

# THE CASE FOR WRITTEN CONSTITUTIONS: EVEN BROKEN OR BAD PROMISES ARE BETTER IN WRITING

ANTOINE CLARKE

The logo for the Libertarian Alliance, featuring a stylized 'A' with a triangle inside, followed by the words 'Libertarian Alliance' in a serif font.



## INTRODUCTION

For some time, I have been thinking about writing a paper for the LA on the subject of constitutions. Two factors prevented me from doing so. The subject is immensely boring. I have actually succeeded in boring myself into complete lethargy on the many occasions that I have sat down to write a paper on this subject. In addition, I have made fun of those people who care about constitutions in another LA paper.<sup>1</sup> If a subject of my own choosing can bore me to tears, and if I have expressed words to the effect that constitution fanatics are train spotters without trains, what ghastly fate awaits the reader of this discussion?

A supporter of the present British constitutional arrangement objected to this project. He admitted that the present situation is bad and getting worse, and that he would prefer the sort of constitution which Sean Gabb or George Mason could write.<sup>2</sup> But he claimed that written constitutions don't work either, and we should not discuss the issue, for fear that we might get a written constitution which was worse than the present arrangement and harder to change. If the LA only published according to such a strategy, there would be about five Political Notes, one of them on the (possible) benefits of bus deregulation ten years ago. Similarly, to advocate all-night pubs might lead to a reduction in licensing hours by the health-fascists. This objection was actually crucial to my decision to write this paper. If a written constitution introduced by the enemies of freedom is such a fearsome obstacle to the advancement of liberty, how can one introduced for the obstruction of tyranny fail to be a better obstacle than the half-forgotten words of half-mad druids?

## THE CASE FOR AN UNWRITTEN CONSTITUTION CONSIDERED

I do not pretend that there is no merit in an unwritten constitution. Its benefits can be characterised as flexibility, adaptability to different customs, a degree of resilience to subversion, and — in the British case — the notion that precedent justifies the particular application of a law.

The flexibility of an unwritten constitution and adaptability to changing customs mean that the laborious process of amendment does not need to be carried through, simply because of a minor change in political practices. If the minimum voting age were to be changed from 18 to 17 years, the United States' written Constitution would require a formal amendment which could take years and fail to happen for a number of procedural reasons. Such a change in the United Kingdom could be carried out in a matter of hours.

The degree of resilience to subversion is the point which I would expect to appeal most to the conservative minded. Let us consider what would happen if the US federal Government managed to remove the main body of text of the US Constitution and amendments thereof in the following way:

Amendment to the Constitution of the United States of America:

Delete all and insert:

Article 1. The United States of America shall be defined as a feudal society, which means that members of the various branches of Government and their families, on the date of ratification of these articles, shall be designated by the name of "freepersons", enjoying the usufruct of property under license from the State.

Article 2. All persons not covered by the previous article, shall be designated by the term "slave", and shall be constituted as the property of the State, to be awarded in usufruct to "freepersons" by any means which the State may direct, at any time.

Article 3. "Freepersons" shall elect amongst themselves by simple majority a Head of State to be designated "President", who shall, for the duration of a four year term, take any decisions as to the application of usufruct as he or she shall deem necessary. A candidate for the position of "President" shall require one hundred registered votes to be declared eligible; he or she shall also be at least fifteen years of age. The registration of votes shall be the following: one vote per freeperson, with an additional three-fifths of a vote to each freeperson for each slave in his or her custody. A Freeperson shall cast votes on his or her own behalf, and in the stead of his or her slaves. Upon being elected, the President shall take the following Oath of Office:

"I, [name of President-elect], do solemnly swear that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States. So help me God."

Article 4. Any change in the Articles of the United States Constitution shall require a two thirds majority of "freepersons", who shall be awarded votes in the manner described in Article 3.

Note that the only legal obstacles to such a Constitutional amendment are the steps which we have just considered so unhelpful in allowing a change in the minimum voting age. However, within an unwritten constitution such a project could not be carried out in one step. Some "unwritten laws" would slip through, until the reforms had been interpreted into innocuous compatibility. To take two British examples, there is no unanimity about the status of the death penalty in this country, and a Catholic held the post of Chancellor of the Duchy of Lancaster without any resolution as to whether or not this was constitutional or not. The Catholic Emancipation Act (1829) does not appear to allow for a Catholic Prime Minister. Would John Major really have to resign as Prime Minister if he became a Roman Catholic, but not if he became a worshipper of Kali?

The notion of precedence has at least one apparently minor, but really useful application. If Napoleon Bonaparte had given the task of drafting the French Criminal Code to the man who translates the instruction manual for a microwave oven from Korean

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25 Chapter Chambers, Esterbrooke Street, London SW1P 4NN  
www.libertarian.co.uk email: admin@libertarian.co.uk

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Antoine Clarke is a former Economic and Political Adviser to the Finance Minister of the Slovak Republic. He has also worked for the Conservative Party in local government, contested a local election, researched worldwide terrorism and organised crime and written for a variety of publications, in the UK, Slovakia and Spain. He graduated in Philosophy at Birkbeck College, University of London, in 1995.

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Director: Dr Chris R. Tame

Editorial Director: Brian Micklethwait Webmaster: Dr Sean Gabb

**FOR LIFE, LIBERTY AND PROPERTY**



to English via Klingon, the result wouldn't even bear thinking about. The advantage of leaving such matters to custom is that common sense rescues the law from typographical errors: if last week a man was hanged, drawn and quartered for shouting "Death to the King!", then this week the punishment should not be dunking in the witches' chair, just because the court translator mistranslated from the Latin into Ancient Frankish. Would the Euro-Commissioners and British bureaucrats please take note?<sup>3</sup>

### WHY IT DOESN'T WORK

I have tried to give credit to unwritten constitutions. Considering the case for them, however, I notice some weakness in the argument. A constitution has four aims: (i) the limitation, by definition, of the powers of state institutions; (ii) the expression of the means of government which are tolerated; (iii) a reference point for the settlement of disputes over procedure; (iv) by extension, the establishment of a "line in the sand", beyond which any state intervention can be readily identified as an abuse of power.

I can find five reasons why an unwritten constitution must fail. First, because no single text can be invoked, there is no definition of state powers and no limits except "custom", meaning whatever compromise is necessary between current public opinion and the government's sense of virtue (not a pretty sight!). P. J. O'Rourke puts the case for a secretive and autocratic Supreme Court with the power to over-turn public opinion rather well:

And you'd have to be fairly stupid to believe democracy could be preserved by democratic means: "In the final D-day invasion results, Normandy was a decisive winner, with 54 percent of the votes, while 43 percent of American soldiers thought we should re-invade North Africa and only 4 percent favored a massive land, sea and air attack on the folks back home." There wouldn't even be any democracy to defend if our every national whim were put into law. We'd sacrifice the whole Constitution for those lost kids on milk cartons one week, and the next week we'd toss the Rights of Man out the window to help victims of date rape.<sup>4</sup>

Second, only a select few can acquire such knowledge of the unwritten constitution as to be capable of interpreting it, and what is most worrying, these are precisely the sort of people who will be tempted to connive in constitutional subversion. Third, nothing as blunt as the "delete all and insert" constitution is likely, but minor violations will go unnoticed in an unwritten constitution that would be obvious to every schoolchild compelled to learn a new written version.<sup>5</sup> Fourth, limits to state power that are not clearly expressed are unlikely to be of even minor value.<sup>6</sup> Fifth, the "line in the sand" is replaced by the equivalent of an unwritten UN resolution.

### THE CASE FOR A WRITTEN CONSTITUTION

The case for a written constitution has three important arguments. The first is that a single text contains the sum of what state authority consists of, how it is constituted, how it can be used, and what non-violent methods of addressing disputes are to be adopted. This gives clarity.

The second argument is that such a text can be made available to all inhabitants (and visitors). The basis of the political system is therefore comprehensible to all, instead of in the hands of a specialized guardian-caste. Consider how many LA subscribers could rapidly check up the US Constitution, compared with the British one, despite the fact that most LA subscribers (as I write) are European not American. This is vital when there are to be dealings between individuals and the State. But it means that a well-written constitution can "subvert" a neighbouring one, whether it is unwritten, or formal nonsense — like the constitution of the "German Democratic Republic" (1949-1989).

The third argument is that because the limits of state power are so clear, it is necessary to invoke an amendment process (hopefully drawn-out and difficult), in order to change even a small component of the constitution. The more difficult and time-consuming the change, the less likely that a moral panic will sustain

the credulity of the public long enough for subversion to be achieved. If this also slows down beneficial reform, so much the better. Nothing can be more disappointing than good intentions acted upon hastily.

### WHY IT WON'T WORK

Despite my optimism, it would be ridiculous for me to deny that the best written constitution to emerge — that of the United States of America — has failed to prevent massive encroachments of federal state power. One could also throw at me a copy of the Soviet Constitution of 1977, complete with the Helsinki agreement on human rights, which forms an appendix. There for all to see is the guaranteed right to freedom of movement, of religious practice, and the right to democratic elections where the outcome is not determined by state functionaries before and after the event.

The First Amendment of the US Constitution did not prevent the Waco massacre, nor does the Second prevent Congress from legislating against certain types of firearm.

### WHY IT DOESN'T MATTER THAT A WRITTEN CONSTITUTION "DOESN'T WORK"

What the opponents of written constitutions forget is that it is possible to advocate a measure which is not expected to be fail-proof. I did not approve of the USA's "Star Wars" satellite anti-missile programme because it made nuclear war initiated by the Soviet Union impossible. I did so because the costs of the Soviet military machine were driven to unacceptable levels, which destroyed the Soviet regime and won the Cold War. If I advocate a written constitution, I do not imagine that it will be respected for ever. But the *Code Napoleon*, according to Baudoin Bouckaert,<sup>7</sup> was used by conservative jurists to reject for almost a century a host of socialist pressures on the French courts. "What the Emperor has written is not to be altered by some petty socialist bureaucrat or magistrate", was the line of thinking of the reactionary judges. It survived the restoration of quasi-absolutist monarchism, a *coup d'état*, another monarchical restoration, a revolution which installed a parliamentary monarchy, another revolution which installed a presidential republic, another *coup d'état*, a military dictatorship which evolved into a liberal monarchy, an invasion and a revolution at the same time and four years of uncertainty, with foreign troops in occupation, before a republican regime was installed with a relatively weak executive branch. Throughout this period, the broad legal norms were largely unchanged. It seems unlikely that any continuity could have been the case if the French Constitutional texts prior to 1814 had depended on a mixture of oral tradition and what would have passed for a common law.

But the main reasons I don't mind that a written constitution cannot deliver absolute protection from change are that in the first place, there is no reason to oppose any change — when the nature of a future society cannot be accurately predicted. The second reason is that a "line in the sand" has a purpose whether or not it is breached.

Let us consider the US Constitution with the first thirteen amendments. If the Supreme Court ruled that the New York City authorities could not restrict firearm possession to law-abiding citizens, it would be clearly explicable by the balance of the Tenth Amendment, which states that powers not reserved explicitly by the Federal Government are the affair of local government or of the people themselves, and the Second Amendment which justifies the right of Americans to possess and carry weapons. The argument would be that the Second Amendment takes priority over New York City policy where the latter violates the former. The "line in the sand" would succeed in ruling out an extension of government power — albeit in this case at a municipal level.

A judgment by the Supreme Court which refuses to rule unconstitutional the actions of New York City has to be justified. The point is not that it can't happen, but that an excuse be must given. When the excuse is implausible, we know that the US

Supreme Court has failed in its function, probably because justices have been appointed who do not believe in upholding liberty against state tyranny. No mysterious appeals to the half-mad druids, the latest opinion poll, the public interest and so forth can mask a violation of a written constitution. A written constitution may only be worth the paper it is written on, but it carries in printed form a set of ideas. Which is to say that even an empty promise on paper is worth more than an empty promise in words.

In 1977, the Soviet Union issued a new constitution. As part of an on-going effort to con Westerners into believing that in the age of *détente* there was no significant difference between the USSR and the USA in terms of human rights, the constitution contained the full text of the Helsinki declaration of human rights of 1975. Critics of written constitutions would jump to decry the obvious hypocrisy of the document. But that's the whole point. Any fool inside the Soviet Union who tried to enjoy the rights, which after all were set out on paper, would soon be disabused. The only people who fell for the propaganda were the fellow travelling pseudo-intellectuals outside the USSR who were probably paid for anyway. The Helsinki monitoring groups which sprang up across the former Soviet Empire had a much easier task identifying the charade of Soviet "rights" because the Communists had been unwise enough to put their promises in writing. The libertarian preference for informality, individual responsibility, and Axelrod's arguments about rational co-operation are fine, but if I insist on a receipt when I deposit money at the bank, should I accept a long dead, half-mad druid's promise as my guarantee, when I deal with the State?

My argument that a "failed" written constitution has a purpose ought not to come as a surprise to the LA. Either the constitution which failed was based on unattainable principles, which we can ascertain because they are spelled out, or because part of it didn't work through subversion or unintended consequence. By analogy, either a poor LA paper fails because it is badly written or because it fails to make relevant points. If *The Micropolitics of Free Market Money* (Economic Notes 39, 1992) presented the case for free market currency emission badly, it can still encourage someone else express it better. If *Euroscepticism is not Libertarianism* missed the point completely, then someone will write an angry attack that goes straight to the point. But if Brian Micklethwait's *The Private Ownership of Public Space: The New Age of Rationally Priced Road Use* (Economic Notes 49, 1993) hasn't yet been turned into Government policy, should we all stop writing down Libertarian ideas and arguments? Surely the case for Socialism was advanced by the existence of the Fabian Society's pamphlets, but also through criticism, the case against.

Clearly a document four pages long can be scoured for sloppy wording and contradiction in a way the French *Code administratif* (a large volume containing the sum of the French bureaucracy's powers and obligations) might not be. In the event of a "bad" constitution, it might be difficult for the Conservative Party to win an election because of gerrymandering, or the exclusion of certain people from the vote, and Party Political Broadcasts might be censored, but it doesn't strike me as making the argument about liberty less relevant. But when, as in the USSR, what the State is supposed to deliver is spelled out, the "line in the sand" can be used to show beyond the doubt of any reasonable person whether we live in a country protected from tyranny by the law. When the line is breached, the time has come to consider Hobbes's dilemma: is the violation so severe as to justify the horrors of a civil war to overthrow the tyranny? The answer is usually "No. Let's do the shopping instead." But at least it is possible to determine which trip to the garden centre will be to pick up a couple of tons of fertiliser and some wiring.

### WHY IT MATTERS THAT AN UNWRITTEN CONSTITUTION DOESN'T WORK

With an unwritten constitution, we are left with a defeatist position. It is clear that the battery of statutory legislation imposed since 1900 has destroyed many of the British constitution's safeguards from arbitrary rule. What is not clear is which bits are

lost, which are fudged, contradicted, ineffective, misunderstood, should never have been there or may even have been reinforced. Therefore any protest, however muted, is fraught with danger. We literally cannot tell what effect our own tinkering would have. Rather than risk losing whatever might be left of the common law, we daren't try to rescue the lost bits by codifying them. With this philosophy of stasis, it would be wrong for a German conservative to have opposed Hitler in 1940 by extra-parliamentary means, because German courts still had the right to declare the euthanasia programme against the mentally handicapped as "unconstitutional".<sup>8</sup> In the case of an unwritten constitution, someone would regard Parliamentary opposition to King Charles I as treason in 1640, and then claim that the execution of the King in 1649 was not. I suppose that it would be wrong to propose a written constitution until the tide of tyranny has risen so high that it was impossible to do so legally. In short, the vagueness of the unwritten constitution is a recipe for complacency and confusion.

### CONCLUSION: "LET'S DO THE SHOPPING"

I was tempted to leave the argument at that point. But having lead my readers to consider that the condition of the British and American constitutions may justify armed rebellion, I feel I have to let my view of the situation be known. There is not in Britain a situation where the State is the deliberate enemy of law-abiding citizens. I am opposed to most of the changes in criminal law since 1950, compounded by the ludicrous trend in sentencing which makes murder a mitigated offence, but where victimless crimes are punished with ever increasing severity. Despite this, and what Simon Jenkins has described as the Tory Nationalisation of Britain, I am not convinced that most of this is any more sinister than the shambolic consequences of panicked, stupid, thoughtless, caring, meddlesome, pompous, self-righteous, prudish, do-gooding people of sometimes dubious morals. However exasperating this may be, that doesn't justify blasting children to pieces, any more than "road rage" — that bogus excuse for bad manners — does. Let's do the shopping, but remember which shelf the grow-bags are on.

### NOTES AND REFERENCES

1. Antoine Clarke, *Euroscepticism Is Not Libertarianism*, Foreign Policy Perspectives No. 24, Libertarian Alliance, London, 1994.
2. Sean Gabb is the editor of *Free Life*. He is one of the most informed critics of the destruction of the common law alive today. Some of his papers for the LA suggest that if anyone could rescue the British Constitution, it would be him. Which, I suspect, explains the pessimistic tone of his writings. George Mason (1725-1792), a Virginia representative at the original Constitutional Convention in 1787, refused to support the Constitution's ratification, on the grounds that neither individual rights were sufficiently protected, nor slavery outlawed. In 1776, Mason had written the Declaration of Rights of Virginia, which formed the framework for the first ten amendments to the US Constitution, which are known as "The Bill of Rights".
3. The costs of mistranslation can be bizarre. Christopher Booker in his *Sunday Telegraph* column has collected a host of instances where European Commission directives have resulted in absurd legal tangles — most extremely in the United Kingdom. See Antoine Clarke, note 1 above.
4. "Doing the most important kind of nothing, The Supreme Court", in P.J. O'Rourke, *Parliament of Whores, A Lone Humourist Attempts to Explain the Entire U.S. Government*, Picador, London, 1991, p. 83.
5. After writing this, I put the question to Sean Gabb: "What's left of the British Constitution worth keeping?" His answer: "I don't really know."
6. I understand that the first arrests of Jews under the Nazi regime in Germany invoked the use of "protective custody" legislation. This was possible despite a written constitution which was supposed to be liberal. If a loose end can be misused because of poor wording, what rings would Himmler have run around the British courts?
7. Baudoin Bouckaert, *La tradition juridique en France au dix-neuvième siècle*, in the series "Essais à l'occasion de la dixième université d'été de la nouvelle économie — Aix en Provence 1978-1987", Aix en Provence, France, 1987.
8. An English court has found a doctor not guilty of wrong-doing by performing an abortion whilst operating on a patient who was unaware that she was pregnant. The basic argument was that to delay the operation until consent had been sought was not dangerous, but would cost the National Health Service time and money. News Report, December 1995. I wonder if the "libertarian" advocates of abortion have scenarios such as this in mind when they champion a bureaucrat's right to choose? See also: Antoine Clarke, "Abortion: a Technical Problem", in *Free Life*, No. 24, December 1995.

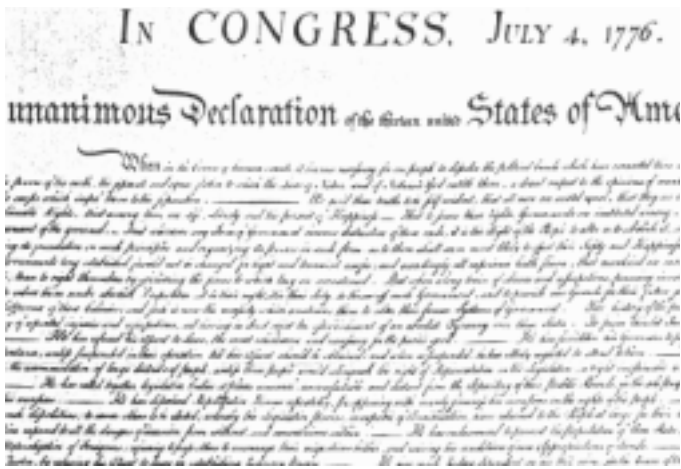
**APPENDIX I:**

**HOW TO WORD A DECLARATION OF WAR AGAINST THE STATE**

In Congress, July 4, 1776.

**A DECLARATION By the REPRESENTATIVES of the UNITED STATES OF AMERICA,**

In GENERAL CONGRESS assembled.



When in the course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another, and to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and Nature's God entitle them, a decent respect of the Opinions of Mankind requires that they should declare the causes which impel them to the Separation.

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness — That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundations on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient Causes; and accordingly all Experience hath shewn, that Mankind are more disposed to suffer, while Evils are sufferable, than to right themselves by abolishing the Forms to which they are accustomed. But when a long Train of Abuses and Usurpations, pursuing invariably the Object, evinces a Design to reduce them under absolute Despotism, it is their Right, it is their Duty, to throw off such Government, and to provide new Guards for their future Security.

[There follows a long list of complaints against the rule of King George III and the British people which ends with the declaration: "We must, therefore, acquiesce in the Necessity, which denounces our Separation, and hold them, as we hold the rest of Mankind, Enemies in War, in Peace, Friends."]

We, therefore, the Representatives of the UNITED STATES OF AMERICA, in General Congress, Assembled, appealing to the Supreme Judge of the World for the Rectitude of our Intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly Publish and Declare, That these United Colonies are, and of Right ought to be, Free and Independent States; that they are absolved from all Allegiance to the British Crown, and that all political Connection between them and the State of Great-Britain, is and ought to be totally dissolved [...]. And for the support of this declaration, with a firm Reliance on the Protection of divine Providence, we mutually pledge to each other our lives, our Fortunes, and our sacred Honour.

JOHN HANCOCK, President

Attest. CHARLES THOMSON, Secretary — and 55 others.

**APPENDIX II:**

**HAS "THE LINE IN THE SAND" BEEN OVER-STEPPED IN THE USA?**

Extracts from the Constitution of the United States

**Amendment I**

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances."

**Amendment II**

"A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed."

**Amendment IV**

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

**Amendment V**

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service or in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

**Amendment IX**

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

**Amendment X**

"The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States, separately, or to the people."

**APPENDIX III:**

**ON ANARCHISM**

No Anarchist could put his unreserved trust in such fine words as:

That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundations on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.

The Anarchist believes that the time to "alter or to abolish" government is now, because all government is destructive of the rights of individuals. However, those who argue in this way have to address three problems:

- 1) the attempt to abolish a government is by no means guaranteed to result in an improvement;
- 2) violent means cannot succeed in the present distribution of force;
- 3) peaceful methods could only succeed where they are unnecessary (i.e. they can be safely ignored).

Therefore, an overthrow of government is more likely to come about through an external event, such as nuclear terrorism by environmentalists. A half-successful anarchist revolt would mean redoubled oppression by the security agencies. Leninists would find such an outcome useful, believing that "in order for things to get better, they have to first get worse". But how much of a worse situation is the anarchist prepared to push for, and how many people sacrificed? We're left with what Kenneth Minogue once said about Socialism and breaking eggs: "Where's the bloody omelette?"