

# National University of Ireland

## 3rd Garret Fitzgerald Lecture

Remarks of Professor Gerard Quinn  
in response to Peter Sutherland.

Friday 31, March, 2014.

Aula Maxima, NUI Galway.

Chancellor, President, members of the Fitzgerald family, distinguished guests,  
ladies and gentlemen:

It is indeed a high honour and privilege to respond to Mr Sutherland on the occasion of the 3rd Garret Fitzgerald lecture. The lecture affords an opportunity for the NUI community to come together to honour one of its most eminent Chancellors and a lifelong champion of an open society in Ireland – and Europe. I am sure that Garret would have reveled in tonight's proceedings.

It is also gratifying to see that the commitment to free and open enquiry and the construction of an open society that so characterized the public life of Garret Fitzgerald is now securely lodged in the hands of Chancellor Maurice Manning who has given invaluable public service throughout his life and done more than most to breath life into cherished ideals of freedom on this island. Maurice, your presence here tonight symbolizes our collective commitment in the broad NUI community to free and open enquiry and the pursuit of truth.

Justice Brandeis of the US Supreme Court reserved particular praise for men – and women - who, through experience and the wisdom gained through experience, develop an acute capacity for ‘situation sense’ – a capacity to see through the immediate, a capacity to divine the root causes of contention and above all a clear moral and political compass to guide our collective action into the future. We are tonight in the company of one such person – Peter Sutherland – a man who possesses that ‘situation sense’ in abundance – a man who has made us proud – but most importantly of all, a man who bears a message that commands attention.

That message has to do with the corrosive impact of extreme nationalism on our shared European ideals and Institutions. Mr Sutherland weaves a compelling account of the essentially moral as well as political and cultural mission of the European Union and the challenges it now faces.

Allow me to respond – as an academic might – by zooming out from that message and placing it into a historical context. For it often seems that the warnings from the past, even the recent past – no matter how harrowing – often fail to connect in the present. How quick we forget the moral wasteland of the 1930s as essential backdrop to the intentions of the framers of the Union.

In truth the Republic – the idea of an open society and open and responsive political institutions of the *Res Publicae* - has had its enemies from the very beginning. The European Union is the latest in a long line of noble efforts to deflect the negative energies and destructive impact of factions, ideologies and extreme nationalism – all intent on undoing the open society. Maintaining the open society as the foundation for peace and prosperity is exactly why the EU won the Noble Peace Prize in 2012

Indeed, if one were to mine the content and power of the some of the world’s greatest constitutional moments – whether the English Glorious Revolution of 1688, the American Revolution in 1776 - one will see an attempt to tame the savagery of totalitarian power, an attempt to erect an edifice that accommodates

diversity – pegged to an economic structure that expands individual freedom. Indeed, during these grand constitutional moments one will see an attempt to define the political community less in terms of belonging to an ethnic group - to which one must belong and conform - and more as an entity with a common set of ethical principles to which all, regardless of their difference can subscribe.

This legacy is a precious thing – but it is also a very fragile thing. Its most inspirational source – a source to which the framers of the US Constitution constantly returned – was the Constitution of the Roman Republic. Imperfect through it was by today’s standards, its essence nevertheless reverberates through the ages and was transmitted directly to us by the Enlightenment.

What set it apart?

First of all, it was premised on a realistic appraisal of the damage that faction could do and represented an attempt to diffuse its impact. The danger of faction was the inspiration for Madison’s Federalist Papers. At the end of the day its Institutions did not prove to be up to the job – the pressure was too extreme. But it did at least make an effort to build walls against the cruder impulses of extreme factions.

Secondly, it took seriously the idea of *Res Publicae*- the view although we have private interests which can and should be pursued vigorously, they are nevertheless to be pursued in the context of the public interest. This entails a commitment to the view that there is always something bigger than ourselves worth committing to and that service in the name of the public interest is always something to be valued.

Thirdly, it entailed the idea and the everyday practice of *civic virtue* – a willingness to go beyond one’s own interests, ideology, religion or nationality and contribute directly to the formation of the public interest. Viewed in this light, Government is not (or ought not to be) a pale shadow of warring creeds and rival private factions - but represents a genuine attempt to rise above them.

And then citizenship – the idea that anybody can belong – and be seen to belong – no matter their ethnicity, nationality or religion - provided one commits to the underlying principles of the *Res Publicae* which include tolerance and respect for difference.

Interestingly, freedom to the Romans meant the freedom to belong and the freedom to participate. It was public freedom and not just the protection of private freedom against arbitrariness. Interestingly this commitment to public freedom maybe explains the resonance of Kennedy's words – 'ask not what your country can do for you but you can do for your country.'

Don't get me wrong. I am no apologist for the egregious abuses of power in the Roman Republic and especially in the later Republic. Thomas Jefferson was sufficiently cold-eyed to see this – and yet drew his inspiration from Rome. Even Alexander Hamilton – the First Secretary of the Treasury and the father of the American economy – did not just dream of a common market across the US States but of a great Commercial Republic – something that EU has already attained at least in the marketplace.

Why this backward glance? What does antiquity have to say to us about political extremism and nationalism in Europe today?

Doubtless it has a lot to say in itself. Ambiguities in the law conferring immunity from prosecution was the immediate reason that drove Caesar to instigate civil war. But the deeper reason lay in the incapacity of the Institutions of the Republic to accommodate new realities – to adjust to difference and severe social dislocation brought about, paradoxically, by unparalleled military success. As Dean Roscoe Pound told us, all Institutions tend toward decay. But, interesting though they are, I don't want to dwell on its ancient messages. For the Roman ideal did not die – it was transmitted to us *via* epoch-making events such as the Enlightenment with the evolution of liberal political and economic theory and

latterly democratic theory and practice – all encapsulated in what we now call liberal-democracy.

My view – for what its worth – is that this liberal-democratic ideology sits very uneasily with nationalism and not just the extreme versions. At its heart is the image of the open society – a society where no one ideology (whether political, religious or otherwise) is privileged. It is a society committed to human flourishing on the basis of the person's own conception of his or her destiny – not on the basis of the dictat of the keepers of orthodoxy or of the economic planner. It is a society where one has a right to be wrong and indeed take risks – to flout orthodoxy and live one's life accordingly. It is a society that responds to the will of the people through open, fair and transparent institutions. Most importantly, it is a society of free and fluid human interaction whereby identity (and even one's views of one's own private interests) are in a constant process of change. It is this constant interaction with the 'other' that adds health to identity. If I may say so, part of the tragedy of partition on this island in the past is that we predictably grew inward as our only source of difference was cut off and latent diversity was submerged.

The very idea of wrapping a political community or State around a self-defined homogenous nation – around an ethnic group – is an accident of history – unknown in antiquity, non-existent in the Renaissance and coming into its own only in the 19<sup>th</sup> century. Some, such as Lord Acton, railed publicly against it even at the time. True, we are all attracted to kith and kin. True, the phenomenon of a national identity whether defined culturally or otherwise, makes sense. It is an observable fact. This is what Herder called 'cultural nationalism.'

But the idea that the political community or State should revolve almost exclusively around kith and kin only took shape in the 19th century. One sometimes has the suspicion that national identity is as much a function of conscious State action and policies to instill it than it is a natural phenomenon existing 'out there.' Once this State induced sense of homogenous nationality dissolves more space is left for multiple identities to express themselves. Here

this has meant space for the expression of the British dimension to the Irish identity/ies. By the way, one of the most eminent scientists in this University has confirmed that – genetically speaking – the Irish people are not of Celtic stock! The relative closure of nationalism – whether tame or extreme – to the ‘other’ stands as a threat to an open society – where conformity either to an ethnic label or an associated system of views is the test of belonging or citizenship. In extreme hands it can dissolve the glue of tolerance and respect essential to the maintenance of an open society – and economy. So the first big lesson from history is that the nation-state- a relatively recent construct – with its test of belonging based on ethnic identity and not on shared ethics that transcend difference can be pushed, in the wrong hands, to justify near total political closure – cultural closure and exclusion.

There is another lesson from history – one that speaks not to the ideal of the open society and the challenge that the nation-state poses to it, but more to the inherent vulnerabilities of the open society – vulnerabilities that can allow extreme nationalism – and indeed other forms of extremism – to enter into and then proceed to deconstruct the institutions of an open society.

The very openness of our political institutions creates space for extremist and intolerant forces to enter and hollow out the system. There is a lot written today about the symbiosis between democracy and human rights. Alas, this is not true – or at least not fully true without some important qualifications. Reflect even briefly on the situation under the Weimar Constitution of 1919. Unfortunately, this beautifully crafted liberal-democratic tract was overlain on utterly infertile ground. The old Prussian ideal that the State comes before the Constitution and the State does not tolerate difference and can physically force conformity, exerted its own undertow – so much so that one German politician famously quipped in the 1920s ‘we have a Republic but no Republicans.’ One lesson from this history is that the imposition of a liberal-democratic veneer will not in itself transform an inherently closed or rigid culture – something else is needed to make its precepts appear natural and acceptable.

Another lesson – another reason why the vaunted nexus between democracy and rights is not as it seems to be – has to do with the relative ease with which open systems can be shuttered. An open system can come under stress because of extreme economic or social dislocation and the polarization in politics that this might engender. Arguably some EU Member States are going through this right now. It might come under stress because of the rise of virulent and intolerant orthodoxy either in religion (the Tony Blair thesis) or ethnicity - which is closely tied to nationalism. And it might be aided by weak or opportunistic political parties pandering to extremism in order to supposedly blunt it and control it – an exercise doomed to failure and fraught with risk. And – here's the point – an open system can quite easily be 'legally' deconstructed once one of these extremist forces obtain admission to power – through the democratic process.

This is the haunting lesson of the Nazi 'legal' order. Remember, Hitler did not take power violently. He engaged in what he called a 'tactic of legality' to enter the apparatus of power 'democratically' and to 'legally' dismantle all the recognizably liberal-democratic limits on his power once in place. He manipulated the emergency powers of the President and played Von Hindenburg like a fiddle – one reason why Article 15 of the European Convention on Human Rights placing restrictions on emergency powers is so strong. True he rigged the vote in the Reichstag to get it to hand over its law making powers to him personally through the Enabling Act of 1933 – but he probably would have gotten this vote in time anyhow.

In place of an open society – tolerant toward difference – he insinuated his own extreme nationalist or Volkish theory of the State – a theory which, conveniently, only he could interpret and apply. The nightmare was only beginning. This created space for the persecution of the 'other' – of minorities ritually held up as scapegoats for current travails. These included not only Jews but also many persons with disabilities (the deaf, the blind and the feeble minded) as well as gypsies not to mention political opponents. To a certain extent, the treatment of such groups is a barometer of the health (or otherwise) of a political system.

When their status deteriorates this is not only a cause for concern in itself but an indicator that something is fundamentally wrong in our system of power.

Ladies & Gentlemen, Charlemagne once dreamt of and partly built a Respublica Christiana in Europe as heir to the Roman tradition. His name is honoured to this day in Brussels. Sadly, this decomposed into a patchwork quilt of principalities in the Middle Ages and finally into nations or nation-states in the 19th century. In truth, no state has ever completely encompassed one nation. Bits of nations are inevitably orphaned in the territory of other States. Further, these bits are tolerated - not welcomed. The series of minority rights treaties in the first few years of the League of Nations – conferring enhanced rights on national minorities but on a premise that you don't belong and almost as a consolation for not belonging. Grotius – the inventor of international law – tied to pin down a series of ethical principles – emanating mostly from Christianity - to guide the behaviour of States. But the default setting became the balance of power – and terror in which no country ever has permanent friends- only permanent interests.

There were many complex causes of the First World War but surely one of them had to do with extreme nationalism, the ease with which bias could be mobilized and the practice of the dark art of the politics of fear. The extreme competition for new markets between the major nation-states did not help. Certainly the peacemakers did not come to terms with the nation-state and virulent nationalism. Indeed One author has recently opined that the First World War has not yet ended. By this he meant that the Wilson's well intentioned ideal of self-determination probably put the quest for nation-statehood on steroids which has arguably had visible effects down to this day – especially in the Balkans and also in the former Protectorates in the Middle East. Incidentally, Wilson did not consider the claims of Irish nationalism to be just and instead held that it was an issue to be accommodated within the open British democratic system. Irish representatives pressed for entry to the Versailles negotiations – but were firmly rebuffed.



The penny only began to drop at the conclusion of the Second World War. That is to say, many throughout the world felt that the nation-state was itself part of the problem and that ways had to be found whether to reconceptualise the political community without relying on the nation or to tame the worst impulses of nationalism. Interestingly, the UK has long seen the outcome of the War as a result of the vibrancy of its nation-state (or in reality a multi-nation state). Not so for the rest of Europe. Mr Sutherland paints a very full picture of how the EU was imagined and constructed – out of moral revulsion but with a new moral compass.

To feel the nation-state is part of the problem is one thing. How to tame it – and the space it allows for extremism – is another. Two different approaches were housed in two new and different institutions. The Council of Europe – based in Strasbourg – is premised on the existence and sovereignty of the nation-state. Through its treaties it places a series of collective guarantees underneath the nation-state. It is the keeper of the conscience of Europe.

The European Union is different. It goes beyond setting a floor of minimum guarantees in, for example, the various treaties of the Council of Europe. It seeks instead to poke holes in the sovereignty of the nation-state by integrating our common economic life and, in turn, to influence our cultural and political life. It seeks to instill the value of unity through diversity and not homogeneity. It makes a solid stab at moving away from the negative ethics of conformity, exclusion and discrimination. Of course it does not – because it cannot – completely efface the notion of the nation-state. Unlike the US its base of authority is not ‘we the people’ but ‘we the nation-states.’

However, it does possess some important powers to tame extreme nationalism. And it is premised on the holy trinity of the rule of law, democracy and human rights. It isn’t just human rights and their violations that count – which to a certain extent are symptoms of political failure. It is this insistence on the ‘rule of law’ and democracy’ that also counts which in a sense protect the integrity of the political system. From this angle not every law counts as law within the ‘rule

of law.’ The Nazi sham of hiding naked brutality behind the veneer of legal form will not do. And from this angle not every democratic outcome is due equal weight since democracy is seen not just as a completely open-ended process where anything goes but a bearer of minimum values which can halt the slide against the democratic undoing of the democracy itself. To pick on or exclude one minority group is not permitted since not only is this morally objectionable in itself but it precipitates a long excursus down a slippery slope in which the entire political order can eventually collapse.

Just a few months ago the EU Fundamental Rights Agency found that nearly half the Jewish population in 8 key Member States reported a fear of being verbally harassed in public and 33% feared physical attack. This is damning and an utter shame on Europe. In another 2013 EU FRA report on ‘racism, discrimination, intolerance and extremism’ with a focus on Greece and Hungary the analysis went beyond manifestations of racism and intolerance and looked, with concern, on the entry into Parliament of extremist forces that propagated intolerance (specifically Golden Dawn and Jobbik). It found that Europe has an ample suite of legal measures to tackle discrimination – but that they were not being comprehensively implemented. Yet another 2013 EU FRA report on ‘safeguarding human rights in time of Crisis’ tackles the hard issue – which is how to stop the ‘tactic of legality’ being used by extremist organizations to infiltrate and dismantle the architecture of an open democratic system – which includes erosion of the independence of the judiciary.

Three major reports in one year on variations of the same theme! All systems come under extreme stress at some point. What matters is having the means to respond – which Europe appears to have but needs to exercise more vigorously. Dealing with the symptoms of extremism in terms of discrimination and hate violence is relatively straightforward. It requires vigorous enforcement of exist EU laws. Dealing with the erosion of domestic constitutional guarantees – whether of the independence of the judiciary or otherwise it trickier since they are a matter for the Member-State or the nation-state. Speaking on the Hungarian constitutional changes in 2012 the President of the Commission – Mr

Barroso – stated that the matter would be dealt within in as much as it implicates EU law (which is very little). He did go onto say that the issues did go beyond EU law and cited critiques from the Venice Commission of the Council of Europe. Whats the point? The point is that the EU has a stake – at least once a certain threshold has been reached - in ensuring the integrity of the constitutional orders of its Member States. Put another way, the ‘tactic of legality’ used by Hitler to undermine those orders is not to be tolerated in the 21st century. If you tug at one one string at the domestic level it will inevitably have implications for the entire fabric of the Union as an entity based on law.

To conclude, to me at least, our project is not merely to contain nationalist extremism but to question closely the paradigm of the nation-state into the 21st century. The very idea of the nation is itself under examination. Apart from the fact that such entities have probably never really existed in their pure form, they are defined by whom they exclude. And the State itself seems to be changing form. Our sovereignty is genuinely shared and, to the extent that it isn’t, it is constrained in any event by forces beyond its control. The European Union – with all its in-built limitations - offers our best hope of articulating an ethical theory of the political community as distinct from an ethnically-based theory of the political community and State. Aristotle said you define something by what it is capable of becoming.

Let me end with a quote from Oliver Wendell Holmes – a quote I think that describes Mr Sutherland and his contribution tonight:

“We cannot all be Descartes or Kant, but we all want happiness. And happiness, I am sure from having known many successful men, cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars. An intellect great enough to win the prize needs other food besides success. The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and

catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.”

Ladies and gentlemen, it is sometimes said that lawyers sharpen their minds at the cost of narrowing them. Not so with Mr Sutherland. He has shown a keen awareness of the deep theory – of the ethical foundations - of an open society and the extreme threats we now face. Tonight, as Holmes said – he has caught an echo of the infinite – the values that bind us together across our diversity and the Institutions in Europe that we all have a responsibility to nurture to enable the European project to succeed. He has done the legacy of Garret Fitzgerald proud. For this, I am, and on your behalf, immeasurably grateful.

Thank You.

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