

**THE RIGHT OF THE STATE TO IMPOSE THE MAJORITY'S VIEW ON  
THE MINORITY**

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In this paper I am concerned not with the legal right of any particular State to impose the majority view on the minority in relation to any specific issue but rather with the validity of the moral claim that the State has a right to do so. I assume that the rulers in question are democratically elected and that the view to be imposed is in fact that of the majority at the time.<sup>1</sup> The paper looks first at practical reasons, and then moral ones, why the State's claim should be rejected.

1. The State

"It is thus necessary that the individual should finally come to realize that his own ego is of no importance in comparison with the existence of his nation; that the position of the individual ego is conditioned solely by the interests of the nation as a whole...that above all the unity of a nation's spirit and will are worth far more than the freedom of the spirit and will of an individual..."

"This state of mind, which subordinates the interests of the ego to the conversation of the community, is really the first premise for every truly human culture... The basic attitude from which such activity arises, we call -- to distinguish it from egoism and selfishness -- idealism. By this we understand only the individual's capacity to make sacrifices for the community, for his fellow men."<sup>2</sup>

These quotations are from Adolf Hitler explaining the moral foundations of Nazism. It is clear that on this basis the State, as representing the community, could do as it liked, even to the point of mass slaughter in cold

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- 1 These assumptions are made so as to put the State's claim at its strongest.
- 2 Hitler at Buckerburg, Oct 7, 1933; Mein Kampf, translated by R Manheim (Boston, Houghton Mifflin, 1943) p.298; quoted in The Ominous Parallels, by L Peikoff, Stein and Day, New York, 1982.

blood. Revulsion at the uses to which State authority has in fact been put by such tyrants as Hitler, Stalin and Pol Pot has led some people to embrace views such as those of William Godwin:<sup>3</sup>

"Government was intended to suppress injustice, but its effect has been to embody and perpetuate it."

Godwin's solution was to call for:

"the dissolution of political government, of that brute engine, which has been the only perennial cause of the vices of mankind."<sup>4</sup>

However, the anarchist solution fails for two reasons. First, I have myself witnessed a quarrel between two good men which nearly destroyed a private association. Each, taken separately, is a tower of strength for any association he chooses to join, but together they could not even agree on an arbitrator for their dispute. In the context of a club each could go his separate way, but what if such a dispute arose over property rights? Under anarchism each would be entitled to defend his honest claims against a trespasser, and each could call on his many friends to support him. The dispute could lead to a long-lasting, violent feud. Second, there are unfortunately criminals and violent aggressors in this world.<sup>5</sup> I understand that in Hong Kong the area once occupied by an old Chinese imperial fort is outside the jurisdiction of the colonial government, and that criminals sally forth from there and prey on their neighbours. The same situation existed in mediaeval London, where an area under ecclesiastical jurisdiction formed a sanctuary for thieves and robbers. A lynch mob might eventually form to end this situation (though only at great risk to the lives and properties of the innocent), but such means are not effective against terrorists and revolutionaries, let alone against a neighbour such as Genghis Khan.

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3. Enquiry Concerning Political Justice, Penguin Books, 1973, p.76 (first published 1793).
  4. Quoted in the introduction to the Penguin edition, p.16
  5. Even if the claim that the generations born under anarchism would be non-aggressive were to be accepted, the system would break down under the assaults of aggressors already in existence

We therefore need a State, but hopefully not Hitler's kind of State.<sup>6</sup> The vital point about the State is that it possesses a monopoly of legalised force - force exercised<sup>7</sup> by the State itself or permitted by it to its citizens.<sup>8</sup> States can vary enormously in type, depending on how much force they allow themselves - from the totalitarian to the night-watchman State, which simply retaliates against those who infringe the rights of others.<sup>9</sup> In this paper I am concerned with a State somewhat closer to the middle of the range - one whose constitution provides for unlimited majority rule. Such a State may be democratic, but it accepts no individual rights save such as happen to be allowed from time to time. A 51% majority can confiscate property without compensation, overturn any law, and exile (or even kill) any individual who becomes unpopular.<sup>9</sup>

Is this really in the public interest? A modern economy requires long-range planning, certainly over a period of years and sometimes over decades. How is such planning to be undertaken when the arbitrary whim of even a temporary majority can wreck such planning at any moment. The inevitable result is a reduction in investment and therefore eventually in the quantity of goods and services available for consumption.<sup>10</sup>

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6 Robert Nozick, in Anarchy, State and Utopia, Basil Blackwell, 1974, shows how a State might arise out of anarchy - a "state of nature". (I certainly do not suggest that this is how actual States arose, nor that a State's current legitimacy depends simply on the facts of its historical origin.)

7 In eighteenth century Ireland a man was knighted for killing four burglars with a carving knife - today he would be prosecuted for murder. See R.E. Megarry, Miscellany-at-Law, 1955, Stevens & Sons Ltd., London, p.55.

8. Note that a man who deliberately disregards the rights of others (e.g. by assault or burglary) has no moral right to object should others (including the State as their representative) proceed to disregard his claim not to be seized and imprisoned or fined. If he possesses such rights it must be because he is a human being -- so either all humans possess such rights or he himself has no claim.

9. For an example of what this means in practice, see R. v. Kidman (1915) 20 CLR 425.

10. Note that such a reduction is likely to bear particularly harshly on the poor

Further, if unlimited majority rule is to be accepted, why should the vote be confined to the inhabitants of a single State? Do the inhabitants of India and China (together forming nearly one-half of the world's population) have the right by a simple vote to confiscate the property of sixteen million Australians? If not, why do (say) three million people in New South Wales have the right by a Parliamentary vote to confiscate the property of their fellow citizens?<sup>11</sup>

Unlimited majority rule does not automatically lead to socialism, with total State ownership or (under fascism) total State control of the means of production, distribution and exchange. However the barrier is not a theoretical one - mass confiscation could be brought about by a simple majority of votes - but rather a practical one based on socialism's failure to provide a good lifestyle for the majority. Among the many reasons for socialism's failure I will here deal briefly with three. First, it relies either on brute force or on altruism. People do not work well as slaves, and altruism, while a genuine aspect of the human condition, especially in emergency, is not the dominant motive of most people's lifetimes.<sup>12</sup> The practical result in the communist countries has been not human brotherhood but cynicism, rudeness and corruption.<sup>13</sup> Second, the human short-term memory can hold perhaps seven items at a time. No one planner could keep in mind the effect of each of his decisions on thousands of firms and millions of people, nor could any group of planners coordinate their efforts so as to ensure that whoever makes a particular decision has all the relevant information. Third, the method used under capitalism to avoid this difficulty - the price system - is not available to planners in socialist countries, where prices are set by the State. Someone planning for the future has to take account of the fact that resources are scarce, and that to devote resources to one scheme is to divert resources from another. Suppose that a city is to be expanded, and needs more electric power. The possible schemes to provide it involve hydro-electric power, coal-fired or nuclear power stations, or the bringing in of electricity from elsewhere via the national grid. In a capitalist society those responsible for power production can consider the economic

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11. The Wran government in fact confiscated private property rights over coal in the ground.
  12. See Thomas Sowell, A Conflict of Visions, William Morrow & Co, New York, 1987, pp.19-22.
  13. See, for example, The Russians, by Hedrick Smith, 1973, Sphere Books, London.

issues by looking at the prices of the resources involved, thereby eliminating those schemes which are most wasteful of resources and then going on to consider non-economic issues, such as the preservation of wetlands. The socialist planner, faced with arbitrary prices, has no means of knowing which scheme will best conserve scarce resources, and all too often is left with a massive "white elephant", or a surplus of one item and shortages of others. Those who notice such a discrepancy have to get permission from distant planners before they can set about remedying it, and they have nothing personal to gain from taking the trouble to do so. Unlimited majority rule need not go so far, but the theoretical possibility exists, combined with the actual probability that in any particular line of activity regulations may be introduced at any moment, based not on public safety but on the whim of a majority which may be deceived by special pleading or ignorance of the long-term consequences of its action.<sup>14</sup> This must hamper long-term planning and the increase in prosperity of the community as a whole. There is thus good reason for the State to accept a limitation on its claims to interfere with the liberty of the citizen.

## 2 Morally speaking, intentions are not enough

"One often sees good intentions, if pushed beyond moderation, bring about very vicious results."<sup>15</sup>

If a scheme is put forward as for the public benefit, to be imposed compulsorily and at others' expense, the proponents must show at the very least that it will achieve the ends sought to be attained. A majority vote cannot remove this duty.

Note the failure of so many social programmes, brought in with high hopes.<sup>16</sup> In America Prohibition was brought in democratically, to end the undoubted evils of drunkenness. It not only failed, but led to an increase in corruption, violence and organised crime combined with a decrease in respect for the law.<sup>17</sup> Sunday observance

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14. See further section 13 of this paper.

15. Montaigne, Essays, Book ii, Ch.19.

16 See in particular Charles Murray, Losing Ground: American Social Policy 1950-1980, Basic Books, New York, 1984.

17 Nowadays the trade in illegal drugs raises much the same problems. Note also the problems with brothels and illegal casinos.

laws, once there arises a substantial number of people (including non-Christians) who wish to shop on that day, create great economic pressure on otherwise honest traders to become law-breakers.<sup>18</sup> Rent controls have increased the shortage of low-income housing (the very problem they were supposed to solve) and have tended to drive out good landlords in favour<sup>19</sup> of the sort of person mentioned in Rondel v. Worsley,<sup>19</sup> whose employee did not scruple to use physical violence against those on rent-controlled property (only to be abandoned<sup>20</sup> by his employer when he faced criminal charges).<sup>20</sup>

Public choice theory shows that bureaucrats and politicians cannot be expected to act automatically in the public interest. In Sweden, a city planner entrusted with the construction of housing for a major city complained that while he was putting up blocks of flats there was a lengthy waiting list for private houses. His solution was to put up more flats. At a public conference he drew a representation of a large block of high-rise flats, pointed to one in the middle and said: "Your private house"! Some of those in a position to know have described the series "Yes, Minister" as a documentary. There is a constant risk of interest groups (highly motivated) pushing their particular agendas against the wishes (or interests) of the majority, who cannot be expected to devote time and energy to opposing scores of schemes, each of which individually will impose no more than a moderate burden on them but which collectively may substantially decrease the general standard of living. The same cause may lead to government working against itself, as by an arbitration system raising minimum wages to the point of causing substantial unemployment, followed by the taxing away of the wage gains of those in employment<sup>21</sup> to meet the costs of training or relief for the unemployed. Another example is the requirement, enforced by law, of cartels in certain industries, while the Trade Practices Commission is simultaneously supposed to end the evils of cartels and monopolies. I see no way in which these problems can be overcome so long as the

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18. See, for example, Stoke-on-Trend City Council v. B&Q (Retail) Ltd. [1984] 2 All ER 332 (HL).

19. [1969] 1 AC 191 (HL).

20. How ready would such a man be to keep the property in good repair?

21. Note the further costs in bureaucrats salaries, loss of work experience by the unemployed, and loss of goods and services that would otherwise have been produced

State fails to recognise that there is a large sphere within which the rights of the citizen may not be invaded, even by majority vote.

### 3. Some problems of big government

There comes a point in the expansion of laws and regulations at which it becomes impossible for the ordinary citizen to know, in the absence of expert legal advice, whether or not he is a criminal.<sup>22</sup> In the case of taxation law, in particular, that point has long since been passed.

If a man is allowed no experience in conducting his own affairs, where does he gain the ability to choose a government? His knowledge of his private affairs is necessarily greater than his knowledge of public affairs, and if he ignores the public interest in his private life, why is he expected to do any better as a voter?

In the absence of provision for citizen-initiated referenda, the majority can choose only the government or the opposition as a policy package: on any particular issue the State may not be imposing the majority view.

Even if the bureaucrat is much more intelligent than the citizen, the citizen has a much greater motive to achieve his own well-being, greater time to devote to the matter (of his own life) and greater knowledge of the relevant facts concerning him.

### 4. Statism is an example of group rights

If group rights are to prevail over individual rights, the State is not the only collective with a claim on our allegiance. At different<sup>23</sup> times people may acknowledge prior claims of kinship,<sup>23</sup> of local community groups,<sup>24</sup>

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22. In Victoria alone, over the twenty-year period 1963-1982, the Parliament enacted an average of 144 Acts in a year. By 1983 the number of Acts passed had escalated to 165. By 1988 the number of Acts passed had declined to 81. Note that this ignores the much greater number of regulations, as well as municipal by-laws etc.

23. Note the Chinese Government's claim to absolute priority in the State, as by its praise of a woman who allegedly turned her own brother (a student protester) over to the authorities.

trade unions<sup>25</sup> and religious affiliation.<sup>26</sup> The State certainly claims priority over the rest, but it is not enough to assert such a claim - it must be justified. Where does the group obtain the right to do what the individual members cannot? Domestic associations and companies are required - by the State - to respect the rights of their members. The French government does not respect the group right of African residents to engage in female castration of their children, nor does the Australian government accept that women residents should be deprived of the protection of the Family Court if they happen to be Muslims.<sup>27</sup> Why is the State alone to have the power to do as it pleases?

5. Progress comes from the (often unpopular) ideas of individuals

The State as such has no particular expertise in ideas and indeed, if it follows the majority view, is likely to be out of date because it is impossible for the general public to keep up with all the advances in science and technology. The only thing which the State can contribute to the battle of ideas is the introduction of physical force. At the very best, physical force can lead only to hypocrisy, not genuine conviction, and if the victim refuses to submit the State may discover, too late, that it has martyred a man who turns out to have been correct in his views. Is it an accident that Italy, which up to the time of Galileo's house arrest was among the leaders in European science, was shortly to lose that lead to countries which did not have the benefit of the Inquisition? Even in France Descartes, the leading philosopher of his day, "stressed" those issues "in which he was in agreement with the Church" and "completely overlooked" "the points of disagreement".<sup>28</sup> Note the

24. As with those who have lain down in front of bulldozers rather than accept a decision that some local project should go forward.

25. The most notorious example is the British miners' strike, but there are many others.

26. Note the problem of the Shiites in Iraq - were they to support their co-religionists, who were at war with the Iraqi government?

27. Compare the denial of group rights to Muslims in the Salman Rushdie affair.

28. Descartes, R. Meditations on First Philosophy, Bobbs-Merrill Educational Publishing, Indianapolis



appalling effect of Lysenko on Russian genetics and agriculture, and the forcible rejection of new thinking in Russia until the State was faced with a crisis so grim that it may now prove too late to deal with it. Traditional China and Japan also tried to keep out new ideas, only to have the barriers broken down by force. In the field of ideas, State interference with freedom of speech has proven counter-productive.

6 Why is the production of goods and services treated differently from ideas?

Ideas, if wrong, can have effects far worse than thalidomide or food poisoning. It is false ideas that underlay the atrocities of Hitler and Stalin and that still support the system of apartheid.

Ideas cannot simply be accepted or rejected in a vacuum - those who believe in an idea will feel the need to put it into practice, and there is no reason why they should be prohibited from doing so if they do not thereby invade the rights of others.<sup>29</sup> Even a false idea can prove of benefit: for example, Columbus was told (correctly) that the distance to India was vastly greater than he supposed,<sup>30</sup> and had there been no continent between he would never have made landfall. Furthermore, it is of the essence of modern science that theories must be tested before they can claim acceptance. The production of new goods and services is also based on ideas, which must be tried out in practice. Why is the production of a book (a material object) viewed as sacrosanct while the production of a washing machine is viewed as subject to all kinds of State interference?

### MORAL ASPECTS

7. We live in a pluralist society

In Western society there are disagreements both as to moral and religious principles and as to the findings of

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(translation by L.J. Lafleur), introduction p.xii; and see the introduction by the same translator to Descartes' Discourse on Method, pp.xviii-xxi, where he states (at p.xx) that "the whole treatment of God in Descartes may be due to policy rather than to philosophy."

29 The question of what rights people possess will be considered later in this paper.

30. Aristotle had proved that the world is round, about the time of Alexander the Great

the social sciences. Governmental coercion needs to be justified. The onus of proof is on the person who wishes to impose his views by force on fellow-citizens who disagree with him.

## 8. Morality

Morality is a code of conduct, telling us how we ought to live. Questions of morality apply where there are choices to be made. If the universe were completely determinist there would be no choices and no morality. Determinism fails not only because the universe, at the sub-atomic level, is not a piece of wholly predictable clockwork, but also because, even if it were true, we could never prove (or disprove) it in any meaningful sense. In a determinist world, no valid experiment could be designed (the experimenter being no more than a robot), nor could an argument be conducted if the result depends, not on reason, but on mechanical causation. By the very fact of arguing in favour of his position the determinist undercuts his own premises.<sup>31</sup>

An alternative view is moral relativism, that is, that the morality of any group is as valid as the morality of any other group. Most people attracted to this view tend to hedge when it is pointed out that support or dislike of apartheid then becomes a matter of taste (as with enjoyment or dislike of eating tomatoes), and that no objective moral difference could be pointed to between a Jew in Auschwitz and the man who sent him there. A more fundamental objection to moral relativism is that the doctrine is itself put forward as an absolute!

A third alternative is a morality based on religion. The problem immediately arises - which religion? Believers cannot even agree on whether there is one God (e.g. Islam) or many (some Hindus) or none (some Buddhists). The Christian emphasis on personal salvation and a single life is quite different from the Buddhist emphasis on escaping the wheel of rebirth and on the self as an illusion. In any event, there is no justification for forcing the views of one religious group upon non-adherents. Also, before God can be looked to as the basis of morality it must be shown (independently of His own word) that He is good. There is therefore no substitute for an objectively established morality.

Morality is applicable to choices. If we decide to live, we have four basic options. One may choose to live:

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31. So, too, does the solipsist

- (a) by force. This leads to the objection that there is only one of me, and about 4,000 million of them. Also, even if I am presently the strongest and toughest man alive, I will presumably grow older. Even Napoleon and Hannibal failed in the end. Can I do better than they?
- (b) by fraud. This condemns me to a life of outwitting the gullible. The intelligence and rationality of others is a threat. I live with the prospect of having to take a hasty departure at any moment, once any of my scamps is detected. Long-range profit is most unlikely. Even the most successful practitioner of a combination of force and fraud, Stalin, in order to succeed had to surround himself with a set of men with whom decent people would not care to associate.<sup>32</sup>
- (c) by others' pity - as a parasite. Very few people, even among the physically disabled, have to live this way, and their numbers are decreasing as technology advances. Such a mode of existence renders a person utterly dependent upon others who may or may not choose to foot the bill for one's needs. It also destroys all hope of real accomplishment, thereby endangering self-respect.
- (d) by productive effort. If it is accepted that the moral is universalisable (that is, that what I advocate for myself I equally advocate for all others in a similar position) only productive effort passes the test. If all humanity tried to live by force, fraud and pity, without production, humanity would perish.

(9) To live, rationality is required.

Various alternatives have been tried, and they have all failed. One may attempt to follow a prophet, but one must first answer the question - which prophet? Millions followed Hitler and Khomeini, yet Hitler brought his country and his followers to ruin, while Khomeini, supposedly backed by God, could not even conquer a country of one-third Iran's population. Mystics in general have been able to offer no proof of their claim to superior knowledge. The proponents of parapsychology (ESP) have

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32. See Roy, Medvedev, All Stalin's Men, Basil Blackwell, Oxford, 1983

failed to provide proof even that their subject exists as a science.<sup>33</sup> One might attempt to rely on feeling and will (in company with Hitler), but even here there are conflicts of feelings: reason is required to settle such conflicts, and to select means appropriate to our chosen ends. Any attempt to trust to instinct is (in a human being) very dangerous, first because our instincts are sketchy at best<sup>34</sup> and secondly because what instincts we do have evolved during the hunter-gatherer period (perhaps to be somewhat modified during the period of primitive agriculture). There is no guarantee that such instincts would be suitable to the conditions of the twentieth century, let alone the twenty-first.

It should be noted that reason does not automatically provide either certainty or unanimity. In case of honest disagreement, the only proper resolution to the dispute is to accept that each party has the right to disagree - and that neither has the right to call on the State to uphold his views by force against those who exercise their right of disagreement.

10. All other rights fail, if not backed by property rights

"All men<sup>35</sup> have equal rights, but not to equal things".

That is, there is no right to be given property, but a right to<sup>36</sup> retain and control property which you earn or are given. How is one to maintain one's right to life if

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33. The magician Randi has for years offered a prize of \$US10,000 to anyone who could demonstrate such a talent under controlled conditions and the observation of professional magicians. He concludes after repeated tests that the would-be claimants fall into two classes: those who have deceived themselves and those who seek to deceive others. See Randi, J. Film-Flam, Prometheus Books, Buffalo, NY, 1987.

34. There is even a market for sex manuals to supplement what is surely one of the strongest instincts we possess.

35. Edmund Burke, Reflections on the Revolution in France, first published 1790; Penguin Books, 1968.

36. The right of the heir is derived from the person who earned that property in the first place. One need not established, in law, a right good against God and all

the State (which one has offended) controls all property and jobs? How is the right of free speech to be upheld if the State controls all the media, public parks, halls, street corners and even allocates housing? In the absence of property rights, the exercise of any other right contrary to the will of the State can leave a person helpless before persecution.

Note that rights of property are more important to the poor man even than to the rich. Not only are the poor more frequently the victims of crime than are the rich, and unable to<sup>37</sup> hire private security guards to protect their claims, but the consequences can be more drastic for the poor. A rich man who loses half of his ample supply of clothing can get by until he finds time to buy more: a poor man who owns two sets of clothes suffers a far more serious loss if one of these is stolen.

11 The Desert Island Test. Rights as "Freedom from".

The traditional rights to life, liberty and the pursuit of happiness, undisturbed possession of property and freedom of speech, can readily be exercised on Robinson Crusoe's island. Until Man Friday arrives, there is no one else present who could interfere with those rights.<sup>38</sup> Certain more recently claimed rights, however, are of a very different sort:

"One's freedom finally depends on attaining important prime goals such as dignity, respect, love, affection, solidarity, friendship. To the extent that<sup>39</sup> individuals lack these, they cannot be free."

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the universe, simply a right superior to that of the opposing claimant(s).

37 The same applies to the ability to engage in political maneuvering within the unlimited majority rule State - the individual rich man has more money and time to devote to the matter than do those concerned with day-to-day survival.

38 One has no rights against cyclones and hungry tigers, as they are not in the moral sphere. All one can do is attempt to take precautions.

39. Robert A. Dahl and Charles E. Lindblom, Politics, Economics and Welfare, University of Chicago Press, 1967, p 518; quoted in Sowell, T A Conflict of Visions, William Morrow & Co., New York, 1987, p.89

Instead of claiming rights as "freedom from" certain types of interference such persons claim rights as the "freedom to" attain certain ends. However, though all the things named above are desirable in themselves, and so is freedom, that does not make them part of freedom. I am free to seek these things - but I may fail. Freedom makes success more likely, but it is not inevitable.<sup>40</sup> Hitler in 1941 was free to do all manner of horrible things, but no decent person would have offered him "dignity, respect", etc. Anne Frank was not free to walk out the door without risking a concentration camp, though she earned (and may well have received) far greater "respect, love" etc. than her oppressors.

12. The basic purpose of the State is to protect the citizen's rights.

What is the worth of the promise of a State pension to a man who has just been killed by criminals, or whose State is about to be overthrown by foreign invaders? If the State fails to protect its citizens<sup>41</sup> against violence and fraud, its other promises are idle. Does the State have the right to protect its citizens against offensive conduct? One problem here is that while one can have a pretty clear idea of what constitutes force and fraud, different people have very different ideas as to what conduct should be considered offensive. Ideas vary, not only over space and time, but between individuals and groups in the same society. Many persons living at the time of Darwin (and some living today) found his views on evolution grossly offensive.<sup>42</sup> Most people at that time

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40. Administrative lawyers speak of "error within jurisdiction" or "the right to be wrong". If Parliament confers a power on some public body, with no right of appeal to the court, and that body proceeds to exercise its power within the lawful limits but reaches a result of which the court disapproves, the court has no right to interfere. Similarly, any individual who is free has the right to make mistakes. Some bystander who becomes aware of the mistake can warn him, but has no right to subject him to forcible restraint.

41. Consider the value of a weekly cheque from the State to a man who has been kidnapped, chained in a cellar, and forced to sign an authorization so that those responsible may collect the money "on his behalf".

42. Nor was this irrational. For decades, protestant proofs of the existence of God had rested largely on the argument from design, which Darwin's work refuted.

were religious<sup>43</sup> - did this give them the right to ban Darwin's views? Do Muslims, in a country in which they form a bare majority, have the right to ban views considered blasphemous, such as those of Rushdie?<sup>44</sup> For centuries, homosexuals were subjected to all manner of penalties, on the ground that their conduct was offensive to God and man.<sup>45</sup> Does personal distaste provide good grounds for the imposition of restrictions on others' freedom, backed up by a penalty?

Does the need of others provide a basis for forcible intervention by the State? If another's need is caused by one's own acts of force or fraud, or by negligence on the highway rendering some innocent fellow road-user a paraplegic, then naturally one is responsible for the consequences of one's own actions. But what if one is not personally responsible?<sup>46</sup> Here one must distinguish between the natural human sympathy of the Good Samaritan and a duty enforceable by the State.

Rescue in emergency, and the grant of temporary charitable assistance, are admirable acts (I am myself presently serving as an unpaid member of a board which dispenses such charitable funds on a substantial scale)<sup>47</sup> but the relief of need, treated as the fundamental moral duty, would destroy civilization in short order and would never permit a recovery. There are at present huge numbers of appallingly poor persons on our planet, many of them at the lowest ebb of poverty and distress. Does their need give them a right to our property? If so,

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43. A survey conducted about 1850 showed that on the relevant Sunday half the population attended church.
44. This should be distinguished on the one hand from their right not to buy any book of his, and on the other from the claimed right to put him to death anywhere on earth regardless of the local laws.
45. This is quite separate from the public health reasons for isolating Typhoid Mary, Or AIDS carriers who persist in engaging in anal sex.
46. A fraudulent attempt to evade this question takes the form of blaming "society" - without evidence, let alone proof.
47. The State, in carrying out its function of protecting the citizen against fraud, does have a right to inspect the books of charities, all too many of which betray the trust of those who expect the great bulk of their contributions to be spent on charitable purposes (as opposed, for example, to administrative expenses)

there is no logical limit to that claim until our living standard has been reduced to equal theirs. At that level we could not maintain investment, and technological society would fail, thereby depriving the descendants of today's poor of their best hope for a rise in their standard of living, as well as exposing those already dependent on our charity to starvation.

It has been suggested<sup>48</sup> that the best off have no right to improve their own position unless the position of the worst-off member of society is also improved. Who is the worst-off member of society? Perhaps the human vegetable. Once he has been made comfortable it is difficult to see what more, at present, can be done for him. Another candidate for worst-off is the wino on a park bench. Is this person<sup>49</sup> to act as a ball and chain on human progress? If so, why?

Does the principle of equality entitle the State to interfere by force against the citizen? We must first distinguish three types of equality: equality of outcome, equality of opportunity, and equality before the law. Equality of outcome, regardless of conduct, is both impractical and grossly unjust. Take the example of the worker and the slacker. The worker is entitled to respect for contributing to the joint enterprise, while the slacker is justly resented by all the other participants. How can it be just for the State to demand that each must receive identical respect? If incomes, rather than respect, are to be equalised, there is a great incentive on everyone to shirk, with the result that society attains a state of mass poverty. Worst of all, the very attempt to attain such equality puts vast power in the hands of those who are to implement the programme, while those subject to their rule must be denied the ability to resist. This is not a situation of equality!

Equality of opportunity (an even playing field) at first sight looks more appealing, but here too there are fatal flaws. Consider a parent who is a lawyer, and whose child also wishes to enter that profession. Is the parent

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48. By John Rawls, A Theory of Justice, OUP, 1972.

49. The "original position" as well as stripping the "participants" of their humanity so as to reach the result which the author wants, ignores the actual institution of the lottery, wherein millions of people, so far from adopting Rawls' views, accept a near certainty of losing their ticket money in return for a negligible chance of a big payoff.



to be forcibly<sup>50</sup> prevented from passing on the benefits of thirty years' experience to the child? If so, not only the child suffers, but his subsequent clients as well. Are law students to be selected, not on the basis of ability to pass an objective test, but because they come from broken homes or have received an inferior education? Who will receive the "benefit" of the services of such persons after they are allowed to graduate on the basis of their disabilities? Not the rich - they will continue to pay for the services of the best. It is all too likely that incompetents will drift into conducting the cases of the poor.<sup>51</sup> Similarly, those excluded from a legal career by quotas for the disadvantaged will not be the best students but those who, on a fair test, would just have scraped into the law school. Why, on the principle of equality of opportunity, should these people be penalised?

There remains equality before the law. In a society based on human rights it necessarily follows that the laws must apply to deeds, not men, i.e. that everyone is equally subject to the laws, with no special privileges for any individual or group. The difficulty arises in the matter of enforcing one's rights. Rich persons and large companies can afford to fight a case through a series of appeals. So can the very poor person, if he is on legal aid. The taxpayer in the middle has no such ability, even though his taxes are funding his legally-aided opponent.<sup>52</sup> One cannot infringe on the rich person's right to pay for the services of a particularly skilful lawyer without also infringing on the lawyer's right to choose his clients<sup>53</sup> and if once the State acquired the right to decide who might have legal representation even though he was willing to pay for it the rights of all citizens would be in grave jeopardy. The State of course has the right to impose

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50 Nothing short of force would suffice. Probably it would involve putting the child in a creche from an early age, so no special advantages would be obtained. But there would inevitably be some differences between creches, if only in the quality of the staff.

51 This is not to denigrate the dedicated people who also seek to see that the rights of the poor receive protection.

52 One possible solution is a system of legal insurance, run in a manner similar to medical insurance against the possible need for an operation.

53 In the case of barristers, an ethical rule limits this right so as to prevent the State from bringing pressure to bear on a barrister to leave the citizen defenseless.

severe penalties on any person who seeks to subvert the process of justice, by bribery, perjury, intimidation, political pressure, etc.

### 13. Regulation of business.

To determine the effect of regulations on the citizens in countries of the free world it is necessary first to examine the nature of the system which these regulations are designed to modify, i.e. the private enterprise market.<sup>54</sup> The existence of this relatively free market has produced a condition of prosperity for the common man unparalleled in the history of the human race, and unmatched by any other system of production on the face of the earth today. A vastly increased population is supported at a vastly increased standard of living: should we return to precapitalist methods of production most of these people would starve. Despite these benefits, the free market has been the subject of a continuing campaign of vilification. Karl Marx based his theory on the supposedly inevitable tendency of capitalism to lower the ordinary man's standard of living to a state of extreme poverty and distress - a prediction directly contrary to fact. This is exemplified by the fact that the Chinese government, although communist, has created special private enterprise zones in order to achieve greater production.

The private enterprise market is damned by its opponents on the ground that those who participate in it are selfish - workers and employers, like the consumers, wish to improve their own standard of living. But there is nothing immoral in that unless the improvement is achieved at other people's expense, by force or fraud. If everyone improves his or her standard of living the public, and the nation, must necessarily benefit. The fundamental misconception about the free market is the idea that one man's profit is another man's loss. The founders of Apple Computers are known to have made large profits not by robbing a bank but by providing employment and selling a new and very popular product to the consumer. In fact, rightly understood, the long-term interests of men are in harmony. It may disappoint a worker that another, better-qualified person obtained the job for which he applied, yet the only alternative to leaving the decision to the employer is to allow a bureaucrat to assign men to jobs: but the bureaucrat cannot know the workman's capabilities and circumstances

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54. For a particularly useful analysis, see Ludwig von Mises, Human Action (3rd ed.) 1966, Contemporary Books Inc., Chicago.

as well as the workman himself does, and he lacks the employer's personal interest in efficiency of production. This problem of bureaucratic control with its lack of specific knowledge and lack of personal interest in efficiency is patent when considering bureaucratic environmental controls.

The fundamental problem is that by the very nature of society it cannot exist without some laws. Once people live in a community their activities must impinge on one another and there are necessarily circumstances in which some regulation is needed to protect the rights of individuals as such or of the individuals comprising the community as a whole.

Regulations necessarily interpose a barrier of legalized force between the producers and their attempts to satisfy the demands of the consumers in the most economical way. This points to a need for the regulatory agency to justify the regulations it imposes, and not just by the whim of some bureaucrat or social planner. Justification involves a demonstration that in the absence of the proposed law the rights of others will be infringed. If a regulation cannot be justified by the body imposing it, it should not be allowed, yet the test of ultra vires is concerned with formal validity, correct procedures and the scope of the power and does not extend to the question whether the regulation is needed. Even a "futile" regulation is valid.<sup>55</sup> The test of unreasonableness, which comes closest of the ultra vires tests to examining the merits, has been circumscribed by judicial decisions with the avowed intention of avoiding that very issue. As Gibbs C.J. said in the High Court of Australia:<sup>56</sup> "It is true that the by-law is drafted very widely - some might think too widely - but...the fact that the bylaw may be thought to go further than was necessary is not in itself any ground for invalidating it." The fairly common requirement of the laying of a regulation before both Houses of Parliament does result in disallowance in some cases but it falls far short of a general review of the myriad of regulations flooding in every-increasing volume upon the community. As Gibbs C.J. has pointed out in the High Court of Australia: "Moreover, under modern conditions of responsible government Parliament could not always be relied on to

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55. Ferguson v. Commonwealth [1943] 66 C.L.R.432, at p.435, per Rich J.

56. Foley v. Padley [1984] 58 A L.J R 454, at p.456.

check excesses of power by the Crown or its Ministers."<sup>57</sup> The Victorian Parliament established a legal and constitutional committee to examine many (but by no means all) regulations made under delegated authority but although that committee is required to consider fourteen specified matters not one of them involves the regulation-making body in justifying the need for the regulation and not one of them empowers the committee to recommend disallowance for lack of justification.<sup>58</sup> The closest the Act comes to this is a provision enabling the committee to recommend disallowance on the ground that a regulation "is inconsistent with principles of justice and fairness"<sup>59</sup> The juxtaposition of "justice" and "fairness" suggests that this provision relates rather to the rules of natural justice than to the need to impose the regulation concerned.

Justification is not an unreasonable test to impose upon the would-be regulator. There are undoubtedly circumstances in which the pressures of the marketplace are not self-regulatory. Companies highly profit-motivated have been convicted of breaches of pure food legislation<sup>60</sup> and of environmental controls. In the latter case even a right of inspection by members of the public would be futile, first because the complex technology involved is beyond the expertise of ordinary members of the public to check, and second because those who are affected by environmental emissions are likely not to be the same group who purchase the product. For example, a cement works discharging lime to atmosphere would not be affected by the refusal of its neighbours to purchase its product, for its market is far wider than the local community whose health and vegetation it affects. Regulatory bodies, however, may react too quickly and without adequate investigation: examples include the banning of substances in food as allegedly carcinogenic,

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57. Re Toohy ex parte Northern Land Council [1981] 56 A.L.J.R. 164, at p.173.

58. Subordinate Legislation Act 1962, s.14 as inserted by the Subordinate Legislation (Review and Revocation) Act 1984, s.8.

59. Subordinate Legislation Act s.14(1)(h).

60. If people knew that food was prepared in unhygienic premises or if they knew that the quality controls were inadequate they would of course cease to buy the particular products in question, but as the purchasers have neither the time nor opportunity to inspect the premises themselves it is only through the regulatory process that they can be protected.

but subsequently found not to be so. The need for justification is highlighted by the dictum of Davison C.J of the High Court of New Zealand who said: "I do not think that one could presume that the Crown is always acting in the public interest."<sup>61</sup>

#### Some Examples of Regulation in Practice

An example from Australia of regulations which would not pass a justification test concerns a firm which wanted to sell a new, low-sugar brand of jam. They were forced to abandon the project because "Jam", under the regulations, had to contain a certain proportion of sugar. Note that there could be no question of deceiving the public, as the absence of the sugar would have been the main selling point for the product!

Another example is that of the industrialist which on four separate occasions was required by an environment protection agency to increase the height of its chimney or go out of business (the regulations required compliance or cessation of business even after an appeal had been lodged). Later it was found that the smell of which the agency was complaining did not come from that factory at all, but the legislation provided no remedy in compensation.

The Australian Commonwealth Health Department prosecuted a Brisbane doctor for medical fraud. It is true that the doctor had made an error on four accounts, but by doing so he had undercharged by \$16.00!

Regulations made in such a volume that the inspectorate is unable to enforce them adequately are self-defeating. People will be quick to learn that particular regulations are unlikely to be enforced, and will readily draw the inference that other regulations will be overlooked.

There is cause for concern in what appears to be a developing philosophy of "my authority right or wrong". This tendency is so well-known that it formed the basis of a complete programme in the very successful television

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61. Minister of Works and Development v. Keam [1981] 7 N.Z.T.P.A. 289, at p.297. (Implicitly supported on this aspect on appeal [1982] 8 N.Z.T.P.A. 240, at p.243, per Cooke J )

series "Yes Minister".<sup>62</sup> The empty file that was the triumphant finale to that programme in fact existed in superior court litigation, when a major public authority dumped its vital but embarrassing records on the tip,<sup>63</sup> and sought to tender a certificate that no such records existed.<sup>64</sup> The problem is compounded by the presumption of regularity.<sup>65</sup> How this presumption operates in favour of public authorities is well illustrated by the words of Goulding J.:<sup>66</sup>

"I have to decide the case on the civil standard of the balance of probabilities. In one scale are my misgivings arising from the language of the notice itself, reinforced by the commissioners' unwillingness to produce affirmative evidence of their opinions. In the other scale is the clearly established presumption that statutory duties are duly and properly performed. In my judgment the presumption is weightier than any misgivings, and I therefore dismiss the action."

The presumption of regularity, coupled with the restrictive approach adopted by the courts towards the doctrine of ultra vires for unreasonableness, protects authorities against the need to justify their actions and does so even when they refuse to give evidence in support of them. In the case of an administrative tribunal "the absence of any reasons assigned for a decision may...enable a court to infer that no good reason existed for the decision which was made."<sup>67</sup> The same approach has been adopted by the English courts. Woolf J., also speaking of an administrative tribunal, said that "courts are now much more ready to infer that because of

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62. Lynn, J. and Jay, A. The Complete Yes Minister, Revised Omnibus Edition, 1984, BBC, Ch.21, at pp.492-514.

63. Slapjums v. City of Knox (No.2) (1978) 38 L.G.R.A.98.

64. Slapjums v. City of Knox (No.1) (1977) 38 L.G.R.A 90.

65. Shire of Lillydale v. Gainey [1930] V.L.R.73.

66. Wilover Nominees Ltd. v. IRC (1973) 1 W.L.R. 1393 at 1399.

67. Jet 60 Minute Cleaners Pty. Ltd v. Brownette [1981] N.S.W.L.R 232, at p.235.

inadequate reasons there has been an error of law."<sup>68</sup> Why should the courts be readier to control an administrative tribunal whose decision, however important to the parties, may in many cases have little effect beyond the parties themselves, yet refuse to control regulatory agencies who intend to affect and do in fact affect large sections of the community? In the case of a Minister whose decision is under challenge he has no duty at common law to give reasons.<sup>69</sup> The law even goes so far in favour of the Minister that "where a discretion is absolute and unfettered, reasons for its exercise or non-exercise need not be given."<sup>70</sup>

### Problems for the Regulator and the Regulated

The prominence of large businesses may cause it to be overlooked that the majority of business enterprises are small. Such enterprises cannot afford to retain an in-house lawyer, or to refer constantly to an established firm expert in the regulatory field. Unfortunately for them, "uncertainty or ambiguity will not invalidate subordinate legislation or a written directive issued under statutory power unless a point is reached where it cannot reasonably be given any meaning."<sup>71</sup> Faced with ambiguity, the small industrialist, untrained in law, may be forgiven for trying to interpret the regulation by giving it the best or most practical operation - ignorant of course of the principle that "a court is not obliged to decide whether the regulation is the best provision that might be devised to achieve the end to which it is directed. A regulation may be cumbersome and difficult to administer and obviously capable of improvement, and still

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68. Crake v. Supplementary Benefits Commission [1982] 1 All E.R. 498, at p.507.

69. Salemi v. MacKellar (No.2) [1977] 137 C.L.R.396, at p.443; 51 A.L.J.R.538, at p.557, per Stephen J. He may, but all too rarely, be under a statutory duty to give reasons as in Sezdirmezoglu v. Acting Minister for Immigration and Ethnic Affairs (1983) 51 A.L.R. 561, at p.570.

70. Mutual Acceptance Ltd. v. The Commonwealth [1972] 19 F.L.R.426, at p.431; [1972-73] A.L.R. 1338, at p.1342; 29 L.G.R.A.123.

71. Pyne Board Pty Ltd. v. Trade Practices Commission (1982) 39 A.L.R. 565, at pp.568-9; [1983] Town Planning and Local Government Guide par. 382.

be valid."<sup>72</sup> Further, an industrialist who adopts a reasonable interpretation of a regulation even on legal advice may, if his interpretation is subsequently held to be wrong, find himself guilty of a criminal offence even though he honestly attempted to comply with the law. The problem is compounded by the frequent amendments made to many regulations, amendments which come into force regardless of whether the small businessman is informed of them or not. If confronted by a departmental accusation of breach of the law, he endeavours to challenge the regulation, he is met by the principles that a "bylaw should be 'benevolently interpreted and supported if possible'",<sup>73</sup> that "A bylaw is presumed to be valid and one who attacks it bears the burden of proving the contrary"<sup>74</sup> and that "It is not for the court to examine the merits" of the controls that are under challenge.<sup>75</sup> If this does not deter him a government department or large public authority, if it so chooses, can find the finance to take the matter to the highest appeal court. The small industrialist is faced with the problem that even as its managing director, chairman of directors or governing director he cannot appear on behalf of his company because "in superior courts...the practice has been to refuse to hear a company except through a legally qualified person."<sup>76</sup> This principle was applied even where a small company, on unchallenged evidence, was unable to meet the fees of counsel in a case which would have been heard for at least a month, and in which its

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72. Gordon v. Director of Planning [1981] 28 S.A.S.R.241, at p.249; 49 L.G.R.A.165; [1982] Town Planning and Local Government Guide par. 1185.
73. Re Bates and Corporation of the District of Delta [1983] 22 M.P.L.R. 242, at p.260; [1984] Town Planning and Local Government Guide par.1354; see also Kruse v. Johnson (1898) 2 Q.B.91, at p.99, per Lord Russell of Killowen C.J.
74. H.G. Winton Ltd. v. Corporation of Borough of North Tork (1978) 6 M.P.L.R. 1, at p.11; [1981] Town Planning and Local Government Guide, par. 11.
75. Re Dick and City of Brandon (1982) 21 M.P.L.R. 1, at p.2; [1984] Town Planning and Local Government Guide par. 127.
76. Hubbard Association of Scientologists International v. Anderson [1972] V.R. 340, at p.341; 21 Town Planning and Local Government Guide, par. 311.



whole business was at stake.<sup>77</sup> The Company was opposed by the largest newspaper chain in Australia and by the chief inspector of a regulatory agency, the latter being represented by Queen's Counsel who proposed to call in excess of twenty witnesses.

The total failure of Russian-style socialism and the failure of even the partial nationalisation schemes tried in Western countries means that the State must rely on private business to create wealth, innovation and jobs. At the same time it acts as though it has the right to impose any regulation on business, simply at its whim. Some regulators are hostile to the private enterprise system as such, though its taxes pay their salaries. At no point is there any idea that businesses have rights which governments (morally speaking) may not infringe. As long as this attitude persists the basis of our national prosperity is under serious threat, and so are the rights of the citizen in the non-economic sphere. Once it is accepted that bureaucrats have the right to infringe on liberty in one sphere, why should they not adopt the same attitude<sup>78</sup> in others, even, eventually, towards freedom of speech.

#### 14. Man as Citizen

What a man does to his own property is his affair provided he does no harm to others. If he chooses to attack his television set with a sledgehammer he may be acting foolishly, but he harms no-one except himself. The fact is, however, that apart from a minuscule number of hermits people live as members of society. It is to the advantage of each citizen to co-operate with others, thereby obtaining a chance to form friendships, and the benefits of modern medicine, art galleries, concerts and a variety of consumer goods unmatched in the history of humanity. These things simply cannot be produced by an individual hermit on an otherwise deserted island, no matter what its natural resources may be.

The man who chooses to live as a member of society cannot, morally, take the benefits for himself while ignoring the corresponding obligations. That is the

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77. Molnar Engineering Pty. Ltd. v. The Herald and Weekly Times Ltd. (1984) 1 F.C.r. 455.

78 Note the degree of government intervention in the field of television and radio, and the exclusion of Mr Howard (in his capacity as a journalist) from the 1989 Budget lockup, as well as the activities of the federal government's taxpayer-funded media unit

policy of a burglar, who depends for his livelihood on the existence of property rights (even when he sells stolen goods to a fence) yet denies those same rights to others. If everyone adopted the burglar's policy, everyone would starve. It is characteristic of a moral principle that it is universalizable: the claim that everyone must respect my right to life but that I may ignore theirs is not a moral claim.

In the great majority of instances the individual's own self-interest will push him towards respecting the rights of his fellows. It is not in the interests of a manufacturer to produce, or of a retailer to sell, shoddy goods - that is an excellent way to go out of business. For example, a food manufacturer can suffer great financial loss if it is discovered that four or five people suffered food poisoning after eating his product; such an incident endangers the goodwill built up by years of producing wholesome foods. However, not all people act in accordance with their own self-interest. A fly-by-night operator will never become a captain of industry, and he is unlikely to be more than a fringe nuisance to the economic system, but before he is imprisoned for his frauds he may injure a considerable number of individuals. The problem is that regulation of industry designed to control folly and villainy is of limited effectiveness for that purpose (since fools and villains will be the first to ignore it), while it hampers innovation on the part of honest businessmen who are, of course, in the great majority. Further, once it is acknowledged that the government can intervene to prohibit what it likes, it will inevitably intervene for political reasons with a consequent risk of interference without compensating benefit to the public. This can result in a distortion of economic activity which lowers living standards for everyone compared to what would be achieved in a comparatively free market.

There do exist cases where the interests of individuals are in genuine conflict and in which control is essential. Such a situation arises when houses are built on filled land<sup>79</sup> and subsequently crack, sink or crumble. The prospective purchaser would frequently not be able to detect the filling unless he had a series of samples taken from the ground - an expensive and unusual precaution, and one which might make the builder exceedingly suspicious of him, even if the builder permitted it. By the time the cracks appear and the cause is identified years may have passed, and the building company may well have been wound up. In such a situation

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79. As in Ann's v. Merton London Borough Council [1978] A.C 728.

the builder would make a profit at the expense of the purchaser, in contrast to the usual situation where both parties benefit from their contract. The State may therefore justly require the placing of the words "filled land" on the certificate of title.

Other examples where an individual or company may seek to gain a benefit for itself at the expense of (generally unspecified) others occur in underground mining and pollution. In Australia, by the 1860's, when alluvial gold deposits had been largely worked out, underground mining became prominent. There are a few parts of the country where the consequences are still with us. In the city of Bendigo, built over the old diggings, underground cave-ins and consequent subsidence of the land above can have distressing consequences. To have the walls of one's house crumble is bad enough, but if a mine shaft opens beneath the local swimming pool a person could be introduced to the sport of caving quite unexpectedly.<sup>80</sup> Even in California, while a man might be delighted to receive proof that his ancestor was a '49er, it is difficult to see how one could sue a descendant for what his great great grandfather did. A complaint to the miner via a spiritualist medium might obtain what purports to be an apology, but little in the way of practical help. The miner's own interests point strongly in the direction of preventing cave-ins while he is down the mine<sup>81</sup> and, if to a lesser degree, while he is still around to be sued, even after the mine closes. Should the cave-in occur a century hence, however, the company will be gone, the profits while they and the miners will be permanently underground in their coffins. If we are to avoid leaving a booby-trap for future generations there seems no alternative but government<sup>82</sup> intervention to require that precautions be taken. However, it cannot be guaranteed that a government body involved in mining may not itself create such a problem and rely on economic pressures to force acceptance of a situation in which it does not backfill.

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80 I understand that the swimming pool incident occurred at night, and that no one was injured.

81. A mining company is pushed in the same direction by pressure on profits - cave-ins are expensive to clear and half production, as well as leading to workers' compensation claims - even if it could be assumed that the executives were totally heartless.

82. Perhaps worked out mines could be used to dispose of (compacted) garbage and industrial waste, though steps might have to be taken to prevent pollution of the ground water

The case of pollution provides a serious problem for the ethical polluter as well as the pollutee. The victim of pollution has a problem in even identifying the source of his trouble - he may suffer a small amount of pollution from a thousand different sources, none worth his while eliminating individually, but collectively adding up to a serious infringement of his right to the enjoyment of his own property. Even where he can identify a single major source the costs of suing (including the preparation of complex scientific evidence) may prove prohibitive. The industrialist faces a different problem. It is not overly difficult for him to learn that his plant is a source of pollution, and he may as an individual be genuinely committed to cleaning up the environment, but if he spends tens of millions of dollars on pollution control equipment while his competitors pollute he is not likely to remain an industrialist for long. The difficulty here is not that pollution has no effect on market forces but that the pressure may fall on the wrong area - if a factory pollutes a beauty<sup>83</sup> spot people may continue to buy the factory's products but they will no longer pay to visit the beauty spot. Some means must be found to make the polluter meet the actual costs of what he is doing and while the task is extremely difficult government-set pollution standards (backed up by a private right to sue for breach and nuisance) provide a possible (if clumsy) remedy. Note that the suggested remedy refers to pollution standards, not the prescription of particular pollution control devices, a "remedy" which blocks technical innovation, even in the direction of greater pollution control.

An alternative remedy is a tax on polluters. The government might have scientists calculate (subject to challenge of their estimates in a court action) the damage caused by particular pollutants, and tax the polluter so as to make him bear the full cost of producing his particular product.<sup>84</sup> This remedy poses very real

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83. Subject, of course, to the possibility of a consumer boycott.

84. Note that even in this area regulation is far from being a panacea. A local community, for example, may force a polluter to erect tall chimneys - the local community thereby retains the jobs provided by the polluter, at the risk of causing acid rain elsewhere. Thus the ethical legislator has the same problem as the ethical polluter: should he require his local community to bear the cost of the jobs provided, he will not remain a legislator for long. A local community may have to choose between pollution and other problems. For example, a local authority's

difficulties, and legislation adopting it would have to be drafted with extreme care. For example, some standard would have to be established for estimating the monetary value of damage caused to plants in domestic gardens, and a policy would have to be devised for apportioning particular damage between perhaps a thousand different sources. Science is not yet able to provide cut and dried answers in this field, and there is a very real danger that the tax legislation could become as complex and arbitrary as the regulations it was designed to replace, as well as leading to lengthy and exceedingly costly litigation. The more complex the pollution in an area, the less likely it is that this remedy will prove practical.

The basic problem posed by pollution is that of protecting people's rights. The polluter must claim for himself the rights to life and property for without them he would be unable to continue his business; he cannot deny these rights to others and simultaneously expect them to uphold his claim. The polluter may produce valuable goods, and provide employment, but he is not entitled to do this at the expense of the life, health or property of third parties. It is a legitimate function of government to lay down objective rules to protect the citizens against interference in the enjoyment of these rights. However, this does not justify the current growth in the number and complexity of controls, or arbitrariness in their administration. Nor does it justify the bad example set by too many public bodies, which themselves are responsible for some of the most visible pollution within their own areas. When a body responsible for enforcing pollution controls is itself a major polluter it undermines its own moral right to control others, and encourages disrespect for the law.

An entirely different problem is presented by the control of public property. If an individual has a track

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bylaw taxing or regulating pollution may put the town's major industry out of business. The councillors will then have to choose between repealing the regulation or tax and sending their community into an economic tailspin. Repeal, however, may leave serious pollution drifting down on other communities. There must therefore be a division of responsibility for pollution control between local, state, national and international levels. Note also that government authorities are often the worst offenders where pollution is concerned. This can be controlled at national level, but how is a country that shoots down a civilian aircraft to be persuaded to respect the rights of the citizens of Alaska not to be visited by foreign pollution?

running across his property (not a public right of way) he can license whom he pleases to use it, on whatever terms he chooses, subject to his duty under the law of occupier's liability. Where roads, etc., are dedicated as public rights of way and control over them is transferred to the representatives of the public they too may regulate who is to use them and at what cost. Speed limits, and the requirement that people drive on a particular side of the road, are justified by the right of control over the road, and required by the controlling authority's duty owed to road users. If a citizen objects to a particular regulation he may make submissions to the controlling authority, raise the matter at the next election, or switch to public transport. However ineffective those rights may prove in practice he has no other options.

Man is neither a mere portion of a collective, like an ant in its hill, nor an isolated individual. He is a rational animal who chooses to live in society in return for the advantages provided to every citizen by the division of labour. Because the advantages are large, almost all people do choose to live as members of some community, but that this is a choice not a necessity for each individual is shown by the existence in the past of isolated hermits, and in the present of people who choose to sail a yacht around the world single-handed, withdrawing entirely from society for weeks or months. Even the person who chooses to live in society is not the slave of the particular society he happens to have been born in: he may seek to emigrate, or to withdraw with others to a commune, there to form a society of their own. It is the business of the government to protect men's common interests, rightly understood,<sup>85</sup> not to give legal privileges, maintained by force, to some men at the expense of others. John Stone, shortly before his resignation as Secretary to the (Australian) Treasury, referred to "the inextricable linkages between government intervention and diminution of both individual and more general liberty" as well as the ineffectiveness and wastefulness of the attempts by governments to control economic forces - "indeed, to control virtually anything that moves" - and the risk of the regulatory enterprise becoming "not merely non-productive, but positively negative in its effects upon the productive capacity of [the] country."<sup>86</sup>

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85. The polluter has an interest in preventing everyone else's pollution, and a more general interest in protecting the property rights of all citizens (or how does he defend his own?)

86 J. Stone, The Shann Memorial Lecture 1984, reported in the Australian, August 28, 1984, p 10.

People are different. Some things, such as food and clothing, are desired by almost everybody; but even here people have different tastes (as well as different sized bodies and appetites). Only the most rigid of totalitarian governments would dream of providing a single diet for all citizens.<sup>87</sup> When less basic wants are in question, people differ more widely. To regulate society according to the desires of one man is therefore to frustrate the desires of others. The one thing which all men have in common is an interest in preserving the rights to life, to liberty, and hence to property,<sup>88</sup> for without these it is impossible for anyone (with the sole exception of a dictator) to achieve his goals.

A person can be taken to have accepted the laws of a society either when he chooses to go and live in its territory or when, on coming of age or inheriting property, he "puts himself presently under the government he finds there established..."<sup>89</sup> The mere fact that one considers some laws immoral does not, therefore, in itself confer a moral right to break them. In particular, as a lawyer, I cannot urge, or engage in, civil disobedience.<sup>90</sup> There does come a point, however, at which a government's denial of human rights becomes so gross that violent resistance to its justified. That point is reached when a

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87. The actual quality (and quantity) of food and clothing in totalitarian societies is poor, but that is due to the inability of a socialist economy to provide a rational basis for production, or real incentive to work. See Ludwig von Mises Socialism, 1932 (Liberty Classics Translation).

88 In a society which fails to recognise the right to earn and hold property the citizen is a slave of the state, which can sentence him to death by starvation. Where the state owns all means of production, distribution and exchange how is a man who thinks for himself to earn his own living? How is he to exercise his right of free speech when the government owns all the printing presses and the radio stations?

89 John Locke, The Second Treatise of Government, 1690, pars 89 & 117.

90 This is because a person who makes his living from the integrity of the existing legal system cannot consistently urge the breaking of the laws. Non-lawyers may make up their own minds as to the validity of civil disobedience. Ironically, the more moral the government, the more effective the tactic is likely to be.

particular government denies both the right of free speech (so that one can no longer campaign for peaceful change) and the right to emigrate.<sup>91</sup>

## 15. Conclusion

A comparison of the results of 500 years of scientific effort with 2,500 years of effort in philosophy demonstrates that philosophic problems, while not completely intractable, present very real difficulties. While I would be happy to see a solution to such problems presented with all the indisputable logic of a theorem in geometry, I am not holding my breath while waiting for it. In the meantime I draw an analogy with the law of property - a claim need not be made good against all conceivable opponents, it is enough to establish a right superior to that of actual rival claimants. In philosophy as in science, one cannot wait a thousand years for the perfect theory - it is necessary to act now.

The practical and moral arguments presented in this paper demonstrate a need for the reduction of the present overly broad claims of the State to interfere with the life of the citizen. Such a reduction should be made point by point, with campaigns concentrating on specific issues where the restoration of freedom would have the greatest practical benefits, but with stress laid on the basic principle of freedom, and on the need for justification of any State intervention. Such a process will afford time for analysis, and for examination of the practical results of the steps taken.

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91. The right to resist may be justified earlier, but in such circumstances I would wish to look carefully at the grounds given for it.