ See Simon Chesterman, *The UN Security Council and the Rule of Law: The Role of the Security Council in Strengthening a Rules-Based International System*. Final Report and Recommendations from the Austrian Initiative (Federal Ministry for European and International Affairs, 2004-2008, also published by the Institute for International Law and Justice, New York University School Of Law). This report is available at

<http://ssrn.com/abstract=1279849>

²⁴ Jeremy Waldron, 'The Rule of Law and the Importance of Procedure', forthcoming in *Nomos 50: Getting to the Rule of Law* (New York University Press, 2011), available at <http://ssrn.com/abstract=1688491>

²⁵ Fuller, *Morality of Law*, pp. 38-9.

²⁶ Sunstein, *Rules and Rulelessness*, p. 3.

identify the Rule of Law with the use of just one kind of tool. Rules with their strict logic and their descriptive and numerical predicates, specifying *ex ante* the outcome for cases that fall under them, are one kind of tool; but standards, which use value terms like ‘reasonableness’ or in some other way call for judgement in the course of their application, are another. There is no particular reason to associate law or the Rule of Law with the former category only, as though for example, in the US Constitution, the Eighth Amendment were less truly law than (say) the Article II rule that says the President must be 35 years old.

When we distinguish rules from standards, we sometimes say that the difference is that a standard is a norm that requires some evaluative judgment of the person who applies it, whereas a rule is a norm presented as the end-product of evaluative judgments already made by the law-maker. A posted speed limit of 70 mph represents a value-judgment already made by the legislature that that speed is appropriate for driving in the designated area. A legal requirement to drive at a ‘reasonable’ speed, by contrast, looks for a value-judgment to be made downstream from the legislature; it indicates that the legislature has decided not to make all the requisite value-judgments itself, but has left some to be made by the law-applier. Now, by the law-applier I don’t just mean the police and the magistrate (police-officer who pulls the driver over and gives him a ticket, and the judge in traffic court who decides whether or not to enter a conviction): I mean in the first instance the subject himself who is tasked under the standard with figuring out what a reasonable speed will be and monitoring and modifying his behaviour accordingly.²⁷

In New Zealand, where I learned to drive, there used to be things called ‘Limited Speed Zones’ (LSZ) – where there was no fixed speed limit lower than the general speed limit but where the LSZ sign alerted drivers to the variability of local circumstances and instructed them to proceed at a speed appropriate to the circumstances. Some jurisdictions eschew speed limits altogether, and just tell their drivers to proceed at a reasonable speed. A conviction entered in Montana against a driver who went 80 mph on hilly country road was struck down in 1998 on the grounds that the relevant statute was void for vagueness, since the array of traffic statutes offered no guidance at all as to appropriate speed.²⁸ But other courts in the US have upheld the use of standards rather than rules in other circumstances, where there are background speed limits but where conditions in a particular area defy easy classification, so that at some times of day a patch of road is like an urban street and at other times it is like a rural highway.²⁹ On motorways, perhaps, we can vary the speed limit with digital signs, but not on every country lane. Anyway the traffic example is just an easy paradigm; much more important cases concern the imposition of duties of

care in tort law, where a requirement of reasonable care is imposed on potential tortfeasors or human rights provisions that deploy complex value terms like ‘dignity’ or ‘Inhuman and degrading treatment’ rather than telling us directly what we are or are not allowed to do.

What people sometimes say in the Rule of Law tradition is that norms that use terms like ‘reasonable’ or value terms like ‘cruel’ or ‘inhuman’ suffer from a deficit of clarity – ‘[t]he desideratum of clarity,’ said Lon Fuller, ‘represents one of the most essential ingredients of legality’³⁰ and therefore they detract from or undermine the Rule of Law, because they don’t let people know in advance exactly where they stand, they don’t offer determinate guidance, and they empower those entrusted with the application of the law to impose their own judgments in a way that is not legally controlled, or at least not tightly controlled by law. People then seem to be at the mercy of the value judgments (the discretion) of officials and courts, second-guessing their own futile attempts to figure out how these norms will be authoritatively applied. It is Hayek’s opinion, expressed in *The Road to Serfdom* that ‘[o]ne could write a history of the decline of the Rule of Law ... in terms of the progressive introduction of these vague formulas [like ‘fairness’ and ‘reasonableness’] into legislation and of the increasing arbitrariness and uncertainty that results.’³¹

But if we are supposed to infer from this that when standards are in play we might as well not have law at all, or if the implication is that the thoughtfulness which is sponsored in the use of standards represents the opposite of the Rule of Law, then I beg to differ. It is a mistake to regard these norms as simply blank cheques for discretion, as though the most they told the person that they were addressed to was prepare yourself for the arbitrary imposition of a value judgment by those in power. In fact the use of standards clearly represents an exercise in legal guidance. Think back to our sign saying ‘Limited Speed Zone’. Is it really the case that it gives the driver no guidance? Only on the crudest behavioural conception of what it is to guide someone’s action. Having one’s action guided by a norm is not just a matter of finding out about the norm and conforming one’s behaviour to its specifications. It can involve a more complex engagement of practical reason than that. The use of a standard credits a human agent not just with the ability to comply with instructions but with the capacity to engage in practical deliberation. The sign that says ‘Drive at a reasonable speed in the circumstances’ tells the driver ‘Now is the time to check the weather and the road conditions and relate that information to your speed to your speed and moderate your behaviour accordingly. Now is the time to focus on this and do the thinking that the application of the standard requires.’ It mobilises the resources of practical intelligence possessed by the norm subject – a

²⁷ For the idea of self-application as a most important moment in the legal process, see Henry M. Hart and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, ed. William N. Eskridge and Philip P. Frickey (West Publishing, 1994) at 120.

²⁸ *State v. Stanko*, 974 P2d 1132 (1998).

²⁹ See *State v. Schaeffer* 96 Ohio St. 215; 117 N.E. 220 (1917), and the discussion of the general problem of vagueness and standards in relation to

that case in Jeremy Waldron, ‘Vagueness and the Guidance of Action’, forthcoming in Marmor and Soames (eds.) *Philosophical Foundations of Language in the Law* (Oxford University Press, 2011), available at <http://ssrn.com/abstract=1699963>

³⁰ Fuller, *Morality of Law*, p. 68.

³¹ Hayek, *Road to Serfdom*, p. 81.

mobilisation that might not take place if the law-maker had not promulgated the standard. It guides his agency in that way, even if it leaves it up to him to determine the appropriate behaviour. It is law that requires and triggers thoughtfulness, rather than law that supersedes thoughtfulness.

And sometimes standards channel our thoughtfulness as well as triggering it. A standard that prohibits 'inhuman' and 'degrading' treatment requires, it is true, an exercise of judgement, value-judgement, on the part of those who apply it: the legislators and officials to whom it is directed in the first instance, and the judges who are called upon to review their compliance. But it does not require an all-purpose evaluation. 'Inhuman' and 'degrading' have specific meanings. They require assessment of a practice or a penalty in some dimensions and not others. And so depending on the particular thick predicate that is used, the standard directs our practical reasoning to a particular domain of assessment. So these norms too guide the practical reasoning (and action based on that reasoning) of those to whom they are addressed: they provide structure and channelling for the thoughtfulness they are designed to elicit.

Let me pursue this one step further.³² There is a temptation among scholars to think that when faced with something like, for example, the Article 3 prohibition in the ECHR on 'inhuman degrading treatment', the task of the courts is in effect to replace the standard with rules developed through a succession of cases. In other words, we treat the standard as an inchoate rule, formulated in half-baked fashion by the lawmaker, awaiting elaboration and reconstruction as a set of determinate rules by the courts. If the courts decide that solitary confinement is inhuman, then we can treat the standard prohibiting inhuman treatment as including a rule prohibiting solitary confinement. If they decide that shackling prisoners is degrading, then we take the provision prohibiting degrading treatment as comprising a rule that prohibits shackling. As the precedents build up, we replace vague evaluative terms with lists of practices that are prohibited, practices that can then be identified descriptively rather than by evaluative reasoning. In time, the list usurps the standard; the list of rules becomes the effective norm in our application of the provision; the list is what is referred to when an agency is trying to ensure that it is in compliance.

All this might make law more manageable but I fear that it can detract from the sort of thoughtfulness that the standard initially seemed to invite. Article 3 invited us to reflect upon and argue about the idea of degradation and inhumanity, which are moral ideas. But now we are tempted to simply consult the precedents and the set of rules that they generate, abandoning any of the guidance in our evaluative thought that these particular moral predicates might provide.

(By the way, none of this is new. I am really just elaborating some points made by Ronald Dworkin in a body of insight ranging from his discussion of what he called 'weak discretion' in a famous article from 1967 to his more recent advocacy of what he calls 'the moral reading' of terms like these in the constitution of the United States.³³ Actually, I hope it is clear that a lot of what I am doing in this lecture is inspired by insights and arguments that have been prominent in Dworkin's jurisprudence.)

5. Formal procedures

A second regard in which law as such might be associated with thoughtfulness has to do with procedural due process – the highly formalised procedures that structure the judicial hearings in which official legal determinations are arrived at. I worry sometimes that our philosophical conceptions of law and the Rule of Law do not pay nearly enough attention to procedural as opposed to formal aspects of the Rule of Law.³⁴ For the Rule of Law is not just about the formal characteristics of the norms that we apply, it is about the processes by which they are applied, and those processes involve not just an official with a power of decision, but a whole elaborate structure in which evidence is presented and tested and legal arguments are made.

I spoke of the difference between lay, professional and philosophical images of law. For most lay people, law and the workings of law are represented by the courtroom – the dramatic and almost ritualistic way in which opposing bodies of evidence and opinion confront each other in court. Think of the influence even in the United Kingdom now of the ubiquitous American television show, *Law and Order*. No doubt, it is a mistake to think of this as the whole of legal practice: most lawyers are not litigators, and a lot of them never see the inside of a working courtroom from one year's end to the next. But the public are right to assign it an important role nonetheless because an awful lot of legal business is conducted in the shadow of the due process, and with a view to (or a dread of) legal proceedings, even if it does not actually take place in the courtroom itself.

So: let us think about the way we structure judicial or quasi-judicial hearings. By hearings, I mean formal events like trials, tightly structured in order to enable an impartial tribunal to determine rights and responsibilities fairly and effectively after hearing evidence and argument from both sides. Those who are immediately concerned have an opportunity to make submissions and present evidence, and confront, examine and respond to evidence and submissions presented from the other side. Not only that, but both sides are listened to by a tribunal which is bound to respond to the arguments put forward in the reasons that it eventually gives for its decision. We tend to think of

³² This is based on some discussion in Jeremy Waldron, 'Inhuman and Degrading Treatment: The Words Themselves', *Canadian Journal of Law and Jurisprudence*, 23 (2010), 269, reprinted in Jeremy Waldron, *Torture, Terror and Trade-offs: Philosophy for the White House* (Oxford University Press, 2010), 276.

³³ See Ronald Dworkin, 'The Model of Rules', in his book *Taking Rights Seriously* (Duckworth, 1977), pp. 32 ff. and *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press, 1996).

³⁴ See Waldron, 'The Rule of Law and the Importance of Procedure'.

due process primarily in terms of fairness, but we can think of it also as a way of maximising the role of reason and thoughtfulness in the settlement of disputes.

Here I want to draw on the immensely important work of Lon Fuller in a long essay published posthumously in 1978 in the *Harvard Law Review* called 'Forms and Limits of Adjudication'. It is an irony, which Professor Lacey has written about, that in the work of his that is most cited in the Rule of Law tradition (and in his famous 1958 dispute with H.L.A. Hart), Fuller focused on formal elements to the exclusion of procedural elements, whereas he was in fact one of our deepest thinkers on matters procedural. His work on this essay is light years in quality beyond anything you find in Hart's writings on procedure. Anyway, Fuller said this about adjudication:

the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor.³⁵

It is, he said, 'a device which gives formal and institutional expression to the influence of reasoned argument in human affairs'. Fuller did not think that the distinguishing characteristic of courtroom process was the impartial office of judge, because there are all sorts of judging functions, where impartiality is at a premium, that don't involve the presentation of reason and argument at all: Fuller mentions umpiring in baseball or judging in an agricultural fair.

What distinguishes these functionaries ... from courts, administrative tribunals, and boards of arbitration is that their decisions are not reached within an institutional framework that is intended to assure to the disputants an opportunity for the presentation of proofs and reasoned arguments.³⁶

Again, it may be objected to Fuller's characterisation that there are opportunities to present reasoned arguments in all sorts of contexts, in election campaigns for example. But, says Fuller,

[t]his objection fails to take account of a conception that underlies the whole analysis being presented here, the conception, namely, of a form of participating in a decision that is institutionally defined and assured.³⁷

And how is it assured? Among other ways by the requirement that judge or arbitrator give reasons for his decision. This is not just because we want the judge to be thoughtful. It is rather, Fuller says, because without such reasoned opinions, the parties would have to just 'take it on faith that their participation in the decision has been real, that the arbiter has in fact understood and taken into account their proofs and arguments.'³⁸

I know that courtroom process can seem cumbersome. And to someone in the grip of an image of thoughtfulness that privileges the relatively unstructured working of the human intellect – autonomy, spontaneity and flashes of insight – the laborious and ritualised proceedings of the courtroom may seem the antithesis of the sort of thoughtfulness we are looking for in government.

And in some areas that may be right: I am reminded of Lon Fuller's caution against over-insisting on the use of judicial procedures:

As lawyers we have a natural inclination to 'judicialize' every function of government. Adjudication is a process with which we are familiar and which enables us to show to advantage our special talents. Yet we must face the plain truth that adjudication is an ineffective instrument for economic management and for governmental participation in the allocation of economic resources.³⁹

We need not deny this point in order to recognise that, nevertheless, where it is used, law in its intricate and formal proceduralism does do the work of structuring and channelling argumentation, so that even if it is not the form of thoughtfulness we always want from the agencies of the modern administrative state, still it needs to be credited for what it is: a mode of thoughtfulness that allows rival and competing claims to confront and engage with one another in an orderly process, where the stakes are high indeed, often deadly, without degenerating into an incoherent shouting match. Like parliamentary procedure, it is one of the ways in which we get thoughtful together, even when my thoughtfulness is the adversary of yours.

There is much more to be said on this, and I can't say it today. If I could I would want to refer to the dignitarian aspects of due process as well, in the work that people like David Luban and Frank Michelman have done (and some work that I did in my Tanner Lectures in 2009) on the dignity of the opportunity to present oneself before an official who has the power to impose binding decisions, to present oneself directly or through a legal representative as someone with a view of one's own on the matter that the public is addressing and a conception of one's own of the elements of the public good that are at stake – a view and a conception that the decision-maker is required to listen to and take into account.⁴⁰

Let me take the analysis in a slightly different direction. The institutional and proceduralised character of legal process makes law a matter of *argument*. Law presents itself as something one can make sense of. The norms administered in our legal system may seem like just one damned command after another, but lawyers and judges try to see the law as a whole; to discern some sort of

³⁵ Lon L. Fuller, 'The Forms and Limits of Adjudication', *Harvard Law Review*, 92 (1978), p. 364.

³⁶ *Ibid.*, p. 365.

³⁷ *Ibid.*, p. 366.

³⁸ *Ibid.*, p. 388.

³⁹ Fuller, *Morality of Law*, p. 176.

⁴⁰ See David Luban, *Legal Ethics and Human Dignity* (Cambridge University Press, 2007) and David Luban, 'Lawyers as Upholders of Human Dignity

(When They Aren't Busy Assaulting It)', *University of Illinois Law Review* [2005], 815; Frank I. Michelman, 'The Supreme Court and Litigation Access Fees: The Right to Protect One's Own Rights', *Duke Law Journal* [1973], 1153; and Jeremy Waldron, 'Dignity, Rank, and Rights: The 2009 Tanner Lectures at UC Berkeley', New York University School of Law Public Law & Legal Theory Research Paper Series Working Paper, No. 09-50 (September 2009), available at <http://ssrn.com/abstract=1461220>

coherence or system, integrating particular items into a structure that makes intellectual sense. And ordinary people take advantage of this aspiration to systematicity and integrity in framing their own legal arguments – by inviting the tribunal hearing their case to consider how the position they are putting forward fits generally into a coherent conception of the spirit of the law. In this way too, then, law conceives of the people who live under it as bearers of reason and intelligence. Even in conflict, they are conceived not as mad dogs at each other's throats, but as rival bearers of reason and intelligence, thinking adversarially about the basis of social order.

Now, of course, this does bring us slap-bang up against the conceptions of the Rule of Law that are preoccupied with predictability. For argumentation of this sort can be unsettling and the procedures that we cherish often have the effect of undermining the certainty that is emphasised on the formal side of the Rule of Law ideal.

An argument may bring something new into the world, a new way of looking at things; and for all we know a panel of judges may be persuaded by it. The upshot of argument is unpredictable, and to the extent that legal process sponsors argumentation, it sponsors uncertainty in the law.

Still, there is no getting away from it. This is not the Rule of Law versus something else. As the late Neil MacCormick pointed out, law is an argumentative discipline and no analytic theory of what it is and what distinguishes legal systems from other systems of governance can afford to ignore this aspect of our legal practice.⁴¹ A fallacy of modern positivism, it seems to me, is its exclusive emphasis on the command-and-control aspect of law, or the norm-and-guidance aspect of law, without any reference to the culture of argument that a legal system frames, sponsors and institutionalises. The institutionalised recognition of a distinctive set of norms may be an important feature. But at least as important is what we do in law with the authoritative norms that we identify. We don't just obey them or apply the sanctions that they ordain; we argue over them adversarially, we use our sense of what is at stake in their application to license a process of argument back and forth, and we engage in elaborate interpretive exercises about what it means to apply them faithfully as a system to the cases that come before us. And legal procedure facilitates and sponsors that form of argumentativeness.

I know the demand for clarity and predictability is made in the name of individual freedom – the freedom of the Hayekian businessman in charge of his own destiny who needs to know where he stands so far as social order is concerned. And he may be disturbed – his investment plans may be disturbed – by unsettling and unpredictable consequences of adversarial argument in law. But think about it. With the best will in the world, and the most determinate seeming law, circumstances and interactions can be treacherous. From time to time, the free Hayekian individual will find himself accused of some violation or

delict. Or his business will be subject – as he thinks, unjust or irregularly – to some detrimental rule. Some such cases may be clear; but others will be matters of dispute. An individual who values his freedom enough to demand the sort of calculability that the Hayekian image of freedom under law is supposed to cater to, is not someone who we can imagine always tamely accepting a charge or a determination that he has done something wrong. He will have a point of view on the matter, and he will seek an opportunity to bring that to bear when it is a question of applying a rule to his case. And when he brings his point of view into play, we can imagine his plaintiff or his prosecutor responding with a point of view whose complexity and tendentiousness matches his own. And so it begins: legal argumentation and the facilities that law's procedures make for the formal airing of arguments.

Courts, hearings and arguments – those aspects of law are not optional extras; they are integral parts of how law works; and they are indispensable to the package of law's respect for human agency. To say that we should value aspects of governance that promote the clarity and determinacy of rules for the sake of individual freedom, but not the opportunities for argumentation that a free and self-possessed individual is likely to demand, is to truncate what the Rule of Law rests upon: respect for the freedom and dignity of each person as an active intelligence.

6. Premises

I cannot cover every aspect of this topic: it is as wide as legality itself. But a third thing I want to emphasise is the way law provides not only the occasion for thoughtfulness and the terms that channel it, and not only the procedures that structure it in formal settings, but also the premises with which it works.

In our individual political thinking, in our moral deliberation, we are privileged as autonomous beings to choose our starting points and argue from whatever set of premises we find compelling. Some begin with God, others with utility, others with some idea of self-fulfilment, and still others begin with some ancient conception of virtue. And as we proceed from our different starting points, our arguments are something of a cacophony as people talk across each other following different and often mutually unintelligible trajectories. This is the problem of public reason that has exercised John Rawls and his followers.⁴²

Law, on the other hand, sponsors a mode of argumentation in which premises are to a very large extent *shared*, and pathways of thought charted out on a common basis, at least in their initial stages. The point is obvious enough in the case of constitutional and statutory provisions, where the text of an enactment provides all of us, grappling with a given issue, with the same point of departure in our interpretive arguments.⁴³ It is less easy, but no less important to see how this works in the case of precedents too. And this is the last topic I want to address.

⁴¹ Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford: Oxford University Press, 2005), at 14-15 and 26-8.

⁴² John Rawls, *Political Liberalism*, New Edition (New York: Columbia University Press, 1996), 212 ff.

⁴³ Often the interpretation of a legal provision is not just a matter of seeing directly how it applies but of how it will interact with other legal provisions and doctrines in complex argument.

When jurists defend *stare decisis* – the idea that we should respect and be constrained by the principles laid down in previous decisions – the defence is usually in terms of predictability. We enhance the certainty of the law – and the determinate guidance that is afforded to those who live under it – by insisting that courts regard themselves as bound in most cases by the principles of their own earlier decisions in similar cases. As I said earlier, the argument is not just about respecting the expectations that may have been invested in a particular decision or line of decisions, but allowing sufficient stability so that actually expectations can form in the first place.

But it can't just be a matter of making legal outcomes more predictable. Once again, we owe to Ronald Dworkin (this time the Dworkin of *Law's Empire*) the observation that predictability – in the straightforward sense of allowing us to predict legal outcomes reliably in advance – can hardly be regarded as the ground of our interest in precedents, because in the practice of law we worry away at the meaning of precedents, their interaction with one another, and their bearing on the cases we are currently dealing with, long after any element of predictability has evaporated. The predictability account cannot explain what Dworkin called 'the constant and relentless concern judges show for explicating the 'true' force of a ... precedent when that force is problematical.'⁴⁴ He says our judges actually pay more attention to precedents than the expectations theory would dictate. Indeed (and I am paraphrasing him) we would judges to lose interest in precedents once their holding, or bearing on future cases, became difficult or controversial, because then we should not suppose that any settled expectations had formed around them. 'The general power of precedents to guide behavior will not much be jeopardised if judges refuse to follow them when the advice they give is garbled or murky.'⁴⁵

True, certain precedents – you might think of them as super-precedents – contribute powerfully to legal predictability by pinning down *major* major premises of law in particular areas. This has been pointed out by scholars like Richard Fallon and Henry Monaghan in the debate about *stare decisis* in American constitutional law.⁴⁶ The background here is that – motivated largely by concern about the continuing authority accorded to the abortion decision in *Roe v. Wade*⁴⁷ – some conservative law professors have suggested that *stare decisis* should have less force in constitutional law where serious individual rights or other constitutional values may be betrayed by sticking with a constitutional precedent that is mistaken, a betrayal that could not possibly be justified by the pragmatic considerations that are associated with certainty and predictability. In response, Fallon and Monaghan reminded their readers of how much American constitutional law is structured by precedent and how much of the legal framework structuring modern governance in the United States might unravel if old precedents were always up for grabs. The cases they cite include the prospect of revisiting the holdings that established things

like the application of the Bill of Rights to the states or the constitutionality of the use of paper money. What these precedents do is limit the range of what can be up for grabs in legal argument; they specify outer limits on where legal argument can go, even while they do not themselves directly determine the result of any litigation that is likely to come before a modern court.

With more mundane precedents, however, it seems to me that the role of established case law is not to determine outcomes in cases with any degree of certainty, certainly not in appellate cases, but rather to provide substantive points of departure that people can use when they argue those cases through. I say points of departure rather than major premises. Unlike statutes and the provisions of written constitutions, cases do not easily disclose the principles of their decision. Often we have to first argue our way upwards through the cases to arrive at the principles they stand for before we can do anything like treating those principles as major premises and arguing downwards from them in a syllogistic fashion. Still, there is a sense in which we share starting points in this dynamic of argument. We argue on the same page, even when we are adversarially opposed to what someone else is making of a line of cases.

I suppose someone obsessed with intellectual autonomy might worry about forms of thoughtfulness that take their premises as given. That may seem, in Kantian terms, *heteronomous* thoughtfulness, not partaking of – indeed compromising or undermining – the intellectual autonomy that is human thinking at its best. But many modes of thought are like this. Theological argument proceeds in this way, by reference to certain inescapable creedal and biblical commitments; but it remains a domain of thoughtfulness. Creedal propositions (of the Nicene Creed, for example) do not determine the outcome of theological argument. But still they constrain and direct it, providing inescapable starting points, axioms and a good number of theorems which are to have a non-negotiable presence in any respectable argument. And scientific argument is sort of like law too in this regard: one proceeds within the framework of existing scientific consensus, building one's own work on the accepted results that have come in from other laboratories, so that scientists can pursue their results and findings as a community not just as an array of intellectually autonomous thinkers.

7. Picking up the threads

Let me now draw some of these threads together. I have mentioned three main ways in which law sponsors and facilitates public thoughtfulness: first, in its use of standards rather than rules as the norms that govern behaviour; secondly, in the procedural structuring of public adversarial argument in court hearings; and thirdly, in providing through texts and precedents many of the axioms and theorems that enter into legal reasoning.

⁴⁴ Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986), pp. 157-8.

⁴⁵ *Ibid.*, pp. 130 and 159.

⁴⁶ Richard Fallon, 'Stare Decisis and the Constitution', *NYU Law Review*, 76

(2001), 570 and Henry Monaghan, 'Stare Decisis and Constitutional Adjudication', *Columbia Law Review*, 88 (1988), 723.

⁴⁷ *Roe v. Wade* 410 U.S. 113 (1973).

These are not marginal characteristics of law. They are central to it – business as usual in the law – though it is my lament that they are none of them made prominent in the most influential jurisprudence of our day, which in many law schools in America and in the United Kingdom remains positivist and analytical. Positivism in the tradition of Hart remains committed to viewing law as a system of rules; it gives scant consideration to procedural aspects of legal practice; and it says next to nothing about the importance of *stare decisis*. More generally, it treats disagreement about the law and inconclusive legal argumentation as a marginal phenomenon, mostly stemming from the accidental use of terminology too vague to determine hard cases.⁴⁸

8. Modes of thoughtfulness

The modes of thoughtfulness I have alluded to under these three headings are not the only forms of thoughtful deliberation that a society needs; legalistic thinking is not the only desirable mode of thoughtfulness in government.

We do need what is often excoriated as discretion – thoughtful discretion, sometimes technical expertise, sometimes policy-oriented either as a matter of implementation or in an awareness of what is politically and administratively possible, sometimes value-oriented in the choice of policy – we need discretion in all these senses, in the hands of administrative agencies and their coteries of expert and experienced officials. And that, I concede, is *not* what the Rule of Law can supply.

Some think that the mission of the Rule of Law is to stamp that out and minimise such discretion; replacing it with clear and determinate rules administered by courts, or at the very least cultivating a posture of suspicion towards it. Maybe. On the other hand, as Professor Davis pointed out, administrative discretion is here to stay.⁴⁹ And law has a role to play in authorising it, channelling it by providing criteria, and bounding its outer limits with basic constraints of justice. My point is that even that role for law is played out as a form of legal thoughtfulness – legal thoughtfulness constraining a different form of administrative thoughtfulness – rather than in terms of the Rule of Law imposing upon the administrator a set of mechanically-applied determinate rules. Sometimes the role of courts here is simple deference to administrative decision-making; but when administrative decision-making is called in question, it is important that we have thoughtful rather than mechanical ways of challenging it under the auspices of the Rule of Law, and the modes of argumentation that I have been talking about in this lecture are crucial for that.

The other distinction that I think is important is between legalistic thoughtfulness and the broader style of political deliberation needed in the public realm of a flourishing democracy. Some have toyed with the prospect of seamless continuity between the two. Ronald Dworkin said once that '[w]hen an issue is seen as constitutional,' –

he was speaking of the United States, for example – 'the quality of public argument is often improved,' because the terms of legal argumentation inform the terms of public discussion 'in newspapers and other media, in law schools and classrooms, in public meetings and around dinner tables.'⁵⁰ I guess this is part of the process that Alexis de Tocqueville referred to when he remarked that '[t]here is hardly a political question in the United States that does not sooner or later turn into a judicial one.' He went to suggest that as a result

parties feel obliged to borrow legal ideas and language when conducting their own daily controversies. ... Judicial language thus becomes pretty well the language of common speech; the spirit of the law starts its life inside schools and courtrooms only to spread gradually beyond their narrow confines; it insinuates itself, so to speak, into the whole of society right down to the lowest ranks until, finally, the entire nation has caught some of the ways and tastes of the magistrate.⁵¹

I am not as enthusiastic about this as either Dworkin or de Tocqueville. Public debate often does perfectly well without a forensic structure.⁵² In many ways, legalistic pathways of thought are too stilted for the purposes of general civic deliberation. My point throughout this lecture has been that legal pathways and legal structures make a particular contribution in the work that the Rule of Law has to do, not that they epitomise every kind of thoughtfulness that we need in politics. Even when we need formality in public debate, what we sometimes need are the rather differently shaped procedures of parliamentary deliberation, rather than forensic procedure. And there is a further problem, which I cannot discuss in this lecture, of how to relate that legislative discourse to the broader, looser and radically less structured mode of deliberation that we hear (and that we need) in civil society, among political parties, in social movements, on the streets, and in the media.

Anyway, from the fact that legalistic thoughtfulness is no substitute for the thoughtfulness we need in public political discourse, it certainly does not follow that legalistic thoughtfulness is unimportant. For in the areas and to the extent that we want to insist on government constrained by law, or in the areas and to the extent that we want a social and economic environment structured by law, we need to understand that constraint and that structuring as being done by law in the thoughtful ways that law operates rather than mechanically and thoughtlessly in the service of some exalted ideal of predictability.

Let me say finally that I don't want to denigrate predictability values altogether. In my remarks here I have wanted to redress a balance, not strike the other side out. Elements of clarity and certainty are often important in the law, but nowhere are they all-important, and such importance as they have does not justify side-lining or ignoring other more thoughtful aspects of legal practice in our conception of the Rule of Law.

⁴⁸ Hart, *The Concept of Law*, pp. 124 ff.

⁴⁹ See Davis, *Discretionary Justice*, pp. 27 ff.

⁵⁰ Dworkin, *Freedom's Law*, p. 345.

⁵¹ Alexis de Tocqueville, *Democracy in America*, trans. Gerald E. Bevin

(Penguin Books, 2003), p. 315

⁵² See discussion in Jeremy Waldron, *Law and Disagreement* (Clarendon Press, 1999), pp. 289-91.

Can the two sides perhaps be reconciled? In his later writings, particularly in his trilogy, *Law, Legislation and Liberty*, F.A. Hayek announces that he was turning his back on thirty years of ‘deeply rooted prejudice’ – his own deeply rooted prejudice – that clear codified legislation would increase the predictability of the law. He speculated

that judicial decisions may in fact be more predictable if the judge is also bound by generally held views of what is just, even when they are not supported by the letter of the law, than when he is restricted to deriving his decisions only from those among accepted beliefs which have found expression in the written law.⁵³

Thinking through the abstract issue of what a fair order of mutually-adjusted intentions would involve so far as the settlement of the instant cases is concerned may enable the judge to come up with a result more congruent to the expectations of the parties than his application of some enacted rule according to its terms. I cannot go into Hayek’s argument in any detail here, but it’s a challenging possibility, and well worth the attention of those who continue to cite Hayek as philosophical authority for associating the Rule of Law with a rule-based conception of predictability.

In the end, though, it is a matter of tension and balance within the Rule of Law. I don’t think what I am doing is introducing a rival political ideal to compete with the Rule of Law – in the way that (say) democracy might sometimes compete with the Rule of Law. Of course we must bear in mind Joseph Raz’s dictum: the Rule of Law is not the sum of all good things.⁵⁴ The Rule of Law is one star in a constellation of ideals that dominate our political morality: the others are democracy, human rights, and economic freedom. We want societies to be democratic; we want them to respect human rights; we want them to organise their economies around free markets and private property to the extent that this can be done without seriously compromising social justice, and we want them to be governed in accordance with the Rule of Law.

Even considered as a limited concept – one star among others in the constellation – the Rule of Law is a contested concept, and this paper is intended to contribute to that contestation.⁵⁵ Also, ‘law’ connotes many different things; as I said, there are many tools in law’s tool box. Different things may come to different people’s minds when we imagine the rule of law. For some it may be the rule of a constitution that has been in place for decades or even centuries. For others it is the rule of a recently enacted statute. For others still, it is the rule of common law. Aristotle famously remarked that ‘a man may be a safer ruler than the written law, but not safer than the customary law.’

I have tried not to rely on new-fangled ideas intended to transform the Rule of Law out of all recognition. I have tried to limit myself to elements centrally and incontestably associated with the core of legal practice – elements (like due process) whose absence from contemporary positivist jurisprudence and from recent philosophical accounts of the Rule of Law looks, in retrospect, curiously and curiously. I have been offering, not just a theory of thoughtfulness in government (and then calling that ‘the Rule of Law’), but an account of the way in which practices and institutions, which everyone recognises as legal, help to sponsor, channel and discipline that thoughtfulness. That is why I was so anxious to distinguish this form of thoughtfulness from other notions of thoughtfulness that we need.

9. Conclusion

Aristotle exasperated generations of readers of his *Politics* when he inserted this observation into his discussion of the Rule of Law:

He who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, [and] the law is reason unaffected by desire.⁵⁶

It’s a challenging observation (to say the least) and in the past, when I have taught the history of the Rule of Law to law students, I have tended to pass over it in silence.

Some formalists I know – some of the Toronto formalists – say that what is crucial here is that law must be articulated without reference to the substantive quality of the ends or policies that are being pursued – that’s desire – and they are hoping to sponsor an account of legal argument unaffected by desire.⁵⁷ If there were more time I would question the austerity of that sort of formalism on grounds of basic sanity. But it is Aristotle’s connection of law to reason that intrigues me, for it is not primarily a natural lawyer’s connection between law and the eternal verities of reason, but between law and the god-like activity of reasoning. We reason together using the forms, channels and points of departure that law provides, and when we celebrate being ruled by law what we are celebrating in large part is that sort of influence of reason in human affairs.

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⁵³ F.A. Hayek, *Law, Legislation and Liberty: Volume I – Rules and Order* (University of Chicago Press, 1983), p. 116.

⁵⁴ Raz, ‘The Rule of Law and its Virtue’, pp. 210-11.

⁵⁵ See Jeremy Waldron, ‘Is the Rule of Law an Essentially Contested Concept (in Florida)?’ *Law and Philosophy*, 21 (2002), 137.

⁵⁶ Aristotle, *Politics*, trans Benjamin Jowett (Cosimo, 2008), p. 140 (III.16, 1287a).

⁵⁷ Ernest J. Weinrib, ‘The Intelligibility of the Rule of Law,’ in *The Rule of Law: Ideal or Ideology* ed. Allan C. Hutchinson and Patrick Monahan (Carswell, 1987).

Language diversity, endangerment, and public awareness

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A WEEK LAST MONDAY was St Valentine's Day. Next Tuesday will be St David's Day. Everyone knows that. If you forget, Google will alter its logo to remind you. But what day was commemorated last Monday, 21 February? Few people know, and Google's logo remained its usual particoloured self.

Last Monday was International Mother Language Day. It is the annual celebration of the importance of maternal languages and linguistic diversity, established by UNESCO in 1999 and first observed in 2000. The day was chosen because on 21 February 1952 several students campaigning for the recognition of Bangla as a state language of Pakistan were killed by police. It is one of only two special days devoted to languages each year. The other is 26 September, the European Day of Languages. This is broader than its name suggests. It is an annual celebration of the languages used in Europe, initiated by the Council of Europe in 2001 as an outcome of the European Year of Languages. The remit includes all languages used within the region, not just those which are indigenous to Europe. Chinese is a European language now.

The European Year of Languages, 2001. That was a year organised by the European Union and the Council of Europe, in which 45 European countries participated. Four years later, in the USA, the American Council on the Teaching of Foreign Languages organised a Year of Languages. In 2006, the African Academy of Languages, launched the Year of African Languages at the African Union. And then, in 2008, the big one: the International Year of Languages, 2008.

Let me now be brutally honest. How many of these years did you know about? And, if you knew about them, do you still remember them? And if you remember them, do you do anything to celebrate them? Many language-aware teachers celebrate the days in schools around the country. But they are a tiny number, compared with the millions who are aware of, for example, St Valentine's Day.

One reason for the collective memory loss is that several UN years competed for attention during 2008. Not only was it the International Year of Languages but also the

International Years of Sanitation, the Reef, Planet Earth, and the Potato. There was a notable complementarity among these initiatives. To survive, humans need a viable environment, drinkable water, and food – prerequisites identified through the focus on the Earth, Sanitation, and the Potato. But the fourth prerequisite for humanity is language. Once human beings have the means to exist, then they must co-exist. And co-existence as humans is possible only through language.

It was, naturally enough, Planet Earth that attracted most public attention in 2008, and continues to attract most attention. I say 'naturally enough', because there is no point in us worrying about diversity of languages if there are no people left to use them. In all parts of the world where endangered languages exist, we need to give priority to survival and quality of life. Medical and economic wellbeing are prerequisites for linguistic wellbeing.

But a second reason for the lack of public awareness is a lack of marketing on the part of the organisations concerned. And that relates to a further issue: that there was precious little to market. The Resolution setting up the IYL had 33 operative clauses or sub-clauses. The vast majority dealt with internal organisational matters at the UN, such as recommending parity among the six official languages and identifying ways in which the UN operation can be improved. Only three of its clauses were of general import, but don't hold your breath, expecting something of great originality to emerge from them:

OP 23 affirmed that 'linguistic diversity is an important element of cultural diversity'.

OP 24 reaffirmed that 21 February should be proclaimed International Mother-Language Day, and calling upon member states and the secretariat to promote the preservation and protection of all languages.

OP 25 announced the International Year, and asked member states 'to develop, support and intensify activities aimed at fostering respect for and the promotion and protection of all languages (in particular endangered languages), linguistic diversity and multilingualism'.



Poster advertising UNESCO's International Mother Language Day.

In the language of international diplomacy, such statements are important. But to the outside world, they are bland, vapid, anodyne.

I am not disputing their importance. On the contrary. The intellectual health of the planet is dependent on multilingualism. Without exposure to the alternative visions of the world expressed by other languages, our view of ourselves and of our planet remains inward-looking, unchallenged, and parochial. It is only by experiencing another language and culture – whether at home or abroad – that we discover the defining contours of our own. That is why it is important for the UN to affirm, and to keep on affirming, the principle of linguistic diversity as a basic human good. It fosters an intellectual and emotional climate in which triumphalist language attitudes and organisations feel increasingly uncomfortable and outmoded. Great progress has already been made with relation to racism. Antagonism to linguistic diversity is a first cousin of racism.

But the fact remains that the IYL and the other Years have not been the successes their creators wanted. They have already receded from public consciousness – remembered with affection only by those already committed to the cause. Why is this so, and what can be done about it? These are the questions I want to address in this paper.

Background

Let me briefly review the recent history of this subject, so that we can see where we are. The 1990s was a revolutionary decade in the way it brought the language crisis into the forefront of academic and political attention. It is remarkable what we have in fact managed to do since 1991, which was when the crisis began to be systematically addressed through a number of visionary articles and public statements, notably those arising out of the Endangered Languages Symposium organised by the Linguistic Society of America in 1991, and the statement emanating from the International Congress of Linguists in Quebec in 1992. UNESCO came on board in 1993, with its Endangered Languages Project. By 1995, the organisations began to appear – such as the Tokyo Clearing House, the UK Foundation for Endangered Languages, and the US Endangered Language Fund. In the mid-1990s the articles began to build up, both polemical (in the best sense) and descriptive, and collections of papers began to appear. The first exposés aimed at a more general public were published. Then by the turn of the century, we find a flurry of book-length expository syntheses of the topic. In this respect, the years 2000-2001 were special years, with three general books coincidentally appearing from Claude Hagege, Suzanne Romaine and Daniel Nettle, and myself – very different perspectives, but with a single focus.

Within a decade, in short, the academic linguistic world had begun to realise that Something Was Up – or at least those linguists did who still retained an interest in real languages as part of their professionalism! The statistics, whether expressed by pessimists (80 per cent extinction within a century) or optimists (25 per cent extinction), were compelling, and the accounts of ongoing endangerment, as well as of successful revitalisation when conditions are right, were persuasive. A middle-of-the-road figure was 3000

‘One language dies every two weeks’

languages so seriously endangered that they were likely to die out during the course of the present century: that is one language dying on average every two weeks. The descriptive literature having grown dramatically, it was possible to make informed and judicious appraisals of the general situation. And I think now we all know the answers, at least in general terms, to the basic theoretical questions: what are the factors which lead to language death? why are we experiencing this crisis now? and what conditions need to be present in order to revitalise a language? We are also aware of the central role of documentation in addressing these questions. Obviously there is still a great deal of empirical and procedural work to be done, and we have hardly begun to develop ‘documentation theory’ as part of an ‘applied preventive linguistics’ – by which I mean the application of our theoretical, descriptive, and methodological advances to individual endangered situations. We do not yet have a typology of intervention and best practice to match those available in some other applied linguistic domains, such as language teaching and speech pathology. But at least all these issues are recognised, and research is ongoing. So what do we do next? There is a dimension of our responsibility which still receives hardly any recognition – the gap which exists between academic awareness of these matters and the awareness of the general public. This, I believe, is the domain which next demands our attention.

Anyone who works in the conservation field will tell you that bridging this gap is the most difficult goal to achieve. It has taken the ecological movement as a whole over a century to bring the world to its present state of consciousness about endangered plant and animal species. For example, the National Audubon Society in the US was founded in 1866: we have been bird-aware for nearly 150 years. For world heritage sites, we have the highly successful UNESCO programme, begun in 1972. Greenpeace, the year before, 1971. The World Wildlife Fund, 1961. The World Conservation Union, 1948. It took over 30 years before this Union was able to establish a World Conservation Strategy (1980), which led to the principles laid down in the booklet 1991 document *Caring for the Earth*.

How, and how much

Compared with such time-frames, linguistic achievements by way of consciousness-raising within just a decade have been remarkable indeed. Thanks to an enormous amount of effort by a fairly small number of individuals and institutions, we have made great progress in relation to the three criteria which we know must be present before progress can be made with an endangered language. First, there is what might be called the ‘bottom-up’ interest – the speech-community itself must want its language saved – and there are now many recorded accounts of how attitudes can be sensitively managed and energies channelled to ensure that this happens. It is also true that we have learned from

our mistakes, in this connection. Second, there must be ‘top-down’ interest: the local and national government need to be in sympathy with the philosophy of language revitalisation and supportive of the task in hand. ‘Top-down’ also includes obtaining the support of international political organisations, such as UNESCO and the Council of Europe, who are crucial in forming an appropriate political climate within which pressure can be brought to bear in difficult situations. We need only reflect for a moment on the number of political statements which were made over the past 20 years to realise that there has been enormous progress in this respect – but we are still, it seems, some way from the goal of an unequivocal United Nations statement of human linguistic rights.

But neither bottom-up nor top-down support are enough, without the third criterion – cash. We know that implementing a minority language policy is expensive, in the short-term. In the long-term, of course, any policy of balanced multilingualism, in which minority languages are respected and protected, guarantees massive savings – if for no other reason, by avoiding the huge expenditure (often, in terms of life as well as money) which arises when people, seeing their linguistic identity threatened, take civil action to protect themselves and their future. But the initial outlay does cost money – though not huge amounts. It is not as expensive as we might think, to foster a climate of language diversity and sustainability. Take the case of the 3000 most endangered languages. It was estimated a few years ago, by the Foundation for Endangered Languages, that a figure of around \$55,000 per language would provide a basic grammar and dictionary for a language that had received negligible documentation, assuming two years of work by one linguist. Another estimate suggested that we would need to allow a linguist three years, and there would then not be much change from \$200,000, after taking into account a salary, fees for indigenous language consultants, travel, equipment, accommodation, publication of the findings, and the provision of basic facilities for revitalisation. Another linguist took an even broader view, anticipating in-depth studies, the development of an audio-visual archive, and a wider range of publications and teaching materials, concluding that the estimate per language would be more like 15 years and \$2 million. Conditions vary so much that it is difficult to generalise, but – looking for common ground between these figures – a figure of \$65,000 per year per language cannot be far from the truth. If we devoted that amount of effort over three years for each of the 3,000 cases referred to in Chapter 1, we would be talking about some \$585 million. That may seem like a lot of money; but, to put it in perspective, it is equivalent to just over one day’s OPEC oil revenues (in an average year). Or a seventy-fifth of the worth of the richest man in America. Or a banker’s bonus.

The sums are tiny, but enough to put governments off, and enough to give support organisations (such as the Endangered Language Fund) a tough time finding capital to make even a small contribution to the present need. That is why the efforts of the large organisations, such as the Volkswagen Stiftung and the Lisbet Rausing Charitable Fund have to be loudly applauded. I would never have dreamed, ten years ago, that two such bodies would be helping our cause to the extent that they are. But the question remains,

why are there not more of them? Why, if language conservation is the intellectual equivalent of biological conservation, have we yet made so little progress in obtaining the requisite funding? The International Union for the Conservation of Nature had a budget of 135 million Swiss Francs in 2010, and heaven knows how many millions more goes into the support of biological conservation projects worldwide. Compared with that, the support for linguistic projects is so far minuscule. Why?

‘Very few people are aware of the existence and scale of the problem’

Public awareness

The answer, I believe, is that still very few people are aware of the existence and the scale of the problem; and there are many people who still need to be persuaded that the situation is a problem. To take the latter point first: many believe in the Babel myth – that a single language on earth would guarantee a mutually intelligible and therefore peaceful planet (as was assumed to be present before the ‘curse’ of Babel differentiated languages). However, Genesis chapter 10 shows that there were languages (in the plural) on earth before the Babel event (which is reported in chapter 11), and there is widespread evidence from all over the planet that the history of monolingual communities does not prevent civil wars (Vietnam, Cambodia, UK, USA...). But leaving this issue aside, the level of unawareness of the language crisis is remarkable, and contrasts dramatically with awareness in other eco-domains. I doubt whether there is anyone in the thinking world who is not now aware, even if only dimly, of the crisis facing the world’s bio-ecology. By contrast, only a tiny proportion of these people have any awareness at all of the crisis in linguistic ecology. This is the gap I referred to above: Us who know versus Them who don’t. How many are Them? Some time ago, in preparing for a radio programme, I asked a series of passers-by in the street whether they were aware that so many of the world’s languages were dying. The people who claimed to be aware (whether they really were or not I do not know) were one in four. The other three had no idea what I was talking about. A similar exercise at the University of Manchester got the same result. And I get the same result today. Seventy-five per cent of the population do not know there is an issue, therefore; and a fair number of the remaining twenty-five per cent do not believe that it is an important issue. Many of these are the opinion-formers of this world – such as journalists, politicians, media personalities, and businessmen. How can we get through to Them?

We can of course lecture to Them, and write books for Them – but let us not fool ourselves. Even if one of our

academic books sold out, we would be talking only about a few thousand copies. I am not so naive as to think that a book like my *Language Death* will ever get into a Christmas must-buy best-selling list. Academic textbooks have an important role in forming intellectual opinion, but they are not the way to bridge the public awareness gap, and certainly not if we are in a hurry. We have to look in other directions. In fact there are several ways of achieving this goal, but the most important ways we have hardly begun to explore, and not at an institutional level. I believe there are four primary means of engaging with the general public in relation to our subject – using the media, the arts, the Internet, and the school curriculum. I shall concentrate on the first two, given the time available, and refer only briefly to the last two – but all four need to be involved in any systematic effort to bring public awareness about linguistic ecology to the same level as that which exists in the biological domain.

The media

Some progress has been made with reference to the first way: enlisting the support of the media. I have been quite impressed with the increased interest shown by some sections of the media during the past decade. Several articles have appeared in general-interest magazines and newspapers. There have been pieces, often illustrated with stunning photographs, in such periodicals as *Prospect*, *National Geographic*, *Scientific American*, and even the British Airways in-flight magazine, *High Life*. Radio has also served us well. Since 2000-1 I know of a dozen or so radio programmes devoted to the topic of language death on the BBC's two main documentary channels, Radio 3 or Radio 4 – in one case a series (called 'Lost for Words') of four half-hour programmes. There seems to have been similar radio interest elsewhere: I have contributed to programmes being made in the United States, Canada, and Australia, and several of my linguistic colleagues have too. Television, by contrast, has been less interested. Since the mid-1990s I know of ten proposals to the various UK television channels for documentaries or mini-series on language death, and although three of these reached a quite advanced stage of preparation – including in one case scripted and partly filmed material – none ever reached completion. The only success story was the component on language death which was included in the series *Beyond Babel*, which has now been screened in over 50 countries, and which is available on DVD.¹ This was, ironically, an account of how English has become a world language; but the producers sensibly accepted the argument that there was another side to the coin.

We should not take our television failure too personally, by the way. We must not forget that there has never been a television blockbuster series on the general topic of language, as such, anywhere in the world. There have of course been individual programmes on some of the 'sexier' aspects of language – such as child language acquisition, or sign language, or speech disability. And there have been a number of series or programmes on individual languages. English, as you might expect, gets the most attention. *The*

Story of English appeared in the 1980s – a huge eight-hour transatlantic co-production – and another eight-hour epic, Melvyn Bragg's *The Adventure of English* told the same story. A few other individual languages have attracted interest too. A six-part series, *The Story of Welsh* was made on BBC Wales, presented by Huw Edwards; and I know of similar programmes on Breton, Irish, and a number of other European minority languages, as well as on the indigenous languages of Australia, the USA, and Canada.

But in all these cases, the creative energy is entirely inward-looking. These programmes tell the story of endangerment only as it affects the individual communities – the Welsh, the Bretons, or whoever. None of them takes the requisite step back and looks at the language endangerment situation as a whole. The nearest you get is when a programme deals with more than one language together, such as a programme made for the Netherlands TV network, in 2001, which looked at the similar plights of Welsh and Frisian, and inevitably began to generalise as a consequence. Another is an ongoing project by the Czech film-maker Michael Havas, whose project on a single Brazilian language, spoken by the Kranak, 'Brazilian Dream', is conceived as a symbol of the world situation. Such perspectives are rare. It seems very difficult to get people who are desperately anxious about the state of their own language to devote some of their energy to considering the broader picture. It is short-sighted, because each endangered language can learn something from the situation of other languages – why some languages seem to be doing better than others. Nonetheless, in 2011 our theme still awaits effective television treatment.

Films are the ideal medium for our purposes, because they enable us to see and hear diversity in action. And one of the most promising developments in the past few years has been to see a slow but steady growth in cinematic efforts to capture language diversity and endangerment, from film-makers in several parts of the world. One of the most striking comes from Barcelona: *Ultima Palabra* (The Last Word), a documentary made by Grau Serra and Roger Sagues in 2003 about three endangered languages in Mexico (Lacandon, Popoluca, and Mayo). Another is *Voices of the World*, made in 2005 by the Danish film-makers Janus Billeskov Jansen and Signe Byrge Sørensen. The success story of recent years has got to be *The Linguists*, which got rave reviews at the Sundance Film Festival in 2008, and later an Emmy nomination. But that is an isolated case.

As I say, we should not take the lack of a television presence too personally. There are reasons why television executives do not like programmes on language. I know what they are because I have been in the fortunate position, thanks to my work in broadcasting over the past 20 years, of being able to ask programme-commissioners. The usual

'Television executives do not like programmes on language'

¹ From Infonation Media: <http://www.beyondbabel.co.uk/>

answer is that language is too abstract and complex a subject. The decision-makers are either thinking back to their days of studying grammar in school (broadcasting senior management is of the age when they all had to parse sentences and study prescriptive grammar) or they have had a close encounter of the third kind with Chomsky, and it has scared them. They are also worried by the generality of the subject: that language does not fit neatly into a TV niche, such as current affairs, or comedy. They are petrified by the risk of the academic approach making people switch off. Even though there have been highly successful TV series by academics – Jonathan Miller's *The Body in Question* on human physiology, Simon Schama's series on history, Lord Winston's on medicine – when it comes to language, the eyes glaze over. Even the specific-language programmes are affected. Language programmes tend only to be presented by well-known personalities – *The Adventure of English* by Melvyn Bragg; *The Story of Welsh* by Huw Edwards. If we did ever manage to get a TV series on language death up and running, heaven knows who they would get to present it – Oprah Winfrey, probably.

Mind you, would that be such a bad thing? If the content is right and the quality is assured, then a big media personality would probably do our subject the world of good. The BBC radio series such as *Word of Mouth* (with Michael Rosen) and *Fry's English Delight* (with Stephen Fry) have already helped to raise language awareness. And this leads to my next point, that we are still some way from attracting the interest of most of the general population (which of course means the politician-electing, fund-raising population) in our crisis. Bottom-up, top-down, cash – my three criteria will all operate at their best if a profound awareness of the nature and likelihood of language death enters the general population. And personalities can help make this happen. But it is more than awareness that we need. We also need enthusiasm. People have to be enthused about the issues surrounding language death. Their emotions as well as their intellects have to be engaged. I think we have done quite a good job in the past decade under the latter heading: a lot of people – well, one in four, anyway – now have a degree of intellectual understanding of the issues which they did not have before. But how many have an emotional grasp? How many would weep over a dying language, as I have seen people weep over a dying animal species. How many experience real joy at the prospect of a revitalised language – like the moment in *Beyond Babel* when you hear Cally Lara, a teenager from Hupa Valley in Northern California, say:

As long as we're here, as long as the valley is here, as long as our culture is alive, the language and teaching the language will be a part of what we do. It's our responsibility.

And his chum, Silis-chi-tawn Jackson, adds:

If it's up to me, this language is going to go on.

This makes my heart, as well as my mind, leap, to hear teenagers say that. But how many others share in this sense of celebration? Indeed, how many opportunities are there to celebrate? Another question I ask people, these days, is: Do they know when World Language Day is, or World Mother Language Day? Hardly anyone knows.

The arts

How do we get from consciousness to conscience? We have to engage with people's sensibilities, and this is the most difficult of tasks. In fact I know of only two ways of doing it – one is through religion, the other is through the arts. And of the two, the arts turns out to be the more general, because it transcends the distinction between theism and a-theism. I have personal experience of its widespread appeal, because I have been the director of a new arts centre (the Ucheldre Centre) in my home town of Holyhead in North Wales, over the past 20 years, and the one thing I have learned, from our programme of art exhibitions, sculptures, films, plays, concerts, and performances of all shapes and sizes is that everyone, everyone, appreciates the arts, regardless of age and class. They may appreciate different kinds of art, of course; but even the people in my town who turn their noses up at an exhibition of abstract art or a concert of medieval music, calling it elitist, come to the arts centre when we are showing a James Bond film or putting on a Christmas pantomime for the children. And when I visit their houses, I see pictures on the walls and ornaments on the mantelpieces. Art reaches out to everyone. As Oscar Wilde said, 'We spend our days, each one of us, in looking for the secret of life. Well, the secret of life is in art'.

So, if we want a means of getting our message across to everyone in the most direct and engaging way, my belief is that we should be making maximum use of the arts, in order to do so. If we want Them to see what the situation is, the artists can help us more than anyone else. Repeatedly we find people acknowledging the point: US poet Archibald Macleish put it like this: 'Anything can make us look; only art can make us see'. Another poet, Robert Penn Warren: 'the poem is not a thing we see – it is, rather, a light by which we may see – and what we see is life'. Picasso: 'We all know that art is not truth. Art is a lie that makes us realise truth'. And, as if drawing attention to the difference between the media and the arts, we have Ezra Pound: 'Literature is news that stays news'. But my favourite quotation, in this connection, is from Disraeli, in the Preface to his novel, *Coningsby*: 'Fiction, in the temper of the times, stands the best chance of influencing opinion'. The way forward is through the arts, in its broadest sense, to include everything sensory – visual, verbal, tactile, gustatory, and olfactory – that we consider artistic. And here we meet another kind of gap. For we as academics have not been much interested in the arts, and the artists (in this broadest sense) have not been much interested in us. This in my view is where we next need to direct some of our own creative energies.

It is not difficult to justify my claim. During the past decade I have been trying to find examples of artists who have addressed the issue of language death within their areas of expertise, and I have found very little. I have asked hundreds of artists if they know of anything. Let me begin with the visual arts. I have seen whole exhibitions devoted to plant and animal conservation, but never seen a painting which deals with language conservation. I know of nothing in photography or ceramics or textiles. Artists are continually using the terms of language to define their roles – the 'language of' photography, paintings which 'speak to us'. But they do not seem to have focused on language itself

as a subject. I have come across just one sculpture – the living sculpture produced by Rachel Berwick, which some of you may have seen in New York or London in 1997-8. It was based on an event said to have taken place when the explorer Alexander von Humboldt was searching for the source of the Orinoco, in South America, in 1801. He met some Carib Indians who had recently exterminated a neighbouring tribe (possibly a Maypuré group) and captured some of their domesticated parrots. The parrots still spoke words of the now extinct language, and von Humboldt – so the story goes – was able to transcribe some of them. Having heard this story, Rachel Berwick, professor of sculpture at Yale University, saw its intriguing possibilities, and constructed an artwork based upon it: she designed a special enclosure in which were displayed two Amazon parrots who had been trained to speak some words from Maypuré. Approaching this work for the first time, you are nonplussed. Once you read the explanation, you look at the parrots with awe, and wait to hear some words. You do not forget the experience.²

I would have expected music and dance to be especially interested in this topic. Music has been characterised as ‘the universal language of mankind’ (Longfellow), ‘the speech of angels’ (Carlyle), ‘the only universal tongue’ (Samuel Rogers). You would expect these metaphors to have motivated composers to reach for their staves to deal with linguistic issues. But I have not yet encountered pieces which deal with the subject explicitly. The topic of language death deserves at least a symphony, a fantasia, an opera, a ballet, or – to change the genres – a large-scale jazz piece, or a guitar extravaganza. Even the folk-singers have failed to lament about the world situation. The nearest I have come to a major musical work is the marvellous score Philip Glass composed for Godfrey Reggio’s film, *Powaqqatsi*, the second of his Hopi *qatsi* trilogy – the name means ‘a way of life [technology, in this vision] that consumes the life forces of other beings in order to further its own life’. The anthem composed for that film well expresses the notion of loss, but Reggio’s theme is cultural destruction in general, as a result of technology, not linguistic loss in particular. A few years ago I was talking to the composer Michael Berkeley on Radio 3 in ‘Private Passions’, and I asked him whether he knew of anything about language death. He did not.

We might expect, from its nature, that the world of the verbal arts would yield more positive results – the world of poetry, drama, the novel, the short-story. Here too, though, there is very little. I know of no novel directly concerned with the general theme, though there are a few which reflect on an individual cultural or linguistic situation – such as Joan Bodon (Jean Boudou) writing on the death of Occitan (e.g. *Lo Libre de Catoia*), the Argentinian writer Leopoldo Brizuela’s fable about an imaginary encounter between English and Patagonian cultures (*Inglaterra, una fabula*), or the Abkhazian writer Bagrat Shinkuba’s account of the demise of Ubykh, translated as *Last of the Departed*). There is Alphonse Daudet’s short story, ‘The Last Class’, about the reaction of a schoolchild to the news that French was being replaced by German in his Alsatian school. But I know of no novel and only one short story on the general theme, by the Australian writer David Malouf. In a succinct, breathtaking

four-page tale, ‘The Only Speaker of his Tongue’, he tells the story of a lexicographer visiting a last speaker.

Moving into the genre of poetry, a few writers *have* taken the theme on board. I have been collecting poems on the subject, and so far have about 30. But the genre which puzzles me most, because it is the genre most obviously applicable to expound our subject, is theatre. Where are the plays? Here too there have been works which deal with the problems of a particular linguistic/cultural situation – the best example I know is Brian Friel’s *Translations*, about Irish. Another is Louis Nowra’s *The Golden Age*, about the community discovered in the wilds of Tasmania in 1939, for whom the playwright created a special variety of speech. But what plays deal with the problems of language endangerment in general, or which generalise from individual instances in the way R S Thomas’s poem did? Harold Pinter’s *Mountain Language*, a 20-minute virtuoso explosion, was my solitary discovery, but that is of little general use for it deals only with the topic of linguistic genocide which, relevant as it is for some parts of the world, is only a part of the overall picture. Apart from that, until recently I knew of only my own play, *Living On* (1998).³ But in November 2010 there was some progress: in Australia, Kamarra Bell Wykes’ play, *Mother’s Tongue*, was staged in Perth by the Yirra Yakin Aboriginal Corporation; and Julia Cho’s The Language Archive was staged in New York – really about personal relationships, but its lead character is a linguist constructing an archive of endangered languages.

However, we have to be realistic. Language death is not mainstream theatre. It is not mainstream anything. Can you imagine Hollywood taking it on? It is so far outside the mindsets of most people that they have difficulty appreciating what the crisis is all about, because they are not used to thinking about language as an issue in itself. Somehow we need to change these mindsets. We need to get people thinking about language more explicitly, more intimately, more enthusiastically. Interest in language is certainly there, in the general population – most people are fascinated by such topics as where words come from, or what the origin of their town’s name is, or whether their baby’s name means anything; they are certainly prepared to play Scrabble and a host of other language games ad infinitum; and language games are often found on radio and television – but a willingness to focus that interest on general issues, a preparedness to take on board the emotion and drama inherent in the situation of language endangerment, is not something that happens much. This a goal which artists can help us reach.

‘The arts are the greatest untapped resource that we can exploit’

I believe the arts are the greatest untapped resource that we can exploit to help us do what has to be done. We know the urgency. We need the input of artists, and we need it

² See the website at <http://www.rachelberwick.com/Maypore.php>

³ http://www.davidcrystal.com/DC_articles/Creative9.pdf

now. Somehow – perhaps through UNESCO – the artists of the world need to be mobilised in our support, using all the resources at their disposal. Artists are extraordinary people. Once you catch their interest you do not have to persuade them to act. By their nature, they cannot not. The trick is to draw their attention to the fact that language, as such, is an issue. Give an artist an opportunity and he/she will take it. The problem is that, in so much work, opportunities are missed – not because of any active antagonism towards the language question, but simply because people have just not thought of it as an issue. A few years ago I returned from Brazil clutching a beautiful glossy art-book of photographs on the country, in which the writer and photographer had gone out of their way to find communities and environments at risk. Not a single mention of the Brazilian language crisis, in the whole book. There were statistics about the amount of rainforest which was disappearing, but none about the number of languages which were disappearing. The writer, I suspect, had simply not noticed it, or had taken it for granted, or had forgotten about it. The photographer had not even conceived of the exciting artistic challenge of attempting to pictorialise it.

We need the arts to help us get our initiative into the two domains where it can make greatest impact – the home and the school. How to get awareness of the language crisis into the home? I know of only two ways of easily getting into people's homes: the Internet and the arts. The Internet is an important and still under-used resource for our theme, but it has its problems: it is still not available to a huge proportion of the human race; it can be slow and cumbersome, especially in downloading multimedia material; and those of us who do use the Internet routinely know how difficult it is to get a simple message across – or even noticed, within the floods of pages that exist. But the arts can get into the home every day in all kinds of mutually reinforcing ways – whether it be via a radio or television programme, a CD or DVD, a computer game, a calendar, a wall decoration or painting or photograph, a novel, a postcard, or a text-message poem (currently one of the coolest of artistic mediums among the young). There are so many opportunities, and so few have yet been exploited. We need to exploit them – and at all levels, including the most mundane. Where are the birthday cards related to language diversity? Where are the calendars? Charity, an English proverb says, begins at home. We must adapt that. It should be: Diversity begins at home. A splendid example of what can be done is the material produced by the Subject Centre for Languages, Linguistics and Area Studies at the University of Southampton – including a beautiful calendar, 'Why study languages?'⁴

I was writing the first draft of this paper just after Christmas, and I looked around me at the things which had come into my home at that time. One of the most noticeable arrivals were the Christmas cards. I looked at the ones we had received. Several were bilingual or multilingual, but the languages were all healthy languages, full of *joyeux noels* and *fröhliche weinachtens*. Why is there no Christmas card in which last speakers wish us happy holidays, in their languages, possibly for the last time? Why have I never seen a card wishing me happiness in Aramaic, the language of

Jesus and his disciples, a language which is so near to extinction in the present-day Middle East that, if he were to return using his mother-tongue, he would soon find no-one able to understand him? Let me leave Christmas behind. Why have I never seen an artistic oeuvre in which we see portrayed, for example, the communication gap between grandparent and grandchild, or any of the other striking images which characterise this field?

And the school? Here we need to get the issue into the curricula, and into routine classroom experience. I mean by this that it should be an obligatory part of the school curriculum to deal with language diversity, and that it should be a regular topic considered in school assemblies, open-days, exhibitions, and suchlike. Art projects can help here too. I have seen a whole art exhibition by children on the theme of wildlife extinction. It made front-page news in our local paper. Why not an exhibition on language extinction? The subject-matter of language is making some progress in schools. In this country, the English Language A-Level exam contains a great deal on language change, diversity, and endangerment. But age 16 is too late; awareness of the biological crisis is in schools at age seven. It should be the same with language. It is not too abstract a subject. I have heard seven-year-olds debating the language crisis, thanks to a skilled presentation by their teacher. All teachers should be doing this, and we need to be helping them, by providing materials and examples of excellence in practice. We are used to writing about language diversity for adults. How many of us have ever written on language diversity for children? The role of children to any ecolinguist is patently obvious: they are the parents of the next generation, so the sociolinguistic reality of the inter-generational transmission of language depends primarily on them. If they can be enthused about their native languages and language diversity, or have their enthusiasm maintained, we can be optimistic about any scenario for diversity and sustainability. By providing opportunities for language-specific chatrooms, making available multilingual websites, and doing all the things that the Internet enables us to do, we can make considerable progress.

*

I would like to conclude this paper by making three recommendations. First, bodies interested in language diversity should commission an artwork of some kind to symbolise its content, or perhaps mount a competition. It would, in its recorded form – whether on paper or electronic – be a permanent reminder to their members as well as a means of spreading the message to others. I have discussed the kinds of artwork that might be envisaged, so I say no more about this point now.

Secondly, there needs to be a major award for language. Whether we like it or not, we live in an age of competitions and awards, and these produce some of the most watched programmes on television. Who is not aware of this year's Oscar nominations? Who in our newly extended Europe does not know of the Eurovision Song Contest? Not only are there Oscars, there are Grammys, Emmies, Golden Globes, Bookers, Pulitzers, Goncourts, ... We seem to be obsessed with

⁴ <http://www.whystudylanguages.ac.uk/calendar2011>

awards, but they work. The annual award of the Turner prize in Britain, in its often controversial decisions, has generated an extraordinary amount of discussion about the nature of visual art. The point hardly needs labouring, so let me make it briefly. I have already made it at UNESCO, but if an idea is worth saying it is worth saying twice, so let me repeat it. There needs to be an annual prize for artistic achievement in relation to language diversity, at Nobel level, to be announced perhaps on World Language Day (26 September). Let there be something, anything, concrete, to focus public attention on the language crisis. A dimension of this kind, I believe, would complement our professional linguistic activities, and ultimately aid them, for public awareness and sympathy is prerequisite if we are to alter the intellectual, emotional, and financial climate within which we have to work.

Thirdly, we need a physical location. If you are visiting London (or many another major city), and you are interested in science, where might you go, to follow-up your interest? The Science Museum, at least. And if you are interested in Natural History? The Natural History Museum? And art? The Tate Gallery. And Shakespeare? Shakespeare's Globe. But there is no language 'space' – no Language Museum, or Gallery, or whatever you would like to call it. There is no space where people can go to see how language works, how it is used, and how languages evolve; no space where they can see presented the world's linguistic variety; no public place where they can meet like-minded people and reflect on language diversity, sustainability, and peace.

A proposal for such a space, called World of Language, was promoted during the late 1990s in the UK. This would have been a multi-storey building, the first of its kind, with floors devoted to the world of speech, the world of writing, the world of meaning, the world of languages, and the world of language study. A building had even been identified, in Southwark, right next to Shakespeare's Globe. The plans had reached an advanced stage, with the support of the British

Council, and all that was required was a small tranche of government funding (£20 million) to get the project off the ground. Things were looking promising. But then the government had a better idea. It was called the Millennium Dome. The money which was wasted on the Dome project would have supported 20 'worlds of language'.

The world needs houses of language for the same reason that it needs expositions of all kinds, from the arts to natural history – to satisfy our insatiable curiosity about who we are, as members of the human race, where we have come from, and where we are going, and to demonstrate that we, as individuals and as communities, can make a difference to life on this planet. We expect, in a major city, that there will be a museum or gallery or other centre which will inform us about the main fields of human knowledge and creativity – to show us what others have done before us and to suggest directions where we can stand on shoulders and see new ways forward. Most of these fields, indeed, now have their expositions. But language, for some reason, has been seriously neglected – until now. Barcelona opens its Casa de les Llengües next year. In the USA, there is a National Museum of Language. Last month I heard of a proposal to establish one in Paris. In the UK, so far, there is nothing. And my final recommendation is that somehow, somewhere, somebody creates one.

Note:

This paper is a revisiting of my UNESCO keynote of 2003, incorporating material from papers delivered at Barcelona to Linguapax in 2004, at Reykjavik to the Dialogue of Cultures forum in 2005, and again at Barcelona to a UNESCOCat forum in 2007.

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Tackling tipping points

Professor Tim O’Riordan FBA and Professor Tim Lenton explain the importance of ‘tipping points’ in understanding convulsive change in the world, and offer a manifesto for creating ‘benign’ tipping points to prepare us for future shocks.

Setting the scene

The phrase ‘tipping point’ is gaining popularity, and might ironically have undergone its own tipping point in usage. Tipping points are processes of dramatic change, with their own timescales of onset and transformation, which are often abrupt with unpredictable consequences when seen from a human perspective. Tipping points may manifest themselves across the whole globe, regionally, or locally. They may come in the form of planetary processes, of ecosystem transformations, of military, terrorist or convulsive political action, or of shifts in cultural outlooks and social behaviour.

But this plurality of uses can readily undermine any meaning ‘tipping points’ carries, causing confusion and producing a predictable academic backlash. In response, a recent British Academy/Royal Society seminar regarded tipping points as metaphors for interpreting unexpected, abrupt transformations, using the medium of narrative and creative imagination, but also based on scientific observation and modelling. Thus, tipping points are means of dealing with causes and consequences that are out of the range of ‘normal reasoning’ and expectation.

This conceptualisation was epitomised in the run up to the seminar. In a preliminary meeting held at the British Academy on 4 January 2011, one of the presenters called for the need for a ‘revolution’ in our relationship with the Earth system, and was somewhat ridiculed for being the first person to talk about ‘revolutions’ at the British Academy in decades! Within weeks the Arab Spring had budded, and by the time we met again in April at the Kavli Royal Society International Centre, everyone was talking about unexpected revolutions.

The Kavli seminar characterised tipping points in three ways. The first relates to the science of global physical and social systems, their measurement and predictability, singly or in combination. The second applies to the social science of governance and the means of anticipating and adapting to possible shifts in system states. The third addresses the creative processes of reconstructing social behaviour and mores, which either lessen the likelihood of potentially threatening states ever taking place, or increase the resilience and adaptability of societies to adjust to them.

Lying behind this framing of tipping points is a set of propositions. Firstly, we may be creating conditions of economy, of government, of social conditioning, and of

ethics, which actually contribute to the likelihood of tipping points occurring in physical and social conditions. Secondly, the ways in which we seek to adapt, because of this inbuilt tendency toward greater vulnerability, also lead to more intense combinations of both social and physical or ecological stresses. Thirdly, we have yet to find suitable means for communicating the various narratives, giving meaning to tipping points in all of their manifestations, which can then lead to constructive adaptation.

However, our final proposition is that it remains possible for a series of ‘benign’ tipping points to be combined, so as to prepare society for new approaches to preparation and adaptation that can stave off the onset of ‘malign’ tipping points, in favour of robust, resilient and accommodative social values; fresh approaches to appropriate behaviour; and more flexible and considerate governing procedures.

What are tipping points?

Little things can (sometimes) make a big difference, as Malcolm Gladwell’s book that popularised societal tipping points argues.¹ Mathematicians, with their concept of a bifurcation point describing a sudden shift in system conditions, have known this for centuries, as have physicists fascinated by phase changes of matter. More recently ecologists have borrowed from bifurcation theory in order to describe ‘regime shifts’ in ecosystems. Gladwell takes his cues from epidemiology, and the theory of infection spread, which has different underlying mathematics. Dynamical systems theory encompasses these and other classes of physical phenomena, which all share a common feature; a small change within, or from outside, a system can cause a large change in its future state.

Thus, from a scientific perspective, a *tipping point* is a critical threshold at which the future state of a system can be qualitatively altered by a small change in forcing. Tipping points can conceivably occur in any spatial scale of system which has strong non-linearity in its internal dynamics. A *tipping element* is a part of the Earth system, at least sub-continental in scale, which has a tipping point. Policy-relevant tipping elements are those that could be forced past a tipping point this century by human activities. In the language of the Intergovernmental Panel on Climate Change (IPCC), they are called ‘large scale discontinuities’, and are one type of dangerous human interference in the climate system.

¹ M. Gladwell, *The Tipping Point: How Little Things Can Make a Big Difference* (New York: Little Brown, 2000).

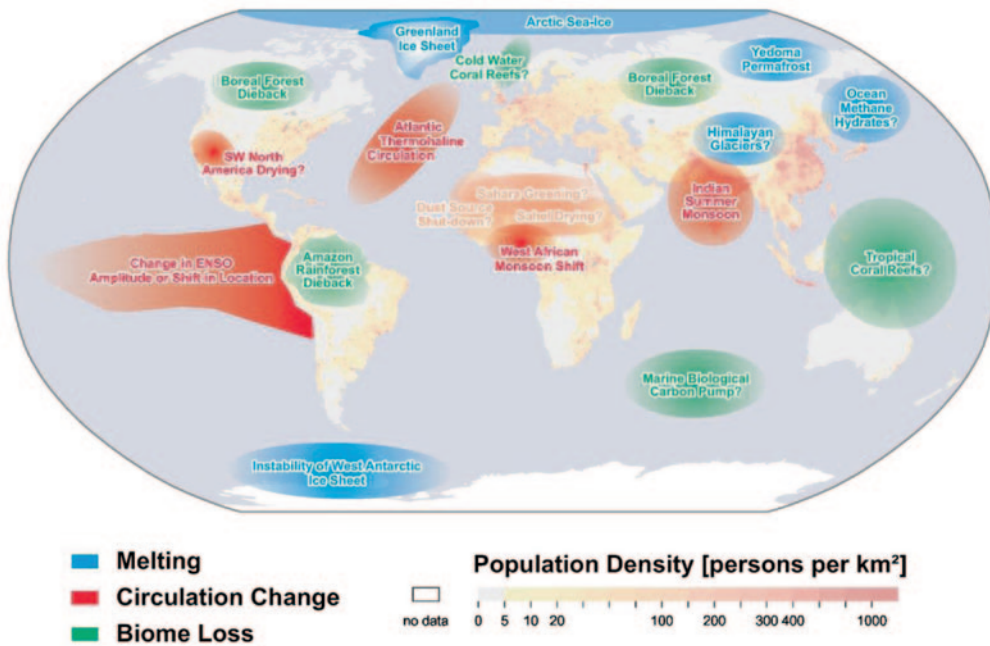


Figure 1. Map of potential policy-relevant tipping elements in the Earth's climate system overlain on population density. Question marks indicate systems whose status as tipping elements is particularly uncertain. (Figure by V. Huber, T. M. Lenton and H. J. Schellnhuber.)

A shortlist of potential policy-relevant tipping elements in the climate system has been drawn up,² which could pass a tipping point this century, and undergo a transition this millennium under projected climate change. They are shown, along with some other candidates, in Figure 1, where the tipping elements are grouped into those that involve ice melting, those that involve changes in the circulation of the ocean or atmosphere, and those that involve the loss of forests and other biological complexes.

We should be most concerned about those tipping points that are nearest (least avoidable), and those that have the largest negative consequences. Generally, the more rapid and less reversible a transition is, the greater its impacts. Also, any amplification of global climate change may increase concern, as can interactions whereby tipping one

element encourages tipping another, potentially leading to 'domino dynamics'.

Figure 2 provides an assessment of the likelihood of tipping nine different tipping elements, in the range of possible increases of global temperature over the rest of this century. Current assessments suggest that Arctic tipping points involving ice melting are probably most vulnerable, with the least uncertainty surrounding eventual occurrence. However, the greater uncertainty surrounding other tipping points allows for the possibility that some of them may be close as well.³

These two diagrams briefly summarise the current state of knowledge of the set of Earth system 'dangers' facing humanity during the coming century. But it can be misleading, and indeed even disingenuous, to equate the

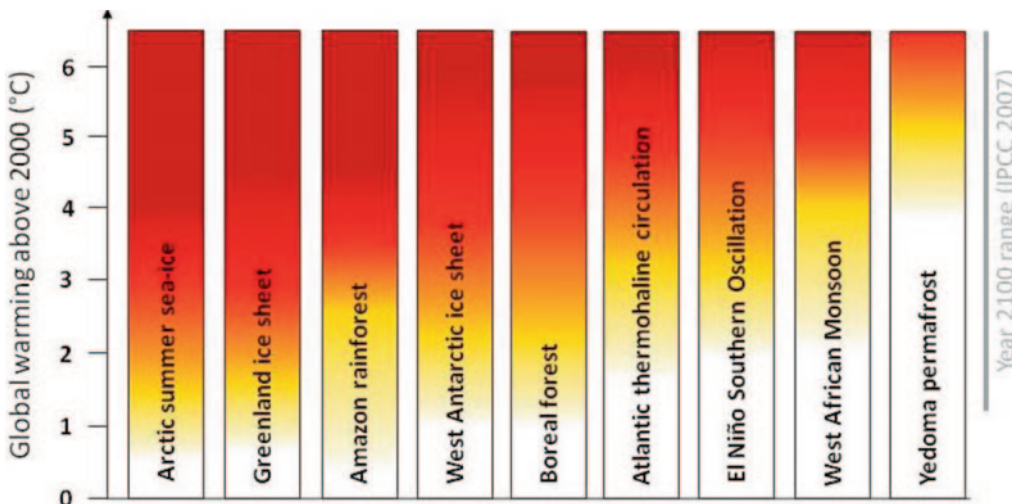


Figure 2. Burning embers diagram for the likelihood of tipping different elements under different degrees of global warming. (Figure by T. M. Lenton and H. J. Schellnhuber.)

² T.M. Lenton *et al.*, 'Tipping Elements in the Earth's Climate System', *Proceedings of the National Academy of Sciences USA*, 105 (6), 1786-1793 (2008).

³ More detailed information can be found in the results of an expert elicitation, which extracted and aggregated imprecise probability

statements from experts in a process of dialogue and reassessment. E. Kriegler *et al.*, 'Imprecise probability assessment of tipping points in the climate system', *Proceedings of the National Academy of Sciences USA*, 106 (13), 5041-5046 (2009).

mathematical and system-based dynamics of natural phenomena, to social arenas such as financial markets, inter-governmental relations, or human behaviour. Quite distinct formulations of tipping points are needed for any aspect of human affairs. Yet there is a form of interpretation, or narrative, here that connects system dynamics to social conditions. One of these communicating themes is *resilience*, another is *predictability*, and a third is *preparedness*.

Resilience and early warning

Resilience is found in many ecological states that are temporarily stressed by, say, shifts in weather or by pest invasions. Numerous field studies and modelling exercises have shown that natural ecosystems have inbuilt mechanisms to facilitate a return to their original state. This is easiest to see where there is no additional external pressure, e.g. human intervention. However, resilience is not infinite, and human pressures can drive ecosystems past tipping points into alternative states. In such scenarios, resilience is steadily lost before the tipping point occurs. Afterwards it becomes much harder to return a 'tipped' ecological state to its earlier condition.

Crucially, the zone of declining resilience that takes place before a tipping point occurs produces identifiable early warning signals. Two indicators are being pursued by researchers. One is a slowing down of the rate of recovery following a perturbation. The other is an increase in the variability of a system. Of the two, slowing down in response to perturbation is the most general property of systems approaching various types of tipping point.⁴

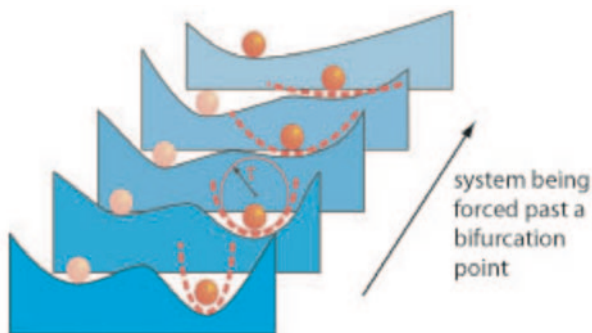


Figure 3. Schematic representation of a system being forced past a bifurcation point. The system's response time to small perturbations, is related to the growing radius of the potential well. (Figure by H. Held and T. M. Lenton.)

To visualise this, picture the present state of a system as a ball in a curved potential well (attractor) that is being nudged around by some stochastic noise process, e.g. weather (Figure 3). The ball continually tends to roll back towards the bottom of the well – its lowest potential energy state – and the rate at which it rolls back is determined by the curvature of the potential well. As the system is forced towards a bifurcation point, the surface of the potential well

becomes flatter. Hence the ball will roll back ever more sluggishly. At the bifurcation point, the potential becomes flat and the ball is destined to roll off into some other state (alternative potential well).

Slowing down can be detected as increasing temporal or spatial correlation in data, increasing memory, or a shift to greater fluctuations at lower frequencies. Such signals have been successfully detected in past climate records approaching different transitions, and in model experiments.⁵ This offers the prospect of probabilistic forecasting of some conceivable future climate tipping points, especially if such statistical early warning indicators can be combined with dynamical modelling. However, not every type of abrupt transition carries early warning signals. We need to be aware that the Earth system can sometimes bite without growling beforehand.

Societal early warning

Early warnings of tipping points in social, economic and governmental activities are inherently more difficult to spot. It may be possible to witness unstable fluctuations, or vulnerable networks of communication and responsiveness.⁶ These were recognised, retrospectively, in the run up to the banking and financial crises of 2008/9, but no explicit early warning was given. Furthermore, the banking world seems to have proved highly resilient, even to the point of raking up huge profits and paying out massive bonuses on the back of assured support funding from taxpayers. Its resilience, it seems, is not inherent, but awarded by political necessities and economic dominance.

Predicting how human behaviour or institutional response may shift in relation to any given destabilising agent is largely beyond modelling, although some analysts of complex systems are trying to do just this.⁷ What can be tackled, however, is better provision of targeted information concerning the resilience of institutional design, of management structures, and of communications procedures, so that socially just and sustainable approaches to adaptation can be put in place before it is too late. Network theory and ecology can help here, but really there is no substitute for good case history of successful practice.

We are particularly concerned with tipping points that involve combinations of stressed or unstable social and economic patterns, coupled to steadily more unstable Earth systems processes. For example, the viability of soil, fresh water, and marine life to maintain the food requirements of an increasing human population, some of whom are becoming wealthier and demanding more of the natural world in their changing diets. Or the scope for deep economic and social instability linked to rising costs of obtaining energy and declining availability of other commodities, in the context of widespread indebtedness and likely debt restructuring.

We need to clarify the evidence for instability in both human and natural conditions, especially where there is

⁴ M. Scheffer *et al.*, 'Early warning signals for critical transitions', *Nature*, 461, 53-59 (2009).

⁵ T.M. Lenton, 'Early warning of climate tipping points', *Nature Climate Change*, 1, 201-209 (2011).

⁶ R.M. May, S.A. Levin & G. Sugihara, 'Ecology for bankers', *Nature*, 451 (7181), 893-895 (2008).

⁷ For example <http://www.er.ethz.ch/>

early warning of convulsive change (see Figure 4). This suggests more effort should be placed on:

- identifying possible early warning signs of longer recovery times, increased variability, and skewed distributions leading to tipping points, and lag effects between an initiating force and a consequent reaction (such as lowering of catch rates for increased fishing activity);
- clearer communication of both the modelling and the measurement of natural system tipping points, by means such as better informed 'risk matrices' of possible dangers, or through carefully phased procedures so as not to cause false alarm or unhelpful denial;
- preparing better for resilience in both the management of natural processes and natural resources, as well as for more social justice in response efforts, with appropriate means for monitoring and reporting for the most endangered species and vulnerable humans;
- creating appropriate social, economic and governmental institutions that can design and implement significant adjustment in the face of combinational tipping points;
- recognising where power and institutional brittleness or 'lock-in' impedes the sensitivity for recognising early warning, and any indigenous capability for building in resilience;
- addressing the consequences of technological 'lock-in', or 'sunk costs', where too much financial commitment is made to investments that impede more adaptable solutions;
- communicating the benefits of early action and the advantages of preparedness, whether in terms of future costs saved, or in political favour, or through more malleable institutional arrangements.

Barriers to adaptation

If we can work through the various metaphors of thresholds, bifurcation and convulsion, we then need to address the complementary thresholds of adaptation, accommodation, and adjustment to the unfamiliar. The Intergovernmental Panel on Climate Change regards adaptation as having three purposes: to reduce exposure to known or possible hazard; to develop a capacity to cope with unavoidable damage (the costs that cannot be removed by reduced exposure); and to take advantage of new forms of living and governing, so as to seek to redesign tipping point 'threat' out of the system. The process of adaptation can be *spontaneous*, namely inbuilt autonomous and reactive; or *planned and managed* through deliberate policy decisions and investments based on reasonable precaution or prediction; or *anticipatory* in that there is long term accommodation of human activity and behaviour.

However, there is currently little institutional clarity for any meaningful and comprehensive approach to adaptation and the removal of vulnerability. Institutions have grown too complex, the removing of disadvantage and injustice in any human condition is deeply difficult, and there is huge political and economic investment in 'sunk costs'.⁸ For example, it may be heroically expensive, and possibly crippling to recession-sensitive economies, to replace the current energy grids of pipes and power lines with the interconnected 'smart grids' of a fully renewable energy age. Current nationally protected energy markets may not be able to transform themselves into region-wide multinational power-conveying systems, where sharing both energy and costs would cross national borders. Established notions of national citizenship might politically preclude multinational shared energy pricing and subsidy.

There is also an individual and group psychology promoting 'lock-in' and societal vulnerability. Self justification, cognitive dissonance (by justifying the incongruous and self-evidently false, to protect reputation and in-group solidarity) and denial, especially when confronted with a common threat, are all important. Together they result in a gambler-like tendency to commit to failing bids, to procrastinate, or to continue with small and incremental maladjustments, even in the face of group calamity.

Human patterns that rely on large settlements, now the dominant norm, are vulnerable to the sheer inertia of rapid adjustment. The possibility of parts of the West Antarctic ice sheet collapsing over a period of decades, with concomitant rises of sea level of a metre or more (unlikely but not unimaginable), would place megacities such as Shanghai, Dhaka, Jakarta and Mumbai in an adaptation pickle. There is at present no institutional machinery for dealing with food provision, fresh water, transport or waste, to say nothing of the relocation of many millions of people dependent on many forms of well established community and family structures, in the timescale of a couple of decades. To seek to do so with fairness and justice, whilst aiming at giving everyone the opportunity of adopting sustainable livelihoods is almost unimaginable. Indeed the very models of development, as evident in modern China, are reinforcing vulnerable patterns of force-fed urbanisation to the detriment of more accommodative small settlements. Sunk costs deliver vulnerability, institutional brittleness, resource over-exploitation, denial of impending collapse, and deep inequality. These are all mal-adaptive and can induce favourable conditions for tipping points.

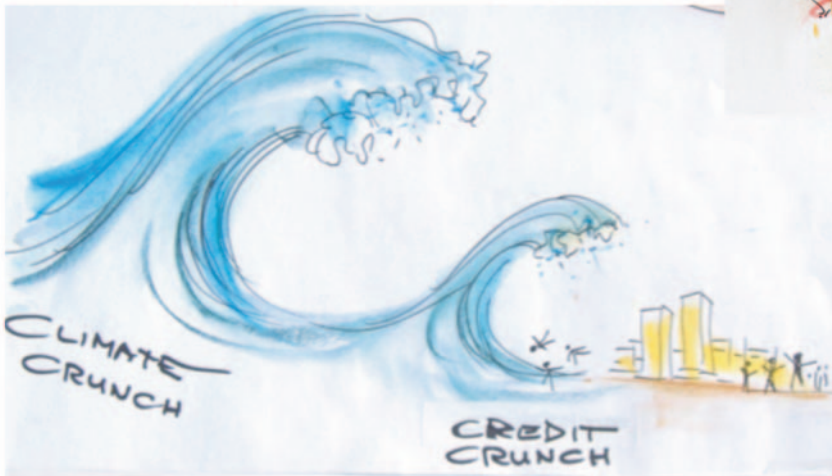
The literature on the collapse of earlier human settlements seems to settle on the role of adverse events (even when predictable); the excessive size of collapsing settlements; and on evidence of over-exploitation of resources immediately before catastrophic deficits. All of this suggests that the metaphor of adjustment, either through planning and management, or by anticipation and pro-activity, may be very difficult to implement for resource-intensive, high-density, rapidly developing, and

⁸ Marco A. Janssen, Timothy A. Kohler & M. Scheffer, 'Sunk-Cost Effects and Vulnerability to Collapse in Ancient Societies', *Current Anthropology*, 44 (5), 722-728 (2003).

Tipping points and human perspectives

We need to observe the tensions building up

We need to work out which out of many is going to tip



It's a tipping point !!!

No, it's part of an ecological cycle !!

And how come we didn't see it coming??

Who hid the signals and why??

Resilience vs lock-in

Is it a clash of paradigms, or just a complex system ??

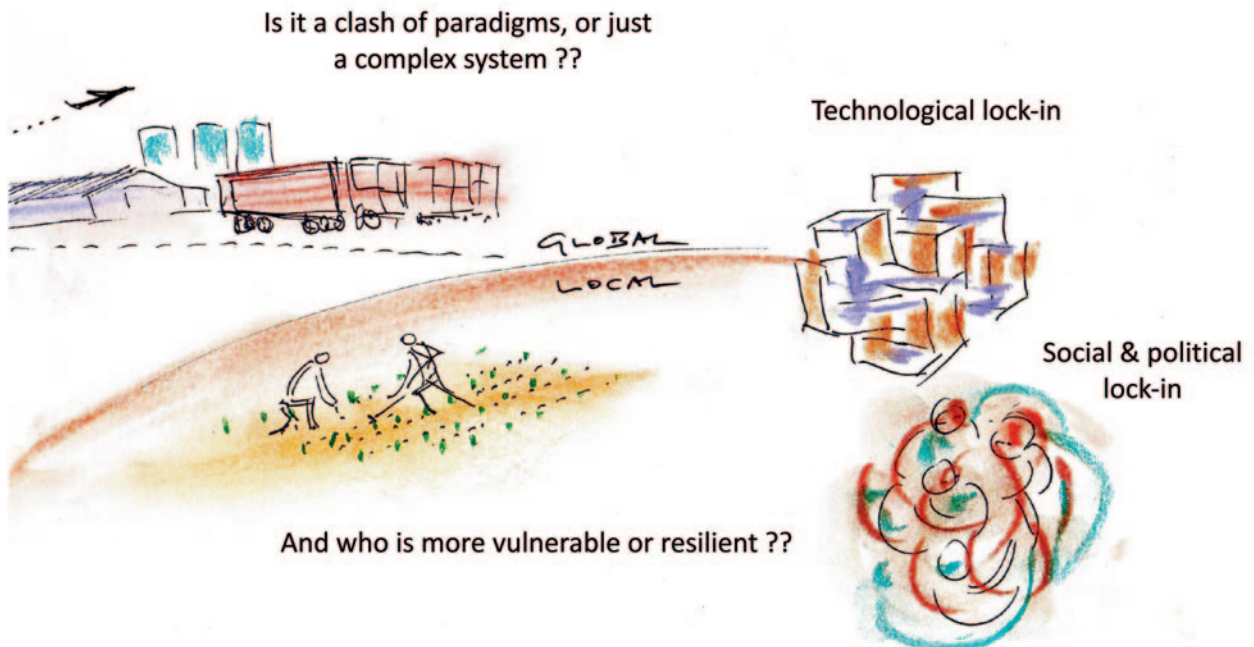


Figure 4. Two of the slides in which Dr Joe Ravetz (University of Manchester) sought to capture in 'A Visual Journey' some of the concepts discussed at the April 2011 seminar. The authors are very grateful to Dr Ravetz for allowing them to include the slides here.

information-technology-dependent societies – the very conditions being replicated on a daily basis in the contemporary world. So it is possible that we are creating the very elements of destabilising tipping points in our maladaptive responses.

Islands of successful transformation

There is no single template for anticipating and adjusting to tipping points. Tipping points come in all types of places, of cultural histories, and of social and economic conditions. So we need to follow examples of successful anticipation of, and adjustment to, impending tipping points, in order to offer the best set of learning experiences for others to follow. There is therefore a case for a constructively portrayed tipping point website that discovers and explores these ‘islands of successful transformation’; a website that tells us just how tipping points were characterised, pursued, thought through, and communicated for appropriate and democratically agreed accommodation and adjustment. There is, as yet, no dedicated arena for sharing experiences of successful ‘benign’ tipping points at regional and communal scales.

Such a communications channel should cover:

- the appropriate conditions for addressing the likelihood of tipping points;
- region-based governmental responses,
- the warning signs, especially for combined natural and human-induced tipping points;
- the communications approaches for informing society, government and markets;
- the use of schools, the media, community networks, social networks, and other discourses such as the creative arts, to outline the benefits and consequences of action and non-action, in ways that are supported by those who might not usually respond positively;
- monitoring responses for both resilience and fairness, as well as for ensuring that the outcomes are not likely to create malign tipping points.

All of these features should help to open up the dialogue on tipping points, in order to foster better understanding and more confident ways of responding.

Currently, it is not proving easy to communicate the possibility of dangerous tipping points. The loss of public interest in climate change is but one case in point. Telling the same story too many times creates apathy, disinterest, boredom, or even resentment. Changing the nuances of the story carries the danger of confusion, bewilderment, loss of focus, and disorientation, all of which can prove counter-productive. There is no simple solution to this dilemma, which seems to be inherent in the ways in which communications media address the concept of tipping points. However, there is a case for a much more positive portrayal of the gains and advantages for everyone of timely anticipation.

It also means making much more use of social networking, so that people can talk to each other with inventiveness, imagination and experimentation. It is just possible that the technology of the emerging age will enable ‘localism’ within mega-structures to flourish, so that communities can design their capabilities and renewal in their familiar spaces and comfort zones. The ‘village urban’ could come of age.

Leaders as agents of transformation

Without leadership there can be no effective ‘islands of successful transformation’. The most effective leadership is a combination of the individual and the communal, linking the present to the past and the future in a continuous creative flow. Leadership means providing for confidence, for capability, for the flourishing of innate and learned qualities of virtue and goodness, and for the empathy of compassion and solidarity.

The aim is to create the conditions for learning individually and collectively, in forms that provide the skills to shift behaviour as well as the incentives and infrastructures that enable everyone to change their outlook, moral positioning, and behaviour. This means in turn giving people the tools to think ahead, to be more strategic in their lives, to be ready to learn from others, and to be confident in their positive deviance. One focus for attention is to ensure that locally fashioned solutions are not impeded by global multi-national structures of finance and disincentives that block valuable innovation and community-supported behavioural change.

Adapting institutions for transformation

Successful adaptation to tipping points cannot be achieved by existing institutional arrangements. Whether in governing, in market formation, in social communication, or in guidance for futures beyond the horizon, current institutions will need to be merged, reformulated, reconstructed and redesigned. This means a willingness to try the unknown, to experiment with innovation, to measure differently, and to monitor with justice in our sights. There needs to be a process of ‘institution appraisal’ for coping with tipping points in all of their variety, unusualness and unexpectedness. In particular, the markets and the pay-off to shareholders will require adjustments to be sure that any gain today does not compromise betterment for future generations. The building in of advance preparedness in markets, in pricing, in hedging, and communicating the richness of foresight, will be a true test of institutional transformation.

We need more examples of experimentation in governmental forms. There is much ‘out there’ to be explored. Adaptive governance is both socially fair and socially trusted – two elements of state governing that are in very short supply. Ensuring human dignity in adaptive governance is a vital aspect of the process of devising benign tipping points. We need the eyes and the wisdom to see

these early shoots of innovation. They are unusual and hence not always easy to spot in the cacophony of the status quo. Here again there is an urgent need to reconnoitre and to report through the 'islands of successful transformation' learning process.

Conclusion

The transformation we call for may not be possible in present arrangements of social existence and economic development. Perhaps current models of governing, of power relationships, of path dependency and of markets, critically impede such transformational narratives. We need to reveal just what bifurcations can be anticipated and designed, at least experimentally, just to see what is possible, even in a world of impossibilities.

As we have noted, this will require leadership of quite an unusual kind – leadership that is deviant from normal managing styles, where social enterprise of a more imaginative and experimental kind is permitted to emerge and to be tested and supported. It means a willingness to accept the learning and adaptiveness of failure, both on an individual and collective level. It suggests the creation of service provision and of infrastructure that has capacity to cope with unusual and unexpected circumstances. It means a willingness to create 'benign sunk costs' that deliberately adjust to maximise adaptability.

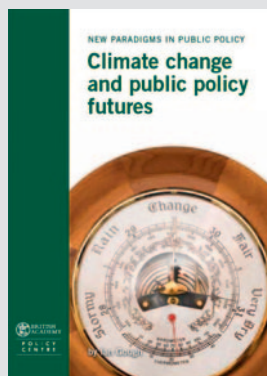
Tipping points are metaphors. They convey scientific rationality, they encourage creativity, they engender

storytelling, and they alert us to our inherent failings and mal-adaptive practices. Tipping points will test democracies: from being electoral to ecological, from pursuing the immediate and the gratifying; to preparing for fairness and accommodation: to seeing the spiritual in the behavioural; and for shaping together a localising and globalising world that can endure.

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Tim Lenton holds the Chair in Climate Change/Earth Systems Science at the University of Exeter.

The British Academy and Royal Society seminar on 'Tipping Points' was held at the Kavli Centre on 13-14 April 2011. The meeting involved 35 distinguished participants, and 15 presentations were given from a very wide range of perspectives – from the scientific modelling of Earth systems to economics, politics, communications, governance, spirituality, and human behaviour.



Climate change is one of the great global policy challenges that humanity faces. As part of the British Academy Policy Centre's *New paradigms in public policy* project, Professor Ian Gough addresses the issues it raises for the UK in his report *Climate change and public policy futures*, published in July 2011.

Gough lists four impacts of climate change on the public policy environment in the UK: direct impacts in the UK, the

results in the UK of impacts overseas, the impacts of adaptation policies, and the impacts of mitigation policies.

Climate change mitigation policies (CCMPs) – acting to reduce greenhouse gas (GHG) emissions or increase greenhouse gas sinks – will have the greatest impact in the medium-term on domestic living standards and on UK public policy. And even though the UK was a leading country in achieving reductions in CO₂ and other GHG emissions from 1990 to 2005, it will still be tough to reach the 2050 target, which means the UK needs to 'up' the effectiveness of its mitigation policies.

In theory there are at least three methods of influencing GHG emissions: market incentives; information, education and behaviour change; and direct regulation. Current government policy places an emphasis on economic incentives, but could do significantly more by way of the other two methods.

So how should we proceed? Gough argues that, as a political-economic model, 'green growth' is the most realistic way forward for the UK. While normal economic growth is accompanied by significant carbon emissions, green growth is based on the premise that increased economic activity does not have to mean an increase in such emissions. New technologies, reframed carbon pricing and policies to change consumer behaviour can all help.

Eventually, we may well reach a point where the tensions between growth and our finite planet will lead the West to question the feasibility of pursuing any sort of economic growth. But even before we reach that stage, climate change is unparalleled in the character of the problem it represents, and in its capacity to affect UK public policy.

Climate change and public policy futures is available to download at www.britac.ac.uk/policy/climate-change-and-public-policy-futures.cfm

How do different kinds of societies cause and mitigate environmental change?

The case of the lost woodlands of ancient Nasca

DR DAVID BERESFORD-JONES

EVERY YEAR thousands of tourists fly over the great landscape of geoglyphs that lie marked upon the surface of the vast desert Pampa de San José on the south coast of Peru. Some are beguiled by spurious fabrications that these were made by alien visitors or by other products of the New Age fantasy. The truth behind the so-called ‘Nazca Lines’, however, turns out to be far more interesting. For this was a sacred landscape: a palimpsest of ancient pathways followed during the fertility cult rituals of a confederation of societies that flourished brilliantly for the first half millennium AD along the riverine oases that cross this painted desert.

We may read something of ancient Nasca in the iconography of its artefacts – truly beautiful ceramics and textiles, almost miraculously preserved in this arid desert climate – which display a famously naturalistic artistic canon ‘celebrating the abundance of all life forms and the factors underlying agricultural fertility’, as two of the most prominent scholars of Nasca studies, Helaine Silverman and Donald Proulx, put it (see Figure 1). Yet, much else remains obscure about the society that made this wonderful material culture. Little of the huge corpus of Nasca material that resides now in museums worldwide was excavated scientifically. Almost all comes from looted tombs. Until recently Nasca was, as Silverman and Proulx note, a society as ‘invisible in life as it is visible in death’. And there is a bitter irony in Nasca’s fame by virtue of the ritual space of its geoglyphs on the empty desert, when the people who used them actually *lived*, farmed and collected elsewhere: amid a riverine forest ecology, of which little trace remains today (see Figure 3). This is the theme of research supported by the

British Academy and published now in the British Academy Postdoctoral Monograph, *The Lost Woodlands of Ancient Nasca*.

The research focuses on the Ullujaya and Samaca Basins of the lower Ica Valley, today depopulated and bereft of cultivation, and yet whose extensive archaeological remains attest to substantial ancient populations, thereby presenting a *prima facie* case for changed ecological and landscape conditions (see Figure 2). It seeks to answer the questions of when and how these changes took place, and, most vexed of all, why did they occur? For classic (or so-called ‘Early’) Nasca seemingly suffered a fracture and collapse into internecine warfare, ultimately to vanish from the archaeological record some five hundred years before the Incas came to incorporate the south coast into the huge empire that Europe encountered here in 1532.

Archaeological interpretations of Nasca’s demise have long invoked past El Niño events and subsequent droughts, because there are hints of such climate perturbations in ice-cores from the Quelccaya glacier, high in the Andes far to the east near Cuzco. Although actual evidence on the ground for these ancient flood events has been difficult to pin down, geomorphological survey of the lower Ica Valley does indeed record a mega-El Niño at around the end of the Early Nasca period. Yet there is also evidence that the impact of these climatic events was only precipitated by other, much more gradual changes – a sequence of human-induced events that underlay the so-called ‘collapse’ of the Nasca culture.

Excavation and archaeobotanical analysis of ancient rubbish middens – which enjoy extraordinary desiccated preservation in this arid climate – provide indications of what people ate and farmed here in the past. Along with

Figure 1. Detail of Early Nasca embroidered textile with birds, carrying in their beaks ant, wasp, beetle, root crops, cactus, fresh water shrimp, snake, chilli pepper, germinating bean, wild tomatoes, fish and possibly cotton, peanut, and achira. Drawing from ‘Early Nasca Needlework’ by Alan Sawyer, courtesy of Lawrence King Publishing.



pollen evidence, these also provide proxy evidence of wider ecological changes, thereby tracking cycles of agricultural intensification. For instance, a number of broad-leafed cultivars such as manioc, coca, indigo, guava and pacay occur in this archaeobotanical record and yet cannot be grown today in the lower Ica Valley because of its wind regime. Meanwhile, geomorphological study helps decipher the long-term histories of sediment deposition and erosion that have shaped the landscape of the lower Ica Valley today,



Figure 2. An ancient Nasca canal crosses a desertified modern landscape in the Samaca Basin, lower Ica Valley, south coast Peru.

and which can be dated by their associated archaeology.

Together, these data show how gradually, over the course of many generations, the natural riverine (or 'riparian') woodlands of the lower Ica Valley were cleared to make way for agriculture of maize and cotton, among other crops. In time, this gradual woodland clearance crossed an ecological threshold, sharply defined in such desert environments, exposing the landscape to the region's extraordinary desert winds and the effects of El Niño floods. For those woodlands were dominated by a remarkable leguminous tree of the genus *Prosopis*, the huarango. The huarango, which lives for over a millennium, is the ecological 'keystone' species in this environment – enhancing soil fertility and moisture, ameliorating desert extremes beneath its canopy and underpinning the river floodplain with one of the deepest and most extensive root systems of any tree. Without sufficient protection by huarango woodland, it is quite simply impossible to carry out sustainable agriculture here.

So while the lower Ica Valley case-study shows that a mega-El Niño may have pushed Nasca society across a tipping point, it also shows that its impact would have been far less devastating had the forests that protected the fragile desert ecology of these riverine oases not already been cleared. In the absence of woodland cover, the river down-cut into its floodplain, damaging irrigation systems and leaving the area unworkable for agriculture. It seems therefore that ancient society here partly wrought its own demise, thus contradicting the popular (and patronising) perception that native American peoples inflicted barely perceptible disturbance upon a New World Eden. Perhaps more

interestingly, however, the lower Ica Valley case-study allows inferences to be made about those specific contexts in which significant human environmental impacts in the New World did, and did not, arise. For aside from being essential to sustainable agro-ecology, huarango woodlands provided a host of invaluable resources including fruit that were processed into flour and beer, fodder for llamas, fine quality timber for construction, weapons and tools and a high-temperature steady-burning fuel. All of which begs the question of *why* people would so deplete woodland cover in the lower Ica Valley as to induce irreversible environmental change?

The archaeological record of the Early Nasca period describes a regionally constrained group of societies with little evidence of social hierarchy. Settlements were small and scattered throughout a landscape, which, whilst certainly agricultural, continued to be dominated by woodland. By far the greatest Nasca site was Cahuachi on the Río Nasca, some 25 monumental platforms built upon natural hills. Yet Cahuachi was no city or focus of large-scale integrated power, for archaeological investigations reveal that it held no significant permanent population. Rather, it was a sacred pilgrimage and burial place serving a number of independent societies participating in and sharing a single Nasca cultural religious tradition.

The iconography of that tradition beautifully depicts the fecundity of nature and agriculture on the south coast. Indeed, it suggests a world-view of little difference between the two: the bifurcation between 'nature' and 'culture' lying instead within our own philosophical tradition. The flora and fauna of the riparian woodlands are clearly and accurately depicted in all their rich variety: including felines and foxes, hummingbirds and all the creatures of the river and its banks such as swifts, egret, crayfish, frogs, catfish, tadpoles and even the wasps that gather mud at the river's edge (see Figure 1). The tree itself is depicted in one of the famous geoglyphs, while the distinctive forms of the huarango woodland subtly pervade the *entire* Early Nasca artistic canon – a canon that would seem to proclaim a profound 'riparian consciousness'. Early Nasca then would seem to mirror Jared Diamond's observation that 'small, long-established, egalitarian societies tend to evolve conservationist practices'.

By contrast, the subsequent Late Nasca period (c. 450–600 AD) shows great social changes. Cahuachi's cosmological hegemony broke down and it was abandoned. Settlement patterns were rearranged and the number of habitation sites fell. The long, conservative Early Nasca iconographic tradition fractured into competing sub-styles in which dramatic new iconography appeared, including more trophy-heads and other depictions of warfare. It is here then, in the Late Nasca Period, that we might look to see the first repercussions of the gradual process of landscape change traced in the archaeology of the lower Ica Valley. The scene was being set for a tipping point: which may well have come in the form of a mega-El Niño. Perhaps this set loose the

dogs of internecine ‘resource wars’, for which we can glimpse hints in the Late Nasca archaeological record. Moreover, this coincides too with the rise in south coast’s highland hinterlands of one of the largest ancient cities in the Americas, and the dawning of the Middle Horizon.

In the Middle Horizon (c. 600–1000 AD) an expansionist empire, centred in the Ayacucho highlands, arose to establish suzerainty over a huge swathe of modern Peru, much like the Inca Late Horizon some five centuries later. Its capital at Wari was vast, covering some 15 square kilometres, and had an estimated population of as much as 100,000 people (even five hundred years later, Venice, the largest city in Europe, had a population of perhaps 50,000). On the neighbouring south coast this Ayacucho Horizon reverberated particularly, where, as John Rowe observes, the archaeological record seemingly ‘marks the virtual replacement of one culture by a radically different one’.

And there is evidence, not least in the archaeobotanical record of the lower Ica Valley, that Wari’s expansion onto the south coast may have been driven in part by a desire to secure lands on which to grow crops such as cotton and coca which could not be grown in its Ayacucho heartland. Clearance of woodlands and conversion of the lower Ica Valley landscape to such monocrops would have been

enacted by a distant highland elite, as part of some state-imposed Middle Horizon policy to serve distant urban demands. It would therefore have been contrary to the traditional agricultural practices of the south coast and in ignorance of the prevailing biophysical characteristics that gave rise to those practices. That such a conversion would have had short-lived and disastrous results if carried out on any scale is implicit in what we know of the role of the huarango in maintaining the viability of the agroecosystems in this environment.

So it turns out that if we are to understand *why* environmental change occurred in the past we must understand the ‘cultural’ component within an ecological approach: how did different kinds of societies cause, mitigate and mediate environmental change through time? For certainly, serious impact upon the ancient woodlands of the lower Ica Valley culminates with the social changes wrought widely on the south coast of Peru by the Middle Horizon.

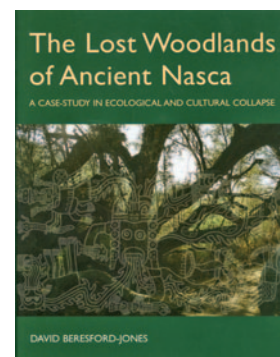
A final coda to this archaeological story is its powerful contemporary resonance. For today three-quarters of the population of the south coast are recent economic migrants. Populations have exploded through massive migration from the adjacent Ayacucho highlands. The consequences are falling water tables and tremendous pressure upon fragile natural and agricultural biomes, all of which increase vulnerability to extreme climatic perturbations. The last remaining ‘old-growth’ forest relicts on the south coast resound to the chain saws of illegal charcoal-burning operations. Floodwater irrigation systems have been neglected with disastrous consequences when El Niño floods do arrive. Common local plant names have fallen into disuse and the suite of pre-Columbian cultivars traditionally grown here is being impoverished, or lost. The result is a society dislocated from its local traditions of environmental and resource management. Indeed, just as it did in the archaeological record, today a new cultural ‘Horizon’ is unfolding on the south coast of Peru. We have, therefore, important lessons to learn here for the future from rediscovering past human relationships with their environment, through different social structures.

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Figure 3. An ancient huarango (*Prosopis limensis*) in Usaca, Río Poroma, Nazca, the last remaining fragment of old-growth woodland on the south coast of Peru.

The Lost Woodlands of Ancient Nasca: A Case-Study in Ecological and Cultural Collapse, by David Beresford-Jones, was published in June 2011 as a British Academy Postdoctoral Fellowship Monograph.



Motivation and global justice: Philosophy and practice

DR KERRI WOODS

THERE IS A persistent gap between what cosmopolitan theorists tell us would be a just world, and the world in which we live, where huge numbers of people (18 million, on one estimate) die of poverty-related causes every year. Indeed, there is a persistent gap between the actual transfers of resources between rich countries and poor countries, and the minimum obligations owed to the global poor claimed even by some critics of cosmopolitan thought. A central part of the argument against cosmopolitanism is the claim that cosmopolitan accounts of obligations owed by persons in the rich countries to the poorest persons in the world's poorest countries are not motivating. One predictable response that a philosopher might give would be to say that, while it is the job of a philosopher to work out what is just, it is the job of someone else, perhaps a social scientist, to explain why an actual agent fails to do what is just. However, to answer in this way is wilfully to miss the opportunity not only to engage in philosophically valid and valuable questions, but also to explore what philosophy can learn from empirical research and vice-versa.

On 22–23 June 2011 at the University of York, an international group of philosophers and political theorists met with NGO practitioners and human rights scholars to discuss questions around individual motivation and global justice, at a workshop sponsored by the British Academy and Society for Applied Philosophy. The participants included Professor Carol Gould (CUNY), Professor Susan Mendus FBA (York), Dr Katrin Flikschuh (LSE), Dr Graham Long (Newcastle), Dr Kerri Woods (York), Dr Simon Hope (Stirling) and Dr Lea Ypi (Oxford) amongst the theorists, with Kathryn Long (Save the Children), Jonathan Ensor (Practical Action), and Professor Paul Gready (York) amongst the practitioners.

The discussion centred on two principal themes. The first advertised theme concerned what political philosophy can contribute to addressing the problem of motivation in relation to global justice, and what philosophers and practitioners might learn from one another in this context. The second theme, which emerged throughout the workshop, might be called 'the ethics of global justice'. Thinking about how, philosophically, one might respond to the 'motivational gap' quickly prompted a series of broader and more complex questions that revealed a dissatisfaction with the field of global justice as it is predominantly pursued in Anglo-American analytical moral and political philosophy.

There were sceptical contributions, such as that from Simon Hope, who doubted whether the project of addressing motivation was properly one for political philosophy, or Susan Mendus, who worried that theorists of global justice were too much concerned with thinking about the ways in which we might be better people, and insufficiently alert to the kinds of value conflicts that the project of global justice really entails for those said to be under a duty to bring it about. There were also broadly optimistic responses, such as that offered by Carol Gould, who pointed to the existence of transnational networks of solidarity as a powerful source of inspiration, and a site of negotiation around what global justice means and what it demands.

It was clear in this and in other contributions that global justice understood as a question about how much 'we' in the rich countries, individually or collectively, ought to give, either financially or in terms of time and campaigning energy, is too narrow a question. Yet this is a question that recurs in the literature, taking a cue contemporarily from Thomas Pogge's influential work, and from a whole slew of papers and books that have debated the issue since at least the early 1970s – when Peter Singer famously argued that people ought to contribute all they could to aid persons affected by the famine in East Bengal (as it then was) without sacrificing something of comparable moral value.¹

This literature has been in part directed by numbers. In 2005 the economist Jeffrey Sachs claimed that world poverty could be ended by 2025 if all the G8 countries gave 0.7% of their GDP to funding the Millennium Development Goals, along with a concomitant 'big push' of Bill and Melinda Gates style philanthropy from rich individuals.² At a slightly more down-to-earth level, Oxford philosopher Toby Ord has set up the Giving What We Can project, which has the commendable goal of encouraging many more people who may not think of themselves as particularly rich, but who live moderately comfortable lives in richer countries, to recognise the contribution they could make.³ As such, the project's website has a calculator that tells you how many lives you will save, as a function of the amount of money you pledge to give.

These sorts of numbers set the scene for the debate one finds within the philosophical literature on global justice about how much 'we' ought to give, but there is a good deal of ethics to be unpacked in who is included in that 'we', and what the would-be recipients of this unidirectional account

¹ T. Pogge, *World Poverty and Human Rights* (Polity, 2002); P. Singer, 'Famine, Affluence and Morality', *Philosophy and Public Affairs* (1972).

² J. Sachs, *The End of Poverty* (Penguin, 2005).

³ www.givingwhatwecan.org

of global justice actually need or want. These figures also mask the greatly varying contexts of communities living in extreme poverty. The narrow question about motivation is in fact only one aspect of a set of broader questions to be asked about global justice.

As Paul Gready pointed out, environmental responsibility is (slowly) becoming embedded in people's everyday lives: people in the UK at any rate are becoming used to recycling and thinking about their transport choices, and taking some steps towards accepting responsibility for their contribution to environmental sustainability. Some part of the motivational problem, then, is connected to the difficulty of similarly embedding responsibility for global justice in everyday people's everyday lives. But there is also a deeper set of questions to be asked about what it is that we are trying to motivate, what assumptions are validated in framing the problem in this way, what are the implications for agency and justice if the globally just gaze is unidirectional.

Here Katrin Flikschuh's paper, co-authored with Helen Lauder (Ghana), was particularly salient. Flikschuh and Lauder raise the intriguing question of why fieldwork is not typically thought to be a necessary part of the study of issues such as global justice by political philosophers and theorists. No doubt some philosophers have done just this, and many

more take pains to be well-informed about the empirical realities of the sorts of cases that are the subject of our theorising. Most theorists, though, are accustomed to thinking of fieldwork as something undertaken by our empirically-inclined colleagues, and not obviously something that philosophical work demands. Yet the universalising tendencies of analytically-trained philosophers to identify the content of duties based on, say, an abstract account of basic needs, or the necessary conditions of agency, might well lead us to overlook some factors that prove inconvenient for our theories – such as the preferences of at least some persons in post-colonial states towards stronger state sovereignty, rather than a weakening of sovereignty and burgeoning cosmopolitan order. Another element highlighted in this critique of the conventional practice of theorising about global justice is the tendency to talk about 'the global poor' or 'distant others' as a homogenous category and one that is opposed to the 'we' of individual agents in the rich West.

NGO practitioners and development and human rights scholars no doubt have the resources to combat, or indeed correct, some of these difficulties. NGOs can act as a conduit through which information about both the specificity of communities and individuals and their circumstances might be communicated, as well as these communities'



Media coverage and NGO appeals have a familiar narrative. They aim to engage our emotions – sympathy, compassion, and also guilt. Yet there is a tension between the need to respect the dignity of individuals and at the same time challenge the short attention span of the Western media. The DEC appeal has made extensive use of this photograph in their East Africa Crisis Appeal. Although a direct and haunting image, it avoids the 'starvation pornography' referred to in the article. Photo © Phil Moore/Concern Worldwide.

self-expressed needs and desires. But the manner of collecting and presenting that information matters, and the ethics of this plays out along several dimensions.

In the weeks after the workshop, the Disasters Emergency Committee (DEC) launched an appeal to raise funds to provide relief for the famine in East Africa, particularly in Somalia. Media coverage and NGO appeals have a familiar narrative; they present stories of hardship and extreme need alongside pictures of malnourished young children, they aim to engage our emotions, most often sympathy and compassion, sometimes also guilt. Graham Long's contribution to the workshop focused on the legitimacy of such emotional manipulation on the part of NGOs. Should those who are not responsible for global injustice be made to feel guilty about it? Should those who have done their fair share be asked to do more?

NGO practitioners, meanwhile, felt a tension between the need to be respectful of their clients in developing countries in the way that they are presented to would-be donors, and the demands created by the short attention span of the Western media alongside the challenge of engaging would-be donors in the context of many competing claims for their attention, time, and money. In this context, emotional manipulation looks like a necessary though inadequate tool. NGOs such as Save the Children and Practical Action aim to build a sense of solidarity on the part of their donors with their clients, an approach argued by some engaged in debates on global justice, and indeed by this author, to be crucial to bridging the motivational gap with which we began. What, after all, are the motivations to be just at all: where self-interest and reciprocity are unavailable to us, as they largely seem to be in the case of global justice, then extending the moral community by encouraging a sense of solidarity seems to be one of only a few options.

But the means matters a great deal. The title of a recent opinion piece by a Nairobi-based journalist gives a flavour of

the concerns here: in 'Starvation Pornography: How Many Skinny Babies Can You Show Me?'⁴, Katy Migiro reports her experience of covering the East African famine in the aftermath of the DEC appeal, of television producers in Western capitals negotiating with aid workers for a suitably grim and desperate picture to be ready for the journalists about to be parachuted into the region, of the bemused responses of local aid workers and journalists. The question theorists of global justice face here is whether engaging sympathy in these terms generates a sense of solidarity or one of spectacle. From thinking about global justice in terms of the number of skinny babies to be saved, do we learn what a just world would be? The demands of global justice may be rather more nuanced and detailed and complex than this. That being the case, the question about motivation remains, but is even more challenging.

What I think we may be persuaded of is the value of theorists, practitioners, and practice-oriented scholars working collaboratively on these issues. Theorists and philosophers cannot articulate what is just without a concrete, as well as an abstract, knowledge of needs and desires, not least because, as at least some theorists have long known, our unconscious biases can be pernicious. Practitioners can also, I hope, gain something from being exposed to the concerns of ethicists who question the very means by which most ethicists will have the opportunity to learn about some of the concrete needs and desires of particular and contextualised communities and individuals who comprise what is referred to as 'the global poor'.

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⁴ www.trust.org/alertnet/news/starvation-pornography-how-many-skinny-babies-can-you-show-me/

Prizing the past for the present and the future

On 1 June 2011, Professor David Lowenthal FBA and Sir Simon Jenkins, Chairman of the National Trust, discussed why stewarding the past benefits the present and the future, and how we can protect, enliven, and enhance our heritage

David Lowenthal

The past remains vital to our utmost being. That dependence is so apparent that the heritage profession tends to take it for granted; preservation gets no justification beyond its economic benefits. Heritage is popular and can be shown to pay. But its social and spiritual benefits are poorly understood. We remain little aware of the crucial role of our inherited make-up and milieu for the habits and the skills that we learn, for our sense of personal and collective identity, for our ambitions and ability to secure a viable future. Heritage underpins and enriches continuities with those who came before and those who will come after us.

From fusty concern with funerary ornaments and antique furniture, heritage in Britain has come to denote all we value from the national past. In particular, countless ancestral deeds and remains shape our sense of collective identity. No other country, British panegyrists often aver, exhibits the same lengthy and conformable continuity of past with present.

Yet heritage in Britain has become deeply problematic. Critics complain that it is suffocatingly voluminous, as well as unmanageably heterogeneous. One is hardly ever out of sight of a listed building, a protected archaeological site, a museum-worthy work of art. Vastness and vagueness marked the legacy from the start. The authors of England's 1983 National Heritage Act 'could no more define [it] than we could define, say, beauty or art ... So we decided to let the national heritage define itself.' It included not only the Tower of London but agricultural vestiges visible only in air photos, not only the duke's castle and possessions but ... the duke himself.¹

Ensuing decades make it still more miscellaneous. Anything old, olde, or old-fashioned is cherished like John Major's beloved pastoral idyll of 'long shadows on county [cricket] grounds, warm beer, ... and old maids cycling to holy communion through the morning mist'.² Top icons

elicited in English Heritage's 2006 online survey were Morris dancing, pubs, Big Ben, cricket, the St George flag, HMS *Victory*, Domesday Book, Hadrian's Wall, Blackpool Tower, *Pride & Prejudice*, *The Origin of Species*, the Globe Theatre, and Constable's *Hay Wain*. Respondents in 2008 added fish 'n' chips, *Dr Who*, a cup of tea, the Glastonbury Festival, black cabs, Land Rovers, chicken tikka masala, and queuing.³

So conceived, heritage seems trivial and superficial. The public throngs to historic sites. But much on show is shallow entertainment. Collective memory fades and abbreviates. For all today's indiscriminate nostalgia, for all the evocations of yesteryears in film and television, for all the roots and re-enactments and retro styles, for all the ancestor-hunts and plethora of memoirs, the historically informed past has become *tabula rasa* to most.

Shorn of historical context, 'the heritage industry' is reviled as backward-looking, fossilising an invented past and crippling present enterprise. Such derision reflects anxiety lest heritage tourism debase Britons from makers to hucksters of history. Beginning in the disheartened 1970s, some suggested the nation's future lay in purveying its past. 'Shudder as we may, perhaps the creation of a living history book in this clutch of islands is not so bad a prospect', said Labour politician Andrew Faulds. He envisioned Britain as 'a sort of Switzerland with monuments in place of mountains ... to provide the haven, heavy with history, for those millions ... who will come seeking peace in a place away from the pulsating pressures and the grit and grievances of their own industrial societies'.⁴ The image is satirised in Julian Barnes's *England, England* (1998), turning the entire Isle of Wight into a Merrie England theme park.

So toxic by the 1990s was the very mention of heritage that the Department of Heritage was renamed Culture, Media and Sport, and Prime Minister Tony Blair's minders kept him sedulously out of sight of antiquities, lest any taint of elite tradition tarnish New Labour as old hat. On his visit

¹ Lord Charteris of Amisfield, 'The Work of the National Heritage Memorial Fund', *Journal of the Royal Society of Arts*, 132 (1984), 325–38 at 327.

² John Major, speech, 22 Apr. 1993, misquoting George Orwell, *The Lion and the Unicorn* (London: Secker & Warburg, 1941).

³ Department of Culture, Media and Sport, 'Culture Online', 2006; Robert Henderson, 'English Icons – an Exercise in Anglophobic NuLabour

Propaganda', 21 Nov. 2010 <englandcalling.wordpress.com/2010/11/21/english-icons> accessed 16 June 2011; Georgi Gyton, 'ICONS – a Portrait of England Reveals the Next Instalment', *Culture24*, 1 Apr. 2008 <culture24.org.uk/history+%26+heritage/art55846> accessed 16 June 2011.

⁴ Andrew Faulds, 'The Ancient Assets That May Be Our Salvation', *Times*, 19 Jan. 1976: 12.

to the 2002 Royal Academy 'Genius of Rome' exhibition, Blair's press officers forbade his being photographed beside a Carracci lest the public get the impression he was not up to date.⁵

Heritage backlash is by no means solely British. In France the surge of heritage is said to overwhelm cultural life and public policies. 'We no longer make history', charges the French philosopher Jean Baudrillard. 'We protect it like an endangered masterpiece.'⁶ The Dutch architect Rem Koolhaas terms preservation a 'dangerous epidemic' fuelled by 'clueless preservationists who, in their zeal to protect the world's architectural legacies, end up debasing them, gentrifying and sanitizing historic urban centers.'⁷

Vilified as retrograde, nostalgic and elitist, heritage is tolerated only for immediate pay-off. Preservationists focus on how but ignore *why* they protect and steward. 'We stand uncertain and mute as decisions are made ... that threaten the very existence of the objects we care for and the institutions' that house them.⁸ Reduced to a minor role in the gross national product, heritage becomes productive and gross.

Forgotten in the drumbeat demand for instant utility was Benjamin Franklin's legendary reaction to Montgolfier's balloonists in Paris in the 1780s. Asked what benefit this arcane airborne novelty could possibly provide, Franklin retorted, 'What is the use of a new-born baby?' Michael Faraday repeated the analogy in discussing the potential of chlorine in 1816. And when reputedly asked by William Gladstone, then Chancellor of the Exchequer, what use was electro-magnetic induction, he replied, 'Why, sir, you will soon be able to tax it.'⁹

Far beyond any contribution to tourism or the Treasury, heritage is in fact fundamental to human existence. We are utterly indebted to the past, not merely to its remembered culture and its surviving artefacts, but in every fibre of our being. 'Each generation inherits a treasury of knowledge that it did not itself amass. We speak a language we did not create; we use instruments we did not invent; we claim rights we did not establish'. And we cherish them as essential to our lives.¹⁰ Human cognition secretes events shaped by millions of years of genetic evolution, millennia of cultural history, and for every year of our lives, ten thousand hours of personal experience. Children encounter and interact with their physical and social worlds almost totally through the mediating lenses of pre-existing human artefacts, embodying past makers' and users' views and aims.¹¹

Critics charge that heritage focuses undue attention on the past at the expense of concern for the future. The charge is doubly misguided. A proper concern for the future requires a prior respect for the past. Posterity is conservation's *prime* duty. We steward the past *for* the future.

That care for both is essential and inseparable has long been an axiom of British statecraft. 'People will not look forward to posterity, who never look backward to their ancestors', warned Edmund Burke in 1790. Forging a sustainable society 'takes far longer than any single lifetime'. It requires 'a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born'.¹² Burke's dictum became a Victorian mantra in every realm of life. 'Old buildings are not ours', declaimed Ruskin. 'They belong partly to those who built them, and partly to all the generations ... to follow us'.¹³ 'Society was working not for the small pleasures of today', said Maynard Keynes of Edwardian city fathers, 'but for the future'.¹⁴

Progressive Era reformers of the 1900s sought 'the greatest good of the greatest number for the longest time'. No generation had the right 'wholly to consume, much less to waste, those sources of life without which the children or the children's children must starve or freeze'.¹⁵ American conservationists led English welfare economist Arthur Pigou to insist that it was government's 'clear duty as trustee for unborn generations [to] protect the interests of the future [against] our preference for ourselves [over] our descendants'.¹⁶

Inability to think more than a generation or two ahead, writes biologist E.O. Wilson, was hardwired into mankind's Palaeolithic brain; among hunter-gatherer bands survival in the short-term was all that mattered.¹⁷ Political leaders today likewise find it pays to think no more than two years ahead, disregarding long-term consequences. 'We borrow capital from future generations, with no intention or prospect of repaying'. Our descendants 'can never collect on our debt to them, [for they] do not vote; they have no political or financial power'.¹⁸ Long-term neglect is pervasive: lethargy on global warming, economists' brutal discount rates, mounting national and personal debts, crumbling infrastructure. Preservation budgets are severed or slashed. Global charters trumpet the rights of future generations, but nations ignore them in practice. A return to Victorian and Edwardian values is neither possible nor desirable. But a national tradition of social and political stewardship, embracing cultural and natural conservation, reaching from

⁵ Mark Fisher, 'Objections to the Object', *Times Literary Supplement*, 22 March 2002, 13-14.

⁶ François Hartog, 'Time and history', *Museum International* 57/227 (2005), 7-18; 'Illusion of the End' [1994], in *Jean Baudrillard, Selected Writings*, ed. Mark Poster, 2nd ed. (Cambridge, Polity Press, 2001), 261.

⁷ Nicolai Ouroussoff, 'The Art of Preservation or Distortion?' *International Herald Tribune*, 25 May 2011: 11-12. Rem Koolhaas, 'Cronocoas: an exhibition by OMA', Venice Biennale 2010.

⁸ Chris Caple, 'The Aims of Conservation', in *Conservation: Principles, Dilemmas, and Uncomfortable Truths*, ed. Alison Richmond and Alison Bracker (Amsterdam: Elsevier, with the Victoria and Albert Museum, 2009), 25-31 at 25.

⁹ I. Bernard Cohen, 'Faraday and Franklin's "Newborn Baby"', *Proceedings of the American Philosophical Society*, 131 (1987), 177-82.

¹⁰ Émile Durkheim, *The Elementary Forms of Religious Life* [1912], tr. Karen E. Fields (New York: Free Press, 1995), 213-14, 351-52, 372, 379.

¹¹ Michael Tomasello, *The Cultural Origins of Human Cognition* (Harvard

University Press, 1999), 216, 202. See Henri Bergson, *Creative Evolution* [1922] (Macmillan, 1954), 20; Edward Shils, *Tradition* (Faber & Faber, 1981), 34-38, 169-70.

¹² Edmund Burke, *Reflections on the Revolution in France* [1790] (London: Dent, 1910), 31, 85, 92.

¹³ John Ruskin, *The Seven Lamps of Architecture* [1849] (New York: Farrar, Straus and Cudahy, 1961), 186.

¹⁴ John Maynard Keynes, *The Economic Consequences of the Peace* [1919], in his *Collected Writings* (Cambridge University Press, 1971), 2: 12, 41.

¹⁵ W.J. McGee, 'Conserving natural resources' [1909-1910], in *American Environment: Readings in Conservation*, ed. Roderick Frazier Nash; 3rd ed. (New York: Knopf, 1990), 45.

¹⁶ A. C. Pigou, *The Economics of Welfare* [1920], 4th ed. (London: Macmillan, 1952), 27ff.

¹⁷ E. O. Wilson, *The Future of Life* (New York: Knopf, 2002), 40-41.

¹⁸ World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987), 8.

advocates as diverse as Burke and Ruskin through Keynes and Pigou, is worthy of admiration and even emulation.

Nor is heritage stewardship ever merely preservative: it is ongoing and creative. Many cry havoc at the loss of our precious irreplaceable legacy. But that legacy is neither dwindling nor irreplaceable. It has an organic life of its own, its make-up and lineaments re-evaluated by every succeeding generation.

Such revision is essential, and static preservation folly. 'Societies which cannot combine reverence to their symbols with freedom of revision must ultimately decay', warned the philosopher Alfred North Whitehead.¹⁸ We in Britain, wrote George Orwell, 'must add to our heritage or lose it'.¹⁹ To be a living force the past is ever remade; the true steward adds his own stamp to his predecessors'. 'It is our felt duty', advises Neil MacGregor, 'to augment what we bequeath'.²⁰ It is not enough to receive and transmit a legacy; it must be refurbished and renewed while in our care.

It is imperative to demonstrate that the past is not a frill or an extra to be enjoyed or dispensed with on impulse. We need to remind ourselves, so as to persuade others, that consciously informed use of heritage is essential to civilised life.

Simon Jenkins

Each generation reinterprets its past. To each generation its past is a sort of jumble of memories, impressions and relics, and all of them become the *mélange* that we then dump before the public as being the heritage of the individual, family, tribe, town, nation. This heritage has become so much of a mess that it no longer has any real historical form, it simply has the form of whatever we have interpreted it to be. As a very practical conservationist – with some custodial responsibility for a sizeable chunk of what passes for England's heritage and that of Wales and Northern Ireland as well – what can I make of it all?

One of the things that we tell the people of the National Trust all the time is: 'Whatever you do to bring the properties to life, to make it fun, to get the punters in, to be a part of the leisure industry, you must not lose touch with the authenticity of the building or the landscape or whatever it is that has been bequeathed to you. There is a fundamental, historical truth that you have to stay true to.' If you diverge from that at all, you have Disneyland. We have just to remember that there is a basic truth to history, to the past, that we have to fasten on to, or we are going to lose it all.

David Lowenthal

I think that authenticity is a bane. I know that it is constantly used as the mantra: people are said to want the real, not a contrived past. 'The past is unarguably authentic', as Ian Crichton put it.

The past is a world that already existed before Disney and Murdoch ... and all the other shapers of the present day. ... The past is real. It's authentic. *And this make[s] the past unbelievably attractive.* People ... want to visit not other places, but other times ... medieval walled cities, Buddhist temples, Mayan pyramids, Egyptian necropolises, ... the vanished world. And they don't want it to be fake. They don't want it to be made pretty, or cleaned up. They want it to be authentic.²¹

But it is not truth that people want; it is the *appearance* of truth. Fearing a prospective Disney history theme park in their backyard, Colonial Williamsburg staff were dismayed to discover that the public saw little difference. Williamsburg was authentic, but 'Disneyland is authentic too'. 'How can this be? Colonial Williamsburg is a real place, even if much restored. Disney's America is going to be totally made up. It isn't even a real historical site. Everything will be artificial.' 'Sure, but Disney always does things first-class, and if they set out to do American history, they'll hire the best historians money can buy ... to create a completely plausible, completely believable appearance of American history.'²² As in Simon Shaffer's *Lettice and Lovage*, a past enlivened by fabrication becomes far more appealing, even when the contrivance is patent. 'Scepticism about one's heritage', noted Alan Bennett, is an 'essential part of that heritage'.²³

Simon Jenkins

It is a difficult challenge you pose. It is very fashionable to be contemptuous about the heritage industry. You put the word 'industry' after something and it immediately detracts from it – makes it seem squalid, money-grubbing. People have lots of leisure and vast amounts of money to spend on their leisure, and they desperately crave something that in some sense they can identify with. They do not want to see the copy; they want to see the original. An entire industry, the museum industry, is totally dedicated to authenticity. An entire profession, that of museum curator, is dedicated to authenticity. These deride the suggestion that you should make a copy of the Elgin Marbles and give the real ones back. Anything to do with copying, to do with the inauthentic, is impermissible.

How do you see the past 25 years?

David Lowenthal

We have gone through a whole generation of using and misusing heritage for tourism, and developing ideas about heritage that seem to me increasingly nostalgic. Back in the 1970s a sense of a future lost or at risk was not nearly so prominent as it has become since. We care about the heritage as a source of enjoyment, but no longer in terms of a social and spiritual asset to help bring about a better future.

¹⁸ Alfred North Whitehead, *Symbolism* (Cambridge University Press, 1928), 104.

¹⁹ George Orwell, *The Lion and the Unicorn* (London: Secker & Warburg, 1941), 109.

²⁰ Neil MacGregor, 'Scholarship and the Public', *Journal of the Royal Society of Arts* 139 (1989), 1263–80 at 1274.

²¹ Michael Crichton, *Timeline* (New York: Knopf, 1999), 436.

²² Sheldon Hackney, 'Who Owns History? Conversations with William Styron and Cary Carson', *Humanities* [National Endowment for the Humanities], 16:1 (Jan.–Feb. 1995), 8–11, 50–53 at 9.

²³ Alan Bennett, *Writing Home* (London: Faber, 1994), 211.

Simon Jenkins

You see no optimism? You see no good news in the fact that in 1980 – I think I am right in saying – the number of visitors to Venice was 1,500,000 a year; it is now 14 million a year. Some might say: ‘This is a complete and total catastrophe: the rabble are at the gates; we have to keep them out, we must not let anyone more in.’ We had the same problem at the National Trust: ‘We must not have any more people in, because they are ruining the properties and are not scholars like us.’ I just do not see it that way. It is hugely encouraging that 14 million people want to go to Venice. They do not believe that The Venetian hotel, Las Vegas is Venice. It is not good enough to go to Las Vegas or Dubai. Venice Dubai is sensational, but it is not Venice. I just find it utterly good that so many people want to enjoy what they see as the past. The nostalgic element to the leisure industry I find wholly benign. People do not simply crave the latest new fad; they crave what you call the old fad.

David Lowenthal

Three points. Nostalgia now is different from that of the 1970s. The nostalgia of now is retro nostalgia. It is much more recent; it is much more ironic and it is much more interesting in many ways. The second point: yes, all those people go to Venice. They also go to Las Vegas and they enjoy Las Vegas. Millions also visit Knossos in Crete, quite unperturbed that this ‘Minoan’ site – the world’s earliest reinforced-concrete antiquity – is in large measure the imaginative invention of Sir Arthur Evans in 1900. Third, the whole business of original and copy has become far more sophisticated in terms of public understanding. We learn to appreciate originals through copies. We appreciate the copies for their own sake, because in some respects they reflect what we value better than the decayed and eroded originals.²⁴

Simon Jenkins

I was looking at the weekend for a new technique for copying an Axminster carpet. Rather than having to ban people from walking in our rooms, we can put down new Axminster carpet, which looks just like an old one and they can walk on it. This is liberating for the room: we do not have to put up a rope. You can take the rope out and people can wander around. I am sure someone is going to come along and say ‘That is a fake’. But these techniques are not offences against authenticity, they are simply enabling larger numbers of people to enjoy something of the past.

Question

What about the idea of national heritage? The metaphor of heritage is dangerous, because it brings in the idea of ownership – who owns the past? Add the adjective ‘national’ and things

²⁴ Rune Frederiksen and Eckart Marchand, eds, *Plaster Casts: Making, Collecting and Displaying from Classical Antiquity to the Present* (Berlin, New York: De Gruyter 2011).

get really tricky, given the number of cultural items that can be reasonably claimed by more than one nation: Greek coffee or Turkish coffee, or a painting by Mantegna that has been in England for 400 years, and so on.

David Lowenthal

The nationalisation of heritage seems to be increasing, whatever the power of the nation state. The identity of the nation state has become bound up with its heritage. That said, most heritage matters to people when they think it is theirs, either individually or collectively. That it should be so focused on the nation state creates major problems, especially when it comes to repatriation. Repatriation requires, essentially, that every object be sent back to where it supposedly came from. But where things supposedly came from thousands of years ago is often either unknown or not identifiable as a current political entity. In any case, a great deal of what we consider to be heritage was portable, made to be trundled around and sold.

Simon Jenkins

When so many other aspects of life have become denationalised, neutralised, internationalised, cosmopolitanised, people revert to their nation. They find nostalgia, they find heritage, in the nation state. The restitution debate is not going to go away. You can never ever tell the Greeks that they will never get their Marbles back, so they may as well forget it. It is the same for Maori heads or the Benin Bronzes. These things will not go away, because heritage is not just some bit of froth invented by the merchandisers of the museum business, it is deeply embedded in people’s psyche. It will always be and it is clearly getting more significant.

David Lowenthal

You can never persuade the Greeks that the Elgin Marbles should not go back, but you have to sort out the politics of their claim from the realities. I have been frequently in Greece, and almost all the young professionals that I meet say ‘We know very well that we are better off not having them back, but go on asking to have them back.’

Simon Jenkins

That is what smart Greeks I know say as well. It is important to see that heritage is successful because it has become politically significant; it has become economically significant. The politics is not going to go away. The task of politics is to resolve these conflicts. Every day, people are trying to resolve these conflicts which have come out of the heritage business. This is reality.

Question

The past is getting bulkier as we speak. How can you preserve everything? How do you decide what to keep and make into our heritage?

Simon Jenkins

In the 1970s we founded something called the Twentieth Century Society (originally called the Thirties Society). Saving Victorian England was easy; you saved everything. Saving Georgian England, you certainly saved everything. Twentieth-century England? We had terrible rows about it. I, frankly, cannot stand new brutalism: if someone came along with semtex to blow up Gateshead Car Park, I would be the first pressing the plunger. But the argument was: 'Save everything. You just do not know what is going to be valued in 100 years time.' So, you must be sensitive to changing tastes in what it is you want to save. The fact that it is old is good enough.

David Lowenthal

Heritage is not always nice. To be historically truthful you have to keep the bad stuff along with the good. More and more people in more and more countries are concerned to rectify what they conceive of as the injustice of the past, and are valorising sites of conscience: prisons, famine places, slave pens. In some countries, such heritage remains an unbearable burden. As Günter Grass remarks (*Crabwalk*, 2002), 'The history we Germans have repeatedly mucked up, is a clogged toilet. We flush and flush, but the shit keeps rising'.

Simon Jenkins

Fascination with the past does encourage people to have arguments. At National Trust houses now the objective is to tell stories, to encourage people to question the stories, to have events in which discussions take place. If you lose touch with past reality, then I think it is difficult to anchor these debates. And if you lose that anchor, then you are going to be constantly vulnerable to highly charged versions of history.

David Lowenthal

No better example of this can be found than the Tea Party movement in the United States, which has managed to disseminate more misinformation about American history in a few pungent phrases than anyone could possibly have imagined. Appropriating and domesticating the past, they have made the present a foreign country.

Question

A lot of curators do feel preservation is the key – keeping things preserved for posterity. But part of the truth of the past is about decay and loss and the ephemeral nature of things. By choosing to preserve everything, do we lose that inherent truth?

Simon Jenkins

In the Red House in south-east London, William Morris's house, the walls have been covered in white paint over the years. It is now like a medieval church. Underneath the whitewash are Morris's original wall paintings. Do you copy them over the white paint, or do you spend an

absolute fortune trying to remove the white paint to get at Morris's paintings underneath? In doing so you are probably going to damage them. You will, doubtless, age them; they will age anyway. Why not just have fun repainting them? – as they have done with that wonderful church at St Fagans in Wales, where they have effectively recreated a 16th-century Welsh church with all the bright colours in it. The interior of Dover Castle is now absolutely authentic 1150. It looks terrific, but it takes a great effort of the will to see that this is what it would have been like then, rather than how we would expect it to be – heavily decayed over time. Memory is also enshrined in ageing.

David Lowenthal

That is why some textile conservators I know say: 'We should collect every bug along with every rug.'

Question

Some years ago National Trust restored Ightham Mote. They spent a lot of money on restoring the medieval structure of the building, but then they covered up the whole thing with the more modern design of the later owners of the building, so nothing could be seen at all. On the other hand, one does not want things to be kept in aspic: some of the draperies that one sees in properties are so dishevelled one wonders why they have not been replaced by a modern replica. How far are you prepared to go for authenticity before it becomes something which is not very real?

Simon Jenkins

The answer is there is no answer. Ightham Mote had been restored in the early part of the 20th century and effectively, kind of Edwardianised. Do you take it back to what was done then, or to what was there before? There is no answer to that question. A decision was made to take it back to what was done in the 20th century. So, part of the building is, indeed, as it was restored, and it covers up quite a lot of the original material in so doing.

The *locus classicus* of this is the great debate over Uppark. Uppark was gutted by fire in 1989. What should you do? Leave it as a ruin like Seaton Delaval? Restore it with an ultra modern interior, like Richard Rogers' house? Put it back like it was immediately before the fire, employing the vast talents of the distressing industry that can age anything you want precisely to the period you want? Or do you put it back to what it was when it was built, in the reign of Queen Anne? The decision was made to go for the reign of Queen Anne. But if you walk around it you see the spirit weakens every now and then. They have left a burnt bell pull. They have left a snake carved in a piece of woodwork with the scorch mark still on it (Figure 1). They have left bits of ragged carpet, just to show that they did not quite have the courage of their convictions. I find the whole thing completely fascinating, but the answer to your question is there is no answer, just a debate.

The one thing you must not do is destroy the past. The past is real. And the only obligation you have towards the past is to not destroy the relic.



Figure 1. Conservation choices. After the fire at Uppark, the serpent 'capitals' of the Saloon doorcases were restored, but scorch marks were left on the woodwork. Photo: ©NTPL/Andreas von Einsiedel.

David Lowenthal

I would agree that the past is real, and the past does not exist either. It is the present that exists, and we have to remember this all the time. What we are seeing is remnants; what we are seeing is memories, shadows, and we are seeing it through 21st-century lenses. So we can never actually go back to what it actually was; we try, but the fascination is in the trying, the impossible but laudable effort to understand and appreciate our ever alien precursors.

Two developments in heritage seem to me to be positive and likely to expand. One is restoration. I know that restoration is seen in many quarters in the old 19th-century way, as a way of destroying the reality of ancient original fabric. But the restorationists with whom I work now see their task as one of melding what remains of the past with efforts to recreate the circumstances, at least, of that past for the better – ecologically, architecturally, or whatever.

The second realm is re-enactment, which has become hugely popular on both sides of the Atlantic, not only in battle replays, but in engagement with everyday aspects of the past. For tens of thousands of people, re-enactment is now the prime mode of participatory engagement with the past, and a major pedagogic tool. Re-enactment also enables us in the heritage field to reconnect with history itself. R.G. Collingwood’s notion of re-enactment has enlivened historical insights since the 1920s. ‘Get a Roman ruin beneath your feet’, taught Collingwood, ‘and you begin to understand a little bit about the men who made it and why they made it.’ Our best biographers, memoirists, historians seek to recapture by re-experiencing the sense of place

connected with the past that they are writing about. They are dedicated to travelling those same roads, Roman and other.

Professor David Lowenthal is Emeritus Professor of Geography at University College London, and a Fellow of the British Academy. Over an illustrious career, spanning some 60 years, he has taught at universities on both sides of the Atlantic. He has advised organisations including English Heritage, SAVE Britain’s Heritage, UNESCO, ICOMOS, Europa Nostra and the British Museum. He is a medallist of the Royal Geographical Society, the Royal Scottish Geographical Society, the International Institute for Conservation and the American Geographical Society, and in 2010 was awarded the Forbes Prize by the International Institute for Conservation for his services to conservation.

Sir Simon Jenkins is an author and journalist, who was appointed Chairman of the National Trust in 2008. He is currently a columnist for the Guardian and the Evening Standard. Sir Simon has a longstanding interest in heritage and the heritage sector, and has been a member of the Millennium Commission, a trustee of The Architecture Foundation and deputy chairman of English Heritage.

An audio recording of the full discussion can be found via www.britac.ac.uk/events/2011/prizing-the-past.cfm

Preserving cultural heritage, a diverse and complex concept, has long been a matter of concern for Fellows of the British Academy. The discussion between Professor David Lowenthal FBA and Sir Simon Jenkins formed part of a wider theme of work examining a range of potential threats to material heritage and offering recommendations to policymakers and academics to help mitigate and counteract these threats.

The main output of this, an essay collection entitled *History for the taking? Perspectives on material heritage* was published on 24 May 2011. Introduced by Sir Barry Cunliffe FBA, the chair of the project, it consists of four essays dealing with different issues affecting material heritage.

- Dame Fiona Reynolds, Director-General of the National Trust, writes on the growth of the UK’s cultural tourism industry and the tensions between enjoying and preserving our heritage.
- Professor Michael Fulford FBA offers an analysis of planning guidelines and the inadequacy of access to the results of commercial archaeology in the UK.
- Dr John Curtis FBA of the British Museum uses the examples of Iraq and Afghanistan to highlight the connection between war and damage to heritage assets.

- Professor Anthony Harding FBA assesses issues surrounding the trade in illicit antiquities and the dilemmas facing academics regarding the study of objects of dubious or unknown provenance.

In each case, the authors examine the current situation and its implications, before suggesting policy measures to better protect our cultural heritage. The messages of these essays are particularly pertinent in today’s climate, with heritage, in spite of its value to present and future generations, at risk of slipping further away from the mainstream policy agenda.



History for the taking? Perspectives on material heritage is available to download via: www.britac.ac.uk/policy/History-for-the-taking.cfm

Phantasmagoria

Professor Marina Warner FBA in conversation with Professor Hermione Lee FBA

Marina Warner has always been interested in the ways the borders between real and imaginary worlds have been breached and blurred. On 11 May 2011, she discussed how the impalpable has been seen or embodied in different eras, cultures and art forms. The following is an edited extract from her conversation with Hermione Lee.



Figure 1. Robert Fludd's images of the mind's eye.

Hermione Lee

The word 'phantasmagoric' or 'phantasm' is related to the word 'fantasy'. There is a tradition of thinking, which I associate most with Coleridge, that there is a lower form of the imagination which is fantasy or fancy. You have a sentence in *Phantasmagoria*, where you quote people saying 'use your imagination', as opposed to 'go ahead, fantasise'. 'Use your imagination' has connotations of a creative responsibility in the mind. It is a good thing to do, to use one's imagination. 'Go ahead, fantasise' means 'Chuck away responsibility!' In *Phantasmagoria*, you are using both high and low art, high and low objects. And you are also dealing with two different kinds of mental imagining.

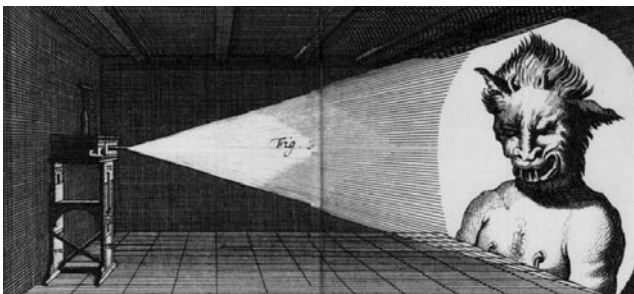


Figure 2. A magic lantern slide from the early 18th century, projecting an image of the Devil.

Marina Warner

I believe that with expressions of popular imagination one is actually getting close to some deep – and often rather concealed – values of the culture; they're revealed not so much in the high art, but in the more vernacular, demotic forms. I was very imprinted by my early readings – in the 1960s and the early 1970s – of anthropology and feminist anthropology by Roland Barthes and Mary Douglas, among others. Structures of fantasy are often highly active in these expressions.

Robert Fludd (1574–1637), who was an Oxford divine, included an image of the mind's eye in his book *Of this World and the Other*: this is his model of the mind (Figure 1). These engravings were made from his own drawings. When he wants to convey the act of 'phantasmata', or mental picturing, he places 'the eye of the imagination' in the

middle of the forehead – in the same position as the inner soul of imagination, according to one of his earlier diagrams. You can see how closely he is imagining the projections of the phantasms in the mind's eye as actual, palpable pictures on the screen at the back of the head. This is centuries before we have cinema.

Hermione Lee

Let's now turn to the word 'phantasm' or 'phantasmagorie' and talk about a very specific example at a very particular cultural moment: the Phantasmagoria.

Marina Warner

Yes, that means 'an assembly of phantoms'.

It struck me that when many scientific inventions, including optical instruments, were first beginning to be developed, they were not always used, as one might expect, to produce images of what you could see, but of what you could not see. This image (Figure 2) is a magic lantern slide from the early 18th century, from a Dutch mathematical treatise book, in which the apparatus is being used to project an image of the Devil. The idea was that you would instrumentalise, through the latest technical innovations, the world beyond the senses. You could pierce through the veil of the visible into the invisible.

The word 'phantasmagoria' was coined in the 1780s, and the performances became popular soon after the French Revolution. Étienne-Gaspard Robertson (1763–1837) was one of the first phantasmagorists or showmen to tour with the magic lantern which he had enhanced in significant ways. He took the magic lantern idea and put it on rollers. The spectre on the screen was back projected, and if you pulled the machine away from the screen the image would grow much larger (Figure 3). He also created tremendous, gothic mise-en-scènes and used Benjamin Franklin's glass harp to create ethereal sounds. He rented a deconsecrated convent in Paris during the Terror, and he had a Chinese gong which he used to strike at moments for maximum impact. It is interesting that his stagecraft was so scientific. He coated the screen in a thin layer of wax so that it would actually gleam, and that relates to wax icons and ex-votos and so forth. Wax is very much one of the metaphorical stand-ins for spirit.

However, his stagecraft was also overtly and intentionally rational. Robertson was the first person to stage what we might now recognise as gothic spectacle, actually drawing an audience into what was a sort of proto-cinematic environment in the dark. We have his writings, which are prefaced with an introduction – a very rhetorical and dramatic introduction – where he says that he wanted to show how you could be frightened by spectres. But, of course, he was making them, so you should not be frightened. The definition of 'phantasmagoria' broadened the idea from 'phantasm', which meant mentally picturing,



to summoning ghosts, because you cannot see a ghost except by mentally picturing a ghost. So, the action of the active imagination, which is the underlying theme of this conversation, makes these two things cohere.

Robertson was an experimenter with numerous other scientific technical media. He was a very keen balloonist, which interestingly again relates new scientific developments to earlier imaginative structures about the clouds and the heavens and the creatures that inhabit them, such as angels and cherubim.

Hermione Lee

I want to go onto another subject, which links Shakespeare to the Romantics, and it is something that you write about quite a lot in *Phantasmagoria*. It is the trope of clouds and looking at clouds, what was known in the Romantic period as 'skying'. I am fascinated by this partly because it has a bearing on Virginia Woolf, who has an essay that you and I both are fond of, called 'On Being Ill'. In this she describes what it is like to give up being a good, upright citizen of the world, going out to earn your living. What is it like if you are ill and you are lying on your back, and you happen to be looking up at the clouds, and suddenly you become aware, as she puts it, of this ongoing cinema, which has been playing in this way, uselessly, forever? If you were a good, upright citizen, you should write to *The Times* about it and it should be harnessed for some good use; it should be used for making electricity or something like that.

Then she goes on into a wonderful play of ideas, including the value of nonsense poetry, but which keeps coming back to this idea of clouds and what you do with them. She is partly saying there is a terrifying indifference about what is up there. It has nothing to do with us and it is going to go on doing what it does, whether or not we are there. There's an echo here of Wordsworth or De Quincey or Coleridge. But she also is imprinting her own creative mind's eye on these clouds and, in doing so, she is invoking passages from Shakespeare.

Marina Warner

Yes, there's a long history of different interpretations, and sometimes meteorology connects with the ways people see the actual substance of spirits and souls. That is how I got to it – I was trying to look at the metaphors used to invoke the invisible person, and how they conceptualised and actually materialised the idea of individual essence. The idea of the spirit being consubstantial with clouds inspires angels in Italian painting who do not have full bodies; they simply end in cloud. Or you find cherubs who are consubstantial with clouds; they gambol at one with the clouds. This results from the painter accepting the vocabulary of spirit and projecting it in visible form. When I was a child, we

Figure 3. Étienne-Gaspard Robertson's use of the magic lantern.

imagined our soul as this little cloudy thing inside us, which sin would turn black. It is important, I think, that in the 19th century, when really quite fine minds and serious scientists experimented with what might be the life force, they actually turned to cloud forms to conceptualise it. They imagined it would appear, like breath, like foam, and be visible and photographable. That was the origin of the idea of ectoplasm.

Clouds became the dominant material metaphor for spirit. In the history of how we look at clouds, you can see very clearly the shift from believing that spirits are out there sending you messages, to an internalised concept of spiritual vision. These ships in the sky (Figure 4) were a portent: the sight prophesied a naval battle or naval victory. Such pictures in the clouds were very common in medieval and early modern Germany, and in England during the Civil War – at times of conflict, the heavens could reveal prophetic messages given by God as privileged information. Here is another portent (Figure 5) – these are bloody heads in the clouds with a sword. Later, the messages are no longer posted by an outside power – by God – for public view, and the ‘turn to the uncanny’ takes place, as Terry Castle calls it in her book, *The Female Thermometer: Eighteenth-Century Culture and the Invention of the Uncanny*. This new interiority develops logically into modern concepts of psychology and theology about spiritual visions. The Rorschach test is the perfect example of that, for it involves a kind of cloudy, amorphous shape being read for diagnostic purposes: the sign in the sky becomes a way into the individual psyche.

Hermione Lee

I want to link it back, again, to Shakespeare. The example that interests me the most, and which I find extremely moving, is the moment just before Antony’s suicide in Antony and Cleopatra. Antony has a very elaborate, very detailed speech, just before his death, about what you see when you look at the clouds:

Antony: Sometimes we see a cloud that’s dragonish
A vapour sometime like a bear or lion
A tower’d citadel, a pendent rock,
A forked mountain, or blue promontory
With trees upon’t, that nod unto the world,
And mock our eyes with air: thou hast seen
these signs;
They are black vespers’ pageants.

Eros: Ay my lord,

Antony: That which is now a horse, even with a thought
The rack dislimns, and makes it indistinct,
As water is in water.

Eros: It does, my lord.

Antony: My good knave Eros, now thy captain is
Even such a body: here I am Antony:
Yet cannot hold this visible shape, my knave.

Antony is just at the point of losing his self, of giving up his self, and he makes this extraordinary, elaborate comparison between selfhood, and the clouds as a reflection of this process of ‘dislimning’ yourself. The subject here, in relation to some of these phenomena, is how we imagine ourselves?



Figure 4. A portent of ships in the sky, prophesying a naval battle or naval victory.

Figure 5. A portent of bloody heads in the clouds with a sword, which would announce bloody battles in times of Civil War. Photo: Wellcome Library, London.



Marina Warner

Yes. Antony is accepting the idea of the active, projective imagination, which Shakespeare certainly knew all about. When it comes to the 1920s and Rorschach tests, what is actually happening is that we are allowing subjective perceptions of a similar, imaginative kind to give us a reading of the inner psychology of a person – in a clinical setting.

Hermione Lee

I know that you are just on the brink of publishing a book on the *Arabian Nights*. Could you talk a bit about how that book, that story, that theme, connects with some of the things you have been talking about today. What is it about the *Arabian Nights* that allures you?

Marina Warner

I ended *Phantasmagoria* with a chapter on apocalypse and I explored there how some of these phantasmic structures had shaped ways of thinking about war, and about the politics of combat and conflict. My book on the *Arabian Nights* arose from a question that grew out of that: was there another possible story to tell about the Middle East? The stories in the *Arabian Nights* open up a space of pleasure and invention, of expanded horizons, and it is a book that has been extremely influential on Western culture. Our histories are deeply entangled, but we do not think enough about the cultural history. Yet the cultural history tells a different story from military history. While we were fighting, murdering one another in the Mediterranean, enslaving one another, all through the period when the *Arabian Nights* was being created and told, something else was going on when imaginations met: a tremendous exchange of ideas and fantasies, not all of them denigratory or fearful.

Marina Warner is a writer of fiction, criticism and history. She is Professor in the Department of Literature, Film and Theatre Studies at the University of Essex, where she teaches Creative Writing, fairy-tales and other forms of narrative, and a Fellow of the British Academy. *Phantasmagoria: Spirit*

Visions, Metaphors, and Media came out in 2006; her new book, *Stranger Magic: Charmed States and the Arabian Nights*, will appear later this year.

Hermione Lee is a biographer and critic. She is President of Wolfson College, Oxford, and a Fellow of the British Academy. From 1998-2008 she held the Goldsmiths' Chair of English Literature, and was Fellow of New College Oxford. She has written biographies of Virginia Woolf and Edith Wharton, books on Woolf, Elizabeth Bowen, Philip Roth, and Willa Cather, and most recently *Biography: A Very Short Introduction*.

This conversation took place as part of the British Academy's 2011 Literature Week, and preceded the Warton Lecture given by Professor Isobel Armstrong FBA on the theme of 'Romantic poetry and optical culture'. For more information, including audio recordings of the full 'Phantasmagoria' conversation and of the lecture, go to www.britac.ac.uk/events/Lit_Week_2011.cfm

New light on ancient medicine

PROFESSOR VIVIAN NUTTON FBA

FEW AREAS OF THE study of Classical Antiquity have changed so much or so rapidly over the last 30 years. That was the message of a panel discussion held at the British Academy on 17 May 2011. As Professor Helen King (The Open University) explained, what had once been confined to the elucidation of a handful of Greek texts by Hippocrates and, occasionally, Galen had been replaced by wide-ranging investigations across a diversity of languages and cultures. Not only had scholars drawn on ideas coming from anthropology and elsewhere in history, but an abundance of new discoveries had allowed new insights into the medical marketplace of Antiquity.

Patients, and doctors, could choose between a variety of sources of cure, ranging from the gods to wise women. There were itinerant healers, but also, as the recently excavated House of the Surgeon at Rimini shows, wealthy bourgeois practitioners living in large stylish houses. There was co-operation, not confrontation, between religious and secular approaches to therapy. Doctors accepted the validity of dream cures, gave generously to temples, and even held religious priesthoods.

Medicine in the Roman world has also been rescued from the prejudices that considered it inferior to that of earlier Greeks, or conversely praised its preference for simple practical remedies over wordy theoretical constructs. Both sides had arguably created rhetorical images of 'their' medicine as a way of responding to the colonial situation that followed upon

the Romans' take-over of the Greek world from the 2nd century BC onwards.

This interaction between medical cultures was nicely demonstrated in the Stanway hoard. Buried near Colchester around the time of the successful Roman invasion of Britain in AD 43, it contained surgical instruments, a board game and what were presumed to be a set of divining rods. Their owner was wealthy, but to call him a Druid healer was a simplistic solution to some complex questions of identity.

Evidence from papyri

The new sources of evidence are not confined to archaeological material, or to inscriptions recording the lives (and sometimes careers) of ancient practitioners. Dr David Leith (University of Cambridge) introduced some of the new papyrus finds that had earlier in the day been the subject of an international workshop jointly sponsored by the British Academy and the Wellcome Trust to assist in the editing of roughly 60 Greek papyri from the city of Oxyrhynchus in Roman Egypt.

His first example was a fragment of a pharmacological treatise containing a recipe by Heras of Cappadocia. Heras, a Greek, wrote his *Narthen (Recipe Box)* in Rome around 20 BC. The new papyrus shows how quickly and how far knowledge of his book had spread within two or three decades, more than a century before Galen excerpted this and other recipes by Heras to use in his own drug books.

The Hippocratic Oath

Papyri from Oxyrhynchus also contribute to a re-evaluation of the most famous medical document from Antiquity, the *Hippocratic Oath*. One of them, deliberately cut out of a bigger text, reiterated that the *Oath* should be taken at the very beginning of a medical education. In another, written around AD 400, the copyist modified the language of the *Oath* to make it more intelligible.

The *Oath* was a living document, and as such open to change. A recent find in a much later medieval Greek manuscript in Milan offers an interesting variant. In place of the

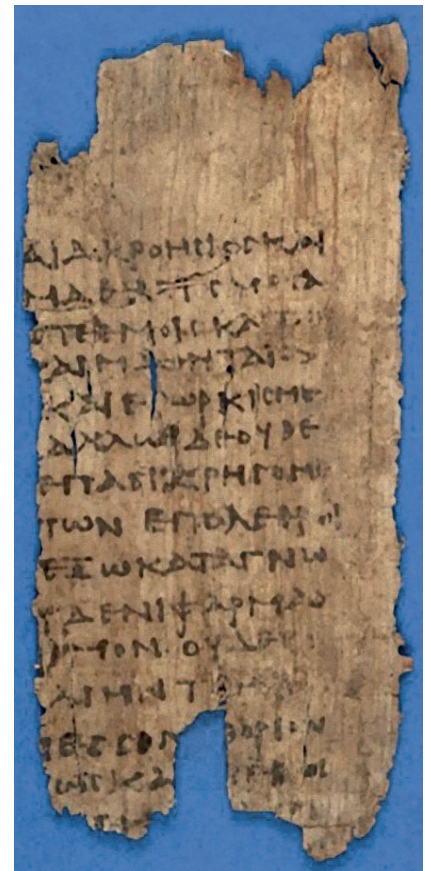


Figure 1. A papyrus fragment of the Hippocratic Oath from Roman Egypt. Photo: © the Wellcome Library.

troublesome sentence forbidding all types of surgery, except by specialists, someone in Antiquity substituted a vow that the doctor would not allow his aides or any other practitioners to administer a poison or an abortive pessary. This manuscript also adds a new sentence to another early ethical text, the *Law*. Its praise of a doctor's competence, 'a good treasure and a proud possession', is a positive counterpart to the previous (known) sentence condemning incompetence. And its presence in an early Arabic translation, made centuries before our earliest manuscripts were written, confirms that this sentence is likely to have been in the original Greek.

But not every doctor in Antiquity viewed the ethical prescriptions in the *Oath* with the same respect as Scribonius Largus, a doctor who came to Britain with the invading forces in AD 43. The preface to his *Drug recipes* is a meditation on the *Oath* in Roman terms. By contrast, the surviving fragments of a commentary on the *Oath* ascribed to Galen (129-216) concentrate on its cultural and historical context, and rely for ethical guidance more on later stories about the great Hippocrates.

New treatises

This commentary, preserved in Arabic, is only one of the many new treatises that have come to light over the last decades. I calculate that, on average, at least 40 pages of new material had been published each year since the 1970s, some in the form of quotations preserved in later authors, but more often as complete treatises, sometimes several books long. Some were entirely new, others had been badly or partially published in the Renaissance from poor manuscripts and then forgotten.

Although most of the new Latin treatises come from Late Antiquity, they include a chapter on bladderstone from the *On medicine* of Cornelius Celsus, the most stylish of all Latin medical writers who lived around AD 40. Greek authors from Late Antiquity have also been rediscovered, like Paul of Nicaea, showing not only the continuation of some sound practical therapies, but also the way in which the great range of medical ideas visible in the time of Celsus shrank,

or was shrinking, into a dogmatic Galenism.

Galen

Galen is the greatest beneficiary of the new discoveries, along with the many earlier authors he cites, or others whose works were believed to be his. One such author, a Greek contemporary, praised the healing powers of the centaur to cure everything from collywobbles and headache to rabies and the plague.

hard to interpret. In *Medical terminology*, Galen advocated an unusual course of action – reading Aristophanes to find out the everyday meaning of words in 5th-century Greece, for a competitive comic writer had to use ordinary language to ensure that his audience got the point of his jokes.

Hippocrates was one of the ancient authors whose ideas Galen thought essential knowledge for every practitioner. In *Examining the physician*, Galen provided the would-



Figure 2. A medieval manuscript of the Latin Galen. Photo: © the Biblioteca Malatestiana, Cesena.

Galen himself stood at the end of a long tradition of Hippocratic exegesis that he had inherited from his teachers. It required both medical and philological expertise, for the dark aphorisms of Hippocrates were often

be patient with a questionnaire to present to the doctor before he was allowed to perform any diagnosis. It reveals much about the desired competence of a Roman physician or surgeon, but even more about the

prospective patient, who not only is expected to know the answers but also has the time to interview several candidates before making his choice. The implication of the treatise is also that it would be safer and quicker to choose Galen.

'Avoiding distress'

Many of these new discoveries, like Galen's long and vivid description of a fight between a snake and a weasel quoted by an Arabic zoologist, are not preserved in their original Greek, but in medieval translations into Arabic, Latin or Hebrew, with all the difficulties that brings. But there are exceptions. In 2005 a French research student found in a neglected volume in Thessalonica a fragment of medical philosophy, the previously lost portions of three works by Galen that form the foundation for all modern studies of his life and works, and another tract, *Avoiding distress*, known previously only from a few isolated references. M. Pietrobelli and his supervisor, Mme Boudon-Millot, have now published all the new texts with commendable speed and accuracy.

Avoiding distress was written by Galen in AD 193 shortly after the death of the emperor Commodus, whose reign, he declares, was the worst in recorded history. In it he reveals what it was like to live under a tyrant, but also the consequences of the disastrous fire in Rome the previous year. He lost books, gold, silver, drugs, instruments and legal documents when the public storehouse went up in flames. He, and others, paid higher rent for depositing their valuables in a supposedly fire-proof building protected by the imperial guard, for many state archives were also kept there. His own losses were substantial, and almost irreplaceable, for many of the originals from which he had taken a copy had also perished when the fire consumed

the imperial libraries on the Palatine.

We are given only a tiny glimpse of these vanished riches. Autograph copies by famous authors, the complete works of Aristotle and Theophrastus, some of which had escaped the notice of earlier cataloguers, the famous editions of Homer by Aristarchus, and masterpieces of calligraphy that had belonged to Cicero's friend Atticus and to other collectors. All these were now gone for ever. Although Galen's friends could supply him with replacements for some of his own books from copies he had sent them for their own use or for deposit in public libraries, much he could never recover. He was extremely unlucky: had the fire broken out only a few weeks later, he would have had copies despatched to his villa in Campania. Nonetheless, so he claims, he refused to be distressed. The example of his father, who despised fame and fortune, and a few lines from a play by Euripides had taught him that, if one always prepared for the worst, even the bad could be tolerated.

New perceptions of old traditions

This abundance of new material, along with the knowledge that there is more still in the pipe-line, has fundamentally changed perceptions of medicine in the ancient world. It has allowed new and wider questions to be asked about the place of healing in ancient society, not least in centuries for which previously there had been little evidence. We are now much better informed about the ways in which Greek medicine developed in the Hellenistic world as it spread from the Aegean basin both westward to Italy and eastward to the borders of India. The old picture of a relatively static tradition, based (with rare exceptions) on the famous theory of the four humours, has been replaced

by the dynamism of the competitive market, in which claims to anatomical knowledge vied with astrological expertise, and where a patient might choose to consult a woman healer or a god, alongside or instead of a Hippocrates or a Galen.

Of wider significance for classical studies is the opportunity provided by the new evidence to study the interaction of a variety of healing cultures across the Greek and particularly Roman worlds. This is neatly illustrated by a brief history of medicine found in a Latin manuscript copied by three scribes in Bologna around 1350, but clearly depending on sources that go back to Late Antiquity, if not earlier. According to the author, it was Noah who awarded separate medical specialties to the Greeks, the Egyptians, the Syrians and the Indians. But some were not satisfied with what they had received. Asclepius, accompanied by 40 Macedonian sages, travelled East to the Garden of Eden to find the tree of knowledge. As he reached out to touch it, he and his companions were struck down by the sword of the guardian angel. Consequently medicine remained hidden for almost 630 years until it was restored by Hippocrates of Cos, the first in a series of great doctors culminating in Galen of Cappadocia.

This unusual text combines Greek and Hebrew traditions, fact and fiction, legend and scholarship. It is a reminder that ancient medicine did not end with the fall of Rome, or of Byzantium for that matter, but long continued to flourish, and indeed still continues to do so in the Muslim world today. This allows scholars to hope that, at least for a while yet, many more medical writings from Classical Antiquity will be discovered, which in their turn will throw yet further light on the classical past of medicine.

Vivian Nutton is Emeritus Professor of the History of Medicine at University College London, and a Fellow of the British Academy. His annotated translation of Galen's *Avoiding distress* is published this year.

Audio recordings of the presentations by Dr Leith and Professor Nutton can be found via www.britac.ac.uk/events/2011/NewLightonAncientMedicine.cfm

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