

DE MEO ET TUO, or, THE TRUE NOSTRUM

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being a defence of the public interest, and incidentally of as much private property as ever is possible.*

We are made for co-operation - like feet, like hands, like eyelids, like the rows of the upper and lower teeth.
Marcus Aurelius, *Meditations*, Book II

We call the Middle Ages the "Age of Faith", and the "Enlightenment" of the eighteenth century the "Age of Reason". Looking at the irrationalities, cruelties and manias which have marred history since then, however, it might be more accurate to say that it was the Enlightenment, with its optimistic view of a rational human nature, that was the real age of faith, and that the mediaeval church had a sounder view of human strengths and weaknesses.

It would be even truer to say that every age is an age of faith. G B Shaw observed that in our time compulsory attendance at church has been replaced by compulsory vaccination, and in a vivid passage Theodore Roszak has said that the uncomprehending faith with which most of us view modern science and its practitioners is little different from the faith with which the mediaeval peasant stood by and heard the priest mutter the Mass in Latin.¹ It has been observed times without number that the works of Marx and Lenin, in certain parts of the world, commanded - until recently, anyway - the same unquestioning belief, officially at least, which the church and the Bible once commanded in the West, and which the Koran and other sacred books command elsewhere. We are still familiar with the importance of the correct line, the ruthless extirpation of heresy, and the attempt to reconcile all actual events with the sacred book and interpret them in a manner consistent with its teaching.

Recent events in Eastern Europe are an admission by some nations that Marx and Lenin may not be divinely inspired after all. But there are plenty of other sacred books about. The last decade, in particular, has seen great numbers of conversions to the simple faith of such sunny saints as Adam Smith and David Hume. In the form in which this faith has been handed down and taught to us - and a little may have got lost in the telling - it may require a reformation to restore us to apostolic simplicity - it preaches that by every man following his own selfish interests, the greatest possible good for all is achieved. In a manner reminiscent of the Divine Hand or Brooding Spirit of Jahweh, Adam Smith's famous "invisible hand" will see to it that the result is the best result in the best of all possible worlds.²

- * This article began as a response to a two-page article by R P Hide, 'In Support of Private Property', [1988] NZLJ 433, but has grown since its conception. I apologise to Mr Hide for treating him as a very convenient spokesman, when my replies could just as readily be directed to many others.
- 1 Theodore Roszak, *Where the Wasteland Ends*, Ch 2. Edward Abbey, in *Desert Solitaire*, after speaking of the heresy trials and burnings of the bad old days, observes "Now the high priests of nuclear physics dispute about the number of electrons that can rotate on the point of a pin - where will this lead? But their disputes are peaceful - only the bystanders get burnt nowadays."
 - 2 The metaphor of the invisible hand securing unintended consequences, now regarded as the central message of *The Wealth of Nations*, is in fact mentioned by Adam Smith only once. Indeed, as various quotations scattered throughout this article will make clear, Adam Smith had a clearer view of the limitations of the market place and the economic world-view than many of his disciples. In Eric Partridge's *Usage and Abuse*, under the entry "Political Economy", we find this

Possibly some of us may not like all of these results. If we object, however, there are two ready replies, uttered without a blush by those who would readily condemn a Jesuit for casuistry, and be scandalised by Hegel's defence of brute power. One reply is that this solution simply *is* the best, even though it may have its undesirable aspects. There *may* be unemployment, environmental degradation and the rest; but if the well-meaning were to interfere, things *would* actually be *worse*. "You have to be cruel to be kind". Just *believe* that this is all for the best.³

The second reply is that if the present state of affairs is undesirable, that is not the fault of the free market at all, but rather the result of *interference* with it. If the market had been left to its own devices, then we would have had perfection. But godless men have interfered, and the present *contretemps* is not the result of market forces at all. This is exactly the same as one side of the interminable arguments about Christianity, for example, which one may overhear some Saturday morning between dressing-gowned householders and besuited doorknockers. The doorknockers describe the virtues of Christianity. The dressing-gown, still annoyed at being plucked from his warm reveries, inquires about the Inquisition, the Crusades, or some other activity seemingly inconsistent with these high ideals. The doorknockers reply that these Inquisitors (say) were not *real* Christians at all - that real Christians, *by definition*, would not do anything like that. The dressing-gown replies that this argument by definition is dishonest, and that we can only judge people and ideas by what actually happens in practice. And so the argument inconclusively proceeds.

But the belief in the beneficence of the "invisible hand" - the idea that, to put it at its plainest, unpleasant and selfish men, for unpleasant and selfish motives, should naturally and inevitably further the common good - is also an article of faith. Carlyle said that he "did not believe in the collective wisdom

quotation from H. D Dickinson, in "The Modern Quarterly" of January 1938, reviewing Maurice Dobb's "Political Economy and Capitalism": "Sixty years ago 'economics' began to supplant 'political economy' as the name of the science that studies the material conditions of social well-being. This change in linguistic habits reflected a profound change in the method of the science itself. Instead of studying the *productive* relations of a human *society*, as Adam Smith and the classical economists had done, the vulgar economists (to give them Marx's designation) studied the *market* relations of isolated *individuals*. Dobb's use of the almost obsolete term 'political economy' ... is a banner of revolt against contemporary individualist tendencies, and marks a return to the methods and outlook of the classical economists." J. K Galbraith, in *The Age of Uncertainty*, at p 26, after quoting Adam Smith's disapproval of joint-stock companies, observes: "It is too bad that a visit by Adam Smith cannot be arranged to some forthcoming meeting of the United States Chamber of Commerce, the National Association of Manufacturers ... or a gathering of the Confederation of British Industries. He would be astonished to hear heads of great corporations - or greater conglomerates or combines - proclaiming their economic virtue in his name. They, in their turn would be appalled when he - of all prophets - told them their enterprises should not exist."

- 3 Edith Templeton, in her unjustly neglected *The Surprise of Cremona*, tells of how her nanny succeeded in getting her to eat her rice pudding by promising that if she ate it she would grow up to be a beautiful woman with blonde hair and blue eyes. Now, still a dark-eyed brunette, she knows better than to exchange present pleasures for future ones. One must have faith to endure present horrors for the sake of a golden future. The vale of tears of our earthly travail, with a crown of glory at the end, has in our own time become the unpleasant but necessary "purification" of society, and the "laying of foundations" for the new Jerusalem, of Hitler, Stalin, Pol Pot, Ceausescu and many others. But "market forces", too, justify seeming inhumanity on the grounds of a better tomorrow. The Social Darwinism of the last century (it is to Herbert Spencer, and not to Darwin himself, that we owe the phrase "the survival of the fittest") is still with us. See, however, Spencer's comments on private property, n 94 below.

of individual stupidity". Yet the collective beneficence of individual self-seeking is regarded as an obvious truth, when it is no more than a pious belief.⁴

The belief that riches make one generous, and that the rich will kindly provide for the wants of the poor,⁵ is not only demeaning to the poor, but also hardly borne out by New Zealand's experience before the most recent stock market crash. There is no evidence that the great increase (admittedly, only on paper) of wealth led to any corresponding increase in charitable works and donations. Militating against such charitable feelings, too, is the belief that "charity" will merely encourage extravagance and fecklessness, and that the best treatment for the less well-off is not to pamper them at all.

This faith in the efficacy of the market place and free and unrestrained competition is a very simple one. Its very simplicity is doubtless one reason why so many supposedly intelligent, curious and sophisticated people accept it. "Come to me all ye who labour and are heavily burdened, and I will give you rest." *Amicus certus in re incerta* - how good to have a sure friend in an age of doubt, uncertainty and complication. Physicists labour to discover the one basic law that may underlie the universe. In human life, it seems, the answer is here already. But, as Mark Twain said, every question has an answer which is short, simple and wrong.

In an earlier article which prompted Mr Hide's defence of private property, Mr Richard Boast had maintained that "the principle that private property should be secure from interference was no more or less valid when analysing planning law than many other contrary principles It is just as valid to assume that there are no private rights in land or ... to assume that private rights must sometimes be overridden by certain public interests." Mr Hide claims, quite correctly, that these three situations, of private property being secure, being non-existent, and being subject to some social or political control - being "overridden by certain public interests" - are mutually exclusive. Of the three, he insists that the absolute security of private property is the only correct principle, and defends it on the grounds that liberty and prosperity flow from it.

4 Thurman Arnold, in *The Folklore of Capitalism*, writes of the "philosophy that great organisations dressed in clothes of individuals achieve long-run unselfish and humanitarian results by pursuing their selfish interests." The only control needed is that of an umpire. (Ch IV, "The Place of Learning in the Distribution of Goods"). This learned author draws many fascinating and accurate parallels between religion and religious disputation in the past, and economics and economic thought today. In both cases, he says, none but the learned can understand the arguments. The duty of ordinary men is not to understand, but simply to defend the faith. The essence of the faith lies in undergoing present inconvenience to save our souls in the future. The view that the most important thing is the creed itself, not its effectiveness, has been abandoned by the churches, but is still the view of our economic religion (and has been nicely summed up in a remark by the former Minister of Overseas Trade, Mr Mike Moore, describing the attitude of the Treasury to the various producer boards: "Yes, they may work in practice, but do they work *in theory*?") Content and logic are the least important things about creeds. The theoretical systems are only tools to condemn heresy. As long as the creed is correct, practical mismanagement and disaster are quite acceptable. They are, in any case, probably either the result of sabotage by enemies, or of not following the words of the spell exactly. Worthy of note also is the ingenious way in which evidence which might be thought to contradict a theory is treated instead as further proof of it. When certain American television evangelists were recently caught out in sexual pranks, they declared it proved the vast powers of Satan, and how it was even more necessary to send them money. When a government, after six or ten years of following a certain theory, still has not succeeded in quelling inflation, unemployment, decline, etc, it merely declares that this is proof of how deeply-seated are the problems it is (slowly) eradicating.

5 A true snob, Proust observes, is someone who cannot meet a duchess, however old and raddled, without genuinely thinking her beautiful. The response to riches can be the same.

Like Mr Hide, this author favours private property, and is inclined to think that the world will be best run where it exists. He favours it, however, in moderation. "Private property" is a trickier and less self-evident concept than Mr Hide supposes. This article will, among other things, point out the absurdity of any notion of "absolute" private property, particularly at a time of technological power and global environmental danger. Mr Hide favours "absolute" private property, for he contrasts it with property "sometimes overridden by certain public interests". There has never been in the past, nor could there be in the future in any tolerably habitable world, any "absolute" property, never overridden at times by certain public interests. "Absolute private property" and "interfered-with private property" are not two distinct categories. There is a continuum, from the theoretical but non-existent absolute private property at one end to a total community of property at the other; and at various points on that continuum "private property" is found in the real world, with one degree or another of public involvement, control or "interference".

This article maintains also that Adam Smith's descriptions of the world of commerce, however appropriate to his own time, are quite inappropriate today. His simple model will not work in the real world. More than this, we live at a crucial time in the world's history, which Fritjof Capra has rightly called *the turning point*⁶, a time when we need new ways to think about the world; a time of ecological crisis, when we need new approaches to science, and, among other things, a new economics, and an attitude to property which might be said to be new or might be seen rather as a return to ancient, saner forms.

1. *The absolute idea of private property*

We of the English-speaking nations still wear the collar of the Saxon thrall, and ... look upon the vested rights of landowners with all the superstitious reverence that ancient Egyptians looked upon the crocodile.

Henry George, *Progress and Poverty*

Private property, which the individual owner may deal with however he alone pleases, is not a self-evident idea. It is a commonplace among the historians of society and law that "full ownership, as applied to the soil, is an institution of quite recent creation".⁷ Indeed, if anyone should have to defend any principle it is the proponents of absolute property who should have to defend so recent an innovation.⁸ We, however, are used to Blackstone's concept of property - "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."⁹ Austin defines ownership as

6 Capra, *The Turning Point: science, society and the rising culture*, London, 1982. The title and the epigraph come from the *I Ching*: "After a time of decay comes the turning point. The powerful light that has been banished returns. There is movement, but it is not brought about by force The movement is natural, arising spontaneously. For this reason the transformation of the old becomes easy. The old is discarded and the new is introduced. Both measures accord with the time; therefore no harm results."

7 Emile de Laveleye, *Primitive Property*, London, 1878. More remarks on this subject are made below in the section "Private Property Historically Considered".

8 One is reminded of Henry Salt's words in *The Heart of Socialism*: "It takes two for a quarrel Why may one, the defendant, also be the arbitrator, dismiss his opponent's plea and leave the court, and the bench, without a stain on his character? Yet so it is with those who claim that the restoration of property to the people is a confiscation of what is rightfully and naturally 'private'."

9 Blackstone, *Commentaries*, Book II, ch 1. "We think it enough", he goes on to say "that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will

“a right - indefinite in point of user - unrestricted in point of disposition - and unlimited in point of duration - over a determinate thing”.¹⁰ The canny lawyer should as a matter of principle be wary of any definition so absolute and all-encompassing. Absolutes are found in metaphysics, not in life and life’s law. A moment’s thought should bring to mind dozens of ways in which these definitions do not agree with the law as it is, or has been. A good part of any course of lectures on the law of property is devoted to “exceptions” to this general rule. It might be better to call them “contradictions”.

It gives many people an uneasy feeling to contemplate the loss of the idea of private property. Any change is unsettling. As Thurman Arnold observes,¹¹ “when new types of social organisation are required, respectable, well-thought-of and conservative people are unable to take part in them. Their moral and economic prejudices, their desire for the approval of other members of the group, compel them to oppose any form of organisation which does not fit into the picture of society as they have known it in the past. This principle is on the one hand the balance wheel of social organisation and on the other hand its greatest element of rigidity.”¹²

It is not just that the idea of change is unsettling. The absolute ownership of property, however impossible a notion, is something that has developed in the west in the last two or three centuries. It is seen as one of the fruits of civilisation and progress. It is the product of those “progressive societies”, as Sir Henry Maine calls them,¹³ whose history has been a movement “from status to contract”. Private property and the freedom to contract are believed to go together. To abandon private property is to betray the slow advance of civilisation and return ourselves to barbarism.

Moreover, there are - or were, until very recently - real barbarians at the gates. Private property is supposed to be one of the stigmata that distinguished the free world from godless communism. Any opposition to it is inspired by sinister forces. To quote Thurman Arnold’s prophetic words: “The holy war between capitalism [and] communism is one of the greatest obstacles to practical treatment of the actual day-to-day needs of the American people. Even agricultural credit and soil conservation become tainted with communism.” This author has been seriously informed that Greenpeace is the environmental arm of the Kremlin, that the Marine Mammal Sanctuary around Banks Peninsula (established under the Marine Mammals Protection Act 1978 to protect Hector’s Dolphin) is part of the Kremlin’s sinister plan for world domination, and that conservationists (most of them, admittedly, innocent dupes and cats-paws rather than being consciously traitorous) opposed the logging of forests in South Westland in order to assist the Russian conquest

and testament of the dying owner; not caring to reflect that (accurately and strictly speaking) there is no foundation in nature or in natural law why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow-creatures from a determinate spot of ground, because his father had done so before him, or why the occupier of a particular field or of a jewel, when lying on his death-bed and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him.”

10 Austin, *Jurisprudence*, II, at 790.

11 *The Folklore of Capitalism*, ch I. “The Systems of Government and the Thinking Man”.

12 “Do you know what holds the world together? Not the gods, nor the law, nor the army. Simply a name. The fusty old superstitious sanctity of the name of Rome - a bluff 200 years out of date Thank God there are still millions of old-fashioned people like yourself who feel slightly uncomfortable when Rome is mentioned. That is what holds the world together - a slightly uncomfortable feeling” Evelyn Waugh, *Helena*.

13 Maine, *Ancient Law*.

of South Westland and the establishment there of a base for the conquest of Australia.¹⁴

To old-fashioned economists, too, the idea of questioning the given authority of the idea of absolute property is dreadful because that questioning reveals the unspoken assumptions on which any and every social science is based. There can be no such thing as “value-free” social science. The values a society lives by will determine its world view, its religious institutions, its scientific enterprise and technology, its political and economic arrangements. As Fritjof Capra says,¹⁵

Social scientists who consider the question of values non-scientific and think they are avoiding it are attempting the impossible. Any “value-free” analysis of social phenomena is based on the tacit assumption of an existing value system that is implicit in the selection and interpretation of data. By avoiding the issue of values ... social scientists are not more scientific but ... less ... because they neglect to state explicitly the assumptions underlying their theories. They are open to the Marxist critique that “all social sciences are ideologies in disguise”.

The continued basing of economics on very simple models of cause and effect and the obvious and elementary physical laws of Newtonian physics means that many present-day economists are increasingly out of touch with economic and social reality.

There is no absolute private property. Our legal system knows many exceptions to the principle - some, the relics of ancient custom, some recent introductions to ameliorate the harshness of absolute property. Just as the only woman free to do whatever she wants to is the one who lives on a desert island - otherwise, in a well-known line, her freedom to swing her fist wherever she wants to ends before her fist reaches another’s nose - so only a solitary living on a desert island could know “absolute” private property.¹⁶ Otherwise, rights to do as one pleases with one’s own property must be limited simply in order to protect other people and their property. It is not only the first rule of ecology, it is surely the first and most obvious rule of commonsense that *everything is connected*. If I, to use Mr Hide’s example, clear forest on ‘my’ land, that will increase the run-off of water onto my neighbours’ lands and into rivers that may consequently flood downstream; the soil formerly under the forest may be washed away, silting up the river and, by its absence on the hillsides, impoverishing the country; droughts will be a little likelier and a little worse as the “forest reservoir” is reduced; the net amount of oxygen produced in the world will be reduced - only by a little, but then every “big” is but a group of “littles” - and so on. If I build an eyesore then my neighbours will have to look at it. If I build a factory in a residential area then the noise, traffic movements, foul air and water produced and so on do not stop at my boundaries. *Nature does not know human boundaries*. It is interesting that Mr Hide, in his objections to planning laws, approaches planning always from the point of view of the “developer”, to whom controls are undesirable. Planning controls are portrayed as an “interference” with private property. This is, however, only one very small part of the picture. For every “developer” who wants to use “his” property as he pleases, and build some unpleasant work, there will almost always be neighbouring property-owners who oppose the “development”, and whose only desire is that the status quo

14 Various practical objections to this strategic design may, of course, spring to mind.

15 *The Turning Point*, ch 7 “The Impasse of Economics”.

16 Given today’s technical powers, indeed, it may well be that even the actions of such a hermit, if well-equipped, might affect people elsewhere in the world.

may remain and that they may continue to enjoy their present properties in peace. From *their* point of view these planning restrictions are actually an enhancement of their right of private property, and it is their neighbour's unpleasant development on his property which is the interference.

Every society that has accepted any sort of private property has imposed restrictions or conditions upon its enjoyment. Mr Hide himself, on the same page whereon he fulminates against planning "restrictions", accepts without complaint that "the common law of nuisance ... delimits the ... rights and duties of landowners, albeit somewhat vaguely. A property owner cannot do as he likes; he has duties as well as rights." This does not sound like "absolute" private property then. It is difficult to see on what theoretical basis Mr Hide accepts and approves of restrictions imposed by one part of the law, that of nuisance, and bitterly opposes sensible restrictions imposed by another part, the law of planning.

There have always been restrictions. They have merely varied in their extent. The eighteenth and part of the nineteenth century saw a tendency to reduce these restrictions. The social temper and ecological crisis of the present, however, demand greater restrictions - or, to put it a better way, *more responsible use of a common good*. There will doubtless be absurdities and abuses in this process. This is only natural in any human society. There have certainly been enough excesses and abuses of the *relatively* unrestricted private property enjoyed recently. But it would be more accurate, and also more comforting to the paranoid seeker of security, to describe the imposing of responsibility on owners not as a regression to barbarism or beastly communism, but rather as a returning of the pendulum to a sensible centre after a couple of aberrant centuries at an extreme.¹⁷

A quick mental flick through our old legal history lecture notes will remind us that absolute ownership has never been a striking feature of English law. In any feudal system, where a lord paramount grants lands to a mesne lord, who in turn subinfeudates, and so on, it is absurd and impossible to speak of anyone in this chain - Crown, mesne lords and tenant of the demesne - as the "owner". In strict law, all landowners in New Zealand still hold their lands of the Crown as tenants in chief, and "ownership" is divided between Crown and tenant. In Scotland subinfeudation is still possible and is widely practised. Where an estate is divided in time between life tenant and remainderman, neither is the absolute owner. Where several co-owners own property, and are all obliged to agree on how it is to be managed, any "absolute" rights of each are gravely limited. Who is the owner, the trustee or the cestui que trust? In all these cases, obviously, the law may from time to time be forced to make some sort of arbitrary declaration that (because of the significance we have attached to "ownership") this person or that is the owner.¹⁸ Yet nevertheless, as a jurisprudential exercise the question of who is "the owner" is meaningless. To identify any one person as the owner is quite arbitrary, because it would be just as possible to identify someone else. It is also misleading, because it denies the existence of any other interests besides the "owner's" or at the very least gives those interests a very inferior status.

¹⁷ The knowledge that what one is witnessing is not an innovation but a *return* to an ancient practice can often be critical in gaining public acceptance of it by a cautious or conservatively-minded group. At the time of the changes in the liturgy and practice of the Roman Catholic Church after the Second Vatican Council, for example, much trauma could have been avoided had the clergy been careful to explain that there were sound historical precedents for all supposed "innovations".

¹⁸ See the discussion in Dias, *Jurisprudence*, 5th ed, p 300.

One might say that landlord and tenant, mortgagor and mortgagee both have important interests in a property. The law identifies the landlord and the mortgagor as "owners". But a mortgagee may, in various circumstances, have far more influence over and interest in a particular property than the mortgagor. The mediaeval serf was tied to the land, and was obliged to spend so many days a week labouring for his lord. This is an exact description of the relationship of many present-day farmers to their mortgagees and creditors. In terms of freedom the situation of the workers on the land has, if anything, regressed. They are still, for all practical purposes, tied to the land - they and their families face unemployment and destruction if they walk off it - and they may well spend all the days of the week, not just several of them, working for their economic lord. If tenancy legislation protects a tenant, he may well have a strong, legally-protected interest in the property. Even if he has no interest protected by law, his practical interest and involvement in what is his home may be much stronger than that of his landlord, to whom the property may be merely one small part of a large investment. Most shareholders have no control at all of the running of a company, nor have they any desire to control it. They are merely, and can only be, speculators in shares and drawers of dividends. It is even in these cases legal convention, to a great extent, that declares that this person or that is the "owner".¹⁹

Many legal questions involve a conflict between individualistic principles and rather more humane and altruistic ones. The law of tort has seen a conflict between the individualistic principle of fault - the liability of a defendant only for negligence or intentional conduct - and the principle, kindlier to victims, of strict liability. The Accident Compensation Act has decided in favour of some small compensation for everyone, regardless of fault. In the law of contract, the clash is between the simple "free-market" principles of assent, and sanctity of agreement, and the kindlier more equitable ideas of unconscionability, good faith, and granting remedies for injustices which arise out of unequal bargaining power. The law of property may not have advanced to this level of humanitarianism - it still acknowledges the principle, at least, of the absolute power of the owner - but it contains plenty of examples now of limitations on any absolute ownership.

Those in favour of "absolute ownership", who reject the idea that "private property should be subject to some form of social or political control", must presumably oppose such laws as these which interfere with the sacred right of property:

- (a) Laws requiring landlords to observe certain basic standards of health and safety in the properties they let.
- (b) Laws regulating the rents that may be charged for residential properties, and the terms of rental contracts generally.

¹⁹ Felix S Cohen, in "Transcendental Nonsense and the Functional Approach", 35 Columbia LR 809 at p 820, speaks of the tendency of lawyers, "in all fields of law, to ignore practical questions of value or positive fact, and take refuge in 'legal problems' solved by manipulating legal concepts in certain approved ways. These are peculiar concepts, not defined in terms of ethics or empirical fact, but used to answer ethical and empirical questions, and bar intelligent investigation." Such concepts include the corporate entity, property rights, fair value, due process, title, contract, conspiracy and malice. These are "the magic solving words of traditional jurisprudence. Legal arguments in these terms are necessarily circular, since these terms themselves are the creation of the law. These arguments add to our knowledge as much as Molière's physician's discovery that opium puts men to sleep because it contains a dormitive principle." These concepts are indeed, in a way which Professor Hart does not mention, "conclusion - drawing words". (Hart, *Definition and Theory in Jurisprudence*, [1954] LQR 37.)

- (c) Any regulation of private property under the town and country planning laws and its successor, the Resource Management Act.
- (d) (To be consistent) the law of nuisance.
- (e) Any right of the community to acquire private property for any purpose, under such statutes as the Public Works Act.
- (f) Provision such as sections 54 and 66 of the Crown Minerals Act 1991 which deny to land-owners the right to forbid other people mining on their properties.
- (g) Regulations concerning earthquake resistance, fire safety and any other sort of safety in any private building.
- (h) Building codes.
- (i) Any health regulations affecting private property.
- (j) Many constructive and implied trusts. *Hayward v Giordani*²⁰ would have no place in our law.
- (k) Laws regulating how an employer was to run his own factory. All safety legislation, and presumably the idea of unjust dismissal, and any duty to make redundancy payments, would be inconsistent with the freedom to use ones factory as one pleased.
- (l) Indeed, quite possibly trade unions themselves might be an interference with private property and the freedom to contract. By the same reasoning, so might associations of employers.
- (m) Prescriptive easements and easements by necessity (not that these are of great significance in New Zealand).
- (n) Any acquisition of title to land under s 62 of the Land Transfer Act.
- (o) The law against perpetuities, section 16 of the Property Law Act 1952 (which abolishes the fee tail) and any other laws limiting an owner's right to tie up his property in the future - for if property is absolutely an owner's, he may do whatever he pleases with it, including tying it up forever.
- (p) Laws requiring innkeepers and others to provide certain services.
- (q) Any laws of matrimonial property involving the redistribution of one spouse's property.
- (r) Laws such as the Human Rights Commission Act and Race Relations Act which forbid discrimination, in any case (such as employment, club membership or selling or renting land) where private property is involved.
- (s) The Family Protection Act.
- (t) The Testamentary Promises Act.
- (u) Laws which make it a condition of granting planning consent that a developer must offer certain land as a reserve, or money in lieu, or provide (say) a day-care centre, or a certain amount of low-income housing, or a job-training programme.
- (v) Much environmental regulation, infringing ones proper freedom to fell "ones own" forest, pollute what is in fact the common air and water, etc.
- (w) "... socialism is the 'utter negation' of the right of private property, [and] 'man is no more adapted to it than the barn fowl is to live in the water'." Philanthropy or any other aid of the poor is a violation of the same laws

²⁰ [1983] NZLR 140 (CA).

of God and property. All attempts to “relieve the natural penalties of indolence and improvidence” bring about “unexpected and severe evil”. The doctrine that the government should provide for the unemployed “is the most subversive of all social order”.²¹ If this be so, then obviously the dole, the old age pension, the sickness benefit and the domestic purposes benefit - not to mention a health and hospital service provided to everyone and paid out of taxes - must contravene the principle of absolute property.

- (x) Quite possibly, if one favours the absolute autonomy of the individual and his freedom to contract, one will oppose any laws protecting mortgagors, say, from oppressive clauses they have agreed to, and statutes such as those enacted during the Depression which granted relief to mortgagors. One will oppose any interference with an agreed contract, regardless of the bargaining strength of the two parties. One will presumably oppose any laws regulating corporations.
- (y) Presumably such a one would favour putting into private hands the lands now contained in national parks, reserves, lakes and rivers.
- (z) He must oppose taxation.

Presumably, since Mr Hide also adheres to the principle of free negotiation, he will allow that a property owner may in negotiations yield up some of the rights he logically insists on. It may be that he will allow implied and constructive trusts as being in fact the offspring of consent. He may allow the acquisition of title by prescription as the claiming of *bona vacantia*. He may insist that testamentary promises are a species of contract, and that a union of employees has the freedom to ask for - but not insist on - certain conditions as to wages, safety and so on. But then, the same freedom of contract which allows a union to negotiate for a safe workplace also allows a lord to negotiate for the *jus primae noctis*.

This author does not claim to be in complete favour of every single item on this list, nor, he suspects, do most of his readers favour every single one of these laws. But all these laws are ones interfering with “absolute private property”, and subjecting it “to some form of social ... control”. To abolish them would lead to a society which, if it did not collapse at once in confusion would be inhumane, indecent and poisonous for all except the rich.

“Whenever I hear anyone defend anything on the ground of ‘the principle of the thing’”, an English judge said once, “I invariably find that he has done something mean.” Professor Hayek, writing *The Road To Serfdom* at the time of the last great bloody war against the total state, may be forgiven his excesses in favour of unfettered competition. But a lack of fetters does not necessarily lead to competition at all,²² and there is less excuse for the many since then who, wearing the high constitutional garb of the rule of law, have condemned practically any sensible and wholesome regulation as an attack on fundamental liberties. In an age which, compared with any past age of human history, is one of the most amazing abundance of material goods, both necessities and luxuries, one cannot help but think of those who would begrudge a few crumbs to Lazarus by the rich man’s table as the Scots spoke of the English in the Declaration of Arbroath of 1320:²³

21 Joseph Dorfman, *Thorstein Veblen and His America*, p 24.

22 See pp 466-472 below.

23 A Donaldson, *Scottish Historical Documents*, p 55. Is there an echo here of Calgacus’ address at Mons Graupius? “East and West alike have failed to satisfy [the Romans]. They are the only

... the King of the English ... ought to be satisfied with what belongs to him since England once used to be enough for seven kings or more, [and] to leave us Scots in peace, who live in this poor little Scotland, beyond which there is no dwelling place at all, and covet nothing but our own.

2. Private property historically considered

Great estates were the ruin of Italy, and indeed of the provinces.

Pliny, *Hist Nat*, xviii, 7

Theories, plausible and comprehensive, but absolutely unverified, such as the Law of Nature or the Social Compact, enjoy a universal preference over sober research into the primitive history of society and law; and they obscure the truth not only by diverting attention from the only quarter in which it can be found, but by that most real and most important influence which, when once entertained and believed in, they are enabled to exercise on the later stages of jurisprudence.

Sir Henry Maine, *Ancient Law*

Sir Henry Maine, in his *Ancient Law*, long ago pointed out the error of supposing that the most ancient form of the ownership of property was individual ownership, and how Blackstone and other theorists were in error when they wrote of ownership and property beginning when a shepherd first sat down in the shade of a grove or by a stream and called that place "his own". The evidence is clear that property was owned by communities - families, tribes, clans, septs - long before it was ever owned by individuals.²⁴ Indeed, the very word "private" comes from *privatus*, the participle of *privare*, which means to bereave, deprive, rob or strip.²⁵ This ancient existence and precedence of communal property might of itself be said to be unimportant. The long and bloody annals of history somewhere provide a precedent for every barbaric and appalling practice. It does not, other things being equal, settle an argument about some institution's virtue to say merely that "the Romans had it" or "the Aztecs recognised it". Yet the reflection that communal ownership of property is found anciently everywhere in the world, not merely in one or two places, may suggest that such a practice has its redeeming characteristics. More important for present purposes, it is clear evidence that individual ownership of property is not a self-evident proposition. The claims in favour of absolute private property, without any social interference, are based not only on the practical claim that such an organisation leads to the best results, but also on the belief, often an unspoken assumption of faith, that this is the natural order of things, and, indeed, the only possible way. Private property is, for most of its proponents, a natural law idea. Its existence is somehow keyed in to the nature of the universe. But, as we have been often warned,²⁶ we all too often see the nature of the universe when all there is is the *status quo*. The inferiority of women to men, and of all other races to the white, was a self-evident truth only a century ago. If *any* status quo is to be accorded the respect due to the natural order, it should be that status quo which has existed for most of human history, not the interloper of that fraction of time we call the last two centuries. If certain practical men do

people on earth to whose covetousness both riches and poverty are equally tempting." Tacitus, *Agricola*, ch 30. Cf Willie Hamilton: "How little we own, when you consider how much there is to own".

24 Laveleye's *Primitive Property*, referred to above, is a pretty comprehensive study of early property not only in Europe but also Egypt and many parts of Asia. It refers to many other works on the subject. Maine's *Ancient Law* concentrates mainly on Rome and India.

25 And also, it must be admitted, to release or deliver; but this seems to be a later meaning, and in any case does not derogate from the idea that communal property is the *basic* and *original* sort.

26 Eg by Christopher Stone, "Should Trees Have Standing? Towards Legal Rights for Natural Objects" (1972) 45 Southern California Law Review 450.

not realise that "private property" is as fragile and vulnerable an idea as any other, this merely reveals the unenquiring and unhistorical nature of their thinking. "Laissez-faire was planned, planning was not."²⁷ "Private property" and "freedom of contract" are not immutable eternal truths, but rights declared by the community. The community, state, commonwealth, *res publica* is just as much involved in the decision *not* to involve itself in certain affairs as it is in the decision to involve itself. It would be an easy but wearying parade of learning to offer even a summary of the volumes which, with Maine and de Laveleye, offer abundant proof that "property once belonged not only to individuals, nor even to isolated families, but to larger societies."²⁸ Maine himself believed the change from communal to individual ownership to be "progressive".²⁹ Practically any jurisprudence text or historical work of anthropology or sociology will at least mention the ancient fact of communal ownership, even if it then at once hastens on "Today, however" It does not, though, seem to rate much mention in land law textbooks, where co-ownership is looked upon as some sort of aberration from the norm of individual ownership. It is a pity, in this respect anyway, that lawyers do not match Voltaire's description of them as "conservators of ancient barbarism", but instead accept a recent development as the norm.

It has been suggested (to offer but one or two examples) that in the pastoral reflections of the Roman poets and their descriptions of a golden age we find traces of a popular tradition of a primitive epoch, and a race memory of a time when property was held in common.³⁰ The will is not a natural right, but

27 Karl Polanyi, *The Great Transformation*. It must be a source of mystification to many that within the factories and offices of the businessmen who preach the virtues of the free market and the folly of planning, there is the most careful organisation. The absence of planning within the workplace is called "chaos"; outside the workplace it is called "freedom".

28 Maine, *Ancient Law*. It is not irrelevant to note that in an age before mechanisation, and even before numerous beasts of burden, communal co-operation was often vital for the success of agricultural operations. Wendell Berry in *The Gift Of Good Land*, describes the Papago Indians still living in the Sonora desert, and whose ideal is, or was, "survival, not triumph": "The Papago communities were at once austere and generous; giving and sharing were necessarily their first principles. The people needed each other too much to risk individualism or dissent The man who hoarded, who saved, who said he and his blood would make it on their own ... such a man led his kin to extinction Power came from toil and could only be stored in other human beings." (Ch 2, *Three Ways Of Farming In the South-West*).

29 The author must not necessarily be thought to disagree in many respects. Individual ownership might be said to have this great disadvantage from an ecological point of view, however, that it leads to ease of alienation, and so to a tendency to look upon land as a mere commodity rather than as the basis of all life. Scotland is discussing at present proposals to abolish subinfeudation by a modern *Quia Emptores*. One of the objections made to subinfeudation is that the holders of "superiorities", the mesne lords, can object to "developments" - possibly for mercenary motives, or possibly for others. This is not to deny that communal ownership cannot have unfortunate ecological consequences. The question of the "tragedy of the commons", however, is often misunderstood. It is dealt with below.

30 *Quam bene Saturno vivebant rege priusquam*
.... Non domus ulla fores habuit; non fixus in agris
Qui regeret certis finibus arva, lapis.

Tibullus, I, 1, Eleg 3

"How well they lived in those old days, under the reign of Saturn.

No house had doors, and the stone which ruled the fields
 with fixed boundaries was not yet set up in the open country."

Vergil, also, in the *Georgics*, I, 125 -

Aene Jovem nulli subigebant arva coloni

Ne signare quidem aut partiri limite campum

Fas erat: in medium quaerebant; ipsaque tellus

Omnia liberius, nullo poscente, ferebat.

"Before Jove's day [ie in the Golden Age, when Saturn reigned]

a novelty invented by the Romans, and even then its aim, at first, was to regulate better the interests of the family, not to distribute wealth or divide property. Only the Statute of Wills gave the English, for the first time, a right to leave by will even some of their landed property without recourse to various cunning devices. Closer to home, the communal ownership of land by the Maoris is a type of an ownership far ancients and commoner than private property. The arguments of the last century and a half over the advantages and disadvantages - spiritual, social, agricultural, technical and economical - of communal ownership of Maori land contain little that is new.

In Rome, ownership by the family with the *paterfamilias* as the family's representative and head was gradually transformed into ownership by the father himself. This was the case also in Scotland, where tribal ownership by clan or sept - an arrangement too complicated, messy and unbusinesslike for a law increasingly prone to favour Occam's razor as a guide to land ownership³¹ - became, at law, ownership, individual and absolute, by the chief of that clan, and the transforming of his clansmen into tenants at will. Thus was laid the legal foundation for that most shameful episode of Scottish history, after the effective destruction of the clans' way of life at Culloden, the expulsion of the people themselves from the land which they (true to their traditions and lore) considered still theirs, but which the law said was their chief's alone. Driven out of their own houses often in the depth of winter, the children of the chiefs were left to starve by the shore, sink into the slums of Glasgow or to chance the fever and filth of an emigrant ship for life in the new world.³²

The appropriation of the common lands of Scotland by the chiefs is but one recent example of appropriations that, under one name or another, have been going on for a long time. The enclosures of the common lands of England have continued until the present century. Henry George, in *Progress and Poverty*, described the situation thus:³³

The English yeoman - the sturdy breed who won Crecy and Poitiers and Agincourt - is as extinct as the mastodon. The Scottish clansman, whose right to the soil of his native hills was then as undisputed as that of his chieftain, has been driven out to make room for the sheep ranges or deer parks of that chieftain's descendant; the tribal right of the Irishman has been turned into a tenancy at will. 30,000 men have legal power to expel the whole population from five-sixths of the British Islands, and the vast majority of the British people have no right whatever to their native land save to walk the streets

no tillers subdued the land. Even to mark the field or divide it with bounds was unlawful. Men made gain for the common store, and Earth yielded all, of herself, more freely, when none begged for her gifts."

See also Ovid, *Metamorphoses*, I, 135.

31 Hence, also, the "*Case of Tanistry*" (1608) Dav IR 28; 80 ER 516.

32 Not all chieftains cleared. It is a matter of regret that some who did still receive the adulation of the ignorant tourist in search of romantic Scotland. See John Prebble's remarks (in his *Scotland*, p 101) during an International Clan Gathering in Edinburgh, when he "regretted that many of [the men and women of Scots descent who had come to the gathering from overseas] knew little, and were being told nothing during their visit, of the manner in which their ancestors had been driven from the Highlands by chiefs whose descendants were now splendidly arrayed in George Street to greet them There was something indecent in a tartan charade which pretended there had been no sadness and betrayal, and that at its best it was as if the undertakers who long ago buried the corpse of the clan society were now holding its wake." John Prebble's *The Highland Clearances* is the only modern popular work on the subject. The author observes in his preface that "we have not become so civilised in our behaviour, or more concerned with men than profit, that this story holds no lesson for us".

33 Cf Matthew, 8.20; "The foxes have their holes and the birds of the air their nests, but the son of man has nowhere to lay his head." Marion Shoad's *This Land is Our Land* contains a good description of the continuing process of encroachment on remaining common land in Britain.

or trudge the roads. To them may be fittingly applied the words of a tribune of the Roman people: Men of Rome, said Tiberius Gracchus, men of Rome, you are called the lords of the world, yet have no right to a square foot of its soil. The wild beasts have their dens, but the soldiers of Italy have only water and air.

“Private” land, as well as common land, did of course exist in the Middle Ages. But the burdens and duties imposed upon it and its owners by the Church, the feudal system and custom, not to mention popular opinion, denied private property any “absolute” nature. Our history books record the painful steps by which these mediaeval regulations were cast off. In England the Civil War was perhaps the great testing-ground between the old idea of limited property and the new. The Tenures Abolition Act of 1660 virtually abolished feudal limitations. The next two centuries see innumerable enclosure acts enclosing - “privatising” - the common lands. The same Roundheads, Puritans and merchants who so changed the idea of property also fought to establish - for themselves, anyway - many of the “classical” human rights and freedoms we enjoy today. But the Crown, too, had been fighting for freedom. “The most characteristic feature of the economic policy of the Stuarts and of the Tudors was the continual endeavour to aid the new classes of society who suffered from the new capitalist development, above all the weavers and the artisans generally against the entrepreneurs and managers of industry and commerce, and also the agricultural population oppressed by the enclosures and sheep-rearing.”³⁴ A price must be paid for everything. “Freedom” can include the freedom to use and discard others.³⁵

Even if property is held privately, a strong sense of community may be necessary even for the survival of sound agricultural practices. We are all familiar with the articles appearing from time in the news media revealing, usually in tones of breathless amazement, that scientist have just discovered that some ancient practice - of agriculture or medicine, say - actually has some sound reasoning behind it.³⁶ The *mos maiorum*, the accumulated wisdom of a society found in its traditional knowledge and practices, is not without its value, and the tone of breathless amazement is perhaps more appropriate to the spectacle of the arrogance of the present day and its surprise to discover that the past is not without wisdom. Their amazement amazes. The point is well put by Wendell Berry in his essay “An Agricultural Journey In Peru” (1979), describing agriculture in the Andes.

[These farmers] do as they have done, as their ancestors did before them. The methods and reasons are assuredly complex -this is an agriculture of extraordinary craftsmanship and ecological intelligence - but they were worked out over a long time, long ago; learned so well, one might say, that they were forgotten. It seems to me that this is probably the only kind of culture that works: thought sufficiently complex, but submerged or embodied in traditional acts. It is at least as unconscious as it is conscious - and so is available to all levels of intelligence. Two people, one highly intelligent, the other unintelligent, will work fields on the same slope, and both will farm well, keeping the ways that keep the land. You can look at a whole mountainside covered with these little farms and not see anything

34 Hecksher, *Mercantilism*, Vol.1, p 257.

35 This was realised at the time. Petegorsky's *Left-wing Democracy in the English Civil War* gives a good account of the complaints by the common Parliamentary soldiery that they were fighting not for their own liberty but for the ascendancy of a new class of master. In politics as in religion, new presbyter was but old priest writ large.

36 The tone of breathless amazement is not universal. Stephen Jay Gould, for example, in a fine and amusing recent essay, tells us with great admiration for ancient wisdom that the bezoar stone, anciently thought a sovereign proof against poison, actually does work against arsenical poisons, rendering the poisonous salts harmless. The intriguing question Mr Gould poses is: how was this discovered? How long did it take before someone first put the concretion from a goat's stomach into a glass of poisoned wine and discovered the poison rendered harmless?

egregiously wasteful or stupid. Not so with us. With us, it grows harder and harder even for intelligent people to behave intelligently, and the unintelligent are condemned to a stupidity probably unknown in traditional cultures.

3. *The tragedy of the commons*

In many European countries, of which England is to us the most familiar, common lands still exist, although still decline. Today, about one and a half million acres of common land remain in England.³⁷ (Between 1710 and 1843 over seven million acres were enclosed, and since then well over a million more.) The proponents of absolute private property are unable to avoid this reminder of the unfortunate communal period in our history. Although it cannot be avoided, however, it can be misinterpreted and the good name of communal property blackened. This is achieved by speaking of the “tragedy of the commons”.

The phrase “the tragedy of the commons” was coined by Garrett Hardin³⁸ to describe a phenomenon observed on common lands and often illogically used as a justification for enclosure and “privatising”. A certain piece of common land can, say, support fifty grazing animals and no more. Yet the commoners overgraze it. Why? They may well recognise the harm they are doing. But each one thinks to himself that there is no point in reducing the number of his beasts, because to do so would merely be to relieve the pressure on the common and allow others to continue grazing, or overgrazing, for longer - or to increase the number of beasts they graze. And so, because no good will be done by individual responsible action, the common land is severely damaged to the detriment of all.

We are familiar with the problem. Why should a householder of Christchurch behave responsibly and stop burning coal, or reduce the amount of rubbish put out on to the street to be collected, or use her motor-car less, and so on? All that would do would be to relieve the pressure on Christchurch’s air, rubbish dumps, roads and carparks, and allow the present deplorable state of affairs to continue for longer, while that responsible householder is at a self-imposed disadvantage. She may as well be in with everyone else for as long as the party lasts.³⁹

The conclusion many draw from this is that public or common property is an ineffectual and useless way of distributing benefits and maintaining resources. Private property would be better, because a private landowner would have a vested interest in not ruining his land. Thus the former existence of common property becomes justification for the article of faith that wise land use arises only out of private property.⁴⁰

³⁷ Marion Shoard, *This Land Is Our Land, The Struggle for Britain’s Countryside*, 198.

³⁸ G Hardin, “The Tragedy of the Commons”, 162 *Science* 1243 (1968).

³⁹ She may, indeed, be performing a public service in not assisting in “propping up a mouldering institution”. So in many cases it could be argued that it is actually a good and kind thing not to relieve want and misery, because such relief only postpones the day of profound reform. The Communist Party of Great Britain has used this argument in the past in opposing any reform of the House of Lords. It is a convenient excuse, sometimes used by the mean to avoid giving to the poor.

⁴⁰ Hardin himself explains the success of the commons system over the centuries as the result of “tribal wars, poaching, and disease [which] keep the numbers of both man and beast well below the carrying capacity of the land.” No credit is given to the organisation of the community or the social system. Rather, when “the day [of] the long-desired goal of social stability becomes a reality ... the inherent logic of the commons remorselessly generates tragedy.” The ignoring of the success of manorial courts in regulating commons for centuries is not only unhistorical - it is also a strange view of human nature. These farmers, it seems, do not talk to each other. Culture and community seem non-existent.

For several reasons, this is simply not true. For one thing, if it were true then there would be no abused or badly-maintained land (or any other resource) in private hands. Those who have not spent over-long worshipping at the shrines of theory will know that not all privately-owned lands and resources are used responsibly. Landowners may be ignorant. They may be greedy, or shortsighted. Perhaps more often, they may be desperate. We gaze at the deserts of Mesopotamia, where after millenia of agriculture in the cradle of civilisation called the Fertile Crescent only salt flats and ruined cities remain; but before we condemn the ancient cultivator for his unwisdom, let us reflect that if he were anything like a modern farmer he was probably deeply in debt and harassed by bureaucrats, moneylenders and the Mesopotamian equivalents of stock and station agents. Although, since 1984 Parliament has wisely removed many incentives and subsidies for unsound practices, yet farmers desperately in debt have still resorted to bush clearance, in particular, simply to attempt to hold on to their farms. Debt is one of the greatest enemies of sound agriculture. On parts of the "privately-owned" Great Plains, five bushels of soil are lost for every bushel of grain produced.⁴¹ This is hardly sounder or more sustainable than over-grazing a common.

It is surprising that the tragedy of the commons is used as an argument for the private ownership of resources by individuals, because the tragedy is really the result of defects - of stupidity, greed, shortsightedness or some other reason - on the part of individuals. The commoners *could* have agreed among themselves, or somehow got their lord or some external authority, to impose sound limits on the use of the resource. It is usually forgotten that where such regulation or agreement *does* exist common land survives very well from age to age. Where commons fail, it is because the commoners failed to agree. This failure is not an argument for private property. It is, if anything, an argument for the fallibility and uselessness of co-operation, and the inability of human beings to see where their own best interests lie. It is evidence of shortsightedness - the remedy for which, it might just as logically be claimed, is submission to the Leviathan.

Why then is the tragedy of the commons so readily interpreted as an argument for private property? One cannot help but suspect that those favouring it consciously or unconsciously draw a distinction between the capacity of the commoners, peasantry and "common people", on the one hand, and of the gentry and "quality" on the other, for ability to perceive their own true interests; the supporter of enclosures, needless to say, putting himself in the second, superior category. The knowledge that the original occupiers of the commons were, under any circumstances, unable to care for the commons themselves, is moreover a comforting and reassuring thought to still any lingering twinges of conscience over so vast an expropriation. As has often been observed of Malthus, much of his popularity derives from the implied flattery of his readers and his justifications for hard-heartedness.⁴²

What is more, we face today an environmental crisis of enormous proportions. It is no exaggeration to say that, even in the absence of a nuclear war,

41 Wes Jackson, *Altars of Unhewn Stone: Science and the Earth*, 1987.

42 But see *Animals, Men and Myths*, by "Morus", 1954 - "The marked sexual tone Malthus gave his theory, albeit in a perfectly proper way, was undoubtedly the main reason why a truism became a sensation." Malthus proposed moral restraint for the breeding classes as the only remedy, while opposing any other form of birth control. It has doubtless not escaped the reader that the idea of the "free market", like the ideas of Malthus, can soothe the sense of responsibility and flatter by the suggestion of superiority.

our future actions - if not our past ones - may lead to profound and devastating actions for much of human life and civilisation.⁴³ Arguments in favour of absolute private property are useless in achieving any solution to many of these problems. Indeed, such arguments have encouraged the growth of the problem. The atmosphere is threatened by air pollution which leads to the build-up of "greenhouse gases" and the destruction of the ozone layer. Yet, just as in the example of Christchurch's air pollution, mentioned above, "private property" has been just as much to blame as any socialist "national property" for this pollution. The fireplaces, motorcars, industrial plants and aerosol cans of the west are all privately owned. This private ownership has not stopped the air from being fouled. If absolute private property were the answer, there would not be an air pollution problem. The fact that there is one is proof that regulation by the community and its lawmakers for the common good is necessary. Indeed, the reductions in air pollution in the west in the past decades has been almost entirely by governmental regulation in the teeth of private opposition.⁴⁴

It has been observed of "classical" physics, the physics of Galileo and Newton, that its terms and explanations are satisfactory for describing the activities of the human-scaled world we see and inhabit, but are unsatisfactory when the scale is greater or smaller than this. Matter and energy at the atomic and sub-atomic levels, and at the level of the great universe itself, seem to be bounden by different laws. So it is with other things. The simple mechanical certainties of absolute private property may have been adequate to sustain life and prosperity in the eighteenth century. That was an age when our simple technology greatly limited the amount of damage we could do. It was a time when there were still, beyond the pale of civilisation, fresh lands whose virgin riches could be exploited. If one part of the earth were spoilt, we could always find another; and the wild places of the earth, the seas, airs and forests, were still big enough to absorb the comparatively little waste and rubbish that we put into it.

Simply by sailing in a new direction you could enlarge the world.⁴⁵

The world, however, has changed - unlike the thinking of some of its inhabitants. "Civilisations", as we flatteringly describe ourselves, are no longer islands in a wilderness. Civilisation embraces the earth and threatens

⁴³ See pp 484-486, below.

⁴⁴ This point is one Hardin recognised. "In a reverse way, the tragedy of the commons reappears in problems of pollution. Here it is not a question of taking something out of the commons, but of putting something in - sewage, or chemical, radioactive and heat wastes into water; noxious and dangerous fumes into the air; and distracting and unpleasant advertising signs into the line of sight. The calculations of utility are much the same as before. The rational man finds that his share of the cost of the wastes he discharges into the commons is less than the cost of purifying his wastes before releasing them [W]e are locked into the system of 'fouling our own nest' so long as we behave only as independent, rational free-enterprisers [T]he air and waters surrounding us cannot readily be fenced, and so the tragedy of the commons as a cesspool must be prevented by different means, by coercive laws or taxing devices [O]ur particular concept of private property ... favours pollution."

⁴⁵ Allen Curnow, *Landfall in Unknown Seas*. He observes later

But now there are no more islands to be found
 And the eye scans risky horizons of its own
 In unsettled weather, and murmurs of the drowned
 Haunt their familiar beaches -
 Who navigates us towards what unknown
 But not improbable provinces?

to overwhelm it. We must change our ideas fundamentally or perish. The last several years⁴⁶ have seen an enormous mania for things green from many people who nevertheless still remain committed to the concepts of continued "economic growth", who stoutly deny any sympathy for the manifestoes of any of the various Green parties, who seem, in short, to believe that nothing need actually change, and that being "green" is little more than changing to a herbal shampoo. But the crisis facing us requires profound changes to our lifestyle and social and economic organisation.⁴⁷

4. *The state of private property now*

There is a certain sort of person, much addicted to things as they are now, who, imagining himself a practical, hard-headed man of affairs, condemns any proposal for reform or change, however reasonable and sensible, as the work of "woolly-headed idealists". The word "idealist" is often used as a condemnation, and to want to change the world for the better is seen as a grave fault. There is on occasion some little justification for this attitude, for one *species* of the *genus* idealist is indeed woolly-headed. This is the *species* who supposes that the world *already* matches his imagined ideal. But the effective idealist has no obligation to believe that his work is already done for him. He follows the advice of Sacred Scripture that we be "as innocent as doves but as wise as serpents",⁴⁸ and knows full well the nature of the raw material he has to deal with. If he has his head in the clouds, he has his feet on the ground.⁴⁹

In this category belong most, if not all, of the great reformers, both sacred and secular. St Teresa of Avila, St Ignatius Loyola, Florence Nightingale, Elizabeth Fry and innumerable others are evidence that having ideals and dreams, being even a celebrated mystic and spiritual writer of great holiness, is not inconsistent with being practical and effective.

The suspicion must be that Mr Hide's paean of praise for absolute private property puts him into the category of those who believe the world to be

46 A convenient milestone seems to be Mrs Thatcher's now famous "green speech" to the Royal Society in September 1988.

47 "Modern society will find no solution to the ecological problem unless it takes a serious look at its life style ... simplicity, moderation and discipline, as well as a spirit of sacrifice, must become a part of everyday life." - from the message of His Holiness Pope John Paul II for the celebration of the World Day of Peace, 1 January 1990. This is a more "deeply ecological" approach than that even of many sympathetic politicians. Sir Geoffrey Palmer's *Environmental Politics* has been criticised because "a truly green perspective must involve more than simply fixing carbon dioxide scrubbers on industrial chimneys". (*Dominion Sunday Times* 10 February 1991).

48 Matthew, 10.16.

49 "We are all lying in the gutter, Lady Windermere, but some of us are looking at the stars." Thoreau observed of building castles in the air, "now put the foundations under them". This observation is reported in Henry S Salt's *The Heart of Socialism*, which also quotes, without attribution, this verse:

When Worldly Wiseman ponderously said
 "Your heart, good sir, is better than your head,"
 Stern truth withheld me from my first intent
 To answer him with converse compliment;
 For who that saw him, dull in every part
 Could say his head was better than his heart?

St Thomas Aquinas states that it does not fall to the law to prohibit all human vices, but only the more grievous ones, and chiefly those that are hurtful to fellowmen, and which must be prohibited to maintain the necessary order in human society. Nor does it fall to human law to prescribe all acts of virtue. This is because law is a measure, and must, like all measures, be appropriate to the thing measured, and since most humans are imperfect law must take this into consideration. *Summa Theologica* Ia IIae, qu 96, articles 2 and 3.

well-run now in accordance with his theory. Already mentioned above are some modern laws which conflict with absolute private property. We look now a little more at the existence of private property today.

As a matter of common sense, it follows that if property is truly to be private, there must be independence in its use. Thus my furniture is obviously my own, to arrange as I please. A farmer's livestock - certainly if he is not heavily in debt - are his own independently-run private property. Independence is obviously a matter of degree. We might hesitate to say that our houses are not our private property because we rely on others to supply the wood and coal for our fireplaces - or even to supply our water, electricity, telephones and sewerage. At least in this country of garden suburbs, with the countryside seldom too far away, we could probably live in our houses and somehow cope without most of these things for a while. It would be different in New York or London. But what of our motor-cars? The organisation required for a motor-car to run - oilfields, pipelines, refineries and tankers, rubber plantations and factories, mines and steelworks, petrol stations and roads, garages and spare parts - this organisation is so great and so complicated - any motorist depends on a vast international system of tens of thousands of people - that ones practical independence is greatly limited. A petrol shortage, even a tanker drivers' strike, war in the Middle East or an accident at a local refinery - such things can not only interrupt our lives but threaten the functioning of the entire country. Because motor-cars and spare parts, fuel and lubricants, and roads to run the cars on are all abundantly available, it is easy to overlook this obvious dependence. If one were to buy an electric jug, but have to rent on a week-by-week basis the cord and plug that alone made it possible to use it, one would have no practical independent "private" ownership of the jug. Or, to put it another way, one would have the ownership of an expensive but completely useless thing. So it is with the motor-car. It will not run without fuel, oil, roads and spare parts. It is completely useless without the constant purchase by us of various inputs which we could never hope to provide for ourselves. The practical independence of the motor-car owner is largely illusory. Many other people have a hand on making your car go. It cannot be said that you are the absolute independent owner of your motor-car.

This dependence, and limitation on ownership, was recognised at the time of the "oil shock" of 1973. Officials in the United States of America issued warnings that the industrialised oil-dependent nations had a *valid claim* on the oil supplies of OPEC countries, and would even be entitled to intervene militarily to ensure that no profound disruption of their own societies occurred. Thus private property in oil - like private property in the motor-car - has been declared to be an unsustainable concept. As a matter of logic, it would follow that countries without other more basic "necessities" of life, such as *food*, should be able to inform countries with an excess of food that they are *entitled* to that food, and would even be entitled to intervene militarily to obtain it. This logical extension of the argument does not find such favour with the governments of powerful well-fed countries, however.

Many other portions of "private" property also depend on a social organisation and context. Our jobs, the shares we may own, the contracts for insurance and superannuation we possess; these things are not simply ours in the same sense in which our furniture is. "Wealth today", Thurman Arnold said, "consists in nothing any one individual can use."⁵⁰ Charles A Reich

⁵⁰ *The Folklore of Capitalism*, p 123.

observed almost thirty years ago that the “new property”, as he termed it, not only consists of rights and status rather than tangible goods - a profession or a job can be more important than a house or bank account - but that much of it consists also of government largesse - licences, franchises, concessions, government contracts and entitlements to various persons or benefits.⁵¹

The modern corporation

One of the commonest forms of private property today is the share in a company. Again, this is property in which the shareholder has no independence. It is not his as a plot of land, a coin or an animal is. It depends for its value on an entire and vast framework of social and business organisation.

To a considerable extent this was not the case with shareholders in many companies, especially smaller ones, even a century ago. The shareholders then were very often personally involved in the running of their companies.⁵² But, just as the nineteenth century saw the phenomenon which Marx described, of the alienation of the labourer from his labour, so the last hundred years have seen the alienation of “owners” from ownership. Technically speaking, it may be that the owners of a large public company are the shareholders. Yet we know that most shareholders have no power (even if they had the desire) to exercise any control whatsoever over the running of the company, and are nothing but mere passive receivers of dividends. They invest money in the company not as merchant adventurers in a more heroic age risked their assets on some daring but doubtful overseas enterprise, which gave them equal chances of becoming paupers or as rich as Croesus. Rather, shares are bought and sold so that a profit may be made from the mere buying and selling of them, and people put their money into shares and keep them just as they put their money into a bank or building society,⁵³ expecting no more - and no less - than a reasonable rate of return.⁵⁴ Since the first controversial appearance in 1932 of *The Modern Corporation and Private Property* by Berle and Means, this idea of “passive property” - property divorced from the “natural” and “normal” concomitant of *control* has become well-known. The structures and details of ownership of particular corporations of course vary. There are various devices by which a minority shareholder - sometimes the owner of a very small proportion of shares - may exercise

51 *The New Property* (1964) 73 Yale LJ 733. The implications of this government largesse for freedom are discussed below, n 84

52 Hence, for example, the inability of the Court of Appeal in *Broderip v Salomon* [1895] 2 Ch 323 (which subsequently went to the House of Lords as *Salomon v Salomon & Co*) to see the one-man company as anything different from the human being who was its guiding force, chief servant and principal shareholder. “In this case an attempt has been made to use the machinery of the Companies Act 1862 for a purpose for which it was never intended.” - Lindley LJ, at p 337.

53 Over which they have no control either. The bank and building society may well be involved in corporate finance also.

54 Radin, in “Property and Personhood” (1982), 34 Stanford LR 957, draws a distinction between personal property, which is intimately connected with us, and which we need for our sense of ourselves as persons - property with which we have some emotional engagement - and fungible property, held, as its name suggests, for its exchange value. Different people may classify the same piece of property in different ways. Thus, a factory, from the point of view of the company which owns it, and its shareholders, may be fungible property. The people who work there, who may depend on it for their livelihoods, may well see it as personal property. Radin proposes that in various ways personal property should receive more protection from the law than fungible property. The distinction between these two sorts of property, one better protected than the other, puts us in mind of the distinction between “real” property, where the *res*, the thing itself, could be recovered in a real action, and personal property, for the deprivation of which the usual remedy was not the restoration of the thing itself, but damages.

control. But it is much truer now than it was in 1932⁵⁵ that in nearly all cases, most, and often all, of the shareholders in a large public company are utterly powerless in the management and control of that company.⁵⁶ Who then does control the company? It is the directors and managers, or some combination or permutation thereof, who, in all but exceptional cases, can do largely as they please - sometimes subject to the law, sometimes not. Large public companies of the present day, then, are little more than vast ownerless funds or money and property, directed by paid officers who are not the owners and who are (for all practical purposes) answerable to no-one.⁵⁷

Once one accepts the essence of the "Managerial Revolution", that in the modern corporation "ownership" and control are in different hands, then the "free-market" assumption of the common good arising out of the use of private property by owners for their own self-interest is even less plausible than it would otherwise be. It should be apparent already that self-interest can be an extremely short-sighted motive. It is not always enlightened and in any case there are degrees of enlightenment. It should also be plain that the idea that it is only the hope of gain which impels us to be useful and industrious is a gross and unpleasant misrepresentation of human nature. It is certainly a consideration, and in many cases doubtless a very significant one. But many would maintain that we are naturally industrious - *homo faber*, rather than mere *homo economicus* - as long as it is useful work, rather than useless toil, which we perform. There are countless examples of disinterested service for poor reward, and it is surely an insult to those great captains of industry who work such long hours for the benefit of all to suggest that their motives are solely the sordid ones of private advantage.⁵⁸ But quite apart from these objections, given the reality of that most ubiquitous piece of modern "private property", the share, and the organisation and workings of large public companies, even this very limited theory of self-interest falls down. For the essence of the modern corporation is that *ownership* and *control* are separated. The "owner" - the shareholder - has no control over the company's activities. Those who control are not the owners. If they happen to have shares themselves they will benefit from increased share prices and dividends, but they may well have no shares, and in any case can benefit without them by arranging to increase their salaries and perquisites. It is often overlooked that Adam Smith himself did not favour large joint stock companies. When he wrote in favour of individual enterprises, they were truly the enterprises of *individuals* he was thinking of - ones where the talents and skills of one man or a very small group of men made the difference - an owner, and perhaps a

55 Much more recent evidence is published in the 1968 revised edition of *The Modern Corporation and Private Property*. The twenty years since then have seen no changes in the trends it measures and records.

56 If it should happen that a shareholder or shareholders do control the company, most often that shareholder will itself be a large institution - a bank, insurance company, etc.

57 For details of the legal and economic structures and forces which not only enable this arrangement to exist but seem to encourage it, see such works as Berle and Means (referred to above); Christopher D Stone, *Where the Law Ends, The Social Control of Corporate Behaviour*; Mintz and Cohen, *America Inc, Who Owns and Operates the United States*; J K Galbraith, *Planning, Regulation and Competition*; and Edwin H Sutherland, *White Collar Crime*. Every library will have several shelves of books dealing with the corporate question, one of the great and perplexing phenomena of our time.

58 "A man who has followed the paths of thriving more for the exercise they afforded to his talents, than for the love of gold with which they are strewed His active mind would have been happy in any situation which gave it scope for exertion, though that exertion had been its sole reward." Sir Walter Scott, *Rob Roy*, vol 1, ch xi.

handful of apprentices and workers. But he objected to "corporations as a business mechanism" because their dispersed ownership made efficient operations impossible. "The directors of such companies ... being the managers of other people's money rather than of their own, it cannot well be expected that they should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own. Like the stewards of a rich man, they are apt to consider attention to small matters as not for their masters honour, and very easily give themselves a dispensation from having it. Negligence and profusion, therefore, must always prevail, more or less, in the management of the affairs of such a company. It is upon this account that joint stock companies for foreign trade⁵⁹ have seldom been able to maintain the competition against private adventurers. They have, accordingly, very seldom succeeded without an exclusive privilege and frequently have not succeeded with one. Without an exclusive privilege they have commonly mismanaged the trade. With an exclusive privilege they have both mismanaged and confined it."⁶⁰

The large corporation is the ruling commercial and mercantile principle of our age. Ever since Le Bon's *The Crowd* it has been known that even such informal transient groups as mobs were distinct phenomena with distinct ways of behaving. The observations of Freud and Weber ring true to anyone with any experience of the workings of a jury or an incorporated society's annual general meeting. With the corporation, as with a jury, there is no reason to suppose that its motives, the way it will respond and adapt to external threats, the way it will scan its environment for information, the way it will calculate and weigh its pleasures against its pains - all its decisions, in fact, and the way it arrives at them - will coincide with those of any human being within it. The corporation, in short, does not behave as would a man motivated even by the very limited motive of self-interest.

In the Middle Ages and Renaissance, when corporations were not enormously numerous, rich and influential, and when the chief purpose of a corporation - church, guild or borough - was merely the passive one of holding property, rights and privileges, the law's attitude to it was not so important.⁶¹ Gradually, the law, seeking simplicity, has chosen more and more to treat corporations, whenever possible, as human beings, as legal persons. This process of simplification has continued to the stage where the 1983 Companies Amendment Act has virtually abolished the necessity of objects clauses and has given to companies all the powers of natural persons. This is in one way a breath of reality. But it is an error if it supposes that corporations think and behave as human beings do.⁶²

The law, after all, is only one mechanism of many influencing our conduct. Conscience, fear of shame and loss of face before our family, university, peer group, and so on all influence us. They may well not influence a corporation, especially when the law is seen as an irritant and inconvenience which can be

59 At the time the only important companies besides banks, insurance companies and water and canal companies.

60 *The Wealth of Nations*, vol 2, p 229 (*Everyman* edition.)

61 Even the first trading companies, granted exclusive rights by the Crown to trade, say, with the Indies or the Czar, did not trade themselves; rather, *members* of that company traded *individually*, or in partnerships with such others as they chose, on their own bottoms. Only in 1612 did the East India Company resolve that thereafter only *the company itself*, and not its individual members, was to trade with the Indies.

62 See, for example, the excellent summary in Christopher D Stone's *Where The Law Ends, The Social Control of Corporate Behaviour*.

broken without any sense of shame or wrongdoing. A criminal conviction is like a lightning bolt, an Act of God.⁶³ A corporation has many motives besides the maximisation of its profit (and indeed, profit maximisation may suggest that it is more profitable to break the law). It must survive, and therefore make a profit; it must make satisfactory profits, as to fend off possible attacks from factions within and takeovers from without; it might well also want to satisfy its employees' wellbeing, to expand, to attract prestige, to earn a reputation for innovation or for solidity; and increasingly there is among large companies an increasing social orientation in their sponsorship, for example, which (one suspects) is somewhat more than any profit-maximising "goodwill" really requires. Companies face many threats, of which the law is only one, and legal fines, even *if* substantial, may be small in relation to total profits and losses.

Corporations, moreover easily become very complex, with each small section having its own small goal. These goals, not the ultimate profits, may be what motivate managers and workers in the administrative subdivisions. Threats to the corporate treasury do not necessarily influence the company's directors and managers - the top management may not be rational economic men, they are unlikely to suffer personally as a result of the illegal risks taken on the company's behalf, either from shareholders⁶⁴ or from the law. They may lack *mens rea* or full knowledge - indeed, lower ranks of officials in the company may well deliberately conceal important matters from their directors in order to protect them from legal action.

Times have changed since Adam Smith wrote.⁶⁵ "The literature of law and economics ... is using the little pictures of private property and the profit motive to describe a society which is more like an army than the group of horse traders which it is supposed to be."⁶⁶ A host of authors⁶⁷ has chronicled the way in which so much of the financial, industrial and economic life of modern states is on the hands of a handful of corporations answerable neither to shareholders nor citizens and electors, nor to the law.⁶⁸

Some may see this irresponsibility as inevitable, but others disagree⁶⁹ and maintain that it would be "bad enough to sell our political and economic

63 "Most men would rather be thought wicked than stupid." La Rochefoucauld, *Maxims*.

64 "Seldom if ever ... [has there been] any serious sustained shareholder movement to oust a major corporation's management in the wake of any lawsuit." Stone, *supra*.

65 But Adam Smith himself observed that "people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." And again, "the interest of the dealers in any particular branch of trade or manufactures, is always in some respects different from, and even opposite to, that of the public. To widen the market and to narrow the competition, is always the interests of the dealers. To widen the market may frequently be agreeable enough to the interests of the public; but to narrow the competition must always be against it." Smith was a spokesman for capitalism rather than for capitalists.

66 Thurman Arnold, *The Folklore of Capitalism*, p 122.

67 See n 57.

68 "You cannot punish corporations. Fines fall upon the wrong persons; more heavily upon the innocent than upon the guilty; as much upon those who knew nothing whatever of the transactions for which the fine is imposed as upon those who originated and carried them through - upon the stockholders and the customers rather than upon the men who direct the policy of the business. If you dissolve the offending corporation, you throw great undertakings out of gear. You merely drive what you are seeking to check into other forms or temporarily disorganise some important business altogether, to the infinite loss of thousands of entirely innocent persons and to the great inconvenience of society as a whole. Law can never accomplish its objects in that way. It can never bring peace or command respect by such futilities." Woodrow Wilson, Address to the Thirty-third annual meeting of the American Bar Association; Reports of ABA 35 (1910) 427.

69 Eg Mintz and Cohen, *America Inc, Who Owns and Operates the United States* (*supra*). They cite

freedom for the coin of technology; it would be ironic if the coin were counterfeit.”⁷⁰ But inevitable or not, it is one of the established facts of our time. Proof can be got from any volume of the Law Reports where judges deal, for example, with standard form contracts.⁷¹

The ordinary consumer does not really negotiate with even a small dry-cleaning company or airline with whom he deals. He accepts their terms, or goes to another company probably offering identical terms. Cases about standard-form contracts illustrate a tension between the supposed freedom to contract and negotiate we all possess, and the fact (denied by the myth) of unequal bargaining power. The free market, where competition exists and where rational individuals pursue their own interests, is a myth and, indeed, an opiate. “In most industrial societies large corporations control the supply of goods, create artificial demands through advertising, and have a decisive influence on national policies.”⁷² Big corporations shape markets, administer prices and manipulate demands. J K Galbraith⁷³ describes thus the society where competition will successfully and beneficially operate: “the market where sellers are numerous, capital requirements are modest, technology generally available, entry in consequence not difficult, the products of different sellers largely substitutable and where in further consequence no seller has the power to influence appreciably the price at which he sells; that is to say, he has no market power. All sell at an externally and impersonally determined price.” We are far from this ideal world, and leaving it further behind. It is grotesque to speak as though we still lived in a simple age of periwigs and ‘prentices. It would be truer to say that in small countries and big, we see oligopolies, where a small number of large firms support each other, or where there may well be only one firm in a particular market. “Free-market forces” simply do not operate. Almost universally these oligopolies are giant corporations, funds of ownerless and irresponsible property. So ownerless are they that Professor Galbraith has suggested that,

various authors, eg G J Stigler, of the University of Chicago Law School, in “The Case Against Big Business”, *Fortune*, May 1952: “Actually, big businesses are generally no more and no less efficient than medium-sized businesses even when the gains wrung by monopoly power are included in efficiency. This is the one general finding in comparative cost studies and corporative profitability studies When we recall that most big businesses have numerous complete plants at various points throughout the country, this finding is not surprising. Why should US Steel be more efficient than Inland Steel, when US Steel is simply a dozen or more Inland Steels strewn about the country?” The unit of technological efficiency is the plant, not the firm, Mintz and Cohen maintain, and although there are advantages to large-scale integrated operations at one plant, there is no *technological* justification for combining these functionally separate plants into a single *administrative* unit. A firm producing such divergent lines as rubber boots, chainsaws, chicken feed, motorboats and lavatory cleaners is not responding to technological necessity, but may well be seeking conglomerate size and power. It is not inconsistent to favour technological bigness (where that is appropriate) and yet oppose administrative bigness. See also pp 41-50, quoting Robert Townsend, former chairman of the Board of Avis: “Excellence and bigness are incompatible”.

⁷⁰ Mintz and Cohen, p 52.

⁷¹ “Each time an individual travels upon a ship, bus or train, buys a motor-car, takes his clothes to the dry-cleaner, deposits his luggage in a railway cloakroom, or even, in some cases, takes the lease of a house or flat, he will receive a standard-form contract, devised by the supplier, which he must either accept *in toto* or, theoretically, go without. In fact, he has little alternative but to accept; he does not negotiate, but merely adheres. In some respects, therefore, it would be more correct to regard the relationship which arises as not one of contract at all, but as one of status. The contracting party enjoys, if that is the right word, the status of a consumer.” A G Guest, *Ansons Law of Contract* (25th ed), 1979.

⁷² F Capra, *The Turning Point*, p 241.

⁷³ In *Planning, Regulation and Competition*.

while the large corporation is here to stay, it would be nothing but a recognition of an existing fact to abolish boards of directors in large firms and replace them with boards of public auditors, which would not involve themselves in affairs of management but rather matters of honesty, law-keeping and public interest.⁷⁴ Although no-one would then represent the shareholder, no-one does now. Indeed, since the shareholder is also obsolete Professor Galbraith proposes buying out such functionless shareholders so that dividends and capital gains accrue to the public.

Whatever our own views of the merits of this proposal, it is noteworthy that it is made by an eminent economist as a simple recognition of the powerlessness of shareholders and supremacy of managers. If it is socialism, it is socialism after the fact; for the corporation takes power from its shareholder owners, and also makes itself socially indispensable. If a corporation is large enough, it cannot be allowed to fail. Despite the rhetoric, it is difficult to believe that any government could countenance the failure of a corporation which provided a considerable proportion of the population with employment, with fuel or food, with electricity or fresh water. There can never be any real "privatisation" of the supply of potable water to the community.

To condemn as "socialism" or "nationalisation" this attempt to make the corporation behave responsibly and well, and this recognition of shareholder powerlessness, is to accept as fact the legal fictions of shareholder control and of corporations as "persons" just like human beings, and suppose that since these corporations are still legally dressed in the clothes of simple farmers and merchants, therefore attempts to regulate them are attacks on liberty and the home.

As a matter of strict economic logic, the primacy objective of a business and its managers is just as likely to be the desire for a quiet and prosperous - or adventurous and prosperous - life for themselves, even at the expense of bamboozable shareholders, let alone the common good, as it is to be efficiency in terms of economics and use of resources. Even if profit for shareholders were directors' sole concern, this does not necessarily benefit the greater community. The profit motive does not lead automatically even to economic efficiency.

The author has already suggested that big is not necessarily better, and that there is no evidence that Brobdingnagian size leads to economic efficiency or invention and innovation. It seems, indeed, a strange contradiction that the very people who complain of fat, sloth and bureaucracy in government as it gets bigger see no objection to bigness in industry. Nor does great size lead to greater humanity. On the contrary, it leads to a greater distance between commander and commanded, führer and functionary. Attila and Tamburlaine at least did their slaughtering themselves. But "the great evil is not now done in those sordid 'dens of crime' that Dickens loved to paint. It is not done even in concentration camps and labour camps. In those we see its final result. But it is conceived and ordered (moved, seconded, carried and minuted) in clean, carpeted, warmed and well-lighted offices, by quiet men with white collars and cut fingernails and smooth-shaven cheeks who do not need to raise their voices. Hence, naturally enough, my symbol for Hell is something like the bureaucracy of a police state or the offices of a thoroughly nasty business concern".⁷⁵

⁷⁴ In *The Age of Uncertainty*, pp 277-279

⁷⁵ C S Lewis, preface to *The Screwtape Letters*.

The simple fact is that we have two governments. One we refer to as “the government”, as if it were the only one. Every bit as influential in our own lives is the other unelected government of business and property. Indeed, the influence of this unelected government on the elected one may also be great. Since we attach the label “private” to this unelected government we do not worry much about it thereafter. But the label is the only difference. Both governments affect us, and are just as much our business. The label is indeed important. Thurman Arnold in a famous observation in *The Folklore of Capitalism* pointed out that although increased taxes and increased prices may both withdraw exactly the same amount of money from our pockets, yet it is increased taxes that excite our fury, because we look upon a tax as a forced taking; whereas we look upon a purchase we make, even of a necessity, as a voluntary giving. Much is in a name.⁷⁶ The label “private” attempts to tell us that the organisation of that industry and business is none of our business. The elected government we may do with as we please - but Fletcher Challenge, say, even though a company of great resources, which employs (counting the employees of its subsidiary companies) over 100,000 New Zealanders, and could, if it chose to be unco-operative, do a great deal of harm, is private. Even though a vast and complicated enterprise it is still looked upon as a rugged individual, and attempts to regulate its doings are looked upon in certain quarters in the same light as we would look upon attempts by the state to tell us how to arrange our furniture.⁷⁷

5. *Private property, natural law and freedom*

I am against the private socialism of concentrated economic power as thoroughly as I am against government socialism. The one is equally as dangerous as the other; and destruction of private socialism is utterly essential to avoid governmental socialism.

F D Roosevelt⁷⁸

Independence? That's middle class blasphemy. We are all dependent on one another, every soul of us on earth.

G B Shaw, *Pygmalion*

The idea of the absolute sanctity and inviolability of private property is not self-evident. The idea that with ones own land one can do whatever one pleases and that one *should* not be compelled by law to do anything in particular; the idea, for that matter, that there *should* be private property at all; these are philosophical propositions. They cannot be proven merely by pointing out that our law now allows no “interference”. Indeed, our law now allows considerable “interference”, and usually has in the past. Absolute private property is no more self-evident, and quite possibly less, than the belief that the riches of this world - the earth, waters and airs and all thereon and therein - are naturally the inheritance of all of us. The proposition that we *ought* to have “irresponsible ownership” is a natural law proposition. It might not be one

76 Concerns over the recently rejected amendments to the Crimes Act remind us how important the word “murder” is. A certain very large New Zealand company recently announced its intention of introducing random spot checks of certain of its employees for alcohol and drug use. If the “official” government had announced the random testing of citizens, there would have been public outrage; but this private plan received little notice and no objections, even though the penalties the employer company proposed might well be worse than those imposed by the state. Charles A Reich, in *The Greening of America*, consider this question at some length.

77 It is because the law treats a corporation as a human being that it considers only its actions, and not its “mental processes”. Many proposals for corporate reform involve not the regulation of a corporation’s external actions but also its internal workings - its deliberations and thoughts.

78 Quoted in Mintz and Cohen, *America, Inc*

many natural lawyers would adhere to, but it is this - or, in Thurman Arnold's categories, a religious faith.⁷⁹ This faith has enjoyed a resurgence of popularity in certain circles in Britain and the United States for the last decade. It is surprising that the phlegmatic Anglo-Saxon, who for centuries has been renowned for eschewing the philosophical and murderous manias that have swept Europe,⁸⁰ avoiding the Gallic frenzy, the excesses of revolution and reaction, and the jackboots of both gauleiter and commissar, should now fall victim to a simple-minded philosophy just as many other nations, most notably in Eastern Europe, seem to be casting off the adamantine fetters of impoverishing ideology. The simplistic ideology divides the world into communism and capitalism. As communism now collapses, capitalism prevails. Eastern Europe is overthrowing its old governments for rule by the principles of Adam Smith, the free market and unbridled capitalism. This is nonsense. As a glance at the list of laws mentioned above which are inconsistent with absolute private property will reveal, no country in the west is "capitalist". Certain governments that are attempting to create pure capitalism are making their countries unpleasant places for increasing numbers of their citizens. For the last fifty years at least "capitalism" has been replaced by states which recognise a large and indispensable mellowing and stabilising role for governments. Eastern Europe is not fleeing from Stalinist planning to the Thatcherite free market, poll-tax and water privatisation, but to the very modified and regulated form of capitalism, with subsidies, social welfare and government involvement, practised in nearly all of Western Europe. Even many of those Eastern Europeans who have not seen the homeless in the streets of London recognise the imperfections of unregulated capitalism, and hope to create a third system which combines the best features of freedom and planning. The revolutions of 1989 were indeed blows for freedom and, doubtless, genuine free enterprise, but the revolutionaries know that *unregulated* free enterprise leads merely to the rule of the strong. In every other aspect of law and life we recognise that without law and regulation there is tyranny. It would be tiresome to repeat Lord Acton's famous dictum about power, but the whole principle of our constitutional arrangements, however imperfectly realised in practice, is that trust and power are liable to be abused, and scrutiny and review are necessary. The Greeks said that law is the child of fear. It would be strange if economic power were exempt from this principle, and lack of regulation lead to perfect freedom. Yet this now seems to be the creed of the previously pragmatic Anglo-Saxon.

The religious principle of the absolute sanctity of private property is defended⁸¹ on the grounds that "people should be free and that they should be allowed to prosper". Opponents of absolute private property, the implication is, oppose freedom and prosperity, motherhood and apple pie. The matter is not this simple. This author favours freedom, prosperity and private property. But Mr Hide is defending *absolute and unfettered* property. He claims that

⁷⁹ Mr Hide admits this when he begins his remarks with such phrases as "I believe" and "I consider".

⁸⁰ Comparatively speaking. The Pope was overthrown, and kings deposed and even killed, but compared with the rest of Europe the Anglo-Saxon has shown more resistance to infection by ideas. This has not always been a bad thing. Lord Acton, speaking of parliamentary democracy, said that "the one thing that saved England from the fate of other countries was not her insular position, nor the independent spirit nor the magnanimity of her people - for we have been proud of the despotism we obeyed under the Tudors, and not ashamed of the tyranny we exercised in our dependencies - but only the consistent, uninventive, stupid fidelity to that political system which originally belonged to all the nations that traversed the ordeal of feudalism."

⁸¹ By Mr Hide.

freedom and prosperity can be attained only by allowing no restrictions whatever on the acquisition and use of private property. He distinctly opposes "absolute property" and "regulated property", and is therefore led to conclude that to favour freedom and prosperity means favouring, for example, the freedom of a large, rich and powerful corporation to behave exactly as it pleases largely, if not entirely, untrammelled by the law, and opposing town and country planning, taxation and social welfare.

Mr Hide defends absolute private property by pointing to freedom and prosperity as its fruits. These arguments could be said to be practical ones, but since he holds freedom, in particular, to be a self-evident good, they might also be said to be theoretical or natural law ones.

There is indeed some connexion between freedom and property. Where there is no private property, there may well be no freedom. Even healthy communal life on communal property, which we may favour for those happy native peoples still lucky enough to enjoy it, we ourselves might well find intolerable because of the duties to the community and pressures from the community which it imposed.⁸² If we are all the tenants-at-will of some monstrous tyrant who can throw us out on the street at any moment, we cannot be said to be free. But this proposition, that freedom requires the possession of private property, contains an obvious logical demand and limitation within itself. For, to put it gnomicly, if we must have private property in order to be free, then we must have private property. If, in order to be free, we must have some sort of security of tenure in those things most important to us - our houses and gardens, at the very least, if not our workplaces and jobs - then we must actually *have* that security of tenure. All or most of us must *as a matter of fact* possess these things. Mr Hide, though, is content to let the facts take care of themselves; he considers only the question of faith and principle, of whether the acquisition of private property is in theory open to us, like the doors of the Ritz hotel, regardless of whether any is for sale, whether enough is available for sale to all who want it, whether it can be afforded by "the decent poor"; and so on. But it is not enough just to say that in principle everyone *may* own private property, and that (since ownership ought to be unfettered) they may own as much as they like and do with it what they will. After all, as W C Fields observed of land, "they've stopped making it". There are not unlimited quantities for everyone. The price of one woman's ownership of large amounts of land is the loss of freedom by others who depend on her. It is indeed a deprivation of freedom if a government can throw families out on to the street. It is an equal deprivation of freedom if a private landlord can throw families out on to the street. It is strange that a lover of freedom should condemn the first but allow the second. It is the word "private" that leads us to believe that a private landowner's right to expel *his* tenants is only "freedom".^{83,84}

82 The author is hinting at a double standard here. The same people who sing the virtues of communal life in a rustic Arcadia may be those least respectful of communal pressures affecting themselves. For the thoughtful examination of the pressure of public attitudes in an anarchic society (in the good sense), see Ursula le Guin's novel, *The Dispossessed*.

83 The state of negroes in slavery in the United States before the Civil War was superior to that of many "free" men there and in Europe. It is hypocritical cant, Henry George says, to demand the liberation of slaves and yet allow such misery to exist among the "free". The Children's Employment Commission of 1842 reported that "Many boys and young men are working in the mines as apprentices. Such is the demand for children that there are no boys in the union workhouses of Walsall, Wolverhampton, Dudley and Stourbridge The boys are sent on trial to the mines between the ages of eight and nine and are bound apprentice for twelve years, being

When several years ago, a white paper proposed a bill of rights for New Zealand, there was a clamour from (among many others) those who saw a sinister totalitarian threat in the absence, in the proposed bill, of any clause guaranteeing the right to own property. They would declare property to be a natural right. "But what is a natural right, unless it be a right so inherent in human nature that no man shall be able to be robbed of it, unless he has forfeited it by his conduct?"⁸⁵ In fact, for a bill of rights to state that "everyone has the inherent human right to own private property" would logically lead to a redistribution of property to ensure that all held some, as their human status entitled them to. This is, one suspects, the very opposite of what the objectors desire. What they desired was not a declaration of a right inherent in everyone, but a declaration that that part of humanity who possessed property now were to be free to keep it. Thus the language of human rights was to be used to justify two different classes, the propertied and the propertyless.⁸⁶

Thomas Jefferson held that the healthiest and best-run states were those of small freeholders. "Cultivators of the earth are the most valuable citizens. They are the most vigorous, the most independent, the most virtuous, and they are tied to their country, and wedded to its liberty and interests by the most lasting bonds."⁸⁷ In this he was greatly influenced not only by his own observations but also by the political writings of the Greeks. Aristotle in the first and second books of the *Politics*, although rejecting the community of property Plato proposes in the *Republic* (and indeed even the strict limits on the accumulation of private property proposed, as an alternative, in the *Laws*), yet still criticises the Spartan state for allowing wealth to be concentrated in too few hands, so that the citizen body has decreased, and criticised the Carthaginians for the importance they attach to wealth, and how they allow offices to be bought and sold. Aristotle - and such others as Plato, Phaleas of Chalcedon and Hippodamus, whose opinions he considers - certainly considered the organisation of property to be a chief source of peace or turmoil in

to the age of twenty-one Now here is slavery in the middle of England as reprehensible as any in the West-Indies which justice and humanity alike demand should no longer be endured."

⁸⁴ Reference has already been made to Charles A Reich's *The New Property* (1964) 73 Yale LJ 733, where modern property is described as being the result of the distribution of "government largesse". The arbitrary distribution, regulation and withdrawal of such largesse - often without any constitutional safeguards in the United States, as the courts may regard the property not as an entitlement, but a mere act of grace on the state's part - is regarded by the author as an infringement of liberty. Property preserved freedom, he says, in that it draws a boundary between private and public power. Within the boundary, an owner has greater freedom; he is Master, and the state must explain and justify any interference. Yet this author concludes (p 778) that "there can be no retreat from the public interest state. It is the inevitable outgrowth of an interdependent world. An effort to return to an earlier economic order would merely transfer powers to giant private governments which would rule not in the public interest, but in their own interest ... Individualism and pluralism [must] be preserved ... not by marching backwards. ... If private property can no longer perform its protective functions, it will be necessary to establish institutions to carry on the work that private property once did but can no longer do."

⁸⁵ De la Veleze, *Primitive Property*.

⁸⁶ For another example of the abuse of the language of private property, which reveals the true motives of some proponents of property and freedom, *The Field*, December 1989 laments the decline in the number of tenanted farms, and the increase in the number of owner-operated farms. One might have innocently supposed that, other things being equal, a man running his own farm would be freer and have greater incentives to produce more. But the author simply disposes of such suspicions by explaining that "Owner-operated farms are like nationalised industries. Tenanted farms are like privatised industries!"

⁸⁷ *The Life and Selected Writings of Thomas Jefferson*, ed Koch and Peden, 1944, pp 729-730.

the state. The history of Sparta was taken as but one example to show that the concentration of land in fewer and fewer hands led to a decline in wealth, population and the vigour of the soldiery, and an increase in class warfare. The idea of regulating the distribution of wealth so as to check excessive inequality recurs at every moment in the writings of the ancients. The biblical commands are well-known to us.⁸⁸

You shall count seven sabbaths of years, that is seven times seven years, forty-nine years, and in the seventh month on the tenth day of the month, on the Day of Atonement, you shall send the ram's horn round. You shall send it through all your land to sound a blast, and so you shall hallow the fiftieth year and proclaim liberation in the land for all its inhabitants. You shall make this your year of jubilee. Every man of you shall return to his patrimony, every man to his family. When you sell or buy land amongst yourselves, neither party shall drive a hard bargain. You shall pay your fellow countryman according to the number of years since the jubilee, and he shall sell to you according to the number of annual crops. The more years there are to run, the higher the price, the fewer the years, the lower, because he is selling you a series of crops No land shall be sold outright, because the land is mine, and you are coming into it as aliens and settlers. Throughout the whole land of your patrimony, you shall allow land which has been sold to be redeemed

The various Greek traditions of *sussitia* (common banquets),⁸⁹ of the periodic redivision and redistribution of land, and of the equal division of its produce are not only evidence of an earlier stage of common property, but also proof that in a healthy community imbued with civic spirit (which civic spirit these communal exercises do much to foster) the "profit motive" is not the chief motive. It is simply not true, history shows us, that agriculture, and therefore civilisation would be impossible without full ownership. In an age of tractors, or even of plentiful beasts of burden, the necessity of co-operation may be overlooked.⁹⁰ It is also evidence that ancient legislators recognised the truth, so constantly repeated by Aristotle, that liberty and democracy cannot exist without some rough, at least, equality of conditions. "Inequality is the source of all revolutions."⁹¹

The causes of the decline and fall of the empire of the Romans have been endlessly debated, and have provided fuel for the moral rearmament theories of legions of crackpots. No-one, however, can deny the change, observed by the Romans themselves, from a land of sturdy independent freeholders, the farmers, soldiers and bearers of the civic virtues of the republic, to an empire of vast estates run by slave labour, and an idle, restless urban proletariat, the whole increasingly defended by auxiliaries and barbarians.

The century which follows the Licinian Laws [which declared that no-one might own more than 500 *jugera* of land, and associated pasturage] is the one in which the soldiers of Rome seem inexhaustible. Varro, Pliny and Columella continually refer to these great days of the Republic, as the time when Italy was really powerful by the richness of the soil and the number and prosperity of its inhabitants. The law of the five hundred *jugera* is always quoted by them with admiration, as being the first which recognised the evil, and sought

88 Leviticus, 26, 8-11, 14-16, 23-24 (New English Bible).

89 Sparta's communal dining is the best known, but common banquets at certain times were a feature of nearly all *poleis*. According to de Laveye, *Primitive Property*, such common banquets were still held in Switzerland at the time he was writing (1878).

90 See n 28.

91 *Politics*, v 1. "Americans, ever suspicious of concentrated political power, have permitted concentrations of economic power to develop, substantially unchallenged, that would make a Roman Emperor gasp" - Senator Gaylord Nelson, Senate hearing, 10 July 1969 (Given in Mintz & Cohen, *America Inc*).

to remedy it by retarding the formation of those vast domains, or *latifundia*, which depopulated Italy and after Italy the whole empire.⁹²

Since Jefferson maintained that a rough equality of conditions, at least, was necessary for democracy and liberty, and was thinking of a republic of farmers and artisans whose freeholds were also their livelihoods, it might not be doing him a grave injustice to suggest that he would consider some stake in the "means of production" by every worker essential to democracy and liberty.⁹³ Many things contain logical limitations upon themselves. Commitment to the principle of toleration does not oblige one to tolerate a creed preaching intolerance and the extermination of unbelievers. Parliament can do anything; yet, according to one school of thought anyway, this is subject to the logical limitation that it cannot do something which it cannot later undo. And so, if we need private property in order to be free, we therefore need laws restricting the unlimited accumulation of private property. If people are "free" to hold as much as they please, inevitably other people hold none. If private property is indeed a "natural" human right, it is one which all human beings must share, and every human being ought by law to be able to acquire his fair share, by means of no more than his own reasonable efforts. If private property is a natural right, then extortionate prices and the accumulation of large estates by those who refuse to sell or subdivide offend against it. Yet the self-styled defenders of the "right" to private property are likelier to condemn than praise any even slightly coercive redistribution of property.⁹⁴

92 M la Boulaye, quoted in de Laveleye, *Primitive Property*. A *jugerum* is about five-eighths of an acre - two roods, nineteen perches and 189 square feet.

93 It must be admitted that he also wrote "I consider the class of artificers as the panders of vice and the instruments by which the liberties of a country are generally overturned". (See note 87). "Artificers" are "manufacturers". No explanation follows, but his disapproval of artificers may well arise from their need for a pool of propertyless and demoralised labourers. "The size of land holdings", Wendell Berry says (*The Gift of Good Land*) "is likewise a political fact. In any given regime there is a farm size that is democratic, and a farm size that is plutocratic or totalitarian. A great danger to democracy now in the United States is the steep decline in the number of people who own farmland - or landed property of any kind Earl Butz has suggested that this is made up for by the increased number of people who own insurance policies. But the value of insurance policies fluctuates with the value of money, whereas the real value of land never varies; it is always equal to the value of survival, of life. When this value is controlled by a wealthy or powerful minority, then democracy is reduced to mere governmental forms, easy to destroy or ignore."

94 The point has been made before. Herbert Spencer, *Social Statics*, ch ix: "Given a race of human beings having like claims to pursue the objects of their desires - given a world adapted to the gratification of those desires - a world into which such beings are similarly born - and it inevitably follows that they have equal rights to the use of this world. For if each of them 'has freedom to do all that he wills provided he infringes not the equal freedom of any other', then each of them is free to use the earth for the satisfaction of his wants, provided he allows all others the same liberty. And conversely, it is manifest that no-one, or part of them, may use the earth in such a way as to prevent the rest from similarly using it; seeing that to do this is to assume greater freedom than the rest, and consequently to break the law. Equity, therefore, does not permit property in land. For if *one* portion of the earth's surface may justly become the possession of an individual, and may be held by him for his sole use and benefit, as a thing to which he has an exclusive right, then *other* portions of the earth's surface may be so held; and eventually the whole of the earth's surface may be so held; and our planet may thus lapse altogether into private hands." Those hapless enough not to own property could therefore be expelled from the earth altogether. "It is manifest that an exclusive possession of the soil necessitates an infringement of the law of freedom."

Henry George, in *Progress and Poverty*, asks: "Has the first comer at a banquet the right to turn back all the chairs and claims that none of the other guests shall partake of the food provided except as they make terms with him? Does the first man who presents a ticket at the door of a theatre, and passes in, acquire by his priority the right to shut the doors and have the performance go on for him alone? Does the first passenger who enters a railroad car obtain the right to scatter his baggage over all the seats and compel the passengers who come in after him to stand up? The

This author would indeed maintain that as part of the order of nature we are all entitled, somehow, to a share of the earth's resources, and that freedom and prosperity are better achieved when all citizens *in fact* enjoy some private property, instead of merely enjoying the privilege of obtaining some if they can. Our status as human beings is our certificate of title. Paley's famous example of the pigeons⁹⁵ serves to remind us of the utter un-naturalness of a society where some have vastly more than they need and others not enough. But this common right does not, even in Paley's view, mean that we should *hold* all things in common. It may well be that a division of the common property into particular private holdings is the best method available for the proper use and development of natural resources. From the basic general proposition of the right of all to some share in the resources naturally placed in the world for all, various thinkers have come to various conclusions. Plato, in *The Republic*, proposes a community not only of property but of wives and children among the ruling classes of his state. In the *Laws*, having perhaps realised the practical objections to this, he proposes instead a limit on the amount of property which one man can own - a man should own only so much as will enable him to live temperately. Aristotle, in the *Politics*, criticises Plato, saying that the abolition of property will produce, not abolish, dissension, discourage liberality, and do away with the pleasure which derives from giving and having what is one's own. Yet at the same time the philosopher also condemns such states as Sparta and Carthage which have few limits on the accumulation of property,⁹⁶ and concludes that "property should be in a certain sense common, but as a general rule private."⁹⁷ In a certain sense

cases are perfectly analogous. We arrive and we depart, guests at a banquet continually spread, spectators and participants in an entertainment where there is room for all who come; passengers from station to station on an orb that whirls through space. Our rights to take and possess cannot be exclusive; they must be bounded everywhere by the equal rights of others." Failure to acknowledge this, he says, leads to "the ultimate absurdity [that] any one human being, could he concentrate in himself the individual rights to the land of any country, could expel therefore all the rest of its inhabitants; and could he thus concentrate the individual rights to the whole surface of the globe, he alone of all the teeming population of the earth would have the right to live." See also M F Huet, *Le Regne Social du Christianisme*, Bk III, ch v.

From here it is but a short and natural step to speak of a right to the inheritance of one's ancestor's property, or even (should one's ancestor be landless or poor) the right upon maturity, to claim a certain area from the state or community, as is still done in Tonga and Fiji among the native populations. It need not be added that the will, which now enables a testator to ignore the claims of his kin and hearth, is not a natural right, but, as Sir Henry Maine tells us, a novelty, invented by the Romans. For many centuries English law allowed wills to regulate only the disposition of the comparatively unimportant personal property. Even among the Romans, the aim of the will, at first, was to regulate better the interests of the family, not to distribute wealth or divide property.

95 "If you saw a flock of pigeons in a cornfield, instead of each picking where and what it liked, taking so much and no more than what it wanted - if instead of this, you saw ninety-nine of them gathering all they got into a heap, taking nothing for themselves but a little draft and refuse, keeping this heap for one, and that the weakest perhaps and worst of the whole flock; sitting round and looking on all the while, while this one was eating and throwing it about and wasting it, and if one more hardy or hungry than the rest touched a grain of it, all the others instantly flew upon it and tore it to pieces - if you saw all this, you would see nothing more than what is every day practised and established among men. Among men you see the ninety-nine toiling and scraping together a heap of superfluities and niceties for one, gathering nothing for themselves all the while but a little of the coarsest of it; and this one, too, off-times the feeblest and worst of the whole set, a child, a woman, a madman, a fool; looking quickly on while they see the fruits of all their labour spent or spoilt, and if one of them take or touch the least of it, the others join all against him and hang him for the theft". *Principles*, Book III, Part 1, ch 1.

96 "The result proves the faulty nature of [Sparta's] laws respecting property; for the city sank under a single defeat; the want of men was their ruin *Politics*, II, 9.

97 Book II, 5.

property should be common - and “good customs and laws” might well improve the sense of communal duty. The aim of the state, he says, is the good life, and the state itself is not in its essence an unnatural interference or monster, but natural - “... if the earlier forms of society [ie family, and village] are natural, so is the state, for it is the end of them, and the nature of the thing is its end.”⁹⁸

St Thomas Aquinas quotes without objection the saying of Isidore of Seville that “the possession of all things in common, and universal freedom, are matters of natural law”.⁹⁹ In the same article of the *Summa* however (which considers the questions “whether the natural law can be changed?”) he says that, although nothing may be subtracted from natural law, which is unchangeable in its first principles, yet

by way of addition ... nothing hinders the natural law from being changed, since many things for the benefit of human life have been added over and above the natural law We might say that for man to be naked is of the natural law, because nature did not give him clothes, but art invented them. In this sense, the possession of all things in common and universal freedom are said to be of the natural law, because, namely, the distinction of possessions and slavery were not brought in by nature, but devised by human reason for the benefit of human life. Accordingly, the law of nature was not changed in this respect, except by addition.

Private property is admissible, then, as a human addition to the natural law, but only so long as it regards the common good, which is of the essence of all laws.¹⁰⁰ Since law is a measure, and, like all measures, must be appropriate to the thing measured,¹⁰¹ we must work with human beings as they actually are, not as we might like them to be. It could well be argued that since the Fall this practical necessity of private property for the common good is almost inevitable. Recent popes in such encyclicals as *Rerum Novarum* (the encyclical of Leo XIII in 1891) and *Quadragesimo Anno* (of Pius XI in 1931) do state that “private ownership is according to nature’s law”¹⁰² and that man has a “natural right of possessing and transmitting property by inheritance”.¹⁰³ Nevertheless these same encyclicals are also gravely critical of the abuses of contemporary capitalism. *Rerum Novarum*, speaking of just wages, says that the idea that “wages, we are told, are fixed by free consent, and, therefore, the employer when he pays what was agreed upon, has done his part, and is not called upon for anything further”, is “by no means convincing to a fair-minded man”. “If through necessity ... the workman accepts harder conditions because an employer will give him no better, he is the victim of force and injustice.” The law, moreover, “should induce as many as possible to become property-owners”, which may well limit large accumulation of property by a few. *Quadragesimo Anno* declares that “a man’s superfluous income is not left entirely to his own discretion”, but that “the grave obligations of charity, beneficence and liberality which rest upon the wealthy are constantly insisted upon in telling words by Holy Scripture and the Fathers of the Church”. Pope John XXIII, while declaring in *Pacem In Terris* that “the right to private property ... derives from the nature of man”, also declares that “there is a social duty essentially inherent in the right of private property”.

⁹⁸ Book I, 2.

⁹⁹ *Summa Theologica*, Ia IIae, qu 94, 9.5.

¹⁰⁰ *Summa Theologica*, Ia IIae, qu 90, 9.2

¹⁰¹ *Summa Theologica*, Ia IIae, qu 96, 9.2: “Human law is framed for the mass of men, the majority of whom are not perfectly virtuous.”

¹⁰² *Rerum Novarum*.

¹⁰³ *Quadragesimo Anno*.

Whether or not St Thomas's words can bear the interpretation which these modern encyclicals put on them, it is clear at least that he considered private property at least compatible with the natural law - as long as, like all human laws, it is ordained *for the common good*. This factual test may well mean that in particular circumstances private property, or the abuse or excessive accumulation of private property, is impermissible. Indeed, although St Thomas's teachings are not usually looked upon as revolutionary, some recent South American writers¹⁰⁴ have declared that since the condition of private property - that *in practice* it is effective in making goods fulfil their natural end of serving all men - has, in their time and place, been broken, then it is no longer permissible.

... St Thomas says that 'Property and slavery were not imposed by nature, but by the reason of Man for usefulness to human life'. Its justification, then, depends on its usefulness. It is noteworthy that ... St Thomas links property with slavery as institutions of the positive law that are useful to men. It would not be strange then that if slavery has ceased to be useful to human life, the same thing should occur with property. What is certain is that both receive the same treatment from St Thomas. The truth is that like slavery, property is a positive institution that is a product of history, neither sacred, nor eternal, nor natural. Like it too, it is a product of social development and will disappear as a result of that same development just as slavery has disappeared. The image of property as an absolute institution inseparable from Man is nothing but a myth created under the influence of large propertyholders who have dominated society.

Several centuries after St Thomas, a fellow spirit of the South Americans, Gerrard Winstanley, was perhaps unique in his time in refusing to accept man's fallen nature as final and unchangeable. He did not seek to construct an adequate social system within these human limitations. Rather, in him "we find the profound conviction that the restoration of the natural order by the abolition of private property is a possible adventure; for human nature is primarily a product of the social conditions under which men have been living, and constitutes no insuperable barrier to fundamental change."¹⁰⁵

There has from ancient times been a widespread opinion in the most respectable philosophical circles that property was, or ought to be - "originally", or in "a state of nature" or in "an ideal community" - held in common. Private property is permissible in that it is often the best method for utilising property for the common good. But since the good of the community is the overriding consideration, the community is entitled to regulate the use of what is, after all, fundamentally its own - by planning laws, for example, or by graduated taxation - or even, in appropriate cases, by repossession (pejoratively described as "confiscation"). Taxation and confiscation *can* of course be gravely unjust, but that does not mean that they always are. An idea, after all, is not responsible for the people who believe in it, nor in those who pay lip-service to it.¹⁰⁶ We may even disagree with Plato or St Thomas but let us at least note that other opinions on property have often been held beside those of the Business Table.

Most of us may favour the cautious approach of Aristotle and St Thomas, and flatter it with the garland of "sensible". Winstanley's hopes of establishing a new society based on common property we may find too spiritually

104 Eg Julio Silva Solar, *St Thomas and Property - A View From the Christian Left in Chile*, and others quoted in P E Sigmund (trans and ed), *St Thomas Aquinas on Politics and Ethics*.

105 D W Petegorsky, *Left-Wing Democracy in the English Civil War, A Study of the Social Philosophy of Gerrard Winstanley*, 1940, p 183.

106 Indeed, just as La Rochefoucauld, in one of the most justly celebrated of his maxims, observes that "Hypocrisy is the homage which vice pays to virtue" so the mere fact that bad people use a good idea as a smokescreen or shelter may well be proof of the idea's real truth.

strenuous and emotionally demanding. St Francis' marriage to Lady Poverty is definitely a counsel of perfection. No community of people in our own materialistic age has managed to renounce property without some spiritual force or inspiration within them. The Acts of the Apostles, speaking of the early church, say that "all whose faith had drawn them together held everything in common: they would sell their property and possessions and make a general distribution as the need of each required".¹⁰⁷ This is indeed, as has often been pointed out, a form of communism. It succeeded, however, where the many experiments of the last century, great and small, have usually failed, because of an enormously different attitude and motivation. The early church considered property supremely *unimportant*. Because Christ's kingdom was not of this world, and treasures should be laid up not here among moth, rust and thief but in the Heavenly kingdom, property could be shared or renounced with a glad heart. The error of any communism which also is atheistic and materialistic, and which considers man only as *homo oeconomicus*, is that it considers material property as of supreme importance, the only thing that really exists; and having taught this, has rendered futile any attempts to get people to behave as if property did *not* matter.¹⁰⁸

From ancient times, then, private property has been accepted as having its uses. Because of the "ideal" or "original" state of common ownership, it has also been recognised as having its philosophical limits. We properly despise the arrogance and ignorance of those who suggest that until Marx no-one ever thought a thought worth thinking. Not the least offence of the New Right is its implication that 'philosophy' has always regarded unlimited private property as acceptable, or that the subject had not been considered until the proponents of absolute private property wrote on the matter. In failing, at the very least, to acknowledge the long history of thought on this subject, they weaken their own claims to serious consideration.

Any "natural right" to property, then, must mean a right for everyone, not merely a privilege in some to keep what they already have. If we truly favour freedom, we must recognise that private owners, perhaps especially the (literally) inhuman corporations, can be as tyrannical as elected governments, and that tyranny does not become freedom simply because it is masked by the label "private". The freedom of some to do as they please with their property is for others the opposite of freedom. Freedom for the landlord is oppression to the tenant. An employer's absolute liberty is his employees' slavery. Freedom for *everyone* must be the result of limiting the absolute freedom of some.

Liberty, for some, is the liberty of each man to do as he pleases with himself and the fruits of his labour. For others, it is the liberty to do as he pleases with *other* men and the fruits of their labour. Mr Hide simply says "I believe people should be free". Such a declaration can be assented to by everyone precisely because it leaves a hundred important questions unanswered. Free to do what? Should people be free to oppress others and deprive them of freedom? Should the law prevent people losing or giving away their freedom through ignorance, poverty or misfortune?¹⁰⁹

¹⁰⁷ Acts, ii, 44-45.

¹⁰⁸ Anyone, indeed, of any political colouring who maintains human beings to be solely *homines oeconomici* is not entitled afterwards to complain that they behave accordingly, nor to claim that this dingy sub-human will nevertheless continue to behave in a public-spirited and charitable manner.

¹⁰⁹ J S Mill, in *On Liberty*, after his famous assertion that the sole ground on which society can

Nature knows no private boundaries, and any ecologically responsible legal system cannot tolerate any idea of absolute private property. Nor does common sense recognise absolute private property. The author has already mentioned such examples as the uselessness of electrical appliances without electricity, or motor-cars without fuel and roads. In the last seven years we have heard at least one local multi-millionaire condemn taxes as "immoral" - as an unjust taking by the state of what it has no right to. Even if such a complainer is hard-hearted enough to deny the community any share in his prosperity, it is surprising to find him unaware of the benefits with which the state, through taxation, provides *him*. Taxation provides a police force, courts of justice and prisons whereby people who interfere with his property can be caught, tried and punished, and others are deterred from such interference. Taxation provides an army to defend his property against foreign princes and the queen's enemies. It provides an education system which provides that rich man with the skilled educated people he finds necessary to run his operations, and with schools and universities to which he may, if he pleases, send his own children. Taxation, local or national, provides the roads he and his servants use, the water, electricity, drainage, sewerage and fire services which he obviously takes for granted. Taxation provides the hospitals his servants, anyway, use, and may well involve itself in the provision of the houses they live in. It is the community - its existence, and activities - which have enabled this man to become rich in the first place, whatever his business. The very value of his property arises out of the attitudes and values of the community. To tax him is but simple justice. To say that it is unjust deprivation is presumably to say either that he should be able to protect his possessions with his own private army, courts, prisons, etc, and in all other respects derive no benefit from the community, or else that these services should be provided to him for nothing - at the expense, that is to say, of the common people. These are both remarkable propositions.¹¹⁰

A factory is about to close down, throwing several hundred people out of work and perhaps threatening to destroy a suburb or even a town. The law's attitude, however unsatisfactory, is at least clear. It asks the question "Who owns the factory?" and upon being told "this man does" replies, "then if he wants to close it, let him". This is unfair. The community may well benefit from the income, employment and products which the factory provides. (On the other hand, the pay might be poor, conditions bad, the products useless or dangerous and the factory might pollute, or waste important resources.) But in either case the factory also benefits from the community. The factory is not an unrewarded distributor of largesse. Factory and community may have grown together, and depended on each other for a long time. The community - the state or local body - may well have built roads and houses

interfere with the conduct of others is the protection of society itself or other members (a vague test, but perhaps inevitably so), offers one exception, allowing paternalistic interference; that a man may not be allowed to sell himself into slavery, and thereby deprive himself of future freedom. It might be retorted, that once one admits the exception to allow society to protect future freedom, this justifies many interferences. Poverty, drug addiction, suicide and ill health are all limits on future freedom as much as legal slavery.

110 Adam Smith: "The subjects of every state ought to contribute toward the support of the government, as nearly as possible in proportion to their respective abilities; that is, in proportion to the revenues they respectively enjoy under the protection of the state." He expressed admiration for the residents of the Canton of Unterwald (Unterwalden), who, on the occasion of a major misfortune (eg a bad storm), came together, declared their wealth, and submitted to *pro rata* payment for the repairs of the damage.

there, piped water and electricity there, and established schools, hospitals, and post offices. Workers will have trained, and shaped their careers and lives around their jobs and employer. They may have moved to that town with their families, and they (or their landlords) will have gone to some expense to build or buy there. It is ingratitude indeed for the employer now to deny these benefits and attempt to fold his tents and creep off silently in the night without at least compensating those who have both benefited and relied on him.¹¹¹ It is only just that the law enforce some recognition by the factory owners of the contributions which workers and their families, and the local and national communities, have made to the factory's success. To a certain extent - by redundancy payments, for example - it does so already. More could be done, even within the framework of the law as it exists at present. The workers might be granted the right to buy the factory if they chose to. The company could be required to seek purchasers,¹¹² or to consider modernisation. It might be obliged to give workers information about the factory (so that they might be able to decide whether they should buy it). Perhaps the factory owners might have to pay sums to the community until new enterprises can be established. None of this is to deny that business operations must close from time to time. But it is to say that we all depend on each other. It is the wrong approach to ask merely "who owns this factory?" and let the owner do as he pleases. Worker and employer both have a legitimate interest in the factory, and it is only justice for the law to recognise it. All property laws involve an accommodation between freedom and security. The serf depends on his lord for protection; but the lord depends on the serf for his humble earth-delvings and food. The strong depend on the weak as well as the weak on the strong.¹¹³ A story, possibly apocryphal, is told of one member of the Ford dynasty showing a group of visitors the new robots which were to do much work on the assembly line and render many workers redundant. To a trade union leader who was present he observed that these robots would not pay many union dues. To this the trade unionist replied that neither would they buy many of Mr Ford's cars.

Manufacturers need purchasers. Even financiers need others' savings to play with. The individualism so characteristic of the last few centuries in the West - which, in so many Bills of Rights and Declarations of the Rights of Man has made a fundamental breach with the corporate spirit of the Middle Ages and every earlier age - this individualism has allowed the appearance of

111 For an exhaustive examination of this question, see Singer, "The Reliance Interest in Property", (1988) 40 Stanford LR 611. Judge Lambros in *United Steel Workers v US Steel Corporation* 631 F 2d 1264, a case mentioned in this article, does recognise such obligations by the factory, but concludes that legal and moral obligations diverge, and that no *enforceable* mechanisms exist to establish such a property interest on the part of the workers (in factory and job) or to compel the corporation to continue to operate that factory.

112 For, of course, the mere fact that the company wants to close down the plant does not mean that it is unprofitable, merely that it is not profitable *enough* for its tastes and requirements.

113 A truth Kipling recognised:

Now this is the law of the Jungle
 As old and as true as the sky;
 And the wolf that shall keep it shall flourish,
 And the wolf that shall break it shall die.
 As the fig-creeper girdles the tree-trunk
 So the law crosses forward and back
 That the strength of the pack is the wolf
 And the strength of the wolf is the pack.
 (*The Law of the Jungle*)

a glorious and shining, if at times wayward, human genius.¹¹⁴ But its manifestation in law - human rights spoken and thought of as absolute and inviolable, and rights of property likewise, and seldom a word of human duties - has done much to obscure our fundamental interdependence. Yet it is as true as ever that

No man is an island, intire of itselfe; every Man is a peece of the Continent, a part of the maine; if a clod bee washed away by the sea, Europe is the lesse, as well as if a promontorie were, as well as if a mannor of thy friends or of thine owne were; any Man's death diminishes me, because I am involved in mankinde; and therefore never send not to know for whom the bell tolls; it tolls for thee.

6. *The environmental crisis and the question of externalities.*

The question is not, how much ecology can the economy stand, but how much economy can the ecology stand.

We face today an ecological crisis of uncertain, but certainly vast proportions; one which may well, unless we profoundly change our lives, habits and patterns of thought, even threaten the very survival of human beings on the earth. There is, of course, much speculation, and we cannot say with any certainty what the future holds. So much will depend on our own future actions, so much will depend on processes and elements imperfectly understood or hardly guessed at, and so much is inherently uncertain.¹¹⁵ It may be that our worst fears are excessively pessimistic. Even our worst fears are, however, arguable possibilities, and it would be folly indeed to continue in our present ways merely because it was *possible* that everything will be all right.

The increase in the average temperature of the earth's atmosphere, the consequence of an increase in "greenhouse gases" in the atmosphere,¹¹⁶ may well (who can say for certain?) lead to the rising of sea levels, with the consequent flooding of at least part of many great cities and innumerable smaller ones, and much fertile and productive agricultural land, and completely unpredictable changes in climate and rainfall which may turn forests and granaries into deserts.¹¹⁷ The loss of the ozone layer may lead not only to an increase in skin cancers but even to the extinction of many sorts of plants

114 Not only the genius but also the mediocre man now has the right to full expression. In the private arts of painting and literature this may be tolerable. In the more public or unavoidable arts of architecture and politics the wish has been expressed that the mediocre were more constrained and guided by a fine tradition in which tradition even genius can still manifest itself. See, eg, Prince Charles' recent comments on architecture.

115 It is, for example, now thought impossible to predict weather patterns at all accurately for more than two or three days in advance. This is not only because much weather is "local", it is not only because better prediction would be impossible without a thousand times more information than that currently available; it is also because of the "butterfly effect" - that a cause as insignificant and unpredictable as the flight of a certain butterfly may lead to a tiny movement of air, which may lead to a slightly greater movement of air, and so on, which may (say) make the difference between a hurricane and calm weather. This is the "chaos theory". The principle in human affairs has been known for some time, and not disproved by such works of pure *fiction* as Isaac Asimov's *Foundation Trilogy*. "For the want of a nail, the shoe was lost"; and, in the end, a whole kingdom may be lost for the want of a horseshoe nail.

116 Not, of course, the appearance of "greenhouse gases" for the first time. Were it not for "greenhouse gases" the earth's atmosphere would retain little or no heat, and the whole world would freeze nightly.

117 Global warming may not be uniform. Despite the general warming of the last eighty years various parts of the world are cooler now than before. Even a warming might lead, for example, to changes in ocean currents - the warm Gulf Stream might then not travel to Western Europe, whose climate might then be considerably colder - and to changes in moisture-bearing winds. Warmer might well also mean drier or wetter.

- plants which we may depend on for food, for medicine, and even for more, for there is the suggestion that many of the phyto-plankton of the oceans, the world's commonest plants, which produce 90% of our oxygen, may be particularly susceptible to increased ultra-violet light. So too with the poisoning of the sea, the destruction of forests - the first rule of ecology (as, this article has attempted to show, of human life) is that *everything is connected*. There is, indeed, no such thing as a free lunch.¹¹⁸

It follows from this that ecological problems are of a scale and a nature different from most other problems. Problems of racism and religious persecution, homelessness and crime, poverty and unemployment, even the perpetually ailing economy may well be serious. But none of these things is as serious as the question of the survival of life itself. Every one of these lesser problems depends for its solution (as, of course, for its existence!) on the fact of life itself. Without clean air to breathe, clean water to drink and clean food to eat, without soil and fuel we can rely on *for ever*, all other problems are utterly petty.

Environmental problems, then, are too important to be left to the chance operation of market forces or anything else. They may not be thrown into the rough and tumble of the market place to sink or swim just as a new soap powder may succeed or fail. *Nature does not recognise private property*. Polluted air or water from one man's property will not refuse to stray into the area governed by another Certificate of Title in the Land Transfer Office. The inhabitants of many low-lying towns will testify that the floodwaters which begin where bush or tussock have been cleared¹¹⁹ will not refuse to cross the boundary and rush downstream. The poisons I spray on my land and administer to my animals will inevitably enter the grass, the grain, fruit, vegetables and the meat that others eat.¹²⁰ My coal smoke and vehicle exhaust emissions will give another emphysema or cancer. Exhaust fumes and coal smoke from one country can not only spread acid rain and air pollution to neighbouring countries, but cause global warming and the flooding of countries on the other side of the world. If my nuclear power plant breaks down, it can spread nuclear radiation over a score of countries. If, just as there should be "no taxation without representation", there should be "no pollution without representation", international pollution is a sound argument for both inter-national government and much greater and fairer representation of local communities.

118 One death, Stalin said, is a tragedy; a million deaths is a statistic. The mind grows numbed and weary from the constant present barrage of horrifying environmental news. To offer, however, yet one more example of nature's refusal to observe human boundaries, and the consequences for all of the actions of a few: the *Observer*, 12 November 1989, reported that Zabize, in Poland's gravely polluted Upper Silesia, has a leukaemia rate among children twice the rate for Poland as a whole (which is itself higher than the rest of Europe). The Department of Katowice has the highest infant mortality rate in Europe. "In some places forty-four out of every 1,000 babies born alive die before their first birthday. By the time they reach four, nearly half have chronic illnesses such as bronchitis or development problems. As they get older it gets worse. Two-thirds of the six-year-olds are ill; three-quarters of the children aged ten are sick enough to need treatment The areas with highest pollution and the areas with the highest rates of illness ... match almost precisely."

119 Often, of course, with the assistance of the taxpayer. Future generations may marvel at the blind stupidity of an agricultural "research" establishment which looked upon tussockland as an impediment to be removed, and with a singular lack of imagination saw progress only as "more of the same", the making of upland pastures just like lowland ones.

120 Wendell Berry observes the modern miracle that we have "replaced germs in food with poisons" - *Unsettling America*.

All this is labouring a very obvious point. But how can absolute private property and its concomitant, the perfect free market, deal with it? The only way in which it might be satisfactorily dealt with in an unregulated free market world is by taking properly into account the innumerable expenses at present lumped together as "externalities".

The "externalities" of an operation are the costs which are not borne by the manufacturer, consumer, or whoever may be involved, but by the public at large (if, ultimately, tax-payers, ratepayers or some other public group have to pay) or by the environment (if no humans interfere or clean up). Advertisers promise us sparkling dishes and clothes, - the costs borne by previously sparkling rivers and lakes are "externalities". They may be numerous. The "externalities" involved in operating a typical present-day farm, for example - the costs borne not by farmer or consumer, but by the community or the earth - would include:

- (a) The contribution to greenhouse gases by the burning of fuels in farm vehicles.
- (b) The harm caused by the gases, carcinogens etc produced in *manufacturing* his farm vehicles, and the other machinery and implements of the farm.
- (c) The damage caused, in far-flung parts of the world, by the mining and refining of the ore, the drilling for, extraction and refinement of the oil and the various other materials used.
- (d) The costs involved in the manufacture of pesticides, herbicides, etc.
- (e) Health care for those who suffer from such poisons and pollutions.
- (f) The costs of dealing with the crime, unemployment, other social problems and ill health arising from a population uprooted from the countryside and accumulating in cities.
- (g) The costs of flood control works as a result of land clearance.
- (h) The costs of building and maintaining roads to farms.
- (i) The costs of damage to fishing and fish breeding downstream or at sea as a result of runoff of soil, floodwater, manures and fertilisers from the farm.
- (j) The cost of providing good drinking water when previously potable water is polluted by nitrates etc.
- (k) The loss of tourist revenue as scenery and wildlife disappear.
- (l) Where soil erosion occurs, as it almost invariably does to *some* extent, the costs of its control and the restoration of the soil.¹²¹
- (m) The costs of conservation activities (eg wildlife protection programmes) required elsewhere because of habitat reduction and destruction by land clearance, etc.
- (n) The costs of oxygen loss and carbon dioxide increase, however those costs are measured (for, obviously, a field of grain produces less oxygen, and absorbs less carbon dioxide, than a field of trees)
- (o) Programmes of farm assistance, social services and support systems for farming families, etc.

¹²¹ In parts of Ohio five or six bushels of soil are lost for every bushel of grain produced. Whatever the "value" of this soil may be, presumably it becomes more valuable the nearer one approaches its exhaustion and disappearance. It is a strange definition of "efficiency" to apply it to practices so wasteful and short-sighted.

This is but the beginning of a long list, a list which could be made, *mutatis mutandis*, for practically every human activity which the modern economy requires us to perform and preaches the virtues of. The author does not suggest that farming is particularly notable for its external costs, only that it is a convenient example.

This fragment of a list shows us that the costs of an operation are far more extensive than the ones now recorded in ledgers and lectured and written about by practical men of business. At present, economics and accountancy are not sophisticated enough to take account of these innumerable and various external costs. It is arguable whether they will ever be able to take them into account. Certain it is that at present there is much perversity in a system of accounting which insists on the arbitrary simplification of the real world by considering only those activities which involve *money* - and by considering all of them. Thus, as Capra points out,¹²²

the gross national product ... is supposed to measure a nation's wealth, but all economic activities associated with monetary values are added up indiscriminately for the GNP while all non-monetary aspects are ignored. Social costs, like those of accidents, litigation and health care are all added as positive contributions to the GNP; education is still often treated as an expenditure rather than an investment, whereas work done in households and goods produced by such work are not counted.

Marilyn Waring has made the same point recently.¹²³ Since economics considers only those activities quantifiable in money, dealing in drugs or arms is treated as a "valuable" economic activity, but mothers who bring into the world and train in love and truth the next generation of citizens are treated as making no contribution to the GNP, and therefore (our political decisions being based on supposed economic necessities) are ignored if not despised.¹²⁴ In the same way, the forest which stands on the hillside, producing fresh air for us to breathe, binding the soil, maintaining the waterflow and preventing floods and droughts - all truly valuable activities - is looked upon as worthless except insofar as it can be cut down, sold, and turned into something else. The freshening of the air and regulation of water are beyond the ken of economics as it is both practised and preached now. It will be a substantial change before economics can give proper weight in its calculations to the living forest. And here we come upon a notable and regrettable vagueness of terminology, and in particular of what exactly is comprehended in the expression "market-forces". To take the simple example of the forest again - the same arguments apply, though, wherever environmental damage is at present an externality - the things which at present are externalities will not be taken into account by landowners, loggers, manufacturers and others in the future unless those people are required to do so. Unless the community imposes taxes, charges or regulations of one sort or another to force the owners and users of the forest to recognise its other values, the good it does merely by standing there, then its owners and users will continue to behave as they do now. A more sophisticated economic system would at least impose some such device as a tax on the felling of the forest, or a levy on the logs, so that land elsewhere might be afforested, reservoirs built, flood works and embankments built, and that in various ways the true environmental cost of these

¹²² *The Turning Point*, p 242.

¹²³ In *Counting for Nothing*. See also Juan Martinez-Alier, *Ecological Economics* (1987).

¹²⁴ It is exactly the same accountants' mentality that "all money is equal" which leads to the error of supposing that the "wealth" created by share-dealing and paper shuffling is just as useful and real as that created by the production of manufactured goods, animals, crops and other things that actually exist.

activities would be paid.¹²⁵ Yet it is uncertain whether the expression "market forces" as used now is intended to include consideration of these externalities, or not. The former Prime Minister of the United Kingdom, Mrs Denis Thatcher, has been among those recently saying that only "market forces" can save the Amazon forests. It is unknown whether by this she means that if economic science were vastly improved to allow considerations of all externalities then the forests would not be destroyed, or whether she is merely maintaining the status quo and suggesting that the United Kingdom's present policies be extended to Brazil.

It would only be after a profound change that economics might be able to reflect properly what are at present "externalities", and thus be compatible with sound environmental practice. The changes attempted so far in economic science have several faults. The first is crudity. The annual "viewing value" of Kenya's elephant herd has recently been estimated¹²⁶ at twenty-five million United States dollars. Backing these findings with contingent valuation methodology (while noting that the economics profession is not of one mind about the accuracy of answers to this analysis), order of magnitude values, starting point biases and median values of willingness to pay, the author states that the figure of \$25 million is "likelier than \$2.5 million or \$250 million" - a rather tentative conclusion - and then, slightly disconcertingly, says that "the figure of \$25 million is selected as a best point estimate merely because it falls within the range of the preferred estimates and may be easy to remember". Two years ago staff in the New Zealand Treasury were considering measuring - and may actually have measured - the aesthetic and spiritual values of our national parks simply by adding up the expenses people incurred in travelling to and staying near or inside them. Even to make the more abstract and hypothetical calculation of how much people *might* be prepared to spend in order to visit them, the method of measurement is still an unsophisticated one.

A second flaw more basic is the difficulty of the idea that one can measure many goods in monetary or other quantifiable terms at all.¹²⁷ It is difficult enough to estimate monetary values in the environment which are long-term, diffuse or uncertain; how does one place any sort of accurate value on quietness, solitude, sparkling air or view, freshness or freedom from pollution?

Another problem recognised by all is that economic opportunities affect people differently. Only some people, in fact, are *homines oeconomici*. The new mining legislation (the Crown Minerals Act 1991), like the old, does not give a landowner a right to a final say as to whether her land may be mined or not. It might be artlessly thought that the devotees of private property, enlightened self-interest and market forces might favour altering this rule, so that the integrity of private property would be enhanced, and landowners, guided by their own best interests, might sell their land, or the right to mine it, for a natural price. Yet the mining industry, in the review of the Resource Management laws, opposed such a change. Presumably the reasoning is that some people may well be impervious to economic inducements. It is not

125 Governments in many parts of the world now are considering various forms of "carbon tax", which in one way or another penalise forest destruction and reward forest planting. Merely to impose such a tax is not of course to apply the revenue so received to remedial works.

126 By Gardner Brown Jnr of Washington University; *Environmental Guardian* 9 March 1990.

127 See, eg, L H Tribe, "Ways Not To Think About Plastic Trees: New Foundations For Environmental Law", (1974) 83 Yale LJ 315.

impossible to imagine some people who might wish to pollute and are happy to bear with the unfortunate economic consequences - especially, of course, if there is no enforcement of those consequences, or it is still profitable to bear those consequences (eg if the cost of them can be added to the final cost to a purchaser).

It would, moreover, be a difficult matter for (say) every dweller by a particular river or on its floodplain, and every user of its water, to negotiate privately with every landowner in the catchment, and pay him a proportion of the sum required to use his land in such a way as to prevent floods and droughts. The idea of all air-breathers negotiating with the owners of all plant-covered oxygen-producing land is absurd beyond belief. There is a valid place for local and national governments, the representatives of us all, to involve themselves in such matters.

For various reasons, then - crudity, unpredictability, short-sightedness, the impossibility of measuring certain values in any sort of monetary terms - the chances that economics can be so reformed so that it can accurately reflect environmental costs, so that "the market" can lead to wise environmental practice, seems slim. Although unlikely to succeed fully, however, any change in economics into that direction would at least be a change to making it a more *realistic* science. Only if economics measures *all* externalities, only if it measures the *real* effects and costs of human activities, is it worthy to be called a science and not merely one particular philosophical and political platform. But to require such externalities to be measured involves laws, of taxation, regulation and prohibition at times - government and community regulation and "interference", which Mr Hide opposes as infringing the "absolute right of private property". The right of private property, he clearly says, involves freedom from the regulation and interference required to cover the costs of such externalities. Economics, therefore, he condemns to the murky groves of pseudo-science. It is wrong, he says, to let the law "interfere" with private property so as to require external costs to be measured or internalised. Economics is not to be a science, a rational measuring of costs; it is rather to be a statement of a certain attitude, that costs presently borne by the public or by the natural world ought to continue to be borne by them. It is not to be a science, but rather a branch of moral philosophy.

In *Waimea County Council v Nelson Pine Forests Ltd*¹²⁸ Holland J. held that a local body, the Waimea County Council, had the right under the Town and Country Planning Act to impose restrictions on landowners' liberty to fell the bush on their land. This was not a case where the council "[took] the rights to the trees without paying for them"; where conservationists "used the power of the state to take rights". Holland J made it clear that the council could not use its district scheme in order to effect a de facto preservation of the forest, which would amount to some sort of confiscation - the "taking of rights" - however desirable that might be. The council was at liberty only to control the felling of bush so that that "resource" might be used in a sustainable way. Criticism of this decision usually fails to consider or even to mention any of the other values of forests - some of them literally "downstream" ones. But the main point made here is that *any* attempt by the local authority and community to regulate this use of private property - for the sake of the public good - by as polite and limited a method as requiring it to be cut down gradually, instead of at once - is condemned as a "taking" of private property.

The trees are "the landowner's", and no-one else's. Presumably Brazil's forests are its own and if it wants to destroy them it can. The attitude is *exactly* the same as that which would say that "this is *my* nuclear power plant, and if I want to let it melt down, I have a perfect right to do so".¹²⁹ The valuable concept of private property is not aided by insisting on this absurd and unsociable extreme.

We all crave certainty, and answers to difficult questions. The philosophical journey of many of us involves sampling different philosophies and beliefs, and finally finding one that we are prepared to adhere to through thick and thin. This is understandable but not always sound scholarship, history or art of government. The danger of a practical model such as that of Hardin's Tragedy of the Commons, or the elegant philosophy of *laissez-faire* free-market ideology, is that it claims (usually by implication) to be free from the trammels of particular times and places. This, indeed, is why we find such models attractive, and why they can be so powerful. They claim to be "natural", universal and free from the contingent circumstances of history and geography. Social Darwinism, the Social Contract, the free market - even the geometry of Euclid and the physics of Newton - purport to describe the world not as it is under particular conditions, but as it always is everywhere. It is one of the chief defects of the modern advocates of David Hume and Adam Smith, who quarry in *The Wealth of Nations* for suitable texts with which to belabour the heretic and pagan, that there is little if any acknowledgement that their theories arose out of, or owed anything to, the particular historical, social, economic and geographic situation in which they lived. Nor, indeed, is there any acknowledgement that many other thinkers might well disagree with the premises and conclusions of Smith and Hume.¹³⁰ Instead, a political theory from one particular time and place is presented as an ancient eternal truth.¹³¹ A certain sort of fashionable Marxist lecturer was once suspected of teaching students that no great or even good thought was thought or uttered before Marx and his direct philosophical ancestors. In the same way, the ignorance, or ignoring, of history is a grave offence of the new free market theorists. The greatest offence, however, is their release of the

129 "Right" is, like other legal concepts, a conclusion-drawing word, as Professor Hart reminds us. Once one has established that something is a right - whether it be the right of an unborn child to life, the right of a woman to do as she pleases with her own body, or, as here, the right to private property - then further argument on the question is pointless. Agreement about the right's existence has already settled the question. The list of commonly-accepted rights is subject to change, however. It is becoming increasingly difficult to speak of any "right" to do as one likes with one's own property. Such a right cannot be a legal right, if laws regulate or prohibit certain activities. It must then be a moral right. But if one purchases property knowing that there are laws which restrict and regulate its use, any moral claim to be entitled to ignore those laws is dubious. And given that very often environmentally unsound activities affect *other* properties, and it is incorrect to speak of an activity affecting merely one's *own* property, the whole basis of the moral right to do as one pleases with one's own disappears.

130 See above, eg, pp 475-481.

131 "With the results of their revolution [1641-1688] effectively guaranteed, the propertied classes could now confront with confidence and security the period of economic expansion on which England now entered. Locke, with his superb common sense, summed up the achievements of the Revolution and presented the middle classes with a theoretical rationalisation of the claims they had already in fact established; and English political theory until Hume was little more than a commentary on his doctrines. The inviolable rights of private property, the establishment of the claim of the individual to pursue his own interests without interference by the state - a claim rationalised, of course, by the conviction that the natural harmony of individual interests was of itself productive of the social good - these were the central problems with which thinkers were concerned". D W Petegorsky, *Left Wing Democracy in the English Civil War*, p 241.

shackles in which greed, that ever-present human character, has been imprisoned as a good servant, or at least tolerable companion, so that greed unadorned has been made respectable and indeed almost compulsory, and much has been done in consequence to destroy the easygoing give and take, amity and spirit of coöperation of New Zealand life.

7. *The shared morality of civilisation*

Woe to those who add house to house and join field to field until everywhere belongs to them and they are the sole inhabitants of the land.

Isaiah, 5:8

The history of man's moral development, Darwin said, has been a continual extension in the objects of his "social instincts and sympathies".¹³² From family to tribe, from tribe to city, city to nation; from adult native free-born males alone to women, children, slaves, other races and religions, aliens, idiots¹³³, our sympathies and ethical responses have expanded and enlarged. One cannot prove that this is a good thing.¹³⁴ Certainly it is one strong current in the great river of history, but it can be risky attempting to deduce what *ought to be from what is*.

It seems, however, to be a fact taught by all keen science, not to say philosophy and religion, that all things are connected - the first law of ecology - and that in harming others, whether the poor at our gates or the mute objects of creation - we in some way harm ourselves.

This extension of sympathy might not have been possible, at any rate to the same extent, without an extension of our material resources. This is not to argue that generosity increases naturally with riches, a proposition with little empirical backing. But if one has only enough food for ones own family, one may have little sympathy with hungry others - and the question, in such a case, is anyway largely academic. If we lived in difficult places where no idle hands could be supported, we might well follow the practices of exposing the crippled and handicapped young, and sending the aged out to die. In a slightly kinder society, the only people permitted to become poets and singers might be those blind like Homer, lame, or somehow otherwise unfitted for work. Some writers¹³⁵ have even conceded the possibility (given existing constraints of population, climate, resources and technology), that until this century and its great advances, a rough hard-working life *may* have been necessary for many or most people if a few were to devote themselves to creating, and enjoying, the fruits of higher civilisation.

Those writers are the first to insist, however, that whatever the case in the past, this division is no longer necessary or justifiable today. We live in an

¹³² In his *Descent of Man*. From this observation Christopher D Stone goes on, in his famous *Should Trees Have Standing? Towards Legal Rights For Natural Objects*, to point out that there is no logical or "natural" reason why we should not extend legal personality further, to natural entities such as rivers, lakes, forests and mountains.

¹³³ Perhaps in the future to the unborn, who hover now on the threshold of personhood.

¹³⁴ Many years ago, when still a schoolboy, the author posed what seemed to him a subtle and cunning question, difficult if not impossible to answer, to a guest speaker who had spoken to the Upper Sixth on human rights. "Sir", he said, "how do you know that these things you *call* rights are rights at all? How do you know they are things which we are *entitled* to, and not mere privileges, which we may be fortunate enough to enjoy here, but which we cannot claim as a *right*?" He replied simply "I assume it", and the author sat down, blushing furiously at his classmates' laughter. The incident is however an admirable summing up of the problem. Nowhere in the copious literature on human rights can any proof of their existence be offered which would be accepted as convincing by an unbeliever.

¹³⁵ Eg Murray Bookchin, in *Post-Scarcity Anarchism*.

age of plenty. The merest fraction of New Zealand's workforce (aided, admittedly, by fossil fuels) can produce not only all the food New Zealanders eat but also vast amounts for export. The "problem of unemployment" is simply the problem that fewer people than the population of "possible workers" are needed to provide the *goods*, at least, necessary for existence. (It may well be, of course, that many of those possible workers could be given employment in providing social and cultural services of many kinds - if the community were prepared to offer the opportunity). We are still so accustomed to the Pauline injunction that "if any would not work, neither should he eat",¹³⁶ reinforced by centuries of Protestant, in particular, conditioning, that the thought of allowing a decent living from community funds to those without formal "work" is anathema to many. As long as the problem is defined as involving "the unemployed" - ie those who *ought* to be employed - the problem will remain. But as long as enough material goods and services are available for the reasonable needs of all citizens, it surely does not matter if not all have "a job".

In an age of plenty, the excuses of the past are no longer valid. "Necessity" is no longer available as a reason for not assisting others. Selfishness must therefore rely on arguments of a more scientific cast, such as those proving that charity weakens the character and abilities of the recipient and the resources and economic systems of the donor, and that "in the long run" the pursuit of selfish interests is best for all. But "competition", even if it did exist in the world of the perfect free market, does not invisibly work to the benefit of all.¹³⁷

Capitalism has certainly had more successes than socialism. But British capitalism in 1992 is little advertisement for anything, and even from the narrow point of view of economic success, *laissez-faire* free market ideology, despite being an elegant political philosophy, suffers from this paradox: that in its assertion that free markets tend to be self-regulating, it denies the need for rules at all; but capitalism (as Keynes asserted) needs rules very badly. Although a better system than collectivist planning - from the point of view of the production and distribution of goods, although not necessarily for (say) social services - it cannot be relied upon to give of its best if left to its own devices. It could well be argued that the capitalist economies which perform best are those whose managers rely least on capitalism's ideology; and that the worst performing ones are those whose masters are most overwhelmed by the splendid philosophy that justifies their superiority over socialism - and who then attempt to put it into practice.

Anyone might be able to win a race, although in the race of life it seems always to be the already slow and crippled who receive the handicaps; but not everyone can. That ancient knightly duty, the protection of the widow and the orphan; charity, perhaps better labelled *respect*, for the poor, the frail, the sick, the idiot and incompetent; these things are the touchstone of civilisation. To allow some to fall and perish, to harden our hearts without any good reason, is to deny our common humanity. It is bad for the souls of those who do it - bad for the bodies of their victims - and, in the long run, bad for society. To

¹³⁶ 2 Thessalonians 3:10.

¹³⁷ Mysteriously, few who complain of the wicked effects of handouts on the poor seem to favour high gift or death duties. Inheritances might be thought to sap initiative and energy, and encourage sloth and soft living, just as much as social welfare handouts. A decline in the character of the rich seems, however, to be the necessary and affordable price for the incentive offered to their ancestors.

assert that property is absolute, that it may rightly be accumulated in certain hands and that the community has no right based on morality or social obligation to see that it is widely used for the good of all - not even a right to tax, or regulate in any way - is the cornerstone of inhumanity and environmental disaster. It is the end of co-operation. It is the end of society,¹³⁸ which becomes simply a group of people who own land next to each other, and others who are tenants or bag-ladies. Without any sense of mutual obligation no society can cohere. Why should the propertyless worker serve his master any more than he has to? If called upon to fight for his country, he might well reply, *mutatis mutandis*, in the words which the Highlanders, cruelly cleared from their ancestral hills, gave to the recruiting officers sent by their chiefs: "We have no country to fight for. You robbed us of our country and gave it to the sheep. Therefore, since you have preferred sheep to men, let sheep defend you!"¹³⁹

Some sort of shared morality is necessary for a society - Lord Devlin and Professor Hart would agree on that much, at least. To maintain that society can be held together by law alone is to credit law with too much power. It is, indeed, to overlook the practical point that accumulations of poor hungry people are a source of civil tumult, if not worse. Adam Smith himself spoke of "the mean rapacity, the monopolising spirit of merchants and manufacturers, who neither are nor ought to be the rulers of mankind". This author takes it as a basic premise, requiring proof only for those who would never be convinced anyway, that to eliminate useless suffering, not to take advantage of the weak and vulnerable and powerless, and to encourage and allow the improvement of the bodies, souls and minds of fellow citizens, are among the fundamental aims of any civilisation worthy of the name. For these aims to coexist with larger accumulations of private property, including the "ownerless property" of large corporations, there must either be a greater spirit of *noblesse oblige* on the part of the better-off, or various forms of regulation and taxation. It seems unlikely that private munificence alone can provide the public hospitals and transport, schools and universities, housing, post offices, libraries, parks and gardens and all the other basic appurtenances of present-day civilised life. "Absolute" private property, then, free from taxation and law, defies nature, common sense, civilisation and humanity. We are lucky if it leads only to (in J K Galbraith's phrase¹⁴⁰) private affluence and public squalor. It would mean a regression (assuming rebellion did not break out beforehand) to beyond the worst excesses of the Industrial Revolution.

Mercury, the god of merchants, is only one of twelve upon Olympus, and not the chief. He is, however, also the god of thieves.

¹³⁸ Mrs Thatcher has claimed on several occasions that "there is no such thing as society".

¹³⁹ John Prebble, *The Highland Clearances*, ch 6.

¹⁴⁰ *The Affluent Society*.

