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TORTS, TRANSPORTATION, AND POLLUTION: DO THE OLD SHOES STILL FIT?

EDMUND S. MUSKIE*

Introduction

We seem to be living in an era when all demands and even requests end with the word "now." Today, moreover, the demands cover a spectrum of public need and activity unprecedented in the history of the modern world. The public of today, whether it lives in the developed nations of the West or the developing nations of Asia and Africa, is far more aware of the problems it faces and far more adept in striving and searching for solutions than any other public in man's history. This is due to the vast strides which have been made in communication and transportation technology. The legislator of today faces an informed, informative, and often insistent public which is even more intent on protecting and preserving its rights than were the rugged individualists in the dawn of the industrial revolution.

Future historians might well conclude that if the decades of the sixties and the seventies represent any describable era in history, it is probably the era when the United States, together with other developed nations, first began to emerge from the practices and precedents of the industrial revolution. The law that was developed in conjunction with the rise of industrial enterprise continues in surprisingly large measure to be the basic law which guides and underlies our judicial system today. It is our task today to determine whether and to what extent the judicial framework of one century ago can properly and effectively serve our present needs.

These thoughts have surrounded the United States Senate's recent consideration of the problem of limitations of maritime liability for oil pollution. Any meaningful consideration of that

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problem necessarily brings into question, as the Senate quickly learned, not only the legal concepts of the mid-nineteenth century but also the concepts, some still in nascent stage, of the second half of this century. Initially, there was an important American statute enacted in 1851[1] when steamship and railroad enterprises were beginning to appear on the international scene. That law remains in effect today. There is also an international treaty adopted in 1957[2] which, though not ratified by the United States, became effective for all ratifying nations in early 1968. Finally, there is active, on-going international negotiation which was opened after the Torrey Canyon disaster, a negotiation which took on greater importance for this country after the Santa Barbara incident of 1969, and which only last October produced agreement on a new international treaty covering limits of shipowner liability for oil pollution damage. With statutes and treaties spanning a century and international negotiations on a new treaty going on at the same time as the Senate's consideration on the problem, it was predictable that all concepts, no matter what their vintage, would and did undergo serious reexamination.

I. Negligence, Strict, and Absolute Liability

The development of tort law over the past 150 years is one of the most fascinating examples of how legal systems adjust themselves, often imperceptibly, to the emerging needs of time and place. It may be said that the concept of negligence is largely the product of the industrial revolution. The concept of fault and culpability existed long before industrialization, but it was only with the rise of modern business enterprise that some balance had to be reached between the need of society for the benefits of an enterprise and the need to protect society from the damage which occasionally but inevitably followed from the operation of that enterprise. The solution was the principle of fault. It protected the entrepreneur from liability, but only so long as his activity, whatever damage it might cause, was conducted with due care. Little purpose is served by pondering whether that balance was

1 46 U.S.C. § 183 (1964).

2 International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships, Oct. 10, 1957.

appropriate when it was reached in this country well over a century ago. The necessary exercise today is to question whether and the extent to which it is still appropriate.

In the United States, doctrines of strict liability were looked upon as an exception, and not a very welcome one, to the prevailing rule of fault or negligence. In 1894, Dean Wigmore openly characterized the pre-negligence epoch, with its penchant for holding an actor responsible for his acts without regard to negligence, as "primitive, superstitious and irrational."[3] Reflecting this view, the judicial atmosphere in most states was one favorable to the development of industry and commerce. The rules with respect to damage caused by straying livestock are an example of this balance. Unlike England, the states of the United States in which livestock interests were important generally passed laws repudiating the common law. They provided that the owner of livestock was not liable for damage caused by the straying of his animals onto the land of his neighbor unless that neighbor had built a fence to protect his own land from the possibility that the animals would stray. Despite the preeminent power of the railroads during that period, some states even went so far as to legislate that the railroad would be liable for damage caused on its right-of-way to straying livestock unless the railroad had fenced out its property; and the wisdom of this type of legislation was long recognized by the Restatement of Torts.[4]

Yet developments in the law were not all anti-compensatory. By the middle of the nineteenth century, it was generally conceded under the common law that an action for wrongful death or personal injury did not survive the victim. While the validity of this premise has been subject to increasing attack in recent years,[5] so long as courts in that period were reluctant to entertain actions for wrongful death, some means had to be worked out to provide compensation for the increasingly frequent injuries that followed the introduction of rail and steam. Thus, from about 1850 until the turn of the century, legislatures throughout the United States

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3 Wigmore, *Responsibility for Tortious Acts III*, 7 HARV. L. REV. 441 (1894).

4 3 RESTATEMENT OF TORTS 504, comment *k*, at 9 (1938).

5 See Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043 (1965); Malone, *American Fatal Accident Statutes—Part 1: The Legislative Birth Pains*, 1965 DUKE L.J. 673.

occupied themselves increasingly with the passage of death acts and survival statutes for the most part modeled after the famous Lord Campbell's Act passed by the English Parliament in 1848.[6] However, the statutes passed in the United States were often designed to serve a double purpose. Primarily, they created a cause of action permitting survivors to recover compensation for the death or disablement of a victim; but at the same time, most of them also contained a limitation on the amount of compensation that could be recovered. By 1893, which was probably the high water mark, 26 of the 44 American states had maximum limitations in their death statutes.[7] The usual range was between $2,000 and $10,000. In describing this balance, one commentator has aptly noted:

> By midcentury, it had become obvious that the railroad was destined to play the dual role of public benefactor and public enemy. The much needed flow of venture capital for the new transportation enterprises could be socially impeded by the prospect of expensive death claims administered through the whims of juries under broad common law principles. Adjustment and compromise could be effected best through a uniform legislative policy announced after due deliberation by the law makers.[8]

In short, this development was a grant to the public of a cause of action which may not have existed at common law in exchange for a grant to industry of a limitation on the amounts to which they could be held liable. An additional aspect of this bargain, particularly in the early days, concerned the terms under which liability could be established. In this regard, Maine offers a good example. In 1855, Maine enacted a death act which rejected the common law rule but solely with respect to survivor actions against railroads. This statute only permitted a recovery if the death resulted from the *gross* negligence of the railroad's servants or agents. A limit of $5,000 was set.[9] The requirement of the showing of gross negligence was part of the bargain in 1855, but that re-

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6 Lord Campbell's Act of 1848, 9 & 10 Vict., c. 93.

7 McKenney, *Maximum Limitation on Damages*, 4 WM. & MARY L. REV. 19, 26 (1963).

8 Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1070-71 (1965).

9 Me. Acts & Resolves, 1855, ch. 161, § 1.

quirement was deleted less than two years later.[10] Thus, with regard to the terms of liability as distinguished from its limits, the discussions which took place before the U.S. Senate subcommittee in the recent oil pollution controversy were by no means without precedent. As for the end of the story of the Maine law, it was not until 1891 that a general death provision was enacted.[11] The limit of liability was raised later and eventually abolished.

Between the middle of the nineteenth century and today, there were innumerable other compromises which served to adjust and readjust the balance between the public and the growing industrial establishment. The most important of these were two types of acts. The first was the Federal Employers' Liability Act passed originally in 1906, declared unconstitutional in 1908,[12] and passed again in a more limited form in 1908.[13] The second was the pervasive scheme of workmen's compensation acts, starting with the first such act passed by New York in 1910 and continuing through 1963 when Hawaii was the last state to fall into line.[14] All of these acts had one fundamental purpose, well stated by Professor Prosser:

> Under the common law system, by far the greater proportion of industrial accidents remained uncompensated, and the burden fell upon the workman, who was least able to support it. Furthermore, the litigation which usually was necessary to any recovery meant delay, pressure upon the injured man to settle his claim in order to live, and heavy attorneys' fees and other expenses which frequently left him only a small part of the money finally paid. Coupled with this were working conditions of an extreme inhumanity in many industries, which the employer was under no particular incentive to improve. Early legislative attempts to regulate these conditions sometimes were nullified by decisions holding that the workman assumed the risk of the employer's violation of the statute. The reluctance of the courts to face the problem and modify the common law rules made it clear that any change must come through some general legislation, and led to a movement for the passage of workmen's compen-

10 ME. REV. STAT. ch. 51, § 42 (1857).
11 Me. Acts & Resolves, 1891, ch. 124, §§ 1, 2.
12 Employers' Liability Cases, 207 U.S. 463 (1908).
13 45 U.S.C. § 51 et seq. (1964).
14 W. PROSSER, THE LAW OF TORTS 554 (1964).

> sation acts, modeled upon the statute already in existence in Germany. . . .
>
> The theory underlying the workmen's compensation acts never has been stated better than in the old campaign slogan, "the cost of the product should bear the blood of the workman." The human accident losses of modern industry are to be treated as a cost of production, like the breakage of tools or machinery. The financial burden is lifted from the shoulders of the employee, and placed upon the employer, who is expected to add it to his costs, and so transfer it to the consumer. In this he is aided and controlled by a system of compulsory liability insurance, which equalizes the burden over the entire industry. Through such insurance both the master and the servant are protected at the expense of the ultimate consumer.[15]

With the concept of risk distribution rather than fault controlling the basis for recovery, workmen's compensation reintroduced into American law the doctrine of strict liability. The revival of this concept was not easy. The first workmen's compensation law enacted in New York was declared unconstitutional simply because it did adopt the doctrine of liability without fault.[16] The 1908 Federal Employers' Liability Act continued to base liability on negligence, although it did abolish the fellow-servant rule. Yet, because of an amendment to that act in 1939 and several intervening federal court decisions, one court was able to say in the late fifties that the quantum of proof required under the Act to establish negligence had been reduced "almost to the vanishing point."[17] The pendulum was thus swinging, sometimes even perceptibly, to readjust the balance.[18]

II. Transportation Law

Until recent years, the liability of transportation companies for damage to persons and property which they carry had not

15 W. Prosser, The Law of Torts 554-5 (1964).

16 Ives v. South Buffalo Ry. Co., 94 N.E. 431 (N.Y. 1911).

17 Atlantic Coast Line R.R. v. Barrett, 101 So. 2d 37, 39 (Fla. 1958).

18 The movement towards liability without regard to fault was also visible during this early period in the area of cases involving defective food or drink. Introduced only in the second decade of this century, the doctrine of strict liability in this area has by now been accepted fully throughout the nation. Since the early 1950's, the doctrine has been applied to products far beyond the food and drink category. For an excellent summary of this development and the legal rationales that were used from time to time to justify it, see W. Prosser, *supra* note 14, at 672-95.

seen the same readjustment that marked the liability of an employer to his employees. This may have been due to the persistent notion that persons taking passage or shipping goods aboard a carrier assume a risk of damage or are entering upon a joint venture with the carrier. But whatever the reason, the processes of readjustment in this area are only now taking hold. The area of international transportation law that best illustrates the difference between the approach of the nineteenth and early twentieth centuries and the approach of today is covered by the 1893 United States Harter Act[19] and the 1924 Brussels International Convention (the "Hague Rules").[20] This subject clearly shows how early notions of negligence, incorporated into our law decades ago, have gone largely unnoticed and untouched.

Historically, a shipowner's liability for damage to cargo was akin to an insurer's liability with certain recognized exceptions.[21] However, these terms of liability were adjusted with the rise of the steamship and the recognition that large amounts of capital had to be risked to assure the success of international commerce. That adjustment was reflected in judicial decisions holding that parties to a contract of carriage were free to enter whatever type of contract they wished, and that such a contract would be enforced. Bolstered by this doctrine of freedom-of-contract, shipowners began to draw up bills of lading containing as many as 120 exceptions to liability.[22] On the other hand, American courts were reluctant to enforce these contracts at the expense of shippers since cargo interests were relatively more important than steamship interests in terms of our world trade.

The balance that was reached in 1893 is set out in the Harter Act.[23] It is basically the same balance adopted internationally in the 1924 Brussels Convention.[24]

The Convention states in pertinent part:

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19 46 U.S.C. § 190-5 (1964).

20 International Convention for the Unification of Certain Rules Relating to Bills of Lading for the Carriage of Goods By Sea, Aug. 25, 1924, 51 Stat. 233, T.S. No. 931, 120 L.N.S.T. 155.

21 For example, acts of God or war, or inherent vice of the goods.

22 Note, *The Carriage of Goods by Sea Act*, 23 VA. L. REV. 590 (1937).

23 46 U.S.C. §§ 190-5 (1964).

24 46 U.S.C. § 1301 et seq. (1964).

> The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to:
> (a) Make the ship seaworthy.[25]

This short provision raises two immediate questions: (1) why should the carrier be bound to exercise only "due diligence" to make the ship seaworthy, instead of being held to a higher duty; and (2) why is his duty further limited by being bound only to exercise that duty "before and at the beginning" but not during the entire course of the voyage? There is little doubt that when this balance was reached, appropriate as it may have been at the time, the doctrines of fault, respondeat superior, and vicarious liability were not nearly as developed as they are today. Further, the Convention provides in pertinent part:

> Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:
> (a) Act, neglect, or default of the master, marine, pilot, or the servants of the carrier in the navigation or in the management of the ship.[26]

Advocacy of absolute or strict liability should be examined against the historical perspective of these compromises that were reached decades ago. In view of the balances reached in 1893 and 1924, which comprise contemporary domestic and international law, it was no surprise that the maritime industry vigorously opposed the concept of absolute liability during the Senate hearings on oil pollution.[27] On the other hand, the balances that are being reached in aviation law are quite different. In terms of ground damage to innocent bystanders caused by airplanes — the damage most analogous to that caused to innocent coastal interests by oil pollution from vessels — the accepted rule has been absolute liability or res ipsa loquitur.[28] In fact, an international convention adopted in Rome in 1952 specificially provided for the absolute liability of the aircraft owner except in cases where the damage "is the direct consequence of armed conflict

25 46 U.S.C. § 1303(1) (1964).
26 46 U.S.C. § 1304(2)a (1964).
27 *Hearings on S.7 Before the Senate Comm. on Public Works*, 91st Cong., 1st Sess. (1969).
28 2 HARPER & JAMES, THE LAW OF TORTS 845-56 (1956).

or civil disturbance, or if such person has been deprived of the use of the aircraft by act of public authority."[29] While the United States has never ratified this Convention, largely because of the inadequacy of the liability limitations, it has recently supported absolute liability in such circumstances.[30]

In the United States, the shift toward strict liability is even clearer with respect to personal injury and death claims than with respect to ground damage. American law covering domestic air accidents provides for unlimited liability on proof of negligence, and there is a recognized judicial doctrine that res ipsa loquitur will be applied to any unexplained crash or to the disappearance of the aircraft to establish a presumption of liability.[31] Although there is a limitation on the amount of liability in international aviation, liability itself is clear without proof of negligence. This balance favoring absolute liability has evolved within the United States only during the past five years, and only as a by-product of widespread dissatisfaction with the limits of liability of the 1929 Warsaw Convention.[32] When first suggested, the notion of absolute liability drew vigorous and unified opposition from the airlines, their trade association (the International Air Transport Association) and the American trial lawyers.[33] Within five years, however, this revolutionary balance has been largely accepted by the international airline industry. Even exceptions for accidents resulting from an act of war or hostilities have been generally rejected. The United States has been in the vanguard of this development. Its most recent policy statement clearly supports absolute liability for air transportation and rejects any exceptions.[34]

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29 Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, Oct. 7, 1952, art. IV.

30 Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, at 558-61 (1967).

31 W. PROSSER, THE LAW OF TORTS 220-1 (1964).

32 Convention for the Unification of Certain Rules Relating to International Transportation By Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (effective Oct. 29, 1934).

33 Lowenfeld & Mendelsohn, *supra* note 30.

34 "Revised Proposal of U.S.A. Made on 11 September 1969" to I.C.A.O. Legal Subcomm. on Warsaw Convention, I.C.A.O. Doc. LC/SC Warsaw — Report II Tab. A. To the extent it can be called an "exception", the U.S. position contemplates preserving to the carrier the defense that the victim's contributory negligence, in-

Maritime law, on the other hand, has not yet been adjusted. As stated earlier, the primary American statute regarding shipowner liability for personal injury and death to passengers was passed in 1851.[35] Although amended with respect to the amount of the limit for such liability in 1936, it still requires proof of negligence by the victim for recovery. Similarly, the Death on the High Seas Act, passed in 1920,[36] requires that the death giving rise to the cause of action "shall be caused by wrongful act, neglect, or default" occurring on the high seas.[37]

III. Limitations on the Amount of Liability

Historically limitations on the dollar amount of liability have been as important a tool as the standard of liability in developing balances between the needs of commerce and the desire to protect individuals. In domestic law, these limits have developed in favor of the individual, continually expanding and finally disappearing entirely. In the fields of international transport and pollution, however, limits on liability have proved much more resistant to change than standards of liability, and still remain one of the major areas still unaffected by new social conditions.

Changes in limits in domestic law were orderly and fairly rapid. In 1893, some 26 states had death statutes with definite limitations on liability ranging from $2,000 to $10,000. By 1935, Professor McCormick indicated that only one-third of the states still retained limitations, and that the usual limit was around $10,000.[38] He cautiously added:

> It may be supposed that such limitations were political concessions made to the opponents of the original acts which introduced liability for death, and that they were conceded because of a general mistrust that juries might allow exorbi-

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cluding wilful acts, will preclude his recovery. This would appear to be an entirely proper exception.

35 46 U.S.C. § 183 (1964).

36 For a good history of the law predating the enactment of the 1920 statute, see Wilson v. Transocean Airlines, 121 F. Supp. 85 (N.D. Cal. 1954).

37 46 U.S.C. § 761 (1964).

38 McCormick, Handbook on the Law of Damages 358 (1935).

> tant sums for fatal injuries for which no doctrines of measuring damages have been chartered.[39]

By 1961 there were only 13 states with limitations;[40] by 1968 the number had dropped to nine. Of those nine, the lowest limit was $35,000 and the highest was $110,000. Moreover, as death act limitations were being raised substantially or repealed entirely, benefits available to employees under workmen's compensation acts were regularly increased by legislatures in virtually every state.

A. *Air Transport*

In contrast, the history of limits on liability in international air law shows a much slower development, although some important changes have recently taken place. In 1929 an international convention was negotiated at Warsaw to regulate terms and limits of airline liability for personal injury or death to passengers and loss or damage to cargo.[41] Liability, based on a presumption of negligence, was limited to $8,300 for personal injury or death claims. A limit of $7.50 per pound was set for cargo claims, also based on a presumption of negligence. However, like the Brussels "Hague Rules" Convention of 1924, the carrier was exonerated from all liability for cargo damage due to "an error in piloting, in the handling of the aircraft or in navigation." The United States ratified this convention in 1934.[42]

A change did come in 1955, when a Protocol to the Warsaw Convention was negotiated,[43] largely because of dissatisfaction within the United States over the amounts of the limits of liability. The finished Protocol, however, was more significant with respect to standards of liability than its limits: the exceptions for errors in piloting, handling, and navigation were eliminated, but the dollar limits were only doubled to $16,600 for personal injury or death. The United States registered its displeasure at

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39 *Id.* For a list of the 17 states that had maximum limits as of 1913, see F. TIFFANY, DEATH BY WRONGFUL ACT xix-lxxi (2d ed. 1913).

40 1 KREINDLER, AVIATION ACCIDENT LAW 395 (1963).

41 1 KREINDLER, AVIATION ACCIDENT LAW 342 (1963, Supp. 1968).

42 Convention, *supra* note 32.

43 Protocol to Amend the Warsaw Convention Done at The Hague, The Netherlands, Sept. 28, 1955 (effective, but not for U.S., Aug. 1, 1963).

the failure to increase the limits significantly by failing to ratify the Protocol.

In 1966 a major readjustment was finally made when, under the pressure of threats by the United States to withdraw entirely from the Warsaw Convention, the international airlines adopted an unprecedented agreement to increase the limits of liability to $75,000 for all flights to and from the United States.[44] While some thought this nine-fold increase in the limit was the most important effect of the agreement, here again it was overshadowed by a striking change in the standard of liability, which was reduced to a theory of absolute liability. Thus the standard of liability came to resemble the more advanced notions used in workmen's compensation plans, while the nineteenth century concept of a limit on liability was modified only to the extent of another modest increase in dollar amount.

Since the origin of the Warsaw Convention, however, there has been an exception to the normal rule whereby the airline loses its right to enjoy shelter under the limit on liability. At first the exception reached only those cases where damage was caused by "wilful misconduct or by such default . . . as . . . is considered to be equivalent to wilful misconduct."[45] The 1955 Protocol broadened the exception to include cases in which there is proof "that the damage resulted from an act or omission . . . done with intent to cause damage or recklessly with knowledge that damage would probably result."[46] The purpose of the exception is to deprive the carrier of the right to limited liability at least when his conduct is deemed socially unacceptable.

But such exceptions cannot be taken to indicate that limits on liability will be eroded quickly. Proposals by the United States in favor of the adoption of the standard of absolute liability evidence a willingness in return to remove all exceptions to the limit on amount.[47]

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44 Agreement Relating to Liability Limitation of the Warsaw Convention and the Hague Protocol, C.A.B. Agreement 18900, Exec. Order E-23680, 31 Fed. Reg. 7302 (1966).

45 Convention, *supra* note 32, at 3020.

46 2 I.C.A.O., INTERNATIONAL CONFERENCE OF PRIVATE AIR LAW 7-8 (1955).

47 "Revised Proposal," *supra* note 34.

B. *Sea Transport and Pollution*

Slow as changes in limits of liability are in the realm of air transportation, maritime liability has not been able to maintain any faster pace. Under the United States statute of 1851,[48] a vessel owner was entitled to limit his liability for pollution of water by a tanker to the value of his vessel plus freight at the time the suit is pending. As a result, a United States district court held that in the case of the Torrey Canyon this amounted to a total of only $50, the value of a single lifeboat that survived the disaster.[49] Moreover, any injured party would have to prove negligence to recover at all.

It was suggested that the circumstances surrounding the Torrey Canyon mishap were such that the court may well have been able to find that the owners had "privity or knowledge," which under the terms of the act denies the owner the right to invoke the limit on liability. This presents the theoretical possibility that the owners of the Torrey Canyon could eventually be held liable in full, but that result might obtain only after protracted and expensive litigation.

The "privity or knowledge" exception to the limits on liability provides an interesting parallel to the exceptions in the Warsaw Convention and later air transport agreements. Although in the original bargain of 1851 it was probably an attempt at the formulation of the now familiar doctrine of respondeat superior, whereby a corporation is made liable for the acts of its employees, the implications of the exception today are much broader. The same may be said of the provision in the so-called "Fire Statute" which frees a shipowner from liability for cargo damage due to fire "unless such fire is caused by the design or neglect of such owner."[50] Even in international matters the 1957 Brussels Convention (not ratified by the United States) removes the protection of its limits on liability where damage results from the "actual fault or privity" of the shipowner.[51] The effect of all such pro-

48 9 Stat. § 635, *as amended* 46 U.S.C. § 183 (1964).
49 In re Barracuda Tanker Corp., 281 F. Supp. 228, at 232 (S.D.N.Y. 1968).
50 46 U.S.C. § 182 (1964).
51 International Convention Relating to the Liability of Sea-Going Vessels, Oct.

visions is to remove limits on liability where the owner's conduct is socially unacceptable as in the field of air transport.

With such exceptions, court interpretations of the statutory language are crucial in determining where the balance is drawn between industry and the individual. Gilmore and Black, contending in 1957 that the phraseology of these exceptions is actually "devoid of meaning," pointed out:

> They [the words] are empty containers into which the courts are free to pour whatever content they will. The statute might quite as well say that the owner is entitled to exoneration from liability or to limitation of liability if, on all the equities of the case, the court feels that that result is desirable; otherwise not. Since, in the infinite range of factual situations no two cases will ever precisely duplicate each other, no judge with the slightest flair for the lawyer's craft of distinguishing cases need ever be bound by precedent: "privity like knowledge," the Supreme Court has remarked, "turns on the facts of particular cases."
>
> Judicial attitudes shape the meaning of such catch-word phrases for successive generations. In the heyday of the Limitation Act it seemed as hard to pin "privity or knowledge" on the petitioning shipowner as it is thought to be for the camel to pass through the needle's eye. If in our own or a subsequent generation the philosophy of the Limitation Act is found less appealing, that attitude will be implemented by a relaxed attitude toward what constitutes "privity or knowledge," "design or neglect." The Act, like an accordion, can be stretched out or narrowed at will.[52]

C. *Oil Spills*

Recent approaches to liability for oil spills have for the most part followed the pattern set in air and sea transport: liability without proof of fault up to a reasonably high limit, but unlimited liability with proof of recklessness or intent. At least one commentator has supported this compromise.[53]

In its recent consideration of the matter, the United States Con-

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10, 1957, art. I(1). This Convention is presently in force but not for the United States. Its text appears at 68 YALE L.J. 1714-19 (1959).

52 G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 695-6 (1957).

53 *See* letter from Allan I. Mendelsohn to Sen. Edmund S. Muskie in 115 CONG. REC. S12107 (daily ed. Oct. 8, 1969).

gress adopted the approach of strict liability with a limit for clean-up costs associated with oil spills.[54] The term *absolute* liability was rejected because Congress understood it to comprehend no exceptions; rather, the bill provides that carriers may escape liability if they can prove that the sole cause of the spill was an act of God, an act of war, or "an act of a third party."[55] It was felt that in these three instances the carrier is free of fault, and the exceptions still imply that blame or fault is the basis of tort liability in this field. The most controversial part of the bill, however, provided that there should be no limit on liability if gross negligence were actually proved. Some comment has been favorable to this approach,[56] although the industry has continued to press for a return to limits on liability without exceptions.

A recent international convention adopts the same system of liability endorsed by the Congress.[57] There is strict liability for oil spills up to a limit of $14 million, with exceptions for damage caused by war, acts of God, or the acts of third parties. The convention also removes the limit on liability on the condition of proof of "actual fault or privity."[58]

Thus while on the national and international scenes limits on liability are still very much a part of the social balance between industry and the individual, there do exist exceptions through which the limits can be defeated. A further sign that changes are imminent may be seen in the fact that two states, Maine and Washington, have recently passed legislation making shippers ab-

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54 Pub. L. No. 91-224 (April 1970).

55 Originally S.7, 91st Cong., 2d Sess. (1970). At the time this article was written, the Senate and House were meeting in conference to reconcile the conflicting provisions of S.7 and H.R. 4148 as passed by the House. It was later passed as Pub. L. No. 91-224 (April 1970).

56 Goldie, Book Review, 1 J. MAR. L. & COMM. 155, 164-5 (1969).

57 It is of course apparent that the Convention limit is substantially lower than the limit adopted by the Senate. While both are pegged at $14 million, the Convention limit applies with respect to all claims (*i.e.*, those by governments for clean-up costs as well as those by private citizens for damages), whereas the Senate's limit applies only to claims by the government for clean-up costs. In this respect at least, there has been some question as to the Convention's adequacy. As for the per-ton limit, there is no significant difference; the Senate adopted $125 per ton, the Convention adopted $134 per ton.

58 International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, art. III(1), (2), V(2).

solutely liable without limit for offshore oil spills.[59] It may be predicted that the search for a social balance more attuned to the modern concern for individual protection may eventually cause the elimination of all limits on liability, much as it has already abandoned negligence standards in favor of absolute liability. It is happening now in the field of liability for oil spills, which points the way for future developments in air and marine transport liability.

IV. Conclusion

It is apparent that every attempt to meet the problems of pollution must come to grips with not only industry and public pressures but also a system of laws, treaties, and judicial decisions handed down over the past 120 years. The process of adjustment and readjustment, however, must be much more rapid than any we have known in the past.

It may have required 50 years to complete the enactment of the nationwide scheme of death acts, survival statutes, workmen's compensation plans, federal employer liability acts, and other similar legislation. But we cannot afford the luxury of another 50 years before we solve the problems of pollution. Because environmental law is inseparable from other areas of the law, notably tort law and transportation law, our work cannot be limited in its scope only to pollution. Our environmental problems stem largely from a pressing need to emerge from the entire system of legal theory and precedent that guided us during the first century of industrialization in this country. Much of this theory and precedent will remain viable in the years ahead, but more must be reexamined and changed as we move into the final third of this century.

We cannot legislate new maritime limitations and terms of liability for oil pollution damages while leaving archaic limits and terms in effect for other maritime damages or for passenger injuries and deaths. Others have pointed out the essential relationship between these areas and the critical need to avoid mod-

59 *See* Lembke, *Environment Hero,* Boston Globe, March 18, 1970, at 1, col. 6; Boston Sunday Globe, Feb. 15, 1970, at 33, col. 1.

ernizing one without the other.[60] Before we embark upon such a comprehensive revision we must first reexamine our fundamental tort law concepts.[61] Does insurance now play such a vital and important role in organized society that it is no longer necessary or even wise to retain notions of fault or negligence in our law? Is insurance, with its unfilled potential for proper and economic risk distribution, the best means for treating socially unacceptable conduct in the future, or must the fault concept still continue to play some role?[62] Even more important, is the insurance industry today capable of meeting the financial needs that a true risk distribution system would impose on it? Certainly, the maritime insurance industry is not. For whatever may be said about its testimony during the Senate hearings on the oil spill legislation — and there has been at least one serious critical appraisal[63] — the maximum capacity which the industry ever admitted did not exceed $15 million. While that might be adequate for the tankers of today, it will not be adequate for the giant tankers of tomorrow.

Moreover, what studies have been made on the relationship between insurance premiums and terms of liability? Is it true, as the marine insurance industry testified during the Senate hearings, that the same premiums which cover liability limited by negligence or presumption of negligence would cover only half that liability if it were absolute? Has this been borne out under the international aviation system where one United States aircraft can now be exposed to $10 million of personal injury and death damages under a system of absolute liability? If strict rather than

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60 Mendelsohn, *The Public Interest and Private International Maritime Law*, 10 WM. & MARY L. REV. 783 (1969).

61 A new draft international convention, providing revised terms and limits of shipowner liability for passenger injury and death, is right now circulating around the world. It provides a limit of liability of only $33,000. And as for terms of liability, it provides only for a presumption of negligence, and then only in the event the damage is caused from "shipwreck, collision, stranding, explosion, or fire." O'Neill, *The C.M.I. Draft Convention Relating to Carriage By Sea of Passengers and Their Luggage*, 1 J. MAR. L. & COMM. 107, 110 (1969). It is hard to understand why such small readjustments were made in this area, particularly in the face of the progress made in the oil pollution area, not to mention that in the international aviation personal injury and death area.

62 *See* Onek *The Montreal Agreement and Enterprise Liability*, 33 J. AIR L. & COMM. 603 (1967) and discussion that follows at 607.

63 Mendelsohn, *Maritime Liability for Oil Pollution: Domestic and International Law*, 38 GEO. W. L. REV. 1 (1969).

absolute liability is adopted, would the capacity and costs differ substantially? Even if they would, should this be the critical consideration? Or should the premium costs simply be permitted to rise so that the users of the product will ultimately pay the costs associated with the dangers of its transport and use? Can there be any adequate control of these costs; or will competition alone suffice to meet the problem? Finally, what relation exists between the answers to these questions in the transportation context and their application to offshore drilling rigs or the pollution of our practices and precedents to cope with the enormous problems facing us today? It is evident that this process of adjustment cannot be handled by the Congress alone. The Congress, however concerned and motivated, cannot initiate and pursue all the necessary examination into technical problems surrounding limitations of liability, insurance market capacity, and oil pollution. The Senate did conduct such an examination during the recent hearings on oil pollution. The legal profession and the public must take up where the Senate left off. This work must be started now.

MILITARY SPENDING AND AN EXPANDED ROLE FOR THE GENERAL ACCOUNTING OFFICE

ABRAHAM RIBICOFF*

> How can a legislator meet his responsibilities to his constituents when it comes to voting on a $80 billion bill if he does not know what is in it? . . . The pressures of time are so great for Senators and Congressmen that it is often impossible for us to get into much detail on many of these matters. Too often we have accepted at face value what the Pentagon tells us about its costs and its procurement.[1]

I. BACKGROUND

Last year, for the first time in a decade,[2] many Senators and Congressmen refused to accept on faith the military budget submitted by the Pentagon. The Vietnam War and cost overruns, among other factors, caused a large segment of Congress to lose confidence in the military,[3] and even among long time supporters of the Pentagon there was disillusionment with some of its practices.[4] Coupled with this sentiment was a widespread feeling that

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1 *Hearings Before the Subcomm. on Executive Reorganization on the Capability of GAO to Analyze and Audit Defense Expenditures,* 91st Cong., 1st Sess. at 169, (1969) [hereinafter cited as *1969 Hearings*] (Statement of Senator Richard S. Schweiker).

2 An examination of the Congressional Record shows that, over the previous nine fiscal years of this decade, the House of Representatives never spent more than one day each year discussing military construction authorization proposals. The longest period of time ever spent on military procurement authorization in the House was three days for fiscal 1968. In the Senate, the record was not much better. Military construction debate was generally one or two days each year until fiscal 1969, when six days were spent. On military procurement, the Senate spent its longest debate, eight days, in fiscal 1968. Generally the floor debate was never more than two days. 115 CONG. REC. S. 12363 (1969).

3 CONG. Q. No. 13, March 28, 1969, at 451; H.R. REP. No. 91-698, 91st Cong., 1st Sess. 70 (1969).

4 CONG. Q. No. 21, Pt. 2, May 23, 1969, at 833.

our national priorities should be reordered,[5] a feeling which was manifested by a growing resistance to military spending,[6] and the role of the military in American life.[7]

The problem facing those opposed to current military policy was how to raise their objections effectively. The legislative process is ill-suited for consideration of overall defense strategy and posture. Congress never has an opportunity to debate the total policy. It can examine only the bits and pieces contained in individual bills such as the military procurement authorization and appropriation and the military construction authorization and appropriation. Moreover, because many of the Senators and Congressmen most actively opposed were not members of the committees which would make the initial decisions,[8] they were greatly handicapped in obtaining the necessary information on which to base their positions.[9]

To acquire the needed data, Senators turned to the GAO.[10] Until last year, the GAO had been a little known congressional agency assigned primarily to oversee the financial operations of the executive branch.[11] It had performed that task well as indicated by the absence of embezzlement and fraud in the federal government today.[12] But when Senator Schweiker's amendment[13] to the military procurement authorization bill[14] was called up for consideration, several Senators objected to the expansion of the GAO's functions into reporting on cost increases, schedule delays, and performance slippage in weapons systems. A closer study of the matter was re-

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5 *See Hearings Before the Subcommittee on Economy in Government on the Military Budget and National Economic Priorities,* 91st Cong., 1st Sess. (1969).

6 Gallup Poll, Washington Post, August 14, 1969, at A8, Col. 4-6. Fifty-two percent of the people surveyed thought the United States is spending too much for national defense and military purposes.

7 Rovere, *Letter from Washington,* THE NEW YORKER, Nov. 1, 1969, at 169, 173.

8 For example: Senators Eagleton, Case, Mondale, Proxmire, Hart, Cooper, and McGovern.

9 A notable exception was the ABM controversy, where the opponents were able to call on a number of experts outside Congress.

10 Amend. No. 85 to S. 2546, 91st Cong., 1st Sess. (1969) auditing of weapons procurement; Amends. Nos. 86, 108 and 136, to S. 2546, 91st Cong., 1st Sess. (1969) analytical studies of the MBT-70 Tank, C-5A Aircraft and CVAN-69 Aircraft Carrier, respectively.

11 31 U.S.C. § 53 (1964).

12 *See* NATION'S BUSINESS, Dec., 1966, at 43.

13 Amend. No. 85 to S. 2546, 91st Cong., 1st Sess. (1969).

14 S. 2546, 91st Cong., 1st Sess. (1969).

quested with Chairman Stennis[15] of the Armed Services Committee and Senators Goldwater[16] and Percy[17] pointing out that since the amendment related to the duties of the GAO, it should first be referred to the Committee on Government Operations, the committee with legislative jurisdiction over the agency.[18] This view was also expressed by Comptroller General Elmer Staats.[19]

After consultation with interested Senators, I announced that my Subcommittee on Executive Reorganization would hold hearings on the capability of the GAO to analyze and audit defense expenditures.[20] It was my belief that the hearings should be a general assessment of GAO, its statutory authority, budget, and staff, and that the Subcommittee should seek to determine in what additional ways the GAO could better fulfill its obligations to the legislative branch.[21] It was apparent that a solution to the problem of analyzing and auditing defense expenditures would have broad applicability and might be extended to all government departments and agencies. My hope was to report out a bill which would be responsive to the problem of monitoring, assessing, and controlling the massive expenditures of the Department of Defense and other federal agencies.[22]

II. The Hearings

Hearings were held on September 16, 17, and 25, 1969, with the Comptroller General, Elmer Staats, appearing as the first witness. Mr. Staats testified that since defense expenditures are the largest item in the national budget, 40 percent of his staff are assigned to defense work, with about half of them concerned with procurement, research, and development.[23] He stated that in general the GAO has good relations with the Department of Defense but noted that there had been some difficulty with the lower echelons

15 115 Cong. Rec. S. 9347 (1969).
16 *Id.*
17 115 Cong. Rec. S. 9350 (1969).
18 Rules and Manual of the United States Senate, Rule 25 (j) at 33 (1969).
19 Letter from Comptroller General Elmer Staats to Senator John Stennis, August 1, 1969. Printed in 115 Cong. Rec. S. 9349-9350 (1969).
20 115 Cong. Rec. S. 9562 (1969).
21 *Id.*
22 *Id.*
23 *1969 Hearings, supra* note 1, at 13.

of the Pentagon in gaining access to necessary information and documents. He emphasized that such information and documents must be made available for the GAO to do its work.[24]

Mr. Staats went on to relate that in the past three years GAO assistance to Congress had increased by nearly 100 percent and that nearly 20 percent of the staff was assigned to work on congressional requests.[25] "Looking to the future," he said, "I believe our assistance to the Congress can be made more effective by further increasing our staff assistance to legislative committees during their consideration of proposals for new or revised federal programs. . . ."[26] In particular, he testified that the GAO could render effective assistance to Congress in its consideration of legislative proposals by listing alternate courses of action, determining whether adequate analyses had been made of them by the executive branch, and by projecting long-term costs and benefits of proposed programs. In order to control the number of requests for assistance and limit their scope, the Comptroller General advised that they be made through committees or the Congress as a whole. He also expressed the view that the GAO should refrain from making recommendations or policy, since this would reduce its independence in reviewing the program enacted.[27]

On the second day of the hearings, Senator Cranston presented his proposal. He agreed with the Comptroller General on the appropriate role for the GAO with respect to review of defense expenditures, but in addition proposed that the Legislative Reference Service of the Library of Congress be expanded to "provide the Senate an overall presentation of [national security] priorities and alternatives from which we could make policy decisions." "This group," he commented, "could also assist legislators in the initiation of policy."[28] Following Senator Cranston's testimony, the Chairman asked the Legislative Reference Service for its views on his proposals.[29] Donald Tacheron, Deputy Director of the

24 *Id.* at 17.
25 *Id.* at 30.
26 *Id.*
27 *Id.* at 31.
28 *Id.* at 184.
29 Letter from Senator Abraham Ribicoff to Mr. Lester S. Jayson, Director, Legislative Reference Service, Library of Congress, September 18, 1969. Printed in *1969 Hearings, supra* note 1, at 186.

Legislative Reference Service, replied that the LRS intends to establish a new division in defense policy-national security within two years. While there are only five researchers presently in this area, plans call for adding five more employees in the coming year with the new division achieving full status in mid-1971. Mr. Tacheron also pointed out that the role of the new division would be restricted to research, problem definition, and assistance to congressional committees in program reviews they might undertake. The new division, he stressed, would not initiate and carry out its own analysis of legislative proposals or program evaluations.[30]

On the last day of hearings the Pentagon's views were presented by Dr. John A. Foster, Director of Defense Research and Engineering, and Robert C. Moot, Assistant Secretary of Defense. A long and detailed statement was submitted covering the weapons system acquisition process, the nature and extent of the Department's relations with the GAO, and a discussion of the possible roles the GAO might play in reviewing defense expenditures. Dr. Foster said that the Department's relationship with the GAO had been "productive and useful."[31] He denied there were any significant problems in GAO access to records and pointed out that Deputy Secretary David Packard's recent memorandum required that access be given to all necessary information.[32]

Regarding the appropriate role of the GAO there was some inconsistency between the Department's statement and Dr. Foster's later answers to certain specific questions. The statement said:

> The second[33] role that GAO could assume does not involve making program recommendations, but does include reviewing and evaluating the process by which the Department of

30 Letter from Donald Tacheron, Deputy Director, Legislative Reference Service, Library of Congress, October 14, 1969, printed in *1969 Hearings, supra* note 1, at 187.

31 *1969 Hearings, supra* note 1, at 210.

32 On August 27, 1969, Deputy Secretary of Defense, David Packard, issued a memorandum for the Secretaries of the Military Departments specifying seven specific classes of information to which GAO should be granted access in its review of weapons procurement.

33 The first role which Dr. Foster postulated for GAO was "independently determine military requirements, assess alternatives and recommend weapons systems acquisition programs to the Congress." He rejected this role as did Mr. Staats previously. *1969 Hearings, supra* note 1, at 215.

> Defense establishes objectives, identifies alternatives, and reaches conclusions and recommendations. Essentially, the Department has no objections to the GAO's performing this role, provided the review is limited to the methodology employed and the validity of the data, and does not involve substantive matters of foreign policy, military strategy, technological issues, and so forth . . . Even if the GAO were limited to reviewing methodology and efficiency we would have a few very significant reservations. First, the GAO should limit its examinations to programs that have been included in the President's budget and recommended to the Congress . . . . . . the Department recommends that all congressional requests for studies of this nature be channeled through the Authorization or Appropriations Committee of either body, so that GAO audits and investigations may be scheduled in an orderly way and be concentrated in those areas most in need of attention . . .[34]

Upon questioning by the Subcommittee, however, Dr. Foster indicated that he did not endorse this role.[35] Instead, he claimed to have recommended a third role for the GAO — reviewing the adequacy of management procedures in completed and on-going weapons acquisitions programs and the degree to which they were being followed.[36]

III. Proposed Legislation

Thus, at the conclusion of the hearings, there were three[37] possible courses of legislative action: the Staats approach, which was similar to the second alternative of Dr. Foster,[38] the Cranston

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34 *1969 Hearings, supra* note 1, at 222-223.

35 *Id.* at 242. Answer to question 5.

36 *Id.*

37 On October 13, 1969, Senator Gaylord Nelson and others introduced three bills, S. 3023, S. 3024 and S.J. Res. 160, 91st Cong., 1st Sess. (1969), which would establish, respectively, an Office of Defense Review, a Temporary National Security Commission, and a Joint Congressional Committee to review and recommend changes in national priorities and resource allocation.

They are intended to provide Congress the information and institutions necessary to challenge the military policy decisions of the Pentagon. The first two bills were referred to the Armed Services Committee and the last to the Government Operations Committee. None appeared to offer an immediate, practical means of dealing with the problem before the Subcommittee. 115 Cong. Rec. S. 12363-12368 (1969).

38 The Department of Defense indicated that it would accept GAO review of its decision-making processes provided it was limited to the methodology employed,

proposal, and the third role for the GAO suggested by Dr. Foster. Evaluating them, it seemed that the Staats-Foster approach was the most promising method of improving the analysis and auditing of defense expenditures. First, the agencies themselves had shown by their testimony that they recognized a need to expand GAO reviews. Second, though there might be some differences in how this should be achieved, the agencies had a history of effective cooperation. And third, recent events had provided a model for new procedures based on this proposal.

During the debate on the military procurement authorization bill,[39] Senator Eagleton offered an amendment[40] which would have halted all work on the MBT-70 (Main Battle Tank) pending a study by the Comptroller General of the cost, effectiveness, and alternatives to the weapon. As a result of negotiations between Chairman Stennis, the Comptroller General, and Senator Eagleton, it was agreed that the GAO would make a study of the cost increases in the project and the feasible alternatives to it.[41] In just three weeks the GAO produced a detailed, closely reasoned report[42] which favorably impressed the Subcommittee and which the Subcommittee believed could serve as a prototype for similar reports on military and civilian programs.

In contrast, there were strong reasons for rejecting Senator Cranston's plan and Dr. Foster's third alternative. It was apparent from Donald Tacheron's letter that the LRS lacked the manpower to conduct searching cost-benefit studies of complex weapons systems. Dr. Foster's third proposal was not promising because it prohibited GAO from reaching the really vital questions, for, as former Secretary of Defense, Robert McNamara, once observed, "The major problem is not the efficiency of procurement, but,

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and the validity of the data on programs that have been submitted to Congress, and the requests were channeled through the appropriate committees. Correspondingly, Mr. Staats said that in response to specific requests from committees, or the Congress as a whole, GAO could provide information on what alternatives exist, whether adequate analysis was made of them, what the cost-benefit ratios are, and the relationship of one program to others.

39 S. 2546, 91st Cong., 1st Sess. (1969).

40 Amend. No. 85 to S. 2546, 91st Cong., 1st Sess. (1969).

41 Letter of Comptroller General Elmer Staats to Senator John Stennis, September 2, 1969, copy in Subcommittee files.

42 GAO Report No. B-163058 (September 2, 1969).

rather, what is to be procured."[43] By restricting the GAO merely to examining efficiency, the Pentagon would prevent it from looking into the more meaningful question of alternatives, as the GAO had been able to do in the MBT-70 report.

From this analysis emerged the outline of a bill, whose purpose would be to permit members of Congress to raise timely questions relevant to the consideration of a bill. On request, the GAO would be authorized to conduct objective studies of the costs, benefits, and alternatives to pending legislation; its function would be confined to review, analyses, and reports on programs submitted to Congress; the Comptroller General would not be involved in making basic policy; and all decisions would be left to Congress. To conform as closely as possible to existing Senate rules, the investigative procedure should not interfere with committee hearings and decision making, nor should it impair the substantive authority of committees and committee chairmen. The bill should allow committee chairmen to sanction requests for studies and deny those which would be inappropriate or violate stated criteria.

In accordance with this analysis, my bill specifies that, first, within ten days after the introduction of any legislation, a member may make a specific written request for a review addressed to the Comptroller General and the chairman of the committee with jurisdiction over the bill.[44] Second, during the next five days, the Comptroller General and the chairman will meet with the member and agree on the scope and coverage of the study. Any disagreement concerning these matters will be resolved by the chairman, but only those requests may be denied, which, in the Comptroller General's opinion, are beyond the competence or available resources of his office or would require him to make a recommendation regarding the adoption of a particular program or policy.[45] Third, the Comptroller General is given responsibility for determining the relative priority of all studies.[46] The priority assigned to a given topic, of course, will depend on the Comptrol-

43 Brandon, *Robert McNamara's New Sense of Mission,* N.Y. Times, November 9, 1969, § 6 (Magazine), at 44.

44 S. —, § 101 (h)(2), 91st Cong., 2d Sess. (1970). At the time this article was prepared for publication, this bill had not yet received a number. The current text is reproduced in part in the appendix for convenience.

45 *Id.*

46 *Id.*

ler General's current work load, the legislative schedule, and other pertinent factors. Fourth, once a request has been made by a committee chairman or by Congress, the Comptroller General then may proceed to analyze certain questions directly related to the bill.[47] For example, the Office of the Comptroller is authorized to examine and report on the costs and benefits of the proposal and any alternatives to it, including those which were available to the departments and agencies. It can also review the analytical processes involved in the justification of such proposals and the validity of the data supporting them. Thus, given a requirement for a certain military capability, the Comptroller General might study whether the most cost-effective method of achieving it had been selected, or whether the data supporting it were accurate. Similarly, given the objective of reducing water pollution to a determined level, the Comptroller General might inquire whether the proposal put forward was reasonably calculated to reach the goal, and whether it employed the least expensive method. Finally, the bill directs the Comptroller General to complete his work and submit a report within approximately 60 days, if feasible, following the meeting with the chairman and the member requesting it. The chairman will then make the report available to other members of Congress, under appropriate security arrangements if necessary.[48]

The adoption of this procedure will, in my opinion, provide Congress with a factual foundation for the consideration of legislation which is more on a par with that of the executive branch. Through the GAO, Senators and Congressmen will be able to gain access to most of the data possessed by the departments and agencies, members will be able to ask for studies of issues which concern them, and the information they receive will allow them to make a more knowledgeable judgment on the bill.

As Mr. Staats recognized in his testimony, however, the reports made by the Comptroller General can be no better than the information with which he works. Active cooperation by the executive branch is essential to obtaining access to necessary records, documents, and personnel. Accordingly, the bill directs depart-

47 *Id.* § 101 (h)(1).
48 *Id.* § 101 (h)(3).

ments and agencies to make available the information which the Comptroller General requires to complete his studies.[49] Should disputes arise over access to various documents, the Comptroller General will bring them to the attention of the member requesting the study and his committee chairman, specifying the nature of the necessary information to which he was denied access and the reasons given for such action.[50] The committee chairman will then attempt to resolve the dispute.

IV. Conclusion

The controversy over various weapons systems proposed in the military procurement authorization bill revealed a widespread desire in Congress for more information regarding these systems so that their merits could be effectively debated. This was not a unique situation. As Senators serve on only one or two committees, they are often unable to participate in hearings and adequately inform themselves of the details of other legislation. Furthermore, the organization of Congress into committees gives selected members a kind of monopoly power over bills within their jurisdiction. There is an informal understanding among the members that they will rely on each other to raise the important issues involved in each bill and resolve them in a manner consistent with the majority interest. While the committee system usually operates in this way, from time to time situations develop in which a substantial number of non-committee members strongly disagree with the committee action. Under current procedures, they have no effective means of gathering the data they need to make a documented case before the entire Senate or House.

My bill offers every member of Congress the opportunity to obtain an objective report on any provisions of any bill which concern him. The GAO reviews and reports will promote intelligent debate on legitimate issues. As a result, the quality of the legislative process will be improved, and public confidence in Congressional decisions should be increased.

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49 *Id.* § 101 (h)(4).
50 *Id.*

APPENDIX

S. ————

IN THE SENATE OF THE UNITED STATES

MR. RIBICOFF

A BILL

To revise and restate certain functions and duties of the Comptroller General of the United States; to change the name of the General Accounting Office to "Office of the Comptroller General of the United States," and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act may be cited as the "Budget and Accounting Improvement Act of 1970."

TITLE I — ASSISTANCE TO CONGRESS

Analysis and Evaluation

Section 101. Section 312 of the Budget and Accounting Act, 1921, 31 U.S.C. 53, is amended by adding at the end thereof the following new subsections:

"(f) The Comptroller General shall review, analyze and evaluate ongoing programs and activities of the Government, including the making of cost-benefit studies and the development of long-range cost estimates thereof (1) upon his own initiative, (2) when ordered by the Senate or the House of Representatives, or (3) when, after consultation with the Comptroller General, the chairman of any committee of the House of Representatives or Senate or of any joint committee of the Congress having jurisdiction over such programs and activities requests such a review and study.

"(g) Upon request of the chairman of any committee of either House or any joint committee of the two Houses, the Comptroller General shall assign, on a temporary basis, employees of the Office of the Comptroller General to assist such committee or joint committee, or the staff of such committee or joint committee—

"(1) in analyzing cost-benefit and other analytical studies furnished by any Federal agency to such committee or joint committee; or

"(2) in conducting cost-benefit and other analytical studies of programs under the jurisdiction of such committee or joint committee.

"(h)(1) The Comptroller General is hereby authorized to make analyses and reviews of legislative proposals and alternatives to such proposals, including those available to the departments and agencies, the long-term costs and benefits thereof, the analytical processes involved in the justification of such proposals and the validity of the data supporting them, when ordered by either House of Congress or requested by the Chairman of any committee of the House or Senate or of any joint committee of the two Houses having jurisdiction over such legislative proposal, either on the Chairman's own initiative or after consultation with the Comptroller General and interested members of the Congress when requests for such analyses and reviews are made under section (h)(2).

"(2) Within ten days after introduction of a legislative proposal, any member of Congress desiring an analysis or review of such proposal may so notify in writing the Comptroller General and the chairman of the committee of the House in which the member is serving or the chairman of the joint committee having jurisdiction over the proposed legislation. The notice shall state in as specific terms as possible the questions and issues to be reported on. Within five days thereafter, the Comptroller General and the chairman shall meet with the member who has filed a notice and agree on the study to be made and

the scope and coverage. Any disagreement shall be resolved by the chairman. The chairman may deny only those requests for studies which, in the opinion of the Comptroller General, are beyond the competence or available resources of his Office or which would require the Comptroller General to make a recommendation regarding the adoption of a particular program or policy. The Comptroller General shall determine the relative priority of all studies and reviews undertaken.

"(3) The Comptroller General shall complete his work and submit a report within 60 days following, or as soon thereafter as possible, to the chairman of the committee requesting the study. The chairman shall make such reports available to other members of Congress. Such reports shall be made available under appropriate security arrangements where necessary.

"(4) The departments and agencies shall make available to the Comptroller General such information and documents as he considers necessary for him to complete his studies under subsection (h). Any instance in which the Comptroller General requests any information or document for the study and there is a refusal by a department or agency to furnish any information or document that he considers necessary to complete his studies, he shall promptly bring to the attention of the member requesting the study and the chairman of the appropriate committee. The chairman shall endeavor to resolve the dispute with officials of the department or agency involved. In his report, the Comptroller General shall specify any information or documents that he considers necessary to complete his studies which he was ultimately denied access to, or any questions which the department or agency would not answer, and the reasons given for such action.

"(i) The Comptroller General shall have available in the Office of the Comptroller General employees who are expert in analyzing and conducting cost-benefit studies and in other skills necessary to carry out the duties imposed upon him by the Budget and Accounting Act, 1921, or any other law.

"(j) The Comptroller General shall submit to the Congress not later than 30 days after the beginning of each congressional session and at such later points in time as he believes useful during the period when authorizations and appropriations are under consideration, status reports on such major weapons systems, major construction programs, and research and development programs as he considers will be of primary interest to the Congress. Such reports shall be designed to supply the Congress such information as the following:

"(1) Currently estimated costs compared with the prior estimates for (a) research, development, and engineering, and (b) production.

"(2) The reasons for any significant increase or decrease from cost estimates at the time of the original authorization and the original contract, if any.

"(3) Options available under the contract for additional procurement and whether the agency intends to exercise any options, and the projected costs of exercising options.

"(4) Changes in the performance specifications or estimates made by the contractor or by the agency and the reasons for any major change in actual or estimated differences from that called for under the original contract specifications.

"(5) Significant slippages in time schedules and the reasons therefor.

"In preparing such reports, the Comptroller General shall utilize to the extent practicable records and reporting systems developed by the executive branch agencies and shall suggest improvements in such reporting systems as he deems appropriate."

TECHNOLOGY ASSESSMENT LEGISLATION

EMILIO Q. DADDARIO*

Introduction

No remarkable perception is required to understand the important role science and technology have played and will continue to play in promoting the general welfare of America. But Congress today finds itself squarely faced with the many problems created by the social, political, and economic side effects of technology. As a major source of funds for the development of new technologies, Congress must assume a strong role in the solution of these problems. In 1940, the total federal expenditure for research and development totaled only $74 million.[1] Following World War II, the R&D expenditures increased by about 20 per cent per year, and approached $15 billion in 1965.[2] Since that time, the rate of growth has declined, and the R&D budget has leveled off to about $17 billion.[3]

As the pace of technology has accelerated, opportunities have multiplied, and these in turn have generated new demands. More fundamental problems also have arisen. It has become necessary to find a reasonable balance between the controls which the federal government must exert to protect the public and the freedom which the individual researcher and entrepreneur must have to express their creative energies and apply the results of their research. Finding a balance is difficult since there is no legislative process to survey and direct complex national research and de-

*U.S. Representative from the first Congressional District in Connecticut. Mr. Daddario is Chairman of the Subcommittee on Science, Research, and Development of the Committee on Science and Astronautics which has recently conducted hearings on the subject of technology assessment. Mr. Daddario is now an announced candidate for Connecticut's governorship.

1 *Hearings on Government and Science Before the Subcomm. on Science, Research, and Development of the House Comm. on Science and Astronautics,* 88th Cong., 1st Sess. 219 (1963).

2 *Id.*

3 *Hearings on 1970 National Science Foundation Authorization Before the Subcomm. on Science, Research, and Development of the House Comm. on Science and Astronautics,* 91st Cong., 1st Sess., vol. II, at 61 (1969).

velopment programs as a coordinated whole rather than as isolated pieces scattered among many agencies. There is also the executive problem of confining major decisions on scientific projects within a narrow political circle. And finally there are the administrative problems of securing adequate and objective advice for the Congress and the efficient management of programs by the executive agencies.

Primarily because of these developments, the Subcommittee on Science, Research, and Development was created in August 1963. Among the objectives of the Subcommittee were: (1) to strengthen congressional sources of information and advice in the fields of science and technology, and (2) to achieve the most effective utilization of the scientific and engineering resources of the United States in the effort to accomplish national goals which affect the lives of all Americans.[4] The Subcommittee has a mandate to focus its attention on science and technology throughout the federal government and on the many administrative and operational facets of science in relation to government, including interdisciplinary approaches to meeting the needs of American society.

During its early years, the Subcommittee delved into a number of specific topics ranging from indirect costs in federal research grants[5] to the development of a standard reference data system.[6] At the same time, the subcommittee sought a broader understanding of the factors contributing to the development of a sound science policy and initiated a number of specific actions.[7] For example, the Subcommittee created a Research Management Advisory Panel (RMAP) which acts as a special task group for the subcommittee in promoting improved research management.[8] In

4 SUBCOMM. ON SCIENCE, RESEARCH, AND DEVELOPMENT OF THE HOUSE COMM. ON SCIENCE AND ASTRONAUTICS, 88TH CONG., 1ST SESS., GOVERNMENT AND SCIENCE No. 1—STATEMENT OF PURPOSE (Comm. Print 1963).

5 SUBCOMM. ON SCIENCE, RESEARCH, AND DEVELOPMENT OF THE HOUSE COMM. ON SCIENCE AND ASTRONAUTICS, 88TH CONG., 2D SESS., GOVERNMENT AND SCIENCE, No. 5: INDIRECT COSTS UNDER FEDERAL RESEARCH GRANTS (Comm. Print 1964).

6 HOUSE COMM. ON SCIENCE AND ASTRONAUTICS, AUTHORIZING THE SECRETARY OF COMMERCE TO PROVIDE FOR THE COLLECTION, COMPILATION, CRITICAL EVALUATION, PUBLICATION, AND SALE OF STANDARD REFERENCE DATAS, H.R. REP. No. 1836, 89th Cong., 2d Sess. (1966).

7 For a listing of all hearings, reports, and other activities of the Subcommittee, see the Committee "Calendar" available from the Committee on Science and Astronautics, U.S. House of Representatives, Washington, D.C.

8 SUBCOMM. ON SCIENCE, RESEARCH, AND DEVELOPMENT OF THE HOUSE COMM. ON

addition, the Subcommittee entered into agreements with the National Science Foundation for studies concerning science education in the United States[9] and with the National Academy of Sciences for studies concerning questions of science policy.[10] The agreement with the Academy represented the first formal contractual relationship between the Academy and a congressional committee.

As the Subcommittee gained experience, it tended more and more to cover a broader range of issues, and in early 1965, it requested its RMAP panel to undertake a preliminary study of the status of the technical capabilities which underlie the national effort to control environmental pollution.[11] Since that time, the Subcommittee has published a number of hearings and reports on air and water pollution,[12] and the broader ecological considerations.[13] By mid-1966 it became apparent to the Subcommittee

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SCIENCE AND ASTRONAUTICS, 89TH CONG., 2D SESS., INQUIRIES, LEGISLATION, POLICY STUDIES RE: SCIENCE AND TECHNOLOGY, REVIEW AND FORECAST, 2ND PROGRESS REPORT OF THE SUBCOMMITTEE ON SCIENCE, RESEARCH, AND DEVELOPMENT, COMMITTEE ON SCIENCE AND ASTRONAUTICS 4 (Comm. Print 1966).

9 Three reports were developed for the Subcommittee: SUBCOMM. ON SCIENCE, RESEARCH, AND DEVELOPMENT OF THE HOUSE COMM. ON SCIENCE AND ASTRONAUTICS, 89TH CONG., 1ST SESS., SCIENCE EDUCATION IN THE SCHOOLS OF THE UNITED STATES (Comm. Print 1965); 89TH CONG., 1ST SESS., HIGHER EDUCATION IN THE SCIENCES (Comm. Print 1965); 90TH CONG., 1ST SESS., THE JUNIOR COLLEGE AND EDUCATION IN THE SCIENCES (Comm. Print 1967).

10 SUBCOMM. ON SCIENCE, RESEARCH, AND DEVELOPMENT OF THE HOUSE COMM. ON SCIENCE AND ASTRONAUTICS, 89TH CONG., 1ST SESS., BASIC RESEARCH AND NATIONAL GOALS (Comm. Print 1965); 90TH CONG., 1ST SESS., APPLIED SCIENCE AND TECHNOLOGICAL PROGRESS (Comm. Print 1967).

11 SUBCOMM. ON SCIENCE, RESEARCH, AND DEVELOPMENT OF THE HOUSE COMM. ON SCIENCE AND ASTRONAUTICS, 89TH CONG., 2D SESS., THE ADEQUACY OF TECHNOLOGY FOR POLLUTION ABATEMENT (Comm. Print 1966).

12 *Hearings on the Adequacy of Technology for Pollution Abatement Before the Subcomm. on Science, Research, and Development of the House Comm. on Science and Astronautics,* 89th Cong., 2d Sess. (1966); *Hearings on Environmental Quality, H.R. 7796, 13211, 14605, 14627 Before the Subcomm. on Science, Research, and Development of the House Comm. on Science and Astronautics,* 90th Cong., 2d Sess. (1968); SUBCOMM. ON SCIENCE, RESEARCH, AND DEVELOPMENT OF THE HOUSE COMM. ON SCIENCE AND ASTRONAUTICS, 89TH CONG., 2D SESS., ENVIRONMENTAL POLLUTION, A CHALLENGE TO SCIENCE AND TECHNOLOGY (Comm. Print 1966); SUBCOMM. ON SCIENCE, RESEARCH, AND DEVELOPMENT OF THE HOUSE COMM. ON SCIENCE AND ASTRONAUTICS, 90TH CONG., 2D SESS., MANAGING THE ENVIRONMENT (Comm. Print 1968).

13 *Hearings on H.J. Res. 1240—International Biological Program Before the Subcomm. on Science, Research, and Development of the House Comm. on Science and Astronautics,* 90th Cong., 2d Sess. (1968); *Hearings on H.J. Res. 589—International Biological Program Before the Subcomm. on Science, Research, and Development of the House Comm. on Science and Astronautics,* 91st Cong., 1st Sess. (1969);

that in addition to investigating a problem such as pollution as an integrated system, it was even more fundamental to obtain an early warning of the consequences of applied science before they required major resources and a national effort to reverse any undesirable trends. To do this would require us—as a Nation—to reorient our thinking and try to determine where our collective decisions would lead us in the future.

As I pointed out in the second progress report of the Subcommittee:

> There is an additional feature to the development and application of new technology which the subcommittee does not believe has received the attention it deserves, but which is nonetheless a grave affair.
>
> We refer to the dangerous side effects which applied technology is creating, or is likely to create, for humanity. Today we can see its ill effects on a dozen different fronts and suspect them on many more . . . .
>
> Time was when man could afford to look upon the innovations of technology with some complacency. For the innovations came slowly, they were put to use in a relatively slow and modest fashion, and their side effects developed at a sufficiently relaxed pace to permit man to adjust to them—or to alter his course if the threat were great enough . . . .
>
> The subcommittee believes that we can no longer blindly adapt technology to our needs with the traditional assumption that there will be ample time to iron out any bugs on a leisurely shakedown cruise. A bigger effort must be made not only to foresee the bugs, but to forestall their development in the first place. The alternative could be disastrous and indeed might turn our physical and social world into something almost uninhabitable.[14]

The following year, on March 7, 1967, I introduced H.R. 6698 to establish a method for identifying, assessing, publicizing, and dealing with the implications and effects of applied research and

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SUBCOMM. ON SCIENCE, RESEARCH, AND DEVELOPMENT OF THE HOUSE COMM. ON SCIENCE AND ASTRONAUTICS, 90TH CONG., 2D SESS., THE INTERNATIONAL BIOLOGICAL PROGRAM: ITS MEANING AND NEEDS (Comm. Print 1968); H.R. REP. NO. 91-302, 91st Cong., 1st Sess. (1969).

14 SUBCOMM. ON SCIENCE, RESEARCH, AND DEVELOPMENT, *supra* note 8, at 23.

technology by establishing a Technology Assessment Board. The bill recognized the need for

> identifying the potentials of applied research and technology and promoting ways and means to accomplish their transfer into practical use, and identifying the undesirable by-products and side effects of such applied research and technology in advance of their crystallization and informing the public of their potential in order that appropriate steps may be taken to eliminate or minimize them.[15]

This bill was introduced not as a completed legislative proposal but as a stimulant to discussion. I received many thoughtful comments, criticisms, and suggestions on the concept of a Technology Assessment Board, and these initial discussions led to the formation of a technology assessment seminar in September 1967.[16] Subsequently, the Subcommittee contracted for special studies with the National Academy of Sciences,[17] the National Academy of Engineering,[18] and the Legislative Reference Service of the Library of Congress.[19] Following the submission of these studies, the Subcommittee held hearings in November and December, 1969, to refine the technology assessment concept.[20]

In addition to the work of the Science, Research, and Development Subcommittee, other Congressional committees have been paying increased attention to the quality of our environment, and the 91st Congress has seen an unprecedented amount of activity in this regard.[21] Foremost of the bills considered during the 91st

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15 H.R. 6698, 90th Cong., 1st Sess. (1967).

16 *Proceedings of Technology Assessment Seminar Before the Subcomm. on Science, Research, and Development of the House Comm. on Science and Astronautics,* 90th Cong., 1st Sess. (1967).

17 COMM. ON SCIENCE AND ASTRONAUTICS, 91ST CONG., 1ST SESS., TECHNOLOGY: PROCESS OF ASSESSMENT AND CHOICE (Comm. Print 1969).

18 COMM. ON SCIENCE AND ASTRONAUTICS, 91ST CONG., 1ST SESS., A STUDY OF TECHNOLOGY ASSESSMENT (Comm. Print 1969) [hereinafter cited as TECHNOLOGY ASSESSMENT].

19 SUBCOMM. ON SCIENCE, RESEARCH, AND DEVELOPMENT OF THE HOUSE COMM. ON SCIENCE AND ASTRONAUTICS, 91ST CONG., 1ST SESS., TECHNICAL INFORMATION FOR CONGRESS (Comm. Print 1969).

20 *Hearings on Technology Assessments Before the Subcomm. on Science, Research, and Development of the House Comm. on Science and Astronautics,* 91st Cong., 1st Sess. (1969) [hereinafter cited as *Hearings*].

21 Some of the bills introduced during the 91st Congress include: S. 7 (Muskie, Me.) to promulgate federal standards for marine sanitation devices, to provide for certification of such devices, and to define jurisdictions over violations of the stan-

Congress was S.1075,[22] which is similar to a bill I had introduced in the House.[23] In signing the National Environment Policy Act[24] into law on New Year's Day, President Nixon stressed the urgency of the situation, saying:

> . . . . I have become further convinced that the nineteen-seventies absolutely must be the years when America pays its

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dards; to delineate the procedure for reporting, cleaning, and controlling oil discharges by authorizing area acid and other mine water pollution control demonstrations, and by urging the cooperation of all federal agencies in the control of pollution (to Public Works, hearing Jan. 3, 1969, passed Senate as amended Oct. 8, 1969, passage vacated and H.R. 4148 passed in lieu thereof); H.R. 4148 (Fallon, Md.) authorizing federal grants for the construction of sewage treatment works; providing for the control of sewage by establishing marine sanitation standards; describing liabilities, procedure and machinery for the control and removal of oil from navigable waters; authorizing acid and other mine water pollution control demonstrations; urging the cooperation of all federal agencies in the control of pollution (to Public Works, hearing Feb. 26, 1969, passed House April 16, 1969, passed Senate Oct. 8, 1969); S. 1818 (Tydings, Md.) to establish an Office of Environmental Quality to provide for the inclusion of environmental quality in the decision-making process (to Public Works); S. 2312 (Scott, Pa.) to create a Department of Conservation and the Environment (to Public Works); H.R. 641 (Ryan, N.Y.) to establish a Federal Water Commission to provide for the development, utilization, and control of the water resources of the United States for the beneficial uses and for their protection in the interest of public health, safety and welfare (to Public Works); H.R. 857 (Ottinger, N.Y.) to amend the Fish and Wildlife Coordination Act to provide for more effective protection of fish and wildlife resources from the effects of projects licensed by federal agencies (to Merchant Marine and Fisheries); H.R. 5185 (Dent, Pa.) to amend the Clean Air Act to provide for more effective prevention, control, and abatement of air pollution through the establishment of air regions and standards applicable thereto (to Interstate and Foreign Commerce); H.R. 1200 (Daddario, Conn.) to redesignate Department of Interior as the Department of Resources, Environment, and Population, and to transfer to such Department certain programs and functions currently being carried out by other departments and agencies (to Government Operations).

22 91st Cong., 1st Sess. (Jackson, Wash.) to authorize the Secretary of the Interior to conduct investigations, studies, surveys, and research relating to the nation's ecological systems, natural resources, and environmental quality, and to establish a Council on Environmental Quality (to Interior and Insular Affairs, hearing April 4, 1969, passed Senate as amended July 10, 1969, passed House with amendment in lieu of H.R. 12549, conf. report agreed to by Senate Dec. 20, 1969, agreed to by House Dec. 22, 1969, approved P.L. 91-190, National Environmental Policy Act of 1969, Jan. 1, 1970).

23 H.R. 13272, 91st Cong., 1st Sess. (1969).

24 Pub. L. No. 91-190, 83 Stat. 852, 13 U.S. CODE CONG. & AD. NEWS 2712. "The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment, to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality."

> debt to the past by reclaiming the purity of its air, its waters and our living environment. It is literally now or never.[25]

I. The Need for Technology Assessment

André Gide, the French novelist and critic, once began a lecture by saying: "All this has been said before—but, since nobody listened, it must be said again."

In a sense, this is also true of technology assessment although no one recognized it at the time—or at least no one did anything about it. In 1937, a prophetic report of a Congressional Subcommittee declared:

> The most important general conclusion to be drawn from these studies is the continuing growth of the already high and rapidly developing technology in the social structure of the Nation, and hence the hazard of any planning that does not take this fact into consideration. . . . In view of the findings regarding the importance of technology and applied science, it is recommended that the Federal Government develop appropriate agencies for continuous study of them; and more specifically that there be set up in the respective departments science committees with the definite function of investigating and reporting at regular periods on the progress and trends of science and invention and the possible economic effects flowing therefrom as they affect the work of the departments and of the agencies to whom they render service.[26]

It was unfortunate that we did not heed the advice of the Subcommittee in 1937. If we did, perhaps we would not now be facing the environmental crisis we do. However, it must be remembered that in 1937 we were still emerging from the great depression, and technology—and the resulting increases in employment—were the most immediate need of the country. A few years later, this country was to commit its entire resources and manpower into a four-year war, and again technological forecasting became academic in comparison to the imperative need of national survival. However, we are far removed from the 1940's, and the need for tech-

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25 New York Times, Jan. 2, 1970, at 12, col. 4.

26 Subcomm. on Technology to the National Resources Commission, Technological Trends and National Policy, H.R. Doc. No. 360, 75th Cong., 1st Sess. at x (1937).

nology assessment is now more acute since virtually all activities today are highly dependent upon technology.

Technological change produces diverse effects on economic growth—some recognizable before the fact, others not until later, and some never clearly established in a cause and effect relationship. To improve our quality of life, society needs to know as much as possible before the fact about the consequences of technological change.

Two new factors have made the assessment of technological alternatives even more critical. First, increased population density, in part, itself a result of technological advancements in nutrition and medicine, means that any activity is likely to affect a great many human beings, making the maintenance of environmental quality much more difficult.[27] Second, the potential threats of modern technologies are very powerful. Biological, chemical and radiological agents now have the potential to substantially upset the balance of nature. Unforeseen consequences are less likely to be confined locally or detected under restricted conditions where lessons can be learned before significant damage is done.

Technology assessment, however, could stifle progress if it seeks the illusive and unobtainable goal of predicting all the consequences of technological change. Modern decision making by those who apply science and technology must consider both the benefits and the risks to the general public. There is a certain conservatism in our culture which tends to make innovation difficult. It is easy to cite many examples of the entrepreneur being ridiculed and frustrated by a society that preferred the status quo. It is all too easy to discover reasons why a novel procedure or idea is not worthwhile. The inventor is often quite alone with his vision.

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27 At a meeting of the American Association for the Advancement of Sciences, Dr. Barry Commoner, Director, Center for the Study of Natural Systems at Washington University in St. Louis estimated that "the optimum population the earth can support is 6 to 8 billion people (it is presently 3.5 billion), and that we will reach that figure by the year 2,000 even if present population trends recede." Even if man could produce enough food, Dr. Commoner estimates, "this may so strain the world's ecosystem—its water-soil-biological balance—so to threaten its continued stability." Washington Post, Dec. 30, 1969, at A2, col. 1. *See also,* David E. Lilienthal, *300,000,000 Americans Would Be Wrong,* The New York Times Magazine, Jan. 9, 1966.

Notwithstanding these problems, a characteristic of America in the past century has been a certain boldness and courage to take risks in applying science. With the immensity of consequences and the irreversible nature of many technological changes, the propensity for risk taking must now be coupled with a deeper assessment of both costs and benefits. We must continue to advance, but we must recognize that mere change is not equivalent to progress. We must not discourage the entrepreneur, the idea man, or the engineer. Indeed, we must encourage the greatest degree of imagination in order to meet the problems of life and political existence. But this imagination must be extended to include the full assessment of all the consequences without fear that a reactionary society will seize on the risks as an excuse for stagnation. As Admiral H. G. Rickover, the father of the nuclear submarine, once described the role of technology:

> When technology is believed to be a force with a momentum of its own that puts it beyond human direction or restraint, it may become a Frankenstein destroying its creator. But when it is viewed humanistically, in other words as a means to human ends, it can be made to produce maximum benefit and do minimum harm to human beings, and to the values that make for civilized living.[28]

II. The Assessment Lag

Technology assessment has been carried out from time to time and is being carried out today on an ad hoc basis. Historically, assessment usually has occurred long after the technology was introduced and when undesirable consequences had reached serious proportions. For example, the intensive cultivation of grasslands in the Great Plains precipitated the duststorms and erosion during the drought of the 1930's. As a result, studies showed the way to corrective action through windbreaks and other soil conservation measures, but it was already too late to prevent hardships to the farmers involved. Countless times a radical change was made to a locality or region prior to any assessment of potential conse-

28 Address by Vice Admiral H. G. Rickover, A Humanistic Technology, Granada Guildhall Lectures of the British Association for the Advancement of Science, in London, Oct. 27, 1965, in *Hearings, supra* note 20, at 301.

quences. Invariably, some adverse condition arose which took time and effort to combat. The building of the St. Lawrence Seaway was a unique technological feat, but it allowed certain predatory oceanic eels to enter into the Great Lakes to the detriment of commercial and sport fishing. The rabbit in Australia and the giant African snail in the Pacific Islands are other poignant reminders of what happens when biological control mechanisms are bypassed or upended.

The need is to find out how, why, and what we are doing to the natural rhythms of earth and to the life and environment upon it. What apparently is happening is that man, through technology building has enormously increased his ability to affect nature, to alter it, to foreshorten it, to accelerate its natural cycles, and possibly to destroy many of its life-supporting characteristics. Many unwanted consequences of technology have been labeled as the price of progress. Smoke in Pittsburgh became the sweet smell of prosperity. But even in a nation as affluent as ours, the price of a devastated environment seems too high a cost. At the same time, mature reflection suggests that the price need not have been paid at all if a thorough understanding had been gained of what was happening in the ecological system at an earlier date.

Technology assessment has been haphazard in the United States because we have never fixed the responsibility for the total results of technology. The market place has been the institution for assessing technology, but it has only considered the first order consequences, and not the broader social implications.[29] Traditionally, the legal system has been the method for imposing broader responsibilities on man for his actions. When a new technology comes into being, the law does not seek to deal with possible hazards until suits have been filed by persons to recover for injuries or seek to enjoin an activity before injury occurs. In dealing with these cases, the courts seek to adapt established legal principles to the new issues presented, and eventually satisfactory rules of law are formulated to deal with the new problem. As illustrations of such judicial evolution, one might mention such doc-

29 For a summary of how assessments are carried out by industry, see Cetron & Weiser, *Technological Forecasting and Planning R&D—A View from the R&D Manager's Desk*, 36 GEO. WASH. L. REV. 1079 (1968).

trines as the law of private nuisance, products liability, and liability for harm caused by ultrahazardous or abnormally dangerous activities.[30] However, the courts operate retrospectively, and many years may elapse before the courts have formulated a set of rules and principles by which individuals can redress grievances. By that time the damage to the environment may be irreparable. As presented by Professor Harold P. Green:

> The basic question is whether our legal system is capable of imposing effective social control over new technologies before they inflict very substantial, or even irreparable, injury upon society. It seems clear that we cannot rely on the courts alone to protect society against fast-moving technological developments. Judge-made rules of law always come after, and usually long after, the potential for injury has been demonstrated in the cases of individuals who have actually sustained injury. . . . If we cannot rely solely on our courts to protect society adequately, reliance must be placed on our legislatures and on administrative bodies performing quasi-legislative functions. These have the theoretical capability to absorb and evaluate current information, to monitor developments as they occur, and to formulate laws controlling the development and use of technology . . . . But neither benefits nor hazards can be meaningfully quantified in this balancing process, and thus we can only hope that the law-makers will perform this balancing operation with wisdom and sound judgment. It should be noted, moreover, that hazards can never be reduced to zero; all human activity involves hazards and risks. Law-makers can only endeavor to establish rules which minimize the hazards to the point consistent with the conduct of activities which are regarded as socially desirable.[31]

When the hazards become too great to be generally acceptable, the government, and more particularly the Congress, can place responsibility for control of the hazards squarely with the industry causing those hazards. As a result, the costs of necessary measures are borne by the user rather than by the general public.[32]

30 *See generally* Katz, *The Function of Tort Liability in Technology*, 38 U. CIN. L. REV. 587 (1969).

31 H.P. Green, The New Technological Era: A View from the Law, Jan. 1968, at 4 (Program of Policy Studies in Science and Technology, The George Washington University, Washington, D.C., Monograph No. 1).

32 The concept of user charges has been employed by the federal government for

As Professor Milton Katz testified before the Subcommittee, it is the existing legal system that determines the incidence of costs, and changes in the law can modify the incidence of these costs. For example, damage to the community caused by waste products from an electric power plant will be a "social" and "external" cost only if, and to the extent that, the legal system happens so to decree. The legal system may alter the incidence of a cost by recognizing a cause of action in tort against the company. A judgment in tort would transfer back to the company the cost previously suffered by the plaintiffs in the form of air or water pollution.[33] The judgment would convert the social cost into an "enterprise" cost. It would internalize the external cost. Through tort law, the legal system operates directly upon the incidence of costs. Through the law of contract or through the tax structure, the legal system may operate indirectly on the incidence of costs. Classic examples of legislation affecting the incidence of cost are the industrial safety and workmen's compensation laws. Recently, a number of states have begun to enact and enforce anti-pollution laws with Illinois taking perhaps the most aggressive action.[34] The State of Minnesota is posing an interesting constitutional issue by insisting that it can set standards for emission of radioactive materials from nuclear power plants which are more restrictive than those promulgated by the Atomic Energy Commission under the Atomic Energy Act of 1954.[35]

As for governmental agencies, their potential for technology assessment is directly affected by the legal system. The scope and nature of the functions of the several agencies are determined by statute. One difficulty in relying on existing regulatory and administrative bodies is that federal agencies frequently may have too narrow a statutory assignment to provide adequate assessment of an entire technological system. For example, the environmental

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some time, and we adopted the concept for the standard reference data system. *Supra,* note 6. As to how user charges might be employed to abate water pollution, see FEDERAL WATER POLLUTION CONTROL ADMINISTRATION, INCENTIVES TO INDUSTRY FOR WATER POLLUTION CONTROL: POLICY CONSIDERATIONS 93 (1967).

33 *Hearings, supra* note 20, at 175.

34 McCarthy, *Pollution Control Through Lawsuit,* Washington Post, Jan. 20, 1970, at A14, col. 5.

35 42 U.S.C. §§ 2011-2281 (1964).

pollution problem is fragmented among many agencies[36] with the result that abatement of contamination of one type may simply shift the burden of pollution to another part of the ecosystem. In addition, some federal agencies such as the Federal Aviation Agency and the Atomic Energy Commission have both promotional and regulatory functions, which may create an inherent conflict of interest.

For example, while no one questions the need for additional electric power, there are increasing challenges to power plant siting, and in particular, to nuclear power plant siting.[37] There also has been legislation introduced calling for a moratorium on the construction of new nuclear power plants.[38] Nuclear plants have been shown to be cleaner than fossil-fueled plants,[39] but they do release some radioactive effluent and approximately twice the amount of heat to the environment as comparable-sized fossil-fueled plants.[40] While the radiation emitted is well within the limits established by national and international bodies,[41] there are those who contend that any radioactivity added to the environment is harmful and should be stopped. In fact, man lives exposed to radiation in the natural environment, and as yet there is no demonstrable scientific evidence that presently permissible

36 One survey shows that there are 90 separate federal environmental programs involving 26 governmental or quasi-governmental bodies, 14 interagency committees, and 13 Congressional committees or subcommittees. *The Ravaged Environment,* NEWSWEEK, Jan. 26, 1970, at 33.

37 It is assumed that electric power needs will double by 1980. See JOINT COMM. ON ATOMIC ENERGY, 91ST CONG., 1ST SESS., SELECTED MATERIALS ON ENVIRONMENTAL EFFECTS OF PRODUCING ELECTRIC POWER (Comm. Print 1969).

38 H.R. 7768, 91st Cong., 1st Sess. A bill to amend the Federal Water Pollution Control Act, introduced by Representative Wolff of New York (to Public Works). See New York Times, Dec. 24, 1969, at 49, col. 4.

39 When asked about radioactive emissions from nuclear power plants, Dr. Lee A. DuBridge, President Nixon's Science Advisor, stated: "Actually, the emissions from nuclear plants are less dangerous than the substantial pollution from power plants that burn oil or gas or coal." *How to Control Pollution,* U.S. NEWS AND WORLD REPORT, January 19, 1970.

40 See FEDERAL POWER COMMISSION, PROBLEMS IN DISPOSAL OF WASTE HEAT FROM STEAM-ELECTRIC PLANTS (1969); OFFICE OF SCIENCE AND TECHNOLOGY, CONSIDERATIONS AFFECTING STEAM POWER PLANT SITE SELECTION (1968); J. R. Clark, *Thermal Pollution and Aquatic Life,* SCIENTIFIC AMERICAN, March 1969, at 19.

41 The Federal Radiation Council (FRC), The International Commission on Radiological Protection (ICRP), and the National Council on Radiation Protection and Measurements (NCRP). The functions and membership of these organizations are shown in *Hearings on Environmental Effects of Producing Electric Power Before the Joint Comm. on Atomic Energy,* 91st Cong., 1st Sess. pt. 1, at 158-63 (1969).

amounts of radioactivity added to the environment by nuclear power plants is causing undue harm. Nevertheless, the present AEC radiation standards have been challenged by two scientists of the Lawrence Radiation Laboratory. Drs. John W. Gorman and Arthur R. Tamplin argue that the Federal Radiation Council guidelines, on which the AEC standards are based, will result in as much as 16,000 additional cancer deaths per year and that the guidelines should be ten times more rigid than they are.[42] Their findings have been disputed by the AEC before the Muskie Subcommittee[43] and before the Joint Committee on Atomic Energy.[44] The interesting thing about this controversy is that of all modern hazards, radiation has been the most researched and the most regulated and yet there are gaps in our understanding and assessments of its hazards.

This brings us back to the remedies available under the existing legal system and a reminder that long range effects are often difficult to prove and that experts will often disagree. What I see is not a modification of our current legal system, nor a realignment of agency functions. Rather what is needed is a new organization with the broadest possible scope which will be able to analyze technological benefits and detriments and to propose alternative courses of action; an organization which will act before the fact and not after it and with no bureaucratic interests to preserve or promotional responsibilities to advance.

III. The Scope of Technology Assessment

Technology assessment will deal for the most part with applications in the United States, although in some cases it will be necessary to consider the entire globe as an integrated ecosystem. In addition, in viewing assessment efforts, it may be necessary to consider the differences between technology for the rich nations as opposed to that for the emerging countries.[45] A risk which the

42 For a brief summary of the dispute see *Agencies Review Attack on Radiation Guides; AEC Opposes Change,* Nucleonics Week, Jan. 8, 1970, at 2.

43 Subcommittee on Air and Water Pollution of the Senate Committee on Public Works.

44 See *Hearings on Environmental Effects of Producing Electric Power, supra* note 41, at 640.

45 For example, at the Biosphere Conference in Paris in 1968, it was clear that

Western World might avoid would perhaps be acceptable to a nation struggling with starvation. For example, the ecological hazards of chemical pesticides might be sufficient to restrict their use in the United States, but in India or Southeast Asia with the threat of malaria coupled with a severe nutritional problem, the broad use of insecticides may be justified.

To assess technology, one has to establish cause and effect relationships from the action or project source to the locale of consequences. It should be remembered that assessment is an aid to, and not a substitute for, judgment. Technology assessment provides the decisionmaker with a list of future courses of action backed up by systematic analysis of the consequences. In this sense it is an analytical study that could be prepared by anyone. Its utility should be enhanced if it is undertaken for a policymaking group that could outline the nature of the problem for the study team beforehand. In a broader sense, assessment is part of the legislative process.

Six steps have been suggested in technology assessment. Briefly stated, the assessor would identify all impacts of a program; establish cause and effect relationship where possible; determine alternative methods to implement the program; identify alternative programs to achieve the same goal and point out the impacts; measure and compare sums of good and bad impacts; and present findings from the analysis. In the initial step one would place the technology within the total societal framework and identify all impacts in the natural, social, economic, legal and political sectors. Direct effects would be separated from derivative effects. Then, causal chains emanating outward in time from the impacting technology would be established. Short-term effects on each sector directly attributable to the program could be separated from long-term effects that result from many forces. Next, the question is asked: In what alternative directions could the program be guided? Each course of action would have a slightly different set of con-

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the emerging nations were more interested in such things as water resources, soil erosion, and increasing crop production rather than environmental pollution. See final report on the Intergovernmental Conference of Experts on the Scientific Bases for Rational Use and Conservation of the Resources of the Biosphere, Paris, Jan. 6, 1969. (Available from the United Nations Educational, Scientific, and Cultural Organization, UNESCO House, Paris, France).

sequences. A second search for alternatives is then initiated. The given goal is reformulated in order to identify other programs or policies in addition to the technology program in question that could achieve the same objective. Identification of new consequences is necessary at this point. The three types of consequences —desirable, undesirable and uncertain—would then be separated for each alternative. Ideally, the assessor would measure and compare the effects where possible and ultimately make findings from the analysis. The conclusions would point out policy issues arising from the benefit/risk ratios of alternative courses of action and from uncertain consequences where further experimentation is feasible and desirable.

IV. Technology Assessment Hearings

In November and December 1969 the Subcommittee held three weeks of hearings on technology assessment[46] during which we heard the testimony of twelve witnesses representing government, the universities, and industry who have given substantial thought to the concept of technology assessment and who may be recognized as leaders in the field. As a result of these hearings, the Subcommittee has gained additional perspective concerning the ramifications of the technology assessment, and we are continuing to consult with the witnesses and others as we analyze the testimony. During the hearings there was considerable testimony concerning the "how" and the "when" of technology assessment, although the testimony did not delve too deeply into the basic mechanics for establishing a technology assessment organization. For the most part, all of the witnesses agreed that some new mechanism was necessary, whether the mechanism be a newly created organization or group added to an existing organization. The one notable exception was the testimony of Dr. Lee DuBridge, the President's Science Advisor and Director of the Office of Science and Technology. Dr. DuBridge indicated that we should conduct a few pilot assessments before deciding upon a mechanism to implement the concept.[47]

46 *Hearings, supra* note 20.
47 *Id.* at 28.

I have no quarrel with the need to conduct pilot assessments, and in fact, I think they would be extremely valuable. However, the Subcommittee has been considering this idea now for the past five years, and considering the urgency of the problem, I believe we are sufficiently informed to begin to put these ideas in practice. Furthermore, as a practical matter, legislation of this type takes a considerable period to evolve, and action could probably not be completed for at least two years. During this period the mechanism will continually evolve and take shape, but I do believe it is important that we start now to offer some concrete proposals. As an example of the time factor, in late 1964 the Subcommittee began a review of the organization and management of the National Science Foundation. That task was relatively simple compared to establishing a technology assessment mechanism, yet it took until mid-1968 before the amendments we proposed to the NSF Act were finally signed into law.[48] The "Technology Assessment Act of 1970" was introduced by me on April 16, 1970. This bill, H.R. 17046, would establish a technology assessment mechanism for the legislative branch. Later, similar considerations are scheduled for the executive branch. What I would like to do here is to discuss some of the considerations which must be given to the bill, and some of the things we will have to decide; however, the specific provisions will be subject to constant evolution. I am sure that even after the technology assessment mechanism is formalized in legislation, there will be a need periodically to review its charter as the organization gains operating experience.

In deciding what type of an organization is necessary to carry out technology assessments, it is first necessary to decide what the organization is going to assess. In the first technology assessment bill, H.R. 6698, which I introduced in March 1967, we identified as the purpose of the organization to provide a method of dealing with applied research and technology by (1) identifying the potentials of applied research and technology and promoting ways and means to accomplish their transfer into practical use, and (2) identifying the undesirable byproducts and side effects of such applied research and technology in advance of their crystallization

48 Act of July 18, 1968, 82 Stat. 360 (codified in scattered sections of 15 U.S.C., 42 U.S.C.).

and informing the public of their potential in order that appropriate steps may be taken to eliminate or minimize them.

As a result of the hearings and the various discussions I have had since H.R. 6698 was first introduced, I still envision this as the primary purpose of the organization. One modification I might look for, however, is the elimination of the word "applied," as distinguished from "application," for two reasons. First of all, it has been amply demonstrated that the division between basic or pure research and applied research is often artificial and somewhat arbitrary. Second, a considerable amount of the present research which could have a tremendous impact on society is still in its very early stages, but we should consider its implications even now. I am thinking specifically about some of the recent biological research and, for example, the recent work by a group at Harvard University in isolating the gene. Indeed, Dr. Jonathan Beckwith, Associate Professor of Bacteriology and Immunology, who guided the Harvard University research team in isolating the gene has been quoted as saying:

> It is our feeling that progress in the field of molecular genetics has been extraordinary in the last few years and that in isolating the pure lac gene, we presented a graphic, useful, and easily understood example of that progress.
>
> This rapid progress—not specifically our accomplishment—makes it likely that the time, when at least some steps in genetic engineering can take place, is not very far off—perhaps 25 years. Thus the public is entitled to know what is in the offing, because the implications of the progress being made in the field are tremendous.
>
> We don't want to work in an ivory tower, make some contribution to science, then turn it over to the government, and say, "do whatever you like with this." Twenty-five years from now we don't want to be a group of J. Robert Oppenheimers, beating our breasts and mumbling mournfully, "we shouldn't have done it."[49]

Another member of the research team, Lawrence Eron, stated:

> Nowadays the science of genetics is moving so quickly that we may very easily live long enough to see the consequences of various discoveries in the field, including our own. That's

49 *How Can We Change the Human Race?*, PARADE MAGAZINE, Jan. 4, 1970, at 7.

> why we have to think of them not only in the light of science but as developments with far-reaching social implications. Changing the human race via genetic engineering is no small thing.[50]

In deciding to include basic research, it is important to note also the results of the study, TRACES, sponsored by the National Science Foundation.[51] In this study, an effort was made to trace retrospectively the key events which led to the development of five major technological innovations—magnetic ferrites, video tape recorders, the oral contraceptive pill, the electron microscope, and matrix isolation. The study indicated that of the key events documented, approximately 70 percent were nonmission research, 20 percent mission-oriented research, and only 10 percent the development and application of research. The report further indicates that the average time between conception of the innovation to demonstration of the innovation was 9 years. This report indicates that the optimum time to influence programs or propose alternatives would be at one of the key points before the innovation had been completed. If this is the case, it would be important to keep abreast of significant technological developments as they occur.[52] Conversely, however, the National Academy of Engineering report demonstrates the difficulties inherent in technology-initiated analyses, and indicates that assessments covering more than five years are likely to be unreliable because of unforeseen events and scientific discoveries.[53] Nevertheless, it is this type of assessment which the Congress needs and does not now have. As the Academy report so accurately stated:

> The concern of Congress . . . is broader than the problems of the moment. The concern expresses itself at least as uneasiness regarding unidentified consequences of scientific and technological efforts. To plan effectively for the future, there

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50 *Id.*

51 NATIONAL SCIENCE FOUNDATION, TECHNOLOGY IN RETROSPECT AND CRITICAL EVENTS IN SCIENCE (1968).

52 It has been estimated that "the most important technological developments for the next 30 years will turn out to be the fruit of things that have not yet been invented." Dr. R.A. Frosch, *Navy Research and Development,* NAVAL RESEARCH [REVIEWS], April 1969, at 3.

53 TECHNOLOGY ASSESSMENT, *supra* note 18, at 5.

> is a need for assessment of the consequences of both new and existing technologies . . . .[54]

Assuming that serving the needs of the Congress will require the examination of the full spectrum of research and development, it is then necessary to consider whose research should be covered by a technology assessment program and whether the research involved should include both classified and unclassified information. At the present time, the total research and development budget totals about $26 billion, of which about $17 billion is supported by the federal government and about $8.5 billion by industry,[55] with the remainder supported by universities, state governments and various other organizations. It seems clear that both because of the size of the industry budget and because such research tends to be centered near the line of more immediate public application, it will be necessary to examine the research supported by both the federal and the private sector. A more difficult question arises in regard to classified research. Two basic assumptions seem to conflict: (1) that the creation of a technology assessment mechanism is in the public interest and (2) that it is likewise in the public interest that classified information be withheld from public disclosure because it would adversely affect the national security of the United States. However, as was pointed out during the hearings, much of the technology which is eventually adopted in the private sector grows out of classified defense work. Therefore, unless we are prepared to wait until the research manifests itself in an unclassified industrial application, which itself may be withheld as trade secret or proprietary information, it would appear necessary for the organization to have access to classified defense work. The public interest can be served, however, by withholding the details of this information from public disclosure. Even here, however, this could involve some modification of historical "need to know" concepts.

With the full spectrum of R & D open for observation, there is also a need to order priorities. The technology assessment organization should not normally duplicate the work being performed both inside and outside the executive branch, although it should

54 *Id.* at 15-16.
55 *NSF Hearings, supra* note 3, at 56-57.

be free to take an independent view of such evaluations. During the hearings, Dr. Myron Tribus suggested that the following criteria be used in determining priorities: "(1) That there is already an ongoing activity in either the public or private sector as to the particular technology, and (2) that it is reasonable to anticipate that such ongoing technology may have a significant impact on the nation."[56]

In its report, the National Academy of Engineering's Committee on Public Engineering Policy offered these somewhat more specific criteria:

(1) Does the technology application have significant economic or social impact at the national level? The cost (in money and manpower) of performing an effective technology assessment requires that only issues with high potential for significant social impact be considered for full-scale assessment.
(2) Is the assessment needed to resolve a highly visible problem? Certain problem areas gain public attention and develop strong political pressures. Alleviation of today's difficulties may be an essential step toward coping with tomorrow's problems.
(3) Is the assessment concerned with rapidly changing technology (the so-called "hot areas")? Fast-moving technology creates new applications that often receive quick acceptance, thus arguing for assessment well in advance of widespread public adoption.[57]

Another approach in deciding what to investigate is that offered by Mr. Lester S. Jayson, the Director of the Legislative Reference Service, Library of Congress. Mr. Jayson suggested that the assessment organization prepare a list of areas in need of assessment which would be submitted to the Congress, and that the Congress could then make its views known as to which areas it considered most important in carrying its legislative responsibilities.[58]

It seems clear that all of these ideas have merit, and that there

56 *Hearings, supra* note 20, at 71.
57 TECHNOLOGY ASSESSMENT, *supra* note 18, at 9-10.
58 *Hearings, supra* note 20, at 44.

will have to be an opportunity for interaction between the assessing organization and the Congress. If the organization is to be effective, it will have to have strong ties to the Congress. In H.R. 6698 we provided that the Technology Assessment Board, as it was called in the bill, "shall be independent of the executive branch of the Government," and H.R. 17046 is similar. I am convinced that this is a proper course of action. The executive branch already has the resources of the Bureau of the Budget, the Office of Science and Technology, the various agencies, and the services of numerous advisory boards and councils in making assessments. However, as Dr. Donald Hornig, the Science Advisor to President Johnson and Director of the Office of Science and Technology, indicated during our Subcommittee hearing on the Utilization of Federal Laboratories in 1968, usually these reports are not made public, and many times they are not even reduced to writing.[59] The various assessments made by or on behalf of the executive branch are merged into the recommendations contained in the President's budget submission, and the differing viewpoints leading up to those discussions are generally not aired publicly.[60] Consequently, in order to make an intelligent assessment considering all of the ramifications of a given course of action, the Congress needs an independent assessment group, free of the inherent conflict of trying to serve both the legislative branch and the executive branch. This is not to say that the assessment organization will not work in an advisory capacity with respect to the executive agencies, because if it is to function effectively, a spirit of cooperation must exist. The relationship which has developed over a period of time between the General Accounting Office,

59 *Hearings on Utilization of Federal Laboratories Before the Subcomm. on Science, Research, and Development of the House Comm. on Science and Astronautics,* 90th Cong., 2d Sess. 7 (1968).

60 See testimony of Elmer B. Staats, Comptroller General of the United States, where he stated: "In our assistance to the committees in their consideration of alternative proposals, our work and the work of legislative committees is made much easier if the background studies and analyses made by or for the executive branch in the development of its proposals for congressional considerations are made available. But we have found that executive agencies, in many cases, are reluctant or unwilling to provide the legislative branch with such studies or analyses or other material which contain communications, opinions, and argumentation which may or may not be consistent with the official position or decision of the agency or which may reveal prematurely executive branch determinations as to priorities." *Hearings, supra* note 20, at 147.

which is responsible to the Congress, and the executive agencies may be analogous.

Turning now to the structure of the technology assessment organization, there have been suggestions that the organization be associated, to a greater or lesser extent, with the Legislative Reference Service of the Library of Congress and with the National Science Foundation. While both of these organizations can offer valuable assistance, as can other organizations such as the National Bureau of Standards[61] or the General Accounting office,[62] I am inclined toward the view that some new entity should be created.

The size of the assessment organization is another problem. During the hearings, the point was frequently made that in order to conduct a meaningful technology assessment, the individuals making the assessment must be on the forefront of knowledge in the area under inquiry. Consequently, it is argued, a bureaucrat relying on published information, even if it were possible to read all the pertinent information, could not make an adequate assessment because the results of the particular research are often outdated by the time they are published. This idea was stated rather bluntly during the hearings by Dr. John P. Pierce: "Successful technological assessment must be done by experts in relevant areas of knowledge and action. Experts may sometimes be blind, but ignorance is even blinder."[63]

Dr. Pierce's viewpoint is undoubtedly true in many respects. At other times what is needed is a somewhat dispassionate view. A combination of the two is most desirable. Consequently, I see the need for a relatively small or moderately sized staff which would have the capability to perform in-house reviews and which, at the same time, could contract for specific assessments by qualified experts.

61 *Id.* at 195-211.

62 According to Comptroller General Elmer B. Staats, the GAO has placed "increased emphasis on reviewing Federal programs and activities from the standpoint of the extent to which congressional objectives are being achieved." *Id.* at 146. He went on to say, however, "we do not believe it would be appropriate for GAO to undertake broad assessments of developing technology and its impact on society." *Id.* at 154. It should be pointed out that GAO would not have the authority to examine technology or programs that did not involve the expenditure of federal funds.

63 *Id.* at 212.

Regarding overall management, there are basically three different organizational structures which could be employed. Regardless of the specific organizational structure, however, the primary objective would be to provide at the policy level an input of views representing the different sectors of the economy and the various disciplines of science, including the social sciences and the law.[64] As one alternative all of the organization's authority could be vested in one individual in a manner similar to the position of the Comptroller General, who is appointed by the President, with the advice and consent of the Congress, for a term of 15 years. Policy recommendations, if desired, could come from a General Advisory Council reporting to the head of the organization. The second alternative would be the creation of a small full-time board similar to the structure of the Atomic Energy Commission. Again there could be a General Advisory Council or smaller advisory committees in specific fields or both. A third alternative could be similar to the structure of the National Science Foundation wherein policy decisions are made by a non-federal part-time board, and responsibility for day-to-day operations is vested in a full-time director.

We turn next to the responsibilities of the organization, towards the information it will develop. The organization's function should be exclusively informational. It should have no authority, for example, to halt a particular research project or to issue regulations requiring safeguards. As I envisioned it, the organization's function would be to report to the Congress and to the public.[65] The responsibility for action would remain with the public and its representatives in the Congress.

More specifically, as detailed by the National Academy of Engineering's Committee on Public Engineering Policy, the Technology Assessment Board would:

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64 For the role of the lawyer in support of science see Baldwin, *Law in Support of Science: Legal Control of Basic Research Resources,* 54 GEO. L.J. 559 (1966); Green, *Technology Assessment and the Law: Introduction and Perspective,* 36 GEO. WASH. L. REV. 1033 (1968).

65 Some people have suggested that the public tends to be apathetic over issues of the direction and control of science and technology, but I do not think this need be the case. See for example Morgenthau, *Modern Science and Political Power,* 64 COLUM. L. REV. 1386, 1405 (1964).

(1) Clarify the nature of existing social problems as they are influenced by technology, possibly with indications of legislation needed to achieve satisfactory control.
(2) Provide insights into future problems, to make possible the establishment of long-term priorities and to provide guidance for the allocation of national resources.
(3) Stimulate the private and public sectors of our society to take those courses of action for the development of new technology that are most socially desirable.
(4) Educate the public and the government about the short-term and long-term effects of the range of alternative solutions to current problems.[66]

As I see the role of the Congress in this process, the organization's reports would mainly be in response to committee requests and, when completed, would be referred to the applicable House and Senate unit. Those reports which require the most immediate action or which raise the most serious issues could be scheduled for hearings with all of the parties given an opportunity to present their case. If further action was deemed necessary by the committee, corrective legislation would be introduced which would be referred to the cognizant committees of the Congress. If the matter could be handled by regulation of one of the existing regulatory agencies, some issues or problems could be certified directly to applicable agencies by the committee. The added function of all Congressional committees will be to give direction to assessment efforts, to provide a forum for public debate, and to bring to the attention of the Congress, the executive and the general public, those issues in need of critical decisions and the possible alternatives available.

An interesting additional question is what responsibility, or liability, should the technology assessment group have for the material it publishes. We have considered this question briefly and will consider it fully in later hearings. Perhaps the liability question will be omitted from the bill, and if in the future an amendment is needed, the basic act can be amended.

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66 TECHNOLOGY ASSESSMENT, *supra* note 18, at 3.

V. Conclusion

The need for technology assessment has been amply demonstrated. If we as a society are to cope with rapidly expanding technology before it so alters our environment that its effects are irreversible, we must take action now. No longer can we afford to wait, as we have so often in the past, until a disaster occurs which raises public indignation to such a degree that it compels action. The changes of the future will be accelerated by a growing population and may be so subtle that by the time they are recognized, they will be beyond the powers and resources of our country to change. The first Water Pollution Control Act[67] was passed in 1948 and the first Clean Air Act[68] was passed in 1955. Yet, as we enter the 1970's, the quality of our environment continues to deteriorate, and massive sums,[69] which themselves are subject to competing demands, are needed to reverse the trend. What I propose is an early warning system designed to spot such potential benefits and dangers, a system designed to promote the benefits, and for the dangers, to provide alternatives for prudent action before interests become wedded to the technology.

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67 Act of June 30, 1948, 62 Stat. 1155.

68 Act of July 14, 1955, 69 Stat. 322.

69 For example, the cost of collecting and adequately treating municipal and industrial waste discharged into the waterways has been estimated to be between $24 and $26 billion. Federal Water Pollution Control Administration, The Cost of Clean Water, vol. 1, at 9 (1968).

NOISE CONTROL: TRADITIONAL REMEDIES AND A PROPOSAL FOR FEDERAL ACTION

JAMES M. KRAMON*

Introduction

A significant imposition which technology has made on our lives is noise. Automobiles, trucks, airplanes, construction equipment, factories, railroads, and housecleaning equipment all contribute to the din which is characteristic of modern communities. Like its cousins air pollution and water pollution, most noise is the result of decisions to opt for particular technological possibilities without considering fully their impact on people. Partly because noise cannot be seen and can be eliminated by turning off the source and partly because the full effects of noise on human beings are still open to question, it has not received the degree of social concern that has recently been given air and water pollution. Yet noise has disrupted the environment just as surely as other forms of pollution and will require commensurate attention.

In addition to hearing loss, noise causes a number of undesirable physiological responses in people. For example, it is well-established that noise affects the brain's pacing of the cardiovascular, endocrine, reproductive, and neurological functions.[1] In addition, a host of psychological responses are attributed to noise, including annoyance, fear, speech impairment, sleep loss, anxiety, and feelings of loss of privacy.[2] There is significant evidence that

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1 Welch, *Physiological Effects of Audible Sound*, SCIENCE, Oct. 24, 1969, at 533; Sullivan, *Noise in the Cities: Its Effect on the Hearing Man*, 113 CONG. REC. H670-71 (daily ed. Jan. 26, 1967). Noise can also affect the human fetus. *See* Sontag, Effect of Noise During Pregnancy upon Foetal and Subsequent Adult Behavior, Dec. 1969 (unpublished paper presented to A.A.A.S. annual meeting at Boston, Mass., Dec. 27, 1969). The effects of sound on a human fetus are due in part to its effects on the host mother and in part to its effects on the fetus itself. A clearly demonstrated change in heart rate attributable to various sorts of sound has been observed in numerous experiments with fetuses. *Id.* at 11-15.

2 *See, e.g., Hearings on Noise: Its Effect on Man and Machine Before the Special*

certain types of noise severely impair the ability to perform even simple tasks.[3] Noise is said to cause dream interruption which may result in a variety of psychotic symptoms, including paranoid delusions, psychoses, hallucinations, suicidal tendencies, and general inability to cope with frustration.[4] There is considerable evidence that long exposure to noise results in a learned response to ignore certain types of sound altogether.[5] Perhaps the most extreme speculation is that there is a correlation between excessive noise and murder.[6] At least one acoustical physicist believes that the levels of noise may soon become lethal.[7]

The purpose of this article is to consider the efficacy of various legal remedies for noise resulting from ill-considered use of technology. A threshhold problem will be that of defining noise. The traditional legal remedies for noise will be discussed with a view toward determining their limitations. The technological possibilities for, and costs of, eliminating certain sources of noise will be considered, and a workable approach to certain problems of noise which are susceptible to technological control will be suggested. Although the problem of aircraft noise, including the sonic boom, is not of primary concern here,[8] experience with that

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Investigating Subcomm. of the House Comm. on Science and Astronautics, 86th Cong., 2d Sess. 23 (1960); *Freedom From "Sound,"* RESOURCES, Jan. 1969, at 15; 2 W. A. ROSENBLITH, K. N. STEVENS & STAFF OF BOLT BERANEK AND NEWMAN, HANDBOOK OF NOISE CONTROL 13-177 (Wright Air Development Corp. Technical Report No. 52-204, 1953).

3 *E.g.*, COMMITTEE ON ENVIRONMENTAL QUALITY OF THE FEDERAL COUNCIL FOR SCIENCE AND TECHNOLOGY, NOISE — SOUND WITHOUT VALUE 4, 32 (1968) [hereinafter cited as COMMITTEE ON ENVIRONMENTAL QUALITY].

4 *See, e.g., Jet Noise Responsible for Psychotic Ills*, TRIAL, Aug.-Sept. 1966, at 6. Extensive materials on both physiological and psychological responses to noise are found in HANDBOOK OF NOISE CONTROL, chs. 7, 9, 10, 11 (Harris ed. 1957) [hereinafter cited as HANDBOOK] and in F. L. HARMON, THE EFFECTS OF NOISE UPON CERTAIN PSYCHOLOGICAL AND PHYSIOLOGICAL PROCESSES (Woodworth ed. 1933).

5 Welch, *supra* note 1, at 534; Zinsser, *Are We Hooked on Noise?*, LIFE, Oct. 31, 1969, at 12. The latter article quotes an acoustic engineer who suggests that the noise addiction phenomenon may result in a feeling of discomfort if customarily noisy operations were suddenly to be conducted in silence.

6 *See, e.g.*, Zinsser, *supra* note 5; *Jet Noise Responsible for Psychotic Ills, supra* note 4; Mecklin, *It's Time to Turn Down All That Noise*, FORTUNE, Oct. 1969, at 130.

7 *Noise — More than a Nuisance*, U. S. NEWS & WORLD REPORT, Nov. 10, 1969, at 40.

8 The legal and technological implications of aircraft noise have received exhaustive attention elsewhere. *See, e.g.*, Note, *Airplane Noise: Problem in Tort Law and Federalism*, 74 HARV. L. REV. 1581 (1961); Note, *Liability for Aircraft Noise* —

particular noise problem shall serve as a useful analogy at various places in this discussion.

I. Defining Noise

A substantial obstacle to successful control of noise is the problem of defining it. This difficulty results from the lack of a set of objective parameters which reflect the impact of noise on people. Unlike air pollution, the physical properties of which (in parts per million of a given pollutant) correspond to particular adverse physiological effects, sound is not easily measured in a manner which yields a functional correlation with its physiological and psychological consequences.

Sound may be fully described in terms of three variables: amplitude, frequency, and time. A quantitative measurement of a particular sound can be made by use of existing scientific instruments which determine accurately these three variables. Several problems arise, however, in attempting to define the range of allowable sound in terms of these variables. Since it is usually difficult to measure the frequency of sound in the field, sound is generally defined simply in terms of decibels, which are the standard measure of its amplitude or intensity.[9] Even when a more discrete objective analysis is made, the resulting information does not correspond nicely with the various undesired effects of noise on human beings. Thus one cannot easily suggest a series of limits for sound which judges, administrators, and legislators may utilize in their normative processes and which law-enforcers in the field may use to decide what is excessive noise.[10]

The Aftermath of Causby and Griggs, 19 U. Miami L. Rev. 1 (1964); Tondel, *Noise Litigation at Public Airports*, 32 J. Air L. & Com. 387 (1966); 1965 A.B.A. Sect. Ins. N. & C. L. 557; Malley, *The Supersonic Transport's Sonic Boom Costs: A Common Law Approach*, 37 Geo. Wash. L. Rev. 683 (1969); Comm. on Public Engineering Policy, National Academy of Engineering, A Study of Technology Assessment 76-172 (House Comm. on Science and Astronautics, 1969); W. A. Shurliff, S.S.T. and Sonic Boom Handbook 21-63 (1970).

9 This is not to suggest that obtaining a decibel measure of noise is always easy. Such measurements are frustrated by: (1) the difficulty of excluding background noise from the source being measured, (2) the effects of physical surroundings and atmospheric conditions on readings, and (3) the problems of compensating for distance from the source. *See Urban Noise Control*, 4 Colum. J. Law & Soc. Prob. 105, 111-12 (1968).

10 The problem of relating physical measurements of sound to adverse effects

In contrast to definitions which seek to define noise in terms of objective measurements are those which focus on its impact on people. A standard reference work on the subject of noise defines it simply as "unwanted sound."[11] This definition might be embellished by defining noise as sound that is "unwanted" because of its adverse physiological and psychological effects on people.

In response to the need for a scale which measures the effect of sound on people, the International Organization for Standardization has devised the "sone." This unit is based on the responses of average individuals to sounds.[12] The "sone" and its mathematical correlative the "phon" rely for their measurement on a group of listeners known as a "sound jury" rather than on a mechanical instrument such as a decibel meter.[13] It has been found that such juries are able to agree with surprising consistency on how loud particular noises are when compared to pure tones of known frequency and amplitude. Using this technique the human response to sounds of varying frequencies and amplitudes is assigned a number which has a certain degree of objective utility.[14]

There are two obvious shortcomings to the use of sones and

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on human beings is further complicated by the subjective nature of human responses to sound. Thus, even if the problems of measuring sound in terms of its three parameters and the problems of correlating these measurements with physiological effects could be overcome, uncertainty as to human emotional responses to noise would remain. *See* Kryter, *The Meaning and Measurement of Perceived Noise Level,* NOISE CONTROL, Sept.-Oct. 1960, at 12 *passim.* However, it is still preferable to measure sound whenever possible in a more sophisticated manner than merely determining its amplitude in decibels. *Id.*

11 HANDBOOK, *supra* note 4, at 1-1.

12 *See The Nuisance of Noise,* 228 THE LAW TIMES 66 (1959).

13 HANDBOOK, *supra* note 4, at 5-2, 3.

14 A phon is equal to the intensity of sound, in decibels (dB) above an arbitrary reference level, which is necessary to appear to the sound jury as loud as the sound being investigated. A sone (S) = $2^{(P-40)/10}$, where P is a phon. The factor of 10 in the denominator results from the observation that an increase of 10 phons above an arbitrary reference level causes an apparent doubling of loudness with fair regularity. The factor of -40 in the numerator is due to the selection of 40 dB above a listener's threshhold as the arbitrary reference level. 40 dB is roughly the amount of background noise present in an average home during the day. One sone is equal to the apparent loudness of a simple tone of 1,000 cycles per second (Hz) at an amplitude of 40 dB above a listener's threshhold. *See* NOISE AS A PUBLIC HEALTH HAZARD, PROCEEDINGS OF THE CONFERENCE, AMERICAN SPEECH AND HEARING ASS'N, REPORT NO. 4, at 31-32 (1969); COMMITTEE ON THE PROBLEM OF NOISE, NOISE, FINAL REPORT 154-55 (Her Majesty's Stationery Office, London, 1963) [hereinafter cited as COMMITTEE ON NOISE].

phons as standards for measuring sound. The first is the unwieldiness of setting up a sound jury every time it is necessary to determine how much noise something is making. The thought of using a sound jury to assist a policeman in deciding whether a motorist has an intolerably poor muffler on his car is plainly absurd. But even in those situations where it is practicable to assemble a sound jury the court or agency which must decide the particular controversy may be very uncomfortable with sones and phons as units of measurement with which to determine rights and liabilities.[15] Thus, while sones and phons are able to more accurately identify those sounds which are harmful to people, they do not respond to the needs of the legal system.[16]

In general legislative and judicial bodies have reacted to the complexities of defining noise by not really defining it at all. Legislative draftsmen have generally failed to couch their prohibitions in objective terms relying instead on words such as "unnecessary" or "unusual" or simply "loud."[17] The use of such ambiguous language has created significant constitutional and enforcement problems which have rendered anti-noise ordinances nearly impotent.[18] The difficulties which legislatures have experienced in formulating standards for noise have also plagued the courts. In a nuisance suit, for example, it seems to be generally agreed that the standard for what is excessive noise depends on

15 *Cf.* Smith v. Western Wayne County Conservation Ass'n, 158 N.W.2d 463, 470-71 (Mich. 1968).

16 Between the purely objective measure of decibels and the primarily subjective measure of sones and phons there have been devised a number of ways to measure sound objectively which, while quite complex, correspond better than decibels to the subtleties of the human response to sound. One such measure is the "C" scale (dbC) which, in contrast to the "A" or "flat" scale (dbA), emphasizes the higher frequency tones in the sound spectrum. Such tones are thought to be more offensive to human beings. Mecklin, *supra* note 6, at 133. More intricate methods, such as those by Stevens and Zwicker, use complex formulae which sum up various pressure (amplitude) levels at different points in the audible portion of the spectrum. These methods rely on filters to separate particular frequencies of sound seriatim for measurement. *See* Kryter, *supra* note 10, at 16. To the extent that such methods deviate from scales which correlate with actual human responses they are open to the same objection as the traditional form of decibel measurement. Furthermore, since elaborate equipment and calculations are needed to utilize these methods, they are poorly tailored to the needs of lawmakers for the same reason as sones and phons.

17 *See, e.g.*, note 53 *infra*.

18 *See* City of Bismarck v. Anderson, 71 N.W.2d 457, 459 (N.D. 1955). For a general discussion of noise ordinances, see the text accompanying notes 53-59, *infra*.

what the elusive reasonable man of ordinary sensibilities thinks it is.[19] This standard apparently considers not only the nature of the noise but also the character of the locality in which it is made including some balancing of competing uses.[20]

From this discussion it may be seen that noise is a complex physical phenomenon which entails considerable definitional problems. Moreover, the effects of noise are not yet clearly understood. As a consequence of these uncertainties, noise which results from the employment of particular technologies resists traditional solutions. A well-designed noise control program should be based on objectives which are defined in terms of the measurable variables of sound. The permissible maxima should be tailored as closely as possible to the needs of human beings. No program which promises to be efficacious can rely on a subjective standard of noise. But no program is worth implementing unless it imposes limitations which will protect people from the adverse effects of sound.

II. Traditional Legal Remedies for Noise

A. *Nuisance Suits*

It has long been established that an individual may obtain a remedy against excessive noise by a private suit for nuisance.[21] However, there are a number of factors which militate against the use of the nuisance suit as an effective tool for noise control.

One difficulty with using the law of nuisance to remedy noise is that it is unclear under what circumstances noise qualifies as a nuisance. Under traditional nuisance doctrine, liability will be imposed only where the noise causes a "substantial interference"[22] with the use and enjoyment of land. As already noted, the test of substantial interference is the effect of the noise on a normal per-

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19 The test is generally said to be the ". . . effect upon the ordinary reasonable man, that is, a normal person of ordinary habits and sensibilities." Smith v. Western Wayne County Conservation Ass'n, 158 N.W.2d 463, 470 (Mich. 1968). *See also*, Gunther v. E. I. duPont de Nemours & Co., 157 F. Supp. 25, 32 (N.D.W. Va. 1957), *appeal dismissed*, 255 F.2d 710 (4th Cir. 1958).

20 *See* Township of Bedminster v. Vargo Dragway, Inc., 253 A.2d 659, 661 (Pa. 1969).

21 The right to an injunction for noise has been recognized for well over a century. *See, e.g.*, Elliotson v. Feetham, 2 Bing. N. C. 134 (1835).

22 W. Prosser, Handbook of the Law of Torts 599-601 (3d ed. 1964).

son of ordinary sensibilities.[23] But the fact that the noise is annoying to a normal person in the community does not assure that the noise will be deemed a nuisance. The courts must weigh the social utility of the noisemaker's conduct against the gravity of the harm to the plaintiff and grant relief only where the noisemaker's conduct is unreasonable in light of all the facts of the particular case.[24] Whether the noise occurs during the day or night is a factor for the court to consider.[25] Another factor is the suitability of the noisemaker's activity to the particular locality.[26] A third factor is the degree of community dependence on the particular activity in which the noisemaker is involved. There are a number of cases indicating that where an activity is beneficial to the community at large, and the burden it imposes on the plaintiff or plaintiffs is not vastly more severe than that imposed on the community in general, there can be no remedy, or in any event the remedy will be limited to damages.[27]

The effect of framing the issue in this manner is to vitiate the

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23 *See* note 19 *supra*. A more colorful standard is suggested in a frequently cited dictum. The standard of noise ought

> . . . to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people.

Walter v. Selfe, 4 De G. & S. 315, 64 Eng. Rep. 849 (Ch. 1851).

24 W. PROSSER, *supra* note 22, 616-618.

25 Lloyd, *Noise as a Nuisance*, 82 U. PA. L. REV. 567, 572-73 (1934).

26 Township of Bedminster v. Vargo Dragway, Inc., 253 A.2d 659 (Pa. 1969) (dragstrip).

27 These cases express two distinct, although frequently confused, notions. One is that a court of equity must balance the social utility of a defendant's conduct against the harm it imposes upon others in determining whether to grant an injunction. An activity of vital interest to the community will not be enjoined although it creates what would ordinarily constitute a nuisance. *See, e.g.*, Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S.W. 658 (1904) (mining company supported most of community). This is particularly true where the aggrieved party comes upon the scene after the activity has become central to the community. *E.g.*, East St. Johns Shingle Co. v. City of Portland, 195 Ore. 505, 246 P.2d 554 (1952) (municipal sewage dump predating plaintiff's arrival). The other notion is that a recovery for nuisance requires the plaintiff to show an injury peculiar to himself and not merely one which he suffers in common with the community at large. *See, e.g.*, Richards v. Washington Terminal Co., 233 U.S. 546 (1914). *See generally* Spater, *Noise and the Law*, 63 MICH. L. REV. 1373 (1965); Katz, *The Function of Tort Liability in Technology Assessment*, 38 U. CIN. L. REV. 587, 608-615 (1969).

nuisance suit as a remedy for many forms of noise. Common noise-making activities such as vehicular traffic or factories will often go unredressed by resort to traditional nuisance law because it is clear that such noises are the result of activities in which the community has substantial interests. Generally private litigation will take place only after a decision to employ a particular technology has been made and large sums of money have been expended. At this juncture the court will be reluctant to subject the enterprise to a heavy burden in tort judgments or enjoin the enterprise from operation. The conclusion often reached is that the noisemaker is making a "reasonable" use of his land because the social utility of his activities outweighs the annoyance to his neighbors of excessive noise.[28] Even in those cases where a plaintiff might prevail in a nuisance suit, the vagaries of the doctrine deter the bringing of such suits.

It has been suggested, particularly with respect to airport noise, that these problems might be avoided by adoption of a standard of strict liability in nuisance suits.[29] Such a theory, it is argued, would dispense with the need for balancing such imponderables as community interest and would enable the private tort suit to serve as a useful vehicle for forcing enterprises to bear the costs they create.[30] It is further suggested that the certainty inherent in a theory of strict liability would allow investors and other first-level decision makers to enjoy greater predictability in estimating their costs.[31] Strict liability for noise would be useful in cases where there is only one source of noise involved such as airport noise. But this approach would be ineffective in controlling noise which is the result of a large number of sources. For example it would be difficult to say that building and repairing noises ought to incur strict liability. Such noise is generally one of a number of noise sources which combine to create a high noise level in a particular area. Nor is it usually the case that a select group of

28 *See, e.g.*, Monlezun v. Jahncke Dry-Docks, Inc., 163 La. 400, 111 So. 886 (1927); Lohmuller v. Kirk, 133 Md. 78, 104 A. 270 (1918); Gilbert v. Showerman, 23 Mich. 448 (1871).

29 *See* Malley, *The Supersonic Transport's Sonic Boom Costs: A Common Law Approach*, 37 GEO. WASH. L. REV. 683, 700-718 (1969).

30 *Id.* at 703-710.

31 *Id.* at 716. *See also* P. Keeton, *Trespass, Nuisance, and Strict Liability*, 59 COLUM. L. REV. 457 (1959).

people continuously bear the brunt of such noise as in the case of airport noise. In New York City, for example, there are 10,000 construction and 80,000 street repair jobs undertaken annually and nearly every New Yorker is subjected to this noise at some time.[32] These factors suggest that strict liability would be an unworkable means of controlling most noise sources.

The problems caused by the uncertain contours of the nuisance doctrine are further complicated by the doctrine of legislative authority or "legalized nuisance." The thrust of this doctrine is that activities which are sanctioned by the legislature are not a nuisance.[33] It has been applied frequently in aircraft noise cases.[34] The fallacy in this doctrine is that in most cases the legislature probably never considered the problem of noise when it authorized the activity. To say, for example, that by constructing a portion of interstate highway and by licensing trucks to use it the legislature has deemed noisy trucks not to be a nuisance is plainly a distortion of legislative intent. Yet this conclusion is often reached by the courts.[35] When it is held to apply, the doctrine of legislative authority grants immunity to noisemakers even if all the elements of liability are present.

Even if courts were willing to broadly recognize noise as a nuisance, a significant obstacle to securing a remedy would remain because of the difficulty of allocating harm among several or many sources of noise. Traditionally it has been necessary for the plaintiff to bear the burden of demonstrating how much of his injury

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32 *Muffling the Clamor of Urban Construction,* BUSINESS WEEK, Dec. 14, 1968, at 168, 169.

33 *E.g.,* People v. Brooklyn & Queens Transit Corp., 283 N.Y. 484, 28 N.E.2d 925 (1940). *See generally,* Note, *Nuisance and Legislative Authorization,* 52 COLUM. L. REV. 781 (1952). This doctrine is of course subject to the constitutional limitation that the legislature cannot sanction a taking of property without compensation. *See* United States v. Causby, 328 U.S. 256 (1946); Griggs v. Allegheny County, 369 U.S. 84 (1962). *But see* Transportation Co. v. Chicago, 99 U.S. 635, 642 (1878) (*semble*).

34 Atkinson v. City of Dallas, 353 S.W.2d 275 (Tex. Civ. App. 1961), *cert. denied,* 370 U.S. 939 (1962); Loma Portal Civic Club v. American Airlines, Inc., 61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964); *see generally* Tondel, *Noise Litigation at Public Airports,* 32 J. AIR L. & COM. 387, 397-98 (1966).

35 *Cf.* Dennison v. State, 22 N.Y.2d 409, 412, 239 N.E.2d 708, 712, 293 N.Y.S.2d 68, 73 (1968) (Bergan, J., dissenting): ". . .[B]y choosing to live in a country which builds modern highways, with resulting economic and transportation advantages to everyone, damage ought not, as a matter of policy, be allowed in general and unlimited scale for [highway noise]."

is due to each of several defendants.[36] There is, however, a substantial line of authority holding that where several defendants are each clearly wrongdoers and there is no way for the plaintiff to apportion the injury, each defendant will be liable for the entire injury and the defendants must bear the burden of apportioning it.[37] But even the most generous apportionment rule would not assist a plaintiff who wished to recover for traffic noise caused by many thousands of vehicles.[38] Nor would a very favorable apportionment rule be helpful to a plaintiff aggrieved by the accumulated noise of numerous pieces of machinery in an industrial district. Thus, cases involving the most universal of noises present the most difficulty in apportioning harm. Relaxing strict rules requiring allocation of harm will be useful only where the number of noise sources is relatively small and the potential defendant is sufficiently culpable to justify shifting the burden of proof to him.

The most significant obstacle to the use of private nuisance suits to control noise is that frequently there is no one willing to invest the time and trouble to initiate a lawsuit. This problem is not peculiar to nuisance suits for noise, but it does render the use of private litigation generally an ineffective means of protecting the environment. Interests which, in the aggregate, may be of overwhelming importance often do not affect any particular individual strongly enough to justify resort to litigation.[39] It is unlikely, for

36 Panther Coal Co. v. Looney, 185 Va. 758, 40 S.E.2d 298 (1946).

37 Most of the authority for this proposition stems from Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948). In that case two defendants negligently fired guns in the plaintiff's direction and one shot hit him in the eye. The Court held that both defendants were liable for the total damage and shifted the burden of apportioning the injury to the defendants. The same result as in *Summers* has been reached in cases where several polluters were contributing to a particular body of water and there was no demonstrable way to prove how much pollution was attributable to each of them. Landers v. East Texas Salt Water Disposal Co., 151 Tex. 251, 248 S.W.2d 731 (1952) (salt water pollution of fresh water lake). A strong argument has been made for extending this rule to cases of air pollution. Rheingold, *Civil Cause of Action for Lung Damage Due to Pollution of Urban Atmosphere*, 33 BKLN. L. REV. 17, 31-32 (1966). *See also* Katz, *supra* note 27, at 617-20.

38 Traffic is the most significant source of noise in nearly all localities. *See* U. S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, NOISE IN URBAN AND SUBURBAN AREAS: RESULTS OF FIELD STUDIES 1, 6 (1967).

39 *See Urban Noise Control*, 4 COLUM. J. LAW & SOC. PROB. 105, 108 (1968); COMMITTEE ON ENVIRONMENTAL QUALITY, *supra* note 3, at 48. Professor Harold Green suggests four reasons why private litigation generally is insufficient to protect the environment: (1) The plaintiff must bear the burden of proving that he is injured; (2) the plaintiff must show a causal link between his injury and the defendant's

example, that any private individual would take it upon himself to bring a lawsuit against a subway or bus company for noise. Yet the sum total of the injuries to all persons living adjacent to subway and bus routes may well be far more substantial than the cost of eliminating the noise. Another example of the kind of noise that is unlikely to result in judicial scrutiny is that resulting from the use of construction equipment. Surely no one living in a community of even moderate size has escaped the din which accompanies large-scale building projects or major street repairs. Yet, one finds few cases seeking redress for such noises mainly because no one is willing to invest the necessary time and money to do so.

One mechanism for the creation of a constituency to represent substantial but diffuse community interests in quietness is the class action. The class action, to be effective, requires three elements: the existence of a group of people who have a cause of action for similar harm from the same source, a cause of action where proof of causation is possible and damages calculable, and a defendant that is responsive to economic pressures.[40] The first requirement — the existence of a group of people having a cause of action for similar harm from the same source — will be met whenever one or more sources of noise affect a sufficient number of people at the same time. Examples are subway and bus routes, construction jobs of some permanence, and industrial noise. The requirement will not be met in cases where the noise is caused by the same activity but by different combinations of actors with respect to the various complainants. Noise such as that caused by trucks in a certain neighborhood would not be noise of a common source. Whether the second requirement — proof of causation and calculable damages — is fulfilled will depend on whether the difficulties already discussed can be surmounted; that is, on whether a particular noise meets the requirements of a nuisance, whether a balancing of equities favors its abatement, whether

conduct; (3) the courts' utilization of cost benefit analysis is hard on plaintiffs; and (4) private litigation is costly and complex. H. P. Green, The Role of Government in Environmental Conflict 2-4 (unpublished paper submitted to the Conference on Law and the Environment at Warrenton, Va., Sept. 11-12, 1969); *see also* Juergensmeyer, *Control of Air Pollution through the Assertion of Private Rights,* 1967 DUKE L.J. 1126, 1155.

40 *See* Note, *The Cost Internalization Case for Class Actions,* 21 STAN. L. REV. 383, 384 (1969).

there is legislative authority for the activity, and whether the requirement of allocation of harm to the particular source can be met. Thus the class action does not eliminate the problems which accompany the use of nuisance law generally. The third requirement — an economically motivated defendant — will be met in nearly all cases except those involving the sovereign.[41] The necessity for a defendant that responds to economic pressure grows out of the hope that if damage judgments make a noisy activity too costly, the actor will either give up the activity or find a way to conduct it quietly.

In summary, the nuisance theory is unworkable as a vehicle for forcing enterprises to assume social costs which are associated with them.[42] Private litigation takes place only after a decision to employ particular technology has been made. There is waste inherent in a system which allows the construction of expensive facilities and decides after operations begin that they are too noisy and must pay their way in tort judgments or be enjoined from operation. The judicial forum is not well-suited to decide how much noise is really detrimental to the community and how great will be the price of eliminating it.

B. *Inverse Condemnation*

Suits in inverse condemnation are frequently utilized to circumvent the barrier presented by sovereign immunity.[43] The cases

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41 *See* Section II B *infra.*

42 Tort law is frequently discussed as a means to internalize market externalities. Noise may be seen as such an externality to the extent that it burdens those who are non-beneficiaries of the noisemaking activity. The noise created by a bus, for example, is a market externality because people who do not benefit from the bus must suffer from the noise and therefore in a sense pay part of the price of the activity. In an efficient economic system those people would be paid for their suffering and if paying them made the activity too costly it would not be undertaken. *See* THE NATIONAL ACADEMY OF SCIENCES, TECHNOLOGY: PROCESS OF ASSESSMENT AND CHOICE 53-56 (House Comm. on Science and Astronautics, 1969); *The Cost Internalization Case for Class Actions, supra* note 40, at 386. This conception of the law of torts raises several difficulties, not the least of which is that courts do not easily fit the role of economic planners. Moreover, it is not at all clear who is or is not a beneficiary of a given activity. Consider, for example, a community hospital which uses a lot of noisy equipment. Surely the beneficiaries of that hospital are not just its patients at a given point in time. It is far from clear that it would be desirable to force every enterprise to pay the full cost of all the noise it makes.

43 For a discussion of the scope of governmental immunity from liability for noise see Spater, *supra* note 27, at 1385-1407. The author concludes that as a general

of *United States v. Causby*[44] and *Griggs v. Allegheny County*[45] have established that under certain circumstances noise from airplanes may constitute a compensable taking. There have also been a number of recoveries for takings by noise resulting from the construction and use of highways.[46] In most of the latter class of cases there was conceded to be an exercise of eminent domain and the recovery for noise was sought as consequential damages incident to the taking.[47]

Since inverse condemnation requires that the defendant be either the sovereign or its delegate, the remedy is of limited usefulness. Furthermore, even when the state is sufficiently implicated in the activity, it is necessary for the plaintiff to show an injury peculiar to himself and not simply that he must tolerate that degree of noise which is common to the community.[48] In most cases the noisy activity in which the state is involved will be one which is felt by everyone to some degree. Thus, the requirement of peculiar injury will frequently be a serious obstacle to recovery.

The major reason why the courts are reluctant to use inverse condemnation to resolve problems of noise is that the possible impact of the doctrine seems limitless. If it is applicable to air-

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rule the government or its authorized agent is immune from liability for noise from any source if the noise is necessarily incident to a lawful activity and the actor is free from negligence. *Id.* at 1406, 1407.

44 328 U.S. 256 (1946).

45 369 U.S. 84 (1962); *accord*, City of Jacksonville v. Schumann, 167 So. 2d 95 (Fla. 1964) (airport noise held sufficient for taking).

46 Dennison v. State, 22 N.Y.2d 409, 239 N.E.2d 708, 293 N.Y.S.2d 68 (1968). Where the property is especially desired for its quietude the case for a compensable taking is much stronger. *Id.* at 414, 239 N.E.2d 711, 293 N.Y.S.2d 72. The *Dennison* case has been cited as a landmark with respect to judicial recognition of freedom from noise as a property right of considerable value. *Triumph over Traffic*, TIME, July 12, 1968, at 74. The purpose for which the property is used has been a significant factor in inverse condemnation cases urging a taking by highway noise. *Compare* Fleetwood Synagogue Inc., v. State, 302 N.Y.S.2d 898, 60 Misc. 2d 326 (N.Y. Ct. Cl. 1969) *with* State, Road Commission v. Williams, 452 P.2d 881 (Utah 1969). A number of cases recognize that freedom from noise is a factor which a willing buyer would consider in deciding what to offer for certain realty. Pierpont Inn, Inc. v. State, 449 P.2d 737, 74 Cal. Rptr. 521 (1969). *But cf.* Northcutt v. State Road Department, 209 So. 2d 710 (Fla. 1968).

47 Dennison v. State, 22 N.Y.2d 409, 239 N.E.2d 708, 293 N.Y.S.2d 68 (1968); Fleetwood Synagogue Inc. v. State, 302 N.Y.S.2d 898, 60 Misc. 2d (N.Y. Ct. Cl. 1969).

48 *See, e.g.*, Richards v. Washington Terminal Co., 233 U.S. 546 (1914); Lombardy v. Peter Kiewit Sons' Co., 72 Cal. Rptr. 240, 244 (1968).

craft noise, it should logically apply to traffic noise which similarly affects people. It should certainly apply to any governmental operation involving machinery as loud as street wreckers or garbage trucks. But no state or municipality could afford to pay for all such takings by noise and no court would find such noise to be a taking even if it could be shown to be as loud as the noise which upset Mr. Causby's chickens.

A sophisticated approach could be devised whereby the court first determines how loud a particular source of noise is in fact, which entails all the measuring problems discussed in Section I, and then determines if that degree of loudness is inimical to the welfare of human beings on the particular land in question. Such an approach has been successful in demonstrating a taking by noise.[49] But using this approach it might well result that all the property in the populous regions of the United States would be found to be taken by noise. In the alternative the courts could adopt arbitrary noise levels beyond which there would be found a taking. But the problems of proof involved in any approach which looks to a maximum level of tolerable noise are immense.[50] There would be no assurance that such levels would be uniform or that they would coincide with those anticipated by the government when it undertook noisy activities. The result is that inverse condemnation cases proceed without a precise determination of how much noise ought to constitute a taking.

The underlying principle of inverse condemnation is that the sovereign has undertaken an activity which results in an appropriation of private property to public use. A court finds a taking when it feels that the plaintiff's loss is one which ought to be shared by the public.[51] A number of factors will influence a court's judgment as to whether to award compensation. When the noise is one such as traffic noise, which the entire community must tolerate, no individual plaintiff's annoyance should be compen-

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49 In Dennison v. State, 22 N.Y.2d 409, 239 N.E.2d 708, 293 N.Y.S.2d 68 (1968), the plaintiff hired audio engineers to prove that the level of noise to which his property was exposed would substantially impair its value.

50 *See* Section I *supra*.

51 *See generally* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1168 (1967).

sated by the community. When the noise results from ill-considered applications of technology, such as noisy garbage trucks, a factor for consideration ought to be the cost of eliminating the noise. A court, however, is not a suitable forum in which to weigh such costs against the possible benefits. Consequently, the courts will be reluctant to find a taking even if the plaintiff's injury is substantial. The airplane cases, where most inverse recoveries for noise have resulted, are examples of employment of technology in a manner which has disproportionately burdened certain members of the community. Yet courts have strictly limited the possibilities for recoveries in inverse actions even in these cases.[52] It is unlikely that the inverse condemnation remedy will be of greater utility in other contexts.

C. *Anti-Noise Ordinances*

With the exception of occasional public nuisance abatement actions, public regulation of noise consists mainly of the enforcement of local anti-noise ordinances. Because of the difficulty of setting an objective standard for noise, most of these ordinances rely on vague words such as "unreasonable" or "unusual" to suggest what is proscribed.[53] One problem with the use of such terms is that they are susceptible to attack for unconstitutional vagueness.[54] Another is that such a standard gives excessive discretion

52 The variety of rules limiting a plaintiff's right to just compensation for aircraft noise is outside the scope of this article. *See* note 8 *supra*.

53 *E.g.*, NEW YORK, N.Y., ADMIN. CODE, Ch. 18, tit. A, § 435-5.0 (1942). Unnecessary Noises Prohibited.

> a. Subject to the provisions of this section, the creation of any unreasonably loud, disturbing and unnecessary noise is prohibited. Noise of such character, intensity and duration as to be detrimental to the life or health of any individual is prohibited.

LOS ANGELES MUN. CODE, Ch. IV, § 42.00(g) (1959).

> (g) Street — Sidewalk — Loud or Unusual Noises Prohibited — Exceptions. No person, . . . shall blow any bugle, horn or trumpet, or beat any drum, or ring any bell, or make any other loud or unusual noise, for the purpose of advertising . . . .

A survey of the anti-noise ordinances of fifty-six cities found that two-thirds of the ordinances were overly general. *See Compilation of State and Local Ordinances on Noise Control*, 115 CONG. REC. E9031-34 (daily ed. Oct. 29, 1969). The lack of a quantitative measure by which to determine violations was concluded to be the single greatest defect of these ordinances. *Id.* at E9033. Of the fifty-six ordinances considered, only two were given an "A" rating, which denotes an ordinance with both a quantitative standard and a suitable enforcement provision. *Id.* at E9046-47.

54 *E.g.*, People v. Sisson, 176 N.Y.S.2d 785, 12 Misc. 2d 18 (1958); People v.

to the law enforcement official in the field in determining what noise violates the ordinance. Since few noises may seem to be extreme enough to warrant citation, such a statute may discourage enforcement altogether.

Use of a decibel standard of noise avoids problems of vagueness and relieves the law enforcement official of having to rely on his own judgment. However, there are a number of practical problems in measuring the decibel level of sound in the field, and consequently, convictions can be attacked on the theory that the proof was not acquired under controlled conditions.[55] The fact that many major sources of noise either are moving, such as motor vehicles, or vary in amplitude over a period of time, such as air compressors on construction sites further frustrates the use of a precise decibel standard. Moreover, there are many sounds that cause acute discomfort to people because of their frequencies although they do not register high decibel levels.

Another problem with anti-noise ordinances is that no single source may violate the statute, and yet the noise level of the community may be intolerably high. To meet this problem it would be necessary to set a number of maximum noise levels for various types of activities such as the use of trucks or the operation of factories. But this makes enforcement problems very complex. Officials must familiarize themselves with numerous provisions and must learn how to properly measure noise under a variety of circumstances.

The only type of anti-noise ordinance which has proved easily enforceable is one which completely prohibits a certain type of noise such as horn blowing. Such an ordinance is in wide use in the city of Memphis and has had considerable success there.[56] Unfortunately a great many of the noisiest products of technology cannot simply be banned from use as can car horns or whistles.

James, 162 N.Y.S.2d 927, 6 Misc. 2d 441 (1957). *But see* People v. Merry, 179 N.Y.S.2d 454, 12 Misc. 2d 20 (1958). *See also* HANDBOOK, *supra* note 4, at 39-3.

55 *See* note 9 *supra*.

56 *Ssh!*, NEWSWEEK, Sept. 8, 1969, at 52. The City of Memphis also vigorously enforces the usual ordinances prohibiting excessive noise. It has won thirteen consecutive awards as the quietest city in the United States. N. Y. Times, May 18, 1969, at 109, col. 2.

Thus, while a non-use ordinance serves well to control noise which serves no important social purposes, it is not appropriate for most situations.

A variety of political considerations militate against the use of anti-noise ordinances to control noise which is the result of applied technology. Frequently, the state or municipality itself is the greatest source of noise. The major forms of transportation in a city are usually owned and operated by a public or quasi-public body. Fire, police, and sanitary services are generally provided by the city. Moreover, a number of activities, while not of a public nature, are so vital to the economic health of the community that it is not expedient to burden them with the cost of being quiet.[57] Few municipalities are willing to vigorously pursue anti-noise policies which would entail considerable expenditures by companies which are the lifeblood of the local economy. Moreover, it is usually not feasible for relatively small political units to attempt to control many of the common sources of noise. Construction equipment is universally considered too noisy, but few communities could single-handedly outlaw the use of such equipment. To do so would raise the cost of building in the community considerably.

A final shortcoming of regulation of noise by ordinance is that it relies on the initiative of vastly overworked local police forces and prosecutors who rarely regard noise as among the most serious of their problems.[58] Thus, even where there is useful anti-noise legislation, vigorous enforcement is unlikely unless some form of administrative body is assigned the task. In New York City it has been suggested that the City's Environmental Protection Administration establish a special department of noise control which would utilize specially trained inspectors to enforce anti-noise regulations.[59] Clearly such an undertaking would greatly increase the effectiveness of the regulatory program. The potential for noise control by properly designed and vigorously enforced ordinances should not be overlooked.

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57 *See* COMMITTEE ON ENVIRONMENTAL QUALITY, *supra* note 3, at 48.

58 HANDBOOK, *supra* note 4, at 39-4.

59 MAYOR OF NEW YORK'S TASK FORCE ON NOISE CONTROL, TOWARD A QUIETER CITY 7-9 (1970).

III. A New Approach to Controlling Noise

The traditional legal remedies for noise have a common shortcoming: they are all retrospective. They are pursued, if at all, only after technology has been employed and weighty economic and practical interests have vested. A more useful approach to problems of noise would be to create incentives for the use of quiet technology.[60] The noise problems that will result from a particular technology ought to be considered from the outset. The legal process should seek wherever possible to channel technology — to delimit the boundaries of technological change. Reliance on a plurality of public and private lawsuits has plainly been misplaced. It is time to make it unacceptable for technicians to disregard the need for quiet.

There is considerable cause for optimism concerning the possibilities for quieter use of technology. A leading noise control expert has asserted that any form of noise, possibly excluding the sonic boom, can be controlled if society is willing to pay the price.[61] Efforts to employ technology to build quieter mechanical devices have often been successful. New York City, for example, under considerable pressure from a group called Citizens for a Quieter City, contracted with General Motors for the construction of quiet garbage trucks. These trucks have been in use since 1968, and although somewhat costlier, they are considerably quieter and felt to be worth their price.[62] One of the noisiest pieces of equipment extant, the air compressor which is used on most construction sites, has been quieted very substantially by the

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60 What has been said about air and water pollution is equally true of noise:

> [T]o pinpoint the problem, what we are really struggling with is the price of our past technological advance. . . . We have built our way of life and our standards of living into [the sources of pollution] and we did it rather carelessly, without thinking of the consequences. . . . So now we have to try to build into our economy and our technology the controlling mechanisms which will correct our past mistakes.

Hearings on S. 780 Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 90th Cong., 1st Sess., pt. 2, at 911 (1967) (remarks of Senator Muskie). *See also* Committee on Environmental Quality, *supra* note 3, at 2.

61 Statement of Leo L. Beranek quoted in *Urban Noise Control, supra* note 39, at 116.

62 Mayor of New York's Task Force on Noise Control, *supra* note 59, at 16-17; N.Y. Times, Oct. 27, 1967, at 92, col. 1.

Ingersoll-Rand Company.[63] There are efforts under way by several companies to quiet the well-known racket of pavement breakers.[64] A silent vacuum cleaner is a clear technological possibility.[65] A quiet lawnmower can be built for about fifteen dollars more than a conventional model.[66] Even garbage cans can be greatly muffled for about one and a half dollars each.[67]

The possibilities for technological change in the direction of quietness appear even more likely when the relatively short useful lives of many of the products which cause noise is considered.[68] Privately owned machinery is generally operable for not more than a few years before replacement is necessary. If quiet equipment were made desirable, the normal replacement process would, without further legal sanctions, eliminate much of the noisy equipment now in operation. An approach which concentrates on new technological undertakings can therefore succeed rather quickly in controlling noise without upsetting economic expectations and rendering considerable amounts of existing equipment unusable.

By the same token it is especially urgent that large scale technological enterprises which create substantially permanent fixtures be designed for quietness. Transportation networks of all forms are perhaps the most serious noisemakers.[69] A good deal of noise resulting from ground transportation depends on the design considerations of the vehicles themselves.[70] But a substantial amount of noise will always be present unless the networks are designed with quietness as an objective. Even vehicles which are extremely

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63 The new air compressor is called the Whisperized Spiro-Flo and operates at a noise level of 85 dB on the "A" logarithmic scale as compared to 110 dB on the same scale emitted by its predecessor. The price has been upped from about $34,000 to $42,500. Sound diminution is accomplished mainly by use of a fiberglass acoustical housing which completely surrounds the internal machinery. *Muffling the Clamor of Urban Construction,* BUSINESS WEEK, Dec. 14, 1968, at 168, 169. The Worthington Corporation which manufactures the largest (1,500 cubic feet per minute) air compressor in the industry is engaged in efforts to suppress the noise level of its model. *Id.*

64 *Id.* A "sonic" pile driver is less noisy than the conventional drop-hammer. *See* MAYOR OF NEW YORK'S TASK FORCE ON NOISE CONTROL, *supra* note 59, at 49.

65 Zinsser, *Are We Hooked on Noise?,* LIFE, Oct. 31, 1969, at 12.

66 Mecklin, *It's Time to Turn Down All That Noise,* FORTUNE, Oct. 1969, at 130, 132.

67 *Id.* at 195.

68 *Id.* at 132.

69 *See* note 38 *supra;* Beranek, *Noise,* SCIENTIFIC AMERICAN, Dec. 1966, at 66, 73.

70 *See* HANDBOOK, *supra* note 4, chs. 31, 32.

quiet will be noisy when stopping or accelerating or when moving at great enough speed to stir up air currents. In order to minimize these sources of noise, engineers must begin to consider these problems early in the design process.[71] Ideally an entire network ought to be planned to meet specific noise requirements before any portion of it is built.[72] It is always more costly to correct past technological errors than to predetermine the requisite degree of noise control and design the system to meet this criterion.

By dealing with noise in a preventive way the problems of definition and measurement discussed in Section I can largely be avoided. In the laboratory where products are designed or in controlled field experiments there are few obstacles to the accurate measurement of noise. In those settings decibel readings, appraisals by sound juries, and more precise forms of analysis are all practical means of measurement. Otherwise troublesome variables, such as distance, background noise, and physical surroundings, are easily taken into account under controlled conditions. The human responses to particular sources of noise can be empirically examined, and unlike courts and legislatures seeking to impose limits on existing sources of noise, technicians planning for the future can consider all the relevant factors without having to defer to entrenched interests.

The first step in the planning process should be to establish

71 For example, road noise may be greatly reduced by smoothing the flow of traffic to avoid starts and stops or by making use of the absorption properties of natural barriers. *See* COMMITTEE ON NOISE, *supra* note 14, at 28; COMMITTEE ON ENVIRONMENTAL QUALITY, *supra* note 3, at 17.

72 Traditionally, planners of transportation systems have failed to give broad consideration to the problem of noise. Recently, however, plans for several new transportation projects have included procedures for making a systematic consideration of potential noise problems. The noise assessment process for transportation systems generally involves five main steps: (1) the establishment of a set of working criteria with permissible noise levels at certain locations (*e.g.*, the passenger's location), (2) a determination of expected sources of noise, (3) a determination of transmission paths for noise in the proposed system (*e.g.*, in the cars of a train), (4) the establishment of requirements for the reduction of noise, and (5) the design of individual structures for the system which will ensure adequate control of noise. *See, e.g.*, Bolt Beranek and Newman, The M. B. T. A. South Shore Project, Recommendations for Control of Noise and Vibration in Rapid Transit Cars—II 1, 2 (Report No. 1446, 1966); Bolt Beranek and Newman, General Design Recommendations for Control of Noise and Vibration in High-Speed Train for Northeast Corridor 1, 2 (Report No. 1277, 1965). *See generally* U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, NOISE IN URBAN AND SUBURBAN AREAS: RESULTS OF FIELD STUDIES 8-14 (1967); Beranek, *Design for Acoustics*, PHYSICS TODAY, July 1949, at 19, 22.

acceptable noise levels for various sorts of operations such as factories, construction equipment, and transportation. These levels should be based solely on considerations of human welfare. Then the law should impose constraints which prevent the existence of noise exceeding such levels.[73] The few examples mentioned here of successful technological elimination of noise are a sample of what is possible if forces are mobilized to promote quietness. A number of major industrial corporations are presently devoting a generous share of their resources to the study of new, quieter equipment.[74] The law should create a climate which encourages the exercise of these technological options. If it can do this, the creative forces of industry should do the rest.

Several factors strongly favor the use of a *federal* rather than a state or local attack on noise. As already noted, state and local governments are loath to enforce anti-noise ordinances.[75] There are a number of noise problems, such as road traffic, that transcend political boundaries.[76] And since one technological development, such as quieter garbage trucks, might be useful in thousands of communities, national standards could provide an incentive for technological change which would otherwise not be present.[77] The federal government is also in the best position to conduct research into the medical and environmental effects of noise. Indeed a number of federal departments have been conducting such studies for some time.[78] The strongest argument for a national approach to noise, and the one that shall be pursued here, is that the federal government is already implicated in many technological programs

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73 *See* COMMITTEE ON NOISE, *supra* note 14, at 132-133.

74 *See, e.g.*, INDUSTRIAL ACOUSTICS COMPANY, INC., AN INTRODUCTION TO NOISE CONTROL (1959); KOPPERS COMPANY, INC., SOUND CONTROL BACKGROUND MATERIAL (1967). *See also Companies Warned: Quieter, Please!*, BUSINESS WEEK, July 26, 1969, at 28, 29.

75 *See* Section II C *supra*.

76 *See* COMMITTEE ON ENVIRONMENTAL QUALITY, *supra* note 3, at 48-55.

77 Although New York City was able to entice General Motors into building quieter garbage trucks by assuring it a substantial market for them, very few cities could offer a similar incentive. *See* note 62 *supra*.

78 For example, the Public Health Service has conducted a National Noise Study to determine safe levels of industrial noise for workers. 1968 DEP'T OF HEALTH, EDUCATION AND WELFARE ANN. REP. 308-9. *See also Hearings on Noise: Its Effects on Man and Machine Before the Special Investigating Subcomm. of the House Comm. on Science and Astronautics*, 86th Cong., 2d Sess., at 149-155 (1960). *See generally* COMMITTEE ON ENVIRONMENTAL QUALITY, *supra* note 3, at 49.

which result in excessive noise. Federal grants-in-aid and purchases are major determinants of the direction of technological change in the fields of transportation and construction and in the development of many products.[79] It is, therefore, natural to look to Washington to pursue these programs to control noise.

This article now turns to a consideration of several programs which offer possibilities for successful noise abatement. The common denominator of these programs is that they would avert noise by conditioning the receipt of federal funds on the recipient's adherence to federal noise control standards.

A. *Public Contracts*

The federal procurement program has recently been used as a means to establish maximum noise levels in industrial plants which manufacture or furnish goods for any agency of the United States in a value exceeding ten thousand dollars. These conditions are embodied in a recent series of regulations[80] promulgated by

79 In recent years federal spending for highways has exceeded four billion dollars per year. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1969, at 543 (89th ed.). This expenditure represents about 80 percent of the cost of highways built cooperatively with the federal government and about 25 percent of all funds expended annually on roads in the United States. *Id.* at 544-45. The federal government, in addition to building to meet its own requirements, insures loans through the Federal Housing Administration and the Veterans Administration for 250,000 private nonfarm housing starts per year. This represents one-fifth of all such starts in the United States. U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, HOUSING STATISTICS 6 (1966). Federal procurement of automobiles comes to 35,000 per year. Mecklin, *supra* note 66, at 195.

80 Labor Dep't Reg. § 50.204.10, 34 Fed. Reg. 7948 (1969) (footnotes, graph and table omitted):

Occupational noise exposure. (a) Protection against the effects of noise exposure shall be provided when the sound levels exceed those shown in Table 1 of this section when measured on the A scale of a standard sound level meter at slow response. When noise levels are determined by octave band analysis, the equivalent A-weighted sound level may be determined as follows: Octave band sound pressure levels may be converted to the equivalent A-weighted sound level by plotting them on [Table 1] and noting the A-weighted sound level corresponding to the point of highest penetration into the sound level contours. This equivalent A-weighted sound level, which may differ from the actual A-weighted sound level of the noise, is used to determine exposure limits from Table 1.

(b) When employees are subjected to sound exceeding those listed in Table 1 of this section, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of the table, personal protective equipment shall be provided and used to reduce sound levels within the levels of the table.

(c) If the variations in noise level involve maxima at intervals of 1 second or less, it is to be considered continuous.

the Secretary of Labor pursuant to the Walsh-Healey Public Contracts Act.[81] It has long been established that Congress in passing the Walsh-Healey Act intended to use the purchasing leverage of the government to raise labor standards.[82]

Industrial noise resists control by traditional legal remedies as is typical of most noise problems. Although it has been known for some time that such noise causes cardiovascular, glandular, respiratory, and neurological disorders, very few cases for industrial compensation find their way through the maze of procedural obstacles and secure recovery.[83] And although nearly every city has a regulation prohibiting the existence of noise conditions which are dangerous to health,[84] these regulations are apparently rarely enforced. It has been estimated by the World Health Organization that the monetary loss due to accidents, absenteeism, inefficiency, and compensation claims attributable to industrial noise in the United States is four billion dollars each year.[85]

The most striking feature of the federal standards is their high degree of specificity. The maximum permissible noise levels are defined as a function of all three parameters of noise: amplitude, frequency, and time. The standards are based on considerations of human welfare and are not tailored to prevailing conditions in particular plants or industries.[86] By carefully setting out the noise

(d) In all cases where the sound levels exceed the values shown herein, a continuing, effective hearing conservation program shall be administered. Exposure to impulsive or impact noise should not exceed 140 dBA peak sound pressure level, fast response.

81 41 U.S.C. §§ 35-45 (1964). Use of the Walsh-Healey Act to stimulate noise control efforts by private industry was suggested by the Federal Council for Science and Technology. COMMITTEE ON ENVIRONMENTAL QUALITY, *supra* note 3, at 38.

82 United Biscuit Company of America v. Wirtz, 359 F.2d 206, 208 (D.C. Cir. 1966), *cert. denied*, 384 U.S. 971 (1966); *accord*, Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 507 (1943). *See also* 80 CONG. REC 10001 (1936) (remarks of Congressman Healey).

83 COMMITTEE ON ENVIRONMENTAL QUALITY, *supra* note 3, at 32-34.

84 *E.g.*, NEW YORK, N.Y., HEALTH CODE § 135.19 (1966).

85 Mecklin, *supra* note 6, at 132.

86 The noise standards embodied in these regulations are the result of the National Noise Study which showed that noise levels above 90 dBA caused hearing losses proportionate to the noise level and time of exposure. Industrial noise levels have so frequently exceeded this limit that in certain industries there is a tradition of expecting hearing loss. *Companies Warned: Quieter, Please!*, *supra* note 74, at 29. While the limits embodied in these regulations may suffice to protect hearing, they are insufficient to avoid speech interference. *Cf.* Beranek & Miller, *The Anatomy of Noise*, MACHINE DESIGN, Sept. 14, 1967, at 174, 177.

limits in terms of objective variables the enforcement problems which accompany the use of general proscriptions have been avoided. The measurement of these variables in an industrial setting is not a very complex matter, and compliance is not difficult to evaluate.

These regulations, if properly enforced, should be successful in ridding factories of industrial noise. The right to contract with the federal government is highly valued in many industries, and the ultimate sanction for failure to comply with the Secretary's regulations is debarment from contracting with the United States for three years.[87] The Labor Department has recently issued notices of proposed debarment for racial discrimination to several companies,[88] and it should not hesitate to act similarly where health violations are concerned.

Ideally, however, these regulations should be enforced in a preventive, rather than a remedial, fashion. A procedure could be devised that requires companies which bid for federal contracts to display certificates of compliance for all plants where work on the federal contracts will be done. Various private acoustical consultants could be authorized to issue such certificates.[89] This procedure would have several advantages. It would place the burden of ascertaining compliance on the private industries seeking to do business with the government. It would ensure wider observance of the standards than can reasonably be expected from spot-checking procedures conducted by the Department of Labor. Most significantly, it would require every company in the United States wanting to compete for government contracts to meet the same noise control conditions. This would provide a substantial market for the technological innovations which would make quieter industrial operations possible. Since manufacturers would be subject

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87 41 U.S.C. § 37 (1964). The Walsh-Healey Act has been strictly applied to all types of contracts with the government coming within its terms. *See* United Biscuit Company of America v. Wirtz, 359 F.2d 206, 209-210 & n.4 (D.C. Cir. 1966), *cert. denied,* 384 U.S. 971 (1966).

88 56 DEP'T OF LABOR ANN. REP. 18 (1968).

89 The passage of the new federal regulations has resulted in advertising of such services by several private consultants. *E.g.,* INDUSTRIAL ACOUSTIC COMPANY, INC., WALSH-HEALEY . . . HEARING CONSERVATION AND YOUR NOISE PROBLEM! (bull. no. 5.1106.0, 1969); BOLT BERANEK AND NEWMAN, SPECIAL REPORT, INDUSTRIAL NOISE (1969).

to uniform requirements, the competitive posture of the industries would be preserved.

The corrective effect might go well beyond those situations contemplated by the Walsh-Healey Act. Companies in industries in which the federal government is a prime buyer might find it expedient to bring all their plants up to the federal standards rather than just those involved in federal contracts. A large demand for quiet machinery would tend to reduce the price of such equipment. If that happened, companies not selling to the federal government might find it advantageous to pay some additional cost for such equipment. Thus, it is possible that the federal regulations may alter the direction of technological development towards quieter industrial work conditions generally.

It is too early to judge the effect of the Labor Department's regulations on industrial noise conditions. Their efficacy will depend largely on the strength of the federal enforcement program. Certainly it is technologically possible to minimize industrial noise as successfully as that of garbage trucks and air compressors. If eligibility for federal contracts can be made in practice to turn on adherence to the federal standards, quiet factory equipment ought to be on the market shortly. It should then be possible to substantially reduce the maximum permissible noise levels of the Walsh-Healey regulations.

B. *Federal-Aid Highways*

There are several very compelling reasons for using the federal grants-in-aid for highways to require that highway developers give priority to noise control.[90] Traffic is ordinarily the most prevalent source of outside noise, particularly in larger communities.[91] Furthermore, there is substantial evidence that traffic noise is the most universally disliked aspect of urban environments.[92] The

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90 This suggestion is found in NOISE AS A PUBLIC HEALTH HAZARD, PROCEEDINGS OF THE CONFERENCE, AMERICAN SPEECH AND HEARING ASS'N, REPORT No. 4, at 352-54 (1969).

91 *See* note 38 *supra*.

92 *See* W. BURNS, NOISE AND MAN 102-105, 265 (1968). A British Government survey of fourteen hundred residents of London found that traffic noise was the thing they would most like to change about their environment. Beranek, *Noise*, SCIENTIFIC AMERICAN, Dec. 1966, at 73; H. A. TRIPP, TOWN PLANNING AND ROAD TRAFFIC 82 (1942). For an indictment of the national highway program, see L.

availability of large amounts of federal money for highways gives the federal government strong leverage in imposing conditions on state and local governments.[93] In fact, there are persuasive arguments to support the assertion that the existence of federal-aid highway money has been a major deterrent to the exploration of alternative transportation systems for urban areas.[94] Since road traffic is inherently noisy, even if the vehicles themselves are carefully constructed,[95] highway planners should be required to meet noise standards in their long-range highway plans.

The Federal-Aid Highway Act[96] was amended in 1962 to include a mandate to consider the impact of highway plans on urban areas of over fifty thousand population.[97] This statute has been interpreted by the Department of Transportation to require that the Secretary[98] consider the potential noise effects of highways in determining whether to approve plans.[99] The history of this sec-

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MUMFORD, THE URBAN PROSPECT 92-107 (1968); A. Q. MOWBRAY, ROAD TO RUIN (1969).

93 *See* note 79 *supra*.

94 The Governor of Massachusetts recently stated that federal policy denies cities and towns the right to choose other forms of mass transit. Governor of Massachusetts Press Release No. FE-53, Feb. 11, 1970. There is evidence that railroads, other than high-speed jet or turbine trains, are quieter than road surface vehicles. *See* COMMITTEE ON ENVIRONMENTAL QUALITY, *supra* note 3, at 16.

95 *See* COMMITTEE ON NOISE, *supra* note 14, at 28-30; COMMITTEE ON ENVIRONMENTAL QUALITY, *supra* note 3, at 17-18.

96 23 U.S.C. §§ 101-141 (1964), *as amended* (Supp. IV, 1969).

97 23 U.S.C. § 134 (1964).

> Transportation planning in certain urban areas. It is declared to be in the national interest to encourage and promote the development of transportation systems, embracing various modes of transport in a manner that will serve the States and local communities efficiently and effectively. To accomplish this objective the Secretary shall cooperate with the States, . . . , in the development of long-range highway plans . . . which are formulated with *due consideration to their probable effect on the future development of urban areas of more than fifty thousand population*. After July 1, 1965, the Secretary *shall not approve* . . . any program for projects in any urban area of more than fifty thousand population unless he finds that such projects are based on a continuing comprehensive transportation planning process carried on cooperatively by States and local communities in conformance with the objectives stated in this section. (emphasis added).

98 The functions assigned to the Secretary of Commerce under the Federal-Aid Highway Act were transferred to the Secretary of Transportation on Oct. 15, 1966, by Pub. L. No. 89-670, codified at 49 U.S.C. § 1655(a)(1), (6) (Supp. IV, 1969).

99 Bureau of Public Roads, Dep't of Transportation Reg., 23 C.F.R. Appendix A following § 1.38 (Supp. 1970):

tion indicates that its purpose was to improve the quality of urban planning generally.[100] Such a broad purpose should give the Secretary authority to reject plans which do not assure adequate protection from noise. The Secretary ought to use the facilities of the Bureau of Public Roads to determine whether proposed plans will result in excessive traffic noise in the affected communities. Highways are permanent features of the urban environment. It is, therefore, imperative that they be designed correctly.[101]

Responsibility for enforcing compliance with federal standards should be placed in the Department of Transportation. Courts have not been inclined to take an active role in reviewing whether a particular highway plan comports with the federal act; they have presumed that compliance with the requirements of the Act is implicit in the granting of funds.[102] Experience indicates that this presumption is unjustified.

There are two general types of conditions which the federal government could impose to reduce traffic noise: conditions requiring that noisy vehicles be excluded from roads constructed

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> Policy and Procedure Memoranda.
> This appendix contains selected Policy and Procedure Memoranda issued by the Bureau of Public Roads.
> Policy and Procedure Memorandum 20-8.
> . . . .
> 2. *Authority.* This PPM is issued under authority of the Federal-Aid Highway Act, 23 U.S.C. 101 et seq., ...
> 3. *Applicability.*
> a. This PPM applies to all federal-aid highway projects.
> . . . .
> 4. *Definitions.* As used in this PPM.
> . . . .
> c. "Social, economic, and environmental effects" means the direct and indirect benefits or losses to the community and to highway users. It includes all such effects that are relevant and applicable to the particular location or design under consideration such as:
> . . . .
> (15) Noise, and air and water pollution.
> . . . .
> 9. *Consideration of social, economic, and environmental effects.* State highway departments shall consider social, economic, and environmental effects . . . .

100 S. REP. No. 1997, 87th Cong., 2d Sess. 24-25 (1962), in 1962 U.S. CODE CONG. & AD. NEWS 3938, 3963-64.

101 *See* note 72 *supra.*

102 *E.g.*, Morningside-Lenox Pk. Ass'n v. State Highway Dep't, 161 S.E.2d 859, 861 (Ga. 1968). *See generally* Roberts, *Highway Relocation Planning and Early Judicial Review*, 7 HARV. J. LEGIS. 179 (1970).

with federal funds[103] and conditions requiring that highways be designed to minimize the noise emanating from them. The former type of conditions presents formidable practical difficulties in securing compliance. Thus the primary focus of this article will be on the latter approach.

The Department of Transportation should reject highway plans which are not designed to assure reasonable quiet to the affected communities. The two particular planning errors which ought to be avoided are insufficient condemnation and failure to shield that portion of a roadway passing through a high-density area.[104] The presence of an expressway at ground level creates a noise band a few hundred yards wide.[105] This noise can be prevented from reaching people nearby by either condemning sufficient land for a buffer zone or by making use of a natural or artificial noise barrier.[106] Where space is very scarce, depressing the roadway is an effective way to accomplish the desired result.[107] It also encourages the sale or lease of the air rights above the highway, since they will be available from the ground level. Of course both sufficient condemnation and road depression will entail increased costs. But planning for technological change which will not unduly impinge on significant human values is invariably costlier.

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103 Most states currently exclude from their roads cars with inadequate mufflers. *E.g.*, WIS. VEHICLE CODE tit. 44, § 347.39 (1957). But these statutes are usually vaguely drafted, and do not require mufflers designed to meet rigorous performance standards. Finch, *Surface Transportation Noise*, NOISE CONTROL, July 1956, at 28, 29-31. *See also* SOUND CONTROL BACKGROUND MATERIAL, *supra* note 74, (subheading on Internal Combustion Mufflers); W. BURNS, *supra* note 92, at 126. There are however other noisy features of cars and trucks which states could be required to regulate as a condition of receiving federal funds. For example, poorly designed tire treads are a source of unnecessary noise. Tires with treads containing "planned irregularities" are much quieter than tires with regularly patterned treads due to a smaller number of cavities coming into contact with the pavement simultaneously. Salmon, *Surface Transportation Noise—A Review*, NOISE CONTROL, July 1956, at 21, 23. Vehicular noise could also be reduced by the substitution of rubberized bellows for steel springs. Apps, *Recent Developments in Traffic Noise Control*, NOISE CONTROL, Sept. 1957, at 34, 36. If acoustic lining were required in the engine compartment, it would significantly reduce vehicle noise. HANDBOOK, *supra* note 4, ch. 31.

104 J. P. Mathis, The Rising Level of Urban Noise: Can the Volume be Lowered?, May 1969, at 45-46 (unpublished paper in Harvard Student Legislative Research Bureau).

105 Dreher, *It's Getting Noisier . . .*, THE NATION, Sept. 18, 1967, at 238, 239.

106 *See* COMMITTEE ON NOISE, *supra* note 14, at 28.

107 J. P. Mathis, *supra* note 104, at 46.

As with the Walsh-Healey regulations, the burden of showing compliance with any federal noise standards promulgated under the Federal-Aid Highway Act should be placed on the applicant for the funds. A program should not be eligible for federal assistance unless it is demonstrated that it conforms to noise guidelines established by the Department. Here too acoustical consultants could be useful in determining whether condemnation or highway depression will be necessary in order to meet the federal standards.[108] The existence of peculiarities in each individual highway project militates strongly against the use of master plans. In some urban areas it may be practicable to condemn a rather wide swath for a highway, while in others the use of noise barriers or sunken portions of roadway will be preferable. Only by tailoring plans to each situation can the objective of noise control be realized.

C. *Public Buildings*

The great amount of building which is undertaken by federal departments,[109] coupled with the existence of technological alternatives to noisy construction equipment,[110] makes the federal construction programs a very attractive opportunity for implementing federal noise control standards. Exacting from contractors with the federal government an agreement to actively advance a national goal is not a new idea. In the past, contracts with the government have contained terms requiring the contractor to adhere to non-discriminatory policies,[111] give preference to goods produced in the United States,[112] give a portion of subcontracts to small businesses,[113] limit employees' work time to eight hours,[114]

108 *See* note 89 *supra.*

109 In fiscal 1967 construction awards for public buildings totaled $186,000,000. 1967 GEN. SERVICES AD. ANN. REP. 41. During that year there were 246 projects, valued at $1,200,000,000, under design or construction in every state, the District of Columbia, and Puerto Rico. *Id.* at 5.

110 *See* notes 63 and 64 *supra.*

111. Exec. Order No. 10,925, 3 C.F.R. 448, 449-451 (Supp. 1960). *See* G. A. CUNEO, GOVERNMENT CONTRACTS HANDBOOK 8 (Machinery and Allied Products Institute and Council for Technological Assessment, 1962).

112 Buy American Act, 41 U.S.C. § 10a-10d (1964). *See* Knapp, *The Buy American Act: A Review and Assessment*, 61 COLUM. L. REV. 430, 431 (1961).

113 Small Business Act, 15 U.S.C. §§ 631-651 (1964). *See* Kefover, *Small Business in Government-Sponsored Research and Development Programs*, 24 LAW & CONTEMP.

and pay a national minimum wage.[115] Thus, the suggestion that construction and repair contracts let by the various federal departments contain terms requiring the contractor to employ quiet techniques and equipment is not without precedent.[116]

The construction of all public buildings is undertaken by the Administrator of General Services,[117] subject in most cases to the approval of the Congress.[118] The policies and procedures which are adhered to by the Administrator with respect to public buildings comprise a portion of the Federal Procurement Regulations.[119] These regulations are binding on all civilian agencies and are supplemented by other regulations for each individual department.[120] The Federal Procurement Regulations currently do not include any noise control standards. It is not clear whether the Administrator has the authority to include noise control require-

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PROB. 132, 142 (1959); K. WEDDELL, AIDING SMALL INDUSTRY THROUGH GOVERNMENT PURCHASES 15 (1960).

114 Eight-Hour Law of 1912, 40 U.S.C. §§ 321-322 (1964). *See* G. A. CUNEO, *supra* note 111, at 273.

115 Davis-Bacon Act, 40 U.S.C. § 276a-276a-5 (1964). *See* G. A. CUNEO, *supra* note 111, at 273.

116 Inherent in this suggestion is the belief that it is appropriate to use a government contract which has a primary purpose (*e.g.*, to build a building) to advance a secondary purpose (*e.g.*, to encourage the development of quiet construction equipment). A persuasive argument has been made that failure to consider such secondary gains (or losses) constitutes legislative myopia:

> Operationally, government policy is what government does, both directly and indirectly. It is the composite outcome of government action. The substantive accomplishment of government programs, the means by which they are achieved, and the values gained and sacrificed as a result of *both* make up the whole. A concern with the contract system leads unavoidably to matters of public policy, because the contract system has an effect on a variety of matters of substance *and* process which have policy significance. To evaluate it, this impact must be appraised in relation to the values to which government is dedicated, the expressed intent of government policy, and a standard for what constitutes the "public interest."

Stover, *The Government Contract System as a Problem in Public Policy*, 32 GEO. WASH. L. REV. 701, 703 (1964). *See* H. M. HART & A. M. SACKS, THE LEGAL PROCESS 1033-34 (tent. ed. 1958).

117 Public Buildings Act of 1959, 40 U.S.C. §§ 601-615 (1964).

118 Resolutions by the Committee on Public Works of the Senate and House of Representatives respectively are necessary for the construction of a building at a cost of over $100,000 or the alteration of a building at a cost of over $200,000. 40 U.S.C. § 606(a) (1964).

119 41 C.F.R. ch. 5B (1963).

120 These regulations are found in the seven volumes comprising 41 C.F.R. (Supp. 1969).

ments in the Federal Procurement Regulations,[121] but it is certainly open to Congress to confer this authority.

If the Administrator were authorized to promulgate noise control standards for federal building sites, the regulations could take several possible forms. One possibility is to establish a maximum permissible noise level for the entire site depending on the type of construction, the proximity of people and other buildings, and the time of day. But such a condition would necessarily entail on-site sound tests to ascertain compliance and would introduce the problems of measuring noise in the field adverted to earlier.[122] An alternative approach is to require the contractor to make use of existing practical technological alternatives to noisy equipment.[123] This approach offers several advantages. It dispenses with the requirement that field noise be measured, since the noise properties of individual makes and models of equipment could easily be tested and catalogued. It obviates the necessity for adjusting permissible noise levels to compensate for the type of construction, the distance from people and buildings, and the time of day. Most importantly, this approach would provide the strongest incentive for technological innovation. By carefully defining practical technological alternatives the Administrator would create an assured market for the equipment of any manufacturer ingenious enough to meet the federal standards. It would be possible to examine the various kinds of noisy construction machinery and establish permissible noise ratings for each particular type of equipment. A maximum allowable cost differential would have to be introduced into the calculus both to forewarn contractors what alternatives would be deemed practical and to ensure that obliging manufacturers were not disappointed by pricing themselves out of the market.

There are a variety of reasons why construction companies

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121 *See* 40 U.S.C. § 609(c) (1964). The legislative history of this section is scanty and neither supports nor denies the existence of such authority. The general intent seems to be to centralize building authority in a single department. S. REP. No. 694, 86th Cong., 1st Sess. 7 (1959), in 1959 U.S. CODE CONG. & AD. NEWS 2291, 2297; H.R. REP. No. 557, 86th Cong., 1st Sess. 10 (1959).

122 *See* Section I and note 9 *supra.*

123 In England, where the government vigorously attempts to control noise, a person indicted for failure to abate noise may raise a defense of "best practicable means." COMMITTEE ON NOISE, *supra* note 14, at 16.

might welcome quiet equipment if they could afford to effectively compete with it. It is well known that the presence of loud noises substantially reduces the performance of workers,[124] and noisy construction sites result in numerous complaints and create a bad public image.[125] But quiet equipment costs more than traditional equipment and will be especially expensive when the demand is small. By requiring the use of practical technological alternatives the competitive positions of all construction companies involved in federal construction are preserved. Every bidder for a federal construction contract would have to consider the additional costs of quiet equipment. Hopefully, once these companies acquired quiet equipment they would use it on all their sites. Also a significant market for quiet equipment might bring its price down enough to attract other companies for reasons of employee efficiency and public image. Today there are often no practical alternatives to noisy construction practices.[126] No one believes, however, that quieter techniques are not feasible. What is needed is a trigger for private innovation. It can be provided by a federal building program which guarantees manufacturers a market for quiet construction equipment.[127]

IV. Conclusion

The three areas of federal involvement discussed in this article — public contracts, federal-aid highways, and public buildings —

124 Committee on Environmental Quality, *supra* note 3, at 4.

125 *Muffling the Clamor of Urban Construction*, Business Week, Dec. 14, 1968, at 168, 169.

126 For example, there is not yet a feasible substitute for riveting, a very noisy process which takes place on a great many construction sites. Mayor of New York's Task Force on Noise Control, *supra* note 59, at 49.

127 If this suggestion seems overly optimistic, consider the impact of the Minimum Property Standards of the Federal Housing Administration on the building supply business:

> The Federal Housing Administration has enormous influence upon general standards of acceptability of products used in residential construction . . . . A good many housing starts in any community are FHA insured. . . . A manufacturer, therefore, usually endeavors to establish acceptability for his product with FHA if he intends to market his material for the construction of single- and multi-family homes.

Advisory Commission on Intergovernmental Relations, Building Codes: A Program for Intergovernmental Reform 48 (1966).

serve collectively to illustrate the inconsistency of the federal government's approach to the problem of noise. In the case of public contracts there is clear statutory authority for policies which seek to control noise and a comprehensive set of regulations implementing that authority. All that is needed here is strong enforcement of sanctions. In the case of federal-aid highways there is apparent statutory authority for noise control policies but only the most general regulations implementing that authority. Here progress in controlling noise requires at least a more comprehensive regulatory scheme. In the case of construction of public buildings there are no regulations concerning noise and it would be difficult to find statutory authority for such regulations. In this situation noise control efforts must begin with an appropriate congressional mandate. In short, if noise is a national concern and one appropriate for federal intervention, then we must rethink our spending programs and the manner in which they bear on noisy technologies. It makes no sense to decree that federal funds shall not be expended in businesses which operate overly noisy factories while funds continue to be spent to sponsor highway programs that inevitably expose millions of people to excessive noise.[128] There is potential for technological change in all these areas.

The acute need for sophisticated means of assessing technology has been the subject of a number of commentaries[129] and has lately been addressed by the Congress.[130] Assessment, however, is only

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128 This is not to intimate that these are the only sources of noise that are ripe for corrective action at the national level. The selection of these programs to illustrate that federal funds could be used to encourage technological developments favoring quietness is due to the degree of federal activity in these areas and to the high ranking of these federal projects as sources of noise.

129 *E.g.*, Wollan, *Controlling the Potential Hazards of Government-Sponsored Technology*, 36 GEO. WASH. L. REV. 1105, 1136 (1968); Green, *Technology Assessment and the Law, id.* at 1033, 1040; Cairl & Gallagher, *Government, Science and Technology: A Bibliographical Essay*, 28 PUB. AD. REV. 373, 374-75 (1968). *See also* Quinn, *Technological Forecasting*, HARV. BUS. REV., Mar.-Apr. 1967, at 89, 105-106.

130 *See Hearings on S. Res. 68 to Establish a Select Comm. on Technology and the Human Environment Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Gov't Operations*, 90th Cong., 1st Sess. (1967); *Seminar on Technology Assessment Before the Subcomm. on Science, Research and Development of the House Comm. on Science and Astronautics*, 90th Cong., 1st Sess. (1967). Representative Daddario has introduced a bill to establish a Technology Assessment Board. H.R. 6698, 90th Cong., 1st Sess. (1967). Senator Allott has introduced a bill calling for a Joint Congressional Committee on Science and Technology. S.

part of what is needed if technology is to be constrained to a course which respects human needs. This article has, therefore, tried to go beyond assessment and suggest programs for conditions on governmental spending which reflect the fruits of an assessment of noise. These proposals merely extend the concept of the Walsh-Healey Act[131] and the recent Labor Department regulations[132] promulgated pursuant to it: that federal spending programs may be used to require that the recipient pursue technological alternatives that provide a reasonable degree of quiet.

The utility of the traditional legal remedies for noise is closely bounded by the limits of judicial competence to digest the factual data necessary to create workable noise control policies.[133] Nuisance suits, inverse condemnation suits, and most anti-noise ordinances require courts to make ad hoc judgments which cannot reflect an adequate consideration of the physiological and psychological affects of noise on people or of the technological possibilities for controlling noise. The approach offered in this article depends primarily on the normative judgments of the legislative and executive branches of government. If this approach were followed, the task of the traditional legal remedies would become interstitial, and courts could use the norms established by ongoing federal programs as a guidepost. The purpose of this article has been to show that thoughtful remedial steps can encourage responsive technological developments and thereby reduce the need for reliance on remedies that have proven to be ineffective.

1305, 90th Cong., 1st Sess. (1967). The House Committee on Science and Astronautics has sponsored reports on technology assessment by both the National Academy of Sciences and the National Academy of Engineering. THE NATIONAL ACADEMY OF SCIENCES, *supra* note 42, *summarized in* Brooks & Bowers, *The Assessment of Technology*, SCIENTIFIC AMERICAN, Feb. 1970, at 13; COMM. ON PUBLIC ENGINEERING POLICY, *supra* note 8. *See generally* Muskie, *The Role of Congress in Promoting and Controlling Technological Advance*, 36 GEO. WASH. L. REV. 1138, 1148 (1968); Daddario, *Technology Assessment—A Legislative View*, *id.* at 1044, 1049; Daddario, *Technology Assessment Legislation*, 7 HARV. J. LEGIS. 507 (1970).

131 *See* note 81 *supra*.

132 *See* note 80 *supra*.

133 *See* H. M. HART & A. M. SACKS, *supra* note 116, at 385, 400. *Cf.* Mayo & Jones, *Legal-Policy Decision Process: Alternative Thinking and the Predictive Function*, 33 GEO. WASH. L. REV. 318, 436-443 (1964).

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STATUTES

A FEDERAL CONSUMER PRODUCTS LIABILITY ACT*

INTRODUCTION

Injured consumers have traditionally relied on negligence and contract-oriented doctrines of recovery in seeking relief from injuries caused by defective products. The concept of strict liability in tort, however, has rapidly increased in acceptance and is replacing negligence and warranty theories.[1] By 1965 a strict tort liability provision had been included in the RESTATEMENT (SECOND) OF TORTS, Section 402A:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the consumer or user without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Judicial standards developing in accordance with Section 402A and at the same time extending warranty doctrines beyond the

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1 Amply chronicling the advent of strict liability for defective products in tort and warranty are Dean Prosser's two articles, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960) and *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

old requirement of privity have resulted in different conclusions in different states and sometimes a confusing mixture of the two strict liability theories of recovery, warranty and tort. At least 32 jurisdictions hold manufacturers strictly liable for damage done by their defective products.[2] Of these, nineteen have adopted a strict tort liability doctrine,[3] and it is predictable that more will follow. In almost every state that has considered the question, courts have been willing to extend product liability law, accepting and expanding upon the principle of Section 402A.[4] However clear the overall movement toward strict liability may be, on more specific issues there is often no clear trend in the law.[5] Examples of such issues are extent of damages, extent of liability for economic loss, burden of proof, extent of defenses, persons able to sue under the theory, and the manufacturer's duty in labeling and design of products.

Judicial resolution of such issues comes very cautiously since important considerations of state policy must be taken into account — particularly the weighing of effects on economic disruption and consumer protection. Legislation expressing policy

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2 1 CCH PROD. LIAB. REP. ¶ 4060 (1968).

3 *Arizona,* Bailey v. Montgomery Ward and Co., 6 Ariz. App. 213, 431 P.2d 108 (1967); *California,* Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962); *Connecticut,* Garthwait v. Burgio, 153 Conn. 284, 216 A.2d 189 (1965); *Illinois,* Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965); *Indiana,* Greeno v. Clark Equipment Co., 237 F. Supp. 427 (N.D. Ind. 1965); *Kentucky,* Dealers Transport Co. Inc. v. Battery Distributing Co. Inc., 402 S.W.2d 441 (Ky. Ct. App. 1966); *Minnesota,* McCormack v. Hankscraft Co., 278 Minn. 322, 154 N.W.2d 488 (1967); *Mississippi,* State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966), *cert. denied,* 386 U.S. 912 (1967); *Missouri,* Morrow v. Caloric Appliance Corporation, 372 S.W.2d 41 (Mo. 1963); *Nevada,* Shoshone Coca-Cola Bottling Co. v. Dolinski, 82 Nev. 439, 420 P.2d 855 (1966); *New Jersey,* Santor v. A. & M. Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965); *New York,* Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81 (1963); *Ohio,* Lonzrick v. Republic Steel Corp., 1 Ohio App. 2d 374, 205 N.E.2d 92 (1965), *aff'd,* 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966); *Oklahoma,* Stubblefield v. Johnson-Fagg, Inc., 379 F.2d 270 (predicting state law); *Oregon,* Wights v. Staff Jennings, Inc., 241 Ore. 301, 405 P.2d 624 (1965); *Pennsylvania,* Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966); *Tennessee,* Olney v. Beaman Bottling Co., 220 Tenn. 459, 418 S.W.2d 430 (1967); *Texas,* McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967); *Wisconsin,* Dippel v. Sciano, 37 Wis.2d 443, 155 N.W.2d 55 (1967).

4 *See, e.g.,* Greeno v. Clark Equipment Co., 237 F. Supp. 427, 432 (N.D. Ind. 1965).

5 *See* Note, *Strict Liability in Federal Courts: Problems of Predicting State Law Under "Erie,"* 55 CORNELL L. REV. 274 (1970).

on these issues not only will satisfy the courts that have insisted that the issue was one for the legislature, but also the public exposure of the legislative process will allow the parties concerned to plan for the future with greater reliance.

I. Goals of the Proposed Act

One goal of the Act is to create a simplified and uniform products liability statute applicable in every state. Section 402A served as a starting point, as did an exchange of ideas with the National Commission on Product Safety, whose request for model federal and uniform state statutes served as the impetus for this draft. Additional goals of the proposed act are: (1) placing the immediate costs of accidents on those "at fault," (2) increasing consumer protection by encouraging better quality control, and (3) ultimately, optimal spreading of the social costs of accidents.

Most courts, preserving the theme of individual responsibility in tort law, have indicated that the losses of injured consumers should be borne by manufacturers since they are in some sense at least "conditionally at fault."[6] Self-enrichment at increased risk to others from the marketing of a less-than-safe product suggests that an injured plaintiff should be able to recover from the maker of the product. In addition, the placing of a product on the market seems to represent to the user that the product is safe for use.[7]

Enacting the proposed statute may also cause manufacturers to upgrade their safety control processes in order to decrease the number of defects and resulting injuries. The average consumer is forced to depend on the manufacturer's quality control since only the manufacturer has the technical resources and knowledge to detect the defects that the ordinary consumer does not have the opportunity to discover before purchase. Therefore, under the proposed statute, the defendant manufacturer is brought within

6 This rationale was discussed in Keeton, *Conditional Fault in the Law of Torts*, 72 Harv. L. Rev. 401 (1959).

7 *See, e.g.*, Suvada v. White Motor Co., 32 Ill. 2d 612, 619, 210 N.E.2d 182, 186 (1965); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 379, 161 A.2d 69, 84 (1960).

the grasp of the injured consumer seeking a remedy by the nationwide service of process and jurisdictional provisions of Title II.

A manufacturer may be encouraged to institute better quality control procedures to limit the insurance premiums or self-insurance reserves necessary to cover his new liability under the law. While it is true that manufacturers can pass on the cost of these premiums to consumers, it is also true that any price increases will usually result in a somewhat lower volume of sales. Of course, the magnitude of such a decrease in volume, and the resulting incentive to avoid or mitigate any insurance-related price increase, will depend upon the elasticity of demand for particular products, which may vary greatly. It may also be true that instituting better quality control will cost more per unit than would the extra or marginal cost of insurance premiums without such controls. This will depend upon the nature of the manufacturing process of particular products and the economic position of particular manufacturers.

Even if manufacturers hesitate, however, insurance companies may simply demand that manufacturers adopt stricter quality and safety control measures as a precondition to issuing policies. Thus, enactment of strict liability may serve as a means of establishing insurance companies as the policemen for better quality control.

The proposed act is further predicated on the belief that, regardless of questions of uniformity in the law, conditional fault, and safety control, it is more equitable that the cost of defective product-caused injuries be spread among all users than remain on those actually injured, and that the manufacturer is generally most able to spread the costs of such injuries.

All consumers assume certain risks whenever they buy products. One risk is that a defect in the product will cause bodily harm. The probability of such harm in any given case is very small indeed, but it is a part of the risks that all consumers must take to live in society. Since every consumer assumes this risk, it is unfair to let that injury which does occur fall entirely upon those who are hurt. By holding the manufacturer strictly liable,

each consumer is forced to pay a small insurance premium proportional to the amount of risk involved. These individual payments are pooled by the manufacturer or his insurance company and distributed to those consumers who are injured. A consumer should not be compensated for his injury only when he knowingly assumes an inordinate amount of risk.

All consumers cannot be expected to insure themselves. The lower middle class, underemployed, and unemployed typically do not have access to medical insurance plans. The costs of injuries that these consumers receive fall directly upon them unless they have a real opportunity to recover in court, and the complex evidence required to prevail in a products liability suit is a major obstacle to plaintiffs. Moreover, the form of insurance that manufacturers would be likely to carry because of this act would be more efficient than having each individual take out his own insurance policy since one large insurance policy is cheaper than a great number of small policies.[8]

Although cost-spreading ability as a basis for liability has been widely supported,[9] there may be instances in which a manufacturer found liable will be in a poor position to actually spread the costs of injuries. For example, he may be unable to improve quality control or pay liability insurance premiums and at the same time maintain the competitive position of his product. This would leave him with two choices.

He could leave the product on the market and hope that no accidents would result from any defects. If injuries did occur for which he is liable, he could attempt to pay the judgment out of existing assets. The chances are, however, that if he was unable to afford insurance premiums or tighter control methods, he would also be unable to pay any substantial judgment or series of judgments, and consequently at least one injured consumer would remain uncompensated for his injury. To that extent the goal of cost-spreading would be frustrated.

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8 *See* Calabresi, *Fault, Accidents and the Wonderful World of Blum and Kalven,* 75 YALE L.J. 216, 225 (1965).

9 *See, e.g.,* authorities cited in Keeton, *supra* note 6, at n.14, 407-08; Noel, *Manufacturers of Products — The Drift Towards Strict Liability,* 24 TENN. L. REV. 963, 1010 (1957); *but see* Keeton, *id.* at 405-09, 436-43.

This chain of events is, however, unlikely. Certainly the bulk of consumer products are produced by businesses that are financially stable. Those producers that are marginal and cannot or will not insure will be forced to stop manufacturing the defective product when they are no longer able to pay judgments. Thus, although the system of cost-spreading under the proposed statute is not perfect, it will be ineffective only in rare instances.

The second choice for the manufacturer would be to withdraw the product, and perhaps his entire business, from the market. This result may seem harsh, but an adequate recognition of the complete cost of products demonstrates that it is an equitable solution. The proposed act causes the true cost of the product, including the social cost of preventing or compensating injuries from defects, to be reflected in the price of the product. The true cost is thus paid by the entire consuming public. If a product is so dangerous that the price that reflects these true costs is prohibitive, it should be replaced by products that can survive competition even when they reflect all their true costs. The net effect will be an allocation of resources which more accurately reflects consumer preferences.[10] Inequities arise when the social costs are not reflected in price and overly dangerous products are able to compete with safer products because the injured consumers are indirectly subsidizing the manufacturers of the defective product.[11]

II. The Case for Direct Manufacturer Liability

It seems most effective to require the injured consumer to proceed directly against the manufacturer on the federal cause of action provided by this statute.[12] A series of warranty actions from consumer to retailer, and on through wholesalers and other intermediaries, already makes it possible under present law to hold manufacturers liable for defective products.[13] The primary

10 Kessler, *Products Liability*, 76 Yale L.J. 887, 928 (1967).
11 *Id.* at 925.
12 *See, e.g.*, Ford Motor Co. v. Lonon, 398 S.W.2d 240, 250 (Tenn. 1966).
13 Noel, *supra* note 9, at 1014.

policy of allowing suits against retailers and intermediaries is to increase the likelihood that liability will reach the manufacturers.[14]

However, these successive suits waste public and private resources. The extent to which a defendant can pass on his costs depends on the structure of the industry, the nature of the costs, and general economic conditions,[15] but it is unlikely that he will be completely successful. Therefore, the greater the number of defendants faced with the problem of minimizing the effect of a large judgment, the more chance there is for the addition of unnecessary costs. Even if an intermediary later recovers from a manufacturer, he cannot recoup his litigation expenses, and thus he must distribute them as best he can and probably in ways unrelated to the safety or true costs of the product. For example, he may raise prices on all his products rather than on the defective product alone. Even if he recovers his litigation expenses, the costs of the inefficiency of multiple litigation will distort the product cost. Insurance premiums paid by each potential defendant will reflect all these imperfections in the conduit of liability leading to the manufacturer. Also, contractual disclaimers between parties in the chain may reduce or eliminate the manufacturer's liability. Furthermore, the manufacturer is more prepared to defend a suit or improve his product than a retailer or an intermediary because of his experience in and control over production. Finally, the jurisdictional scope of this statute should increase the exposure of the manufacturer to direct suit. In those cases where the injured consumer cannot secure a suit against the manufacturer, the drafters do not believe that the retailer or intermediaries should bear the burden as against the consumer solely because the retailer is more able to absorb financial losses. The Act would operate much more like absolute liability if it applied to intermediaries who have little control over product quality and lack the information necessary to adequately defend a suit. For a different view, however, see the alternative draft of Title I.

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14 Kessler, *supra* note 10, at 936 (1967).

15 Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 517-27 (1961).

FEDERAL CONSUMERS PRODUCTS LIABILITY ACT

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TITLE I

Section 101: *Title*

This act may be cited as the Federal Consumer Products Liability Act.

Section 102: *Definitions*

(1) As used in this act, "consumer product" means any product intended for or customarily used for personal, family, or household purposes.

(2) "Manufacturer" means any person engaged in the business, in or affecting interstate commerce, of manufacturing, producing, assembling, or otherwise materially contributing to the production of a consumer product or its component parts.

(3) "Defects" or "defective condition" means any aspect, charac-

teristic, or design of a product (inherent or otherwise) which makes the product unreasonably dangerous for the product's reasonably foreseeable use.

(4) "Consumer" means any natural person, including a bystander, who uses, consumes, or is affected by use of a consumer product.

(5) "Damage" includes physical or emotional injury, property damage, and other economic loss.

Section 103: *Strict Liability*

(1) A manufacturer of any consumer product in a defective condition shall be liable for damage to a consumer proximately caused by the defective condition.

(2) The rule stated in paragraph (1) applies even though:

(a) the manufacturer has exercised all possible care in the preparation and sale of the product;

(b) the consumer has neither bought the product from nor entered into any contractual relationship with the manufacturer;

(c) the consumer has misused the product in a manner reasonably foreseeable within the general usage of the product;

(d) the consumer has failed to inspect the product, to discover the defect, to guard against the possibility of a defect in the product, or has otherwise contributed to the injury, except as provided in section 105.

Section 104: *Burden of Proof; Existence of Defect*

(1) A defect shown to have existed in a consumer product at the time of injury, to the extent that the defendant cannot prove otherwise, shall be deemed to have existed in the product when it left the control of the manufacturer.

(2) A malfunction of the product shall be presumptive evidence of a defect.

Section 105: *Defenses*

(1) A manufacturer shall not be liable under section 103 if the consumer:

(a) knew or reasonably should have known of the defect, and

(b) knew or reasonably should have known the magnitude of the risk and the potential for harm presented by the defect, and

(c) could reasonably have avoided the damage caused by the defect.

In determining questions of knowledge, the effect of a warning shall

not be taken into account in the case of a product reasonably anticipated to be used primarily by children.

(2) A manufacturer shall not be held liable under section 103 if the damage was caused by a misuse of the product which could not be reasonably foreseen by the manufacturer.

(3) A manufacturer of a defective product shall not be liable for damage proximately caused by an intervening negligent act of a third party that is independent, conscious, and not reasonably foreseeable.

Section 106: *Seller Liability for Non-disclosure*

A seller, lessor, or distributor of a defective consumer product shall be liable under this act to the same extent as a manufacturer upon failure to reveal the name and business adress of product's manufacturer within ten (10) days after receiving a written request in good faith for such information from the injured party or his agent.

Section 107: *Effect on Other Rights of Recovery*

Nothing in this act shall limit, annul, or preempt in any way any rights of recovery, either in tort or in warranty, at common or statutory law, provided that the defenses of res judicata and collateral estoppel shall be preserved.

Section 108: *Compliance with Safety Codes, Standards, or Regulations*

(1) Compliance with any federal, state, or local safety code, standard, or regulation shall not be a defense to an action brought under this act.

(2) Failure to comply with any federal, state, or local safety code, standard, or regulation shall be presumptive evidence that the product is defective within the definition of section 102(3).

TITLE II

Section 201: *Jurisdiction*

The district courts of the United States shall have jurisdiction of actions brought under this act. Such jurisdiction shall be concurrent with that of the courts of the several states, except that the courts of the United States shall have jurisdiction only where the matter in controversy exceeds the sum or value of $3,000, exclusive of interest or costs.

Section 202: *Service of Process*

All process in actions brought under this act in the courts of the United States may be served in the district in which the defendant resides or wherever he may be found; or, if the defendant resides or may be found in a foreign country, service shall be according to the provisions of the Federal Rules of Civil Procedure, as from time to time amended.

Section 203: *Limitation of Actions*

(a) No action shall be maintained under this act unless commenced within three years from the date the claim accrues.

(b) For purposes of subsection (a), an action shall be deemed to commence on the date on which a complaint is filed with the court.

(c) For purposes of subsection (a), a claim accrues on the date injury or damage occurs, or, in cases where injury or damage is not obvious or apparent, on the date when the consumer should reasonably be aware of such injury or damage.

Section 204: *Aggregation of Claims in Class Actions*

Parties bringing a class action in the courts of the United States under this act may aggregate their claims in order to attain the matter in controversy exceeding $3,000, exclusive of interest or costs, required under section 201 of this act.

Section 205: *Trial by Jury*

All actions arising under this act in the courts of the United States shall be triable by jury.

Section 206: *Survival of Actions; Wrongful Death*

(a) Any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of the deceased, and, if none, then of the parents of the deceased; and, if none, then of the next of kin dependent on the deceased; and, if none, then of the next of kin dependent on the deceased, but in such cases there shall be only one recovery for the same injury.

(b) Where the death of the deceased is caused by a defective consumer product, the surviving widow or husband and children of the deceased, and, if none, then the next of kind dependent on the deceased, shall be entitled to maintain an action under this act and recover damages. In every such action, the jury may give such damages

as they deem fair and just for the death and loss thus occasioned. Every such action shall be commenced within two years after the death of the deceased person.

(c) There shall be no limitation on the amount of recovery allowable under this act.

Section 207: *Removal*

[Amendment to 28 U.S.C. § 1445, (1964). Add: Section 1445(d).]

A civil action in any state court against a manufacturer, distributor, seller, or lessor of consumer products, arising under section 103 of Title I of this act, may not be removed to any district court of the United States unless the matter in controversy exceeds $10,000, exclusive of interest and costs.

COMMENT TO TITLE I

Section 102: *Definitions*

COMMENT:

(1) "Consumer product." There is a basis for distinguishing consumer products from those used in industry or business. The business consumer is more likely to be covered by an insurance or compensation plan which provides for the cost of his injuries. In keeping with the recent trend of consumer protection law, this federal act is intended to provide recovery to those parties traditionally uninsured as well as unable to recover in strict liability for product-related injuries. The language "customarily used for" is intended to cover situations such as home use of a company car. The use of a consumer product in a business situation (*e.g.*, a coffeepot in an office lounge) would be covered by the words "intended for . . . personal use."

(2) "Manufacturer." The first requirement of the definition is that the manufacturer be engaged in a business. The housewife who sells an occasional jar of preserves is not included, nor is the individual who sells his personal car. A manufacturer is no longer engaged in a business if his wares are being sold to execute a judgment. In such situations, the policies of consumer protection and cost-spreading have no application. The informal producer is usually as incapable of withstanding such loss as the injured

user and would normally have no greater ability to control quality and spread costs. The Act is directed at enterprise liability; thus, that there is an "enterprise" is a fact to be alleged and proved by the plaintiff.

Liability has been placed on the party who has some control over the product to make the product as safe as possible. Those parties who materially contribute to the production of a product are the parties most able to restrict its dangerous elements within safe limits and bear the costs of enterprise liability. Independent agents employed by manufacturers to do their advertising, marketing, design, or testing are not to be held liable to consumers under this act. They may of course be held for negligence or for their express or implied representations.[16]

Sellers and distributors are not made liable by the Act since they have little opportunity to control product quality. The drafters considered several alternatives which would have made sellers liable to some degree. One was to make liable sellers, lessors, and distributors who affix their own brand name to the product before marketing. It is arguable that they are as much at fault as the manufacturer since they are adding another representation of safe quality to the product, *i.e.*, their brand name which presumably has some sales value over a non-branded product. On the other hand, they may already be liable under the warranty theory of sections 2-313 through 2-318 of the Uniform Commercial Code. While most states have not extended Code warranty coverage to the bystander, some trend toward such coverage has developed.[17]

If the seller is held liable (see Alternate Draft below) but is not able to succeed in a suit against a manufacturer, the seller will incur the loss connected with the product. The competing considerations which must be balanced in such a case are protection of the consumer as against the anti-competitive effect of forcing sellers to attempt to spread the cost of damage judgments stemming from defective products that they cannot readily control.

16 *See, e.g.*, Laukkanen v. Jewel Tea Company, 78 Ill. App. 153, 222 N.E.2d 584 (1966).

17 See Note, *Piercing the Shield of Privity in Products Liability: A Case For the Bystander*, 23 U. MIAMI L. REV. 266 (1968).

(3) "Defect" or "defective condition." This definition is intentionally broad. The words "inherent or otherwise" are used to indicate that the defect may be latent, arising only in the course of time or usage, and that the defective condition may be a function of the product as a whole rather than a single identifiable characteristic.

Both defects of design, where a series of like products are uniformly manufactured, and construction defects, or defects peculiar to one unit of an otherwise safe product, are included. Particular defects are more easily proven and courts have been quick to recognize them since *MacPherson v. Buick Motor Co.*[18] The automobile industry, for example, stimulated by the threat of liability, has reduced the number of construction defects in its product.[19] If courts refuse to hold manufacturers liable for unreasonably dangerous *design* defects, however, there is little incentive to make design modification.[20] In automobile crash cases, courts have evaded the question of defective design by ruling that the crash was not an intended use of the product.[21] Other courts have extended products liability in like cases to design defects, and this act follows those cases.[22] Use of the qualifying phrase "unreasonably dangerous for reasonably foreseeable use" in section 103 broadens the usage of the product that can be considered beyond the "intended use" standard upheld in some jurisdictions. The phrase sets up a standard of reasonableness based on foreseeability of injury, design capabilities, and economic practicalities.[23] Complex design issues in accident cases can be handled by juries. This should deter courts from reaching

18 217 N.Y. 382, 111 N.E. 1050 (1916).

19 Katz, *Liability of Automobile Manufacturers for Unsafe Design of Passenger Cars*, 69 HARV. L. REV. 863, n.2 at 864 (1956).

20 The National Motor Vehicle and Traffic Safety Act of 1966, U.S.C. § 1381 *et seq.* (Supp. IV, 1969), sets only performance standards and not design standards.

21 *See, e.g.*, Evans v. General Motors Corp., 359 F.2d 824 (7th Cir. 1966), *cert. denied*, 385 U.S. 836 (1966) (strict liability theory); Shumard v. General Motors Corp., 270 F. Supp. 311 (S.D. Ohio 1967) and Willis v. Chrysler Corp., 264 F. Supp. 1010 (S.D. Tex. 1967) (negligent design theory).

22 Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968); Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969); Dyson v. General Motors Corp., 298 F. Supp. 1064 (E.D. Pa. 1969).

23 For seven considerations which may be used to determine the unreasonably dangerous nature of a product, see Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 17 (1965).

determinations of such issues.[24] Reluctance by courts to grant relief may have come from a fear that the grant of relief in one case would pose serious economic consequences to manufacturers because of the numerous suits to follow. But the greater the risk created, the more desireable the immunity from liability.

Products which cannot be made safe because of inherent defects cannot be said to be unreasonably dangerous because of the great benefit of having such products in society. Evaluations of the risks of injury are, of course, to be made in the light of existing knowledge of benefits and dangers involved at the time when the product left the manufacturer's control.

Another aspect of a product which may make it defective is lack of an effective warning. Where a manufacturer has reason to foresee that danger will result from a particular use, he must give adequate warning of the danger. A product that leaves the control of the manufacturer without such warning is in a defective condition.[25]

(4) "Consumer." Because section 402A of the Restatement (Second) of Torts withheld opinion on the question of recovery by a bystander,[26] some state courts have not been willing to extend coverage to the bystander.[27] Judicial reluctance perhaps has been based on a feeling that bystanders are not the intended users and thus do not have the same reason to rely upon an implied assurance of safety.[28] On the other hand, this theory seems to rest only on warranty grounds. The fact that the bystander cannot be warned is as much a reason to include him as a plaintiff as it is to exclude him. The consumer at least has the protection of the warning; the bystander has no protection at all. Furthermore, the most casual bystander is in no better position to absorb loss

24 Nader and Page, *Automobile Design and the Judicial Process*, 55 CALIF. L. REV. 645, 663 (1967).

25 *See, e.g.*, Barth v. B.F. Goodrich Tire Co., 265 Cal. App. 2d 228, 237, 71 Cal. Rptr. 306, 315 (1968).

26 *See* RESTATEMENT (SECOND) OF TORTS § 402A, Caveat 1 (1965). Several states have not yet ruled on the bystander issue, *see* 1 CCH PROD. LIAB. REP. ¶ 4210 (1968).

27 Davidson v. Leadingham, 294 F. Supp. 155 (E.D. Ky. 1968); Mull v. Colt Co., 31 F.R.D. 154 (1962), *aff'd sub nom.*, Mull v. Ford Motor Co., 368 F.2d 713 (2d Cir. 1966).

28 Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1142 (1960).

than the consumer who purchases directly from the manufacturer.[29] Thus the proposed act extends consumer protection to the bystander, as have some courts.[30] The Act otherwise provides coverage to the same extent as section 402A, comment *l*.

(5) Damages. This section allows recovery where the only injury caused by a defective product is mental distress. With the growth of psychology and psychiatry, it has become easier for courts to determine whether real emotional or psychological damage occurs even without evidence of a physical impact. Courts have been willing to extend the boundaries of tort recovery in such situations.[31] There is no reason consistent with the policy of the Act for excluding recovery for such damages.

The Act decides a question on which two of the jurisdictions with the most progressive tort law, New Jersey and California, have extended section 402A to reach contrary positions — the question of liability for economic loss. In *Santor v. A. & M. Karagheusian, Inc.*,[32] the New Jersey court allowed loss-of-bargain damages on the basis of both implied warranty and strict tort liability. However, in *Seely v. White Motor Co.*,[33] a plaintiff was allowed to recover only on an express warranty theory, the California Supreme Court, in dicta, rejecting a recovery of business losses on the tort theory. Under the proposed act a manufacturer is liable for both consequential damages — lost profits, damage to property, etc. — caused by the defective product and for the direct economic loss caused by the product becoming worthless in the hands of the consumer (loss of bargain). This does not increase the manufacturer's burden of quality control since the care required to avoid liability for tangible harm also suffices to avoid liability for economic loss. This extension avoids the result of denying recovery for economic damage caused by a defective

29 *See* Note, *Strict Products Liability and the Bystander*, 64 COLUM. L. REV. 916 (1964).

30 Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965); Mitchell v. Miller, 26 Conn. Sup. 142, 214 A.2d 694 (Super. Ct. 1965); *see generally* Note, *Piercing the Shield or Privity in Products Liability — A Case for the Bystander*, 23 U. MIAMI L. REV. 266 (1968).

31 *See, e.g.*, Blakeley v. Shortal's Estate, 236 Iowa 787, 20 N.W.2d 28 (1945).

32 44 N.J. 52, 207 A.2d 305 (1965).

33 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); *see also* Henry v. John W. Eshelman & Sons, 99 R.I. 518, 209 A.2d 46 (1965); Price v. Gatlin, 241 Ore. 315, 405 P.2d 502 (1965) (dictum).

product, while allowing recovery to the same consumer for tangible damages from the very same product. On the basis of insurability, the manufacturer can better distribute social costs if he is liable for both consequential and direct damages.[34] Granting recovery for products that are improperly made, but which do not constitute an unreasonable danger, would be difficult to justify under a cost-spreading rationale, since the risk to the manufacturer is less insurable than in the case of personal injury.[35] Reliance on the Uniform Commercial Code to grant relief in economic loss cases is inadequate, since the privity requirements of the Code do not cover all users or bystanders.[36]

Section 103: *Strict Liability*

COMMENT: Section 103(1) is the basis of the plaintiff's cause of action. Plaintiff's allegations can be attacked immediately by defendant if the definitional requirements of "manufacturer," "consumer product," "defective condition," "damage," and "consumer" are not met. In addition, plaintiff must allege that the defective condition was the proximate cause of his injury.

The plaintiff, to be successful, must also show that the product contained a defect. Once a defect is shown by the plaintiff, the burden of persuasion is on the manufacturer to show that the defect arose when the product was no longer under his control (see section 104). Thus, once the plaintiff has brought his case within the definitions set out in section 102, he must establish three basic requirements: (1) that a defect existed in the product at the same time it left the manufacturer's control (but see section 104), (2) that the defect involved was one which rendered the product unreasonably dangerous for its reasonably intended use, and (3) that the injury or damage was proximately caused by the defect.

The first two rules in section 103(2) exist to resolve questions

34 *See* Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917, 954-58 (1966).

35 *Id.* at 950-966.

36 The Pennsylvania Supreme Court in Hochgertel v. Canada Dry Corp., 409 Pa. 610, 187 A.2d 575 (1963), narrowly construed the third party beneficiary definition under § 2-318 so that an injured employee of a purchaser was not able to recover in warranty. This act would allow recovery in strict liability.

of (a) negligence or lack of it on the part of the manufacturer, and (b) privity, notice, disclaimer, statute of limitations, or other issues related to warranty, and not tort, liability.

Section 103(2)(c) states that consumer misusing the product, but in a manner reasonably foreseeable by the manufacturer, are not denied recovery. Relatively unusual, but foreseeable uses, such as standing on a chair,[37] or eating coffee,[38] have long been considered not fatal to the claim of the consumer in some jurisdictions.[39] This act takes the view that the extent of use for which recovery is not denied be more than just the precisely intended use, but include all reasonably foreseeable uses.

Section 103(2)(d) goes no further than does the *Restatement* in saying that contributory negligence is not a defense to this action.[40] The defenses of misuse and consent to risk are allowed by this act (see section 105). Other than these variants, contributory negligence has not been allowed as a defense in strict products liability cases.[41] It has been argued persuasively that to require any degree of care on the part of the consumer, when the product is used within its broad field of utility, violates the concept of strict liability.[42]

Section 104: *Burden of Proof, Existence of Defect*

COMMENT: Section 104 proposes a major change in the law in most jurisdictions. It allocates to the manufacturer the burden of proving the existence or non-existence of a defect. This change has been suggested by student commentators[43] and adopted by

37 Phillips v. Ogle Aluminum Furniture, Inc., 106 Cal. App. 2d 650, 235 P.2d 857 (Dist. Ct. App. 1951).

38 Maddox Coffee Co. v. Collins, 46 Ga. App. 220, 167 S.E. 306 (1932).

39 *But see* text at n. 21, *supra.*

40 RESTATEMENT (SECOND) OF TORTS, § 402A, comment *n* (1965).

41 *See, e.g.*, Sweeney v. Matthews, 94 Ill. App. 2d 6, 236 N.E.2d 439 (1968); McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967); *but see* Ozman, *Products Liability Under the "Suvada" Theory,* 55 ILL. B.J. 906 (1967). On review of pre-1967 Illinois cases, strict liability cause of action requires proof that plaintiff was in exercise of due care for his safety. *Cf.* Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

42 Lascher, *Strict Liability in Tort for Defective Products: The Road To and Past Vandermark,* 38 S. CAL. L. REV. 30, 50 (1965).

43 Comment, *Products Liability and the Problem of Proof,* 21 STAN. L. REV. 1777, 1786 (1969); Comment, 26 WASH. & LEE L. REV. 143, 150-52 (1969).

some recent cases.[44] Most courts have traditionally placed the burden on the plaintiff to prove existence of a defect when the product left the control of its manfacturer or seller.[45]

The Act proposes that once the consumer has shown the product was defective in his hands, the manufacturer must show that the defect did not arise under his control or that a third party caused the defective condition. If the manufacturer fails to meet this burden of persuasion, the defect will be presumed to have been caused by the manufacturer. Section 104(2) indicates that a malfunction is sufficient evidence for a trier of fact to conclude that a defective condition, as defined in section 102(3), existed. The plaintiff must still prove causation between the defect and his injury, but the malfunction serves as evidence of this, to be weighed by the jury. As evidence of malfunction or proof of defect, the trier of fact may consider circumstantial evidence, including type of use, age of product, maintenance, reasonable minimum performance levels, and adherence to the manufacturer's instructions.[46]

The nature of a product liability case makes it very difficult for a consumer to prove a prior defect existed under the control of the manufacturer.[47] Not only are there great costs and difficulties

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44 Greco v. Bucciconi Engineering Co., 283 F. Supp. 978 (W.D. Pa. 1967), *aff'd*, 407 F.2d 87 (3d Cir. 1969); *see also* Bailey v. Montgomery Ward and Co., 6 Ariz. App. 213, 431 P.2d 108 (1967), where the court held in part:

> [T]he jury may reasonably have inferred that the direct result of the pogo stick's flying apart and injuring the plaintiff was due to a defect in the design or manufacture of the stick. *Id.* at 218-19, 431 P.2d at 113-14.

Neither the pogo stick nor any other evidence of a defect was introduced into evidence.

45 *See, e.g.*, Jakubowski v. Minnesota Mining & Manufacturing, 42 N.J. 177, 183-4, 199 A.2d 826, 829-30 (1964); Ford Motor Co. v. Lonon, 217 Tenn. 400, 422, 398 S.W.2d 240, 250 (1966); *but see* Greco v. Bucciconi, *supra* note 44, where the court, in denying defendant's motion for judgment n.o.v., held that the quantum of proof necessary to prove a defect under § 402A could be satisfied when the plaintiff produced sufficient evidence that the product had malfunctioned.

46 For problems of standards of use of products over time, see Dickerson, *Products Liability: How Good Does a Product Have to Be?*, 42 IND. L.J. 301, 312-18 (1967); *see also* Dunham v. Vaughan & Bushnell Mfg. Co., 86 Ill. App. 2d 315, 229 N.E.2d 684 (1967), where plaintiff recovered without proving a defective condition existing at the time of manufacture, but only that a condition then existed which would become dangerous with continuous usage of the product.

47 For an example, see Drummond v. General Motors Corp., CCH PROD. LIAB. REP. ¶ 5611 [1965-1967 Transfer Binder] (Calif. Super. Ct. 1966). In *Drummond*, a "Corvair oversteer" case, the effort by the plaintiff to prove a designed-in defect took over three months of trial, 41 witnesses, most of them experts, and 240 exhibits including a 20 foot model of the accident site and full-scale mock-ups of six

in obtaining competent and distinterested expert analysis,[48] but also since the product is often destroyed in the accident, it is almost impossible to trace physically the product's prior history. The only qualified experts in some industries are in the employ of the manufacturer of the product.[49] Independent consulting firms provide only theoretical analysis which defense counsel can effectively attack as not based on actual laboratory findings.[50]

A lay trier of fact can rarely infer from the nature of the product design or other circumstances that the defect existed when the product was in the manufacturer's hands. If expert analysis cannot show the scientific improbability of the defect arising after the manufacturing process, the plaintiff must, under present decisions, trace the entire prior history of the product to show that *in fact* no new defect arose after the product left the factory.

Shifting the burden of proof is justified by the manufacturer's superior knowledge of the operation of his product. He has the experience of making the product, a tremendous advantage in explaining a product malfunction.[51] He is also able to trace the history of the product more readily than the plaintiff.[52]

Moreover, some accidents may be beyond the explanation of even the most well-informed expert witness. Rather than allow manufacturers to avoid liability by merely suggesting other possible causes of the consumer's injury, it may be necessary to let such "unknowable" cases go to the jury. Thus manufacturers may be encouraged to use the fullest extent of their resources to determine the actual cause of a product failure — hopefully an exercise that will reward society with increased knowledge on how to make products safer.

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automobile suspensions. The jury saw numerous movies and visited the accident site.

48 *See* Freedman, *"Defect" in the Product: The Necessary Basis for Products Liability in Tort and in Warranty*, 33 TENN. L. REV. 323, 325 (1965); *see generally* Hazard, *Science and the Product Liability Claim*, 54 A.B.A.J. 981 (1968).

49 1968 ANN. SURVEY AM. L. 99.

50 Hazard, *supra* note 48, at 982.

51 Dunn, *Preparation and Handling of Products Liability Cases: Machinery and Equipment*, 32 INS. COUNSEL J. 650, 652-3 (1965).

52 Waltz, *Corporate Participation in Preparation for Trial of a Product Liability Case*, 54 ILL. B.J. 694, 697 (1966).

Section 105: *Defenses*

COMMENT: (1) If the consumer knew or should have known of the defect and voluntarily and unreasonably proceeded to use the product or encountered a known danger, recovery is precluded by this consent to, or assumption of, risk.[53] A consumer may be aware of a defect and be willing to assume the risk of injury because he can purchase the product at a lower price. It would be unwise to disturb this choice, provided that the consumer is truly aware not only of the existence of a defect, but also of the size of the risk involved and the potential for harm presented by the defect. Thus it would not suffice for an electric combination toaster-oven to carry a warning merely stating, "Do not close glass oven door while toaster is in operation," if the door shatters when closed and may blind the consumer. Such a device would have to carry a very specific warning for the manufacturer to escape liability.

This problem is complicated by including bystanders in the definition of consumer under section 102(4). A bystander, or one who borrows a product or uses a product at the home of another, may not have knowledge of the existence of the defect and the potential harm, nor can it be ordinarily said that he reasonably should have known. The only way in which a manufacturer can possibly insure preservation of this defense against such nonpurchasers is by permanently and prominently affixing a specific warning to the product.

The effect of a warning and the adequacy of its notice upon the knowledge of the consumer ordinarily is given weight as evidence. Warnings provided with products intended for or primarily used by children are exceptions to the rule because of the infant consumer's inability to evaluate product safety or understand the proper use of the product.[54]

(2) It has long been stated that the manufacturer has a right to expect that the consumer will use the product in the general

53 *See* RESTATEMENT (SECOND) OF TORTS, § 402A, comment *n*; Keeton, *Assumption of Risk in Strict Liability Cases*, 22 LA. L. REV. 122 (1961).

54 *See generally* Interim Report, Recommending Enactment of the Child Protection Act of 1969, National Commission on Product Safety, Feb. 25, 1969 (GSA DC 69-9378, Washington, D.C.).

manner in which it was intended.[55] The affirmative defense of misuse is limited to a misuse of the product which is outside the reasonably foreseeable uses of the product. For example, it may be reasonable to foresee that a ladder will be used as a platform across roof beams while painting, or so a trier of fact might find. The same trier of fact could find that the use of the ladder as a trampoline was so far away from the precisely intended use of ladders as to fall outside a "reasonably foreseeable misuse." The test of a specific "intended use," followed in such cases as *Evans v. General Motors Corp.*[56] is not allowed under this act.

Both assumption of risk and misuse have already been proposed as defenses to strict products liability in section 402A.[57] Although these defenses are based on conduct which occurs while the product is in the control of the consumer, liberal discovery rules available in federal courts should enable the manufacturer to investigate and prove these defenses.

(3) It is usually held in negligence law that a manufacturer is responsible to all successive purchasers for his negligence, unless there is an independent, *foreseeable,* conscious intervening act of a third party, in which event full liability rests with the third party.[58] The requirements of unforeseeability and consciousness make it difficult for a manufacturer to escape liability once negligence has been proven, even if there was a negligent third-party intervenor. The theory was that since the manufacturer was negligent, he should be liable for most injuries resulting from his negligence.

In strict liability, no lack of care on the part of the manufacturer need be proven. From this, one might conclude that a less stringent defense as to intervening third-party negligence should be allowed, on the grounds that the negligence of the third party would be *proven* negligence. However, the reasons for adopting strict liability must be kept in mind in analyzing this problem. It was assumed that the manufacturer would have more control over product safety and be a relatively better cost-spreader. This

55 *See* Prosser, *Fall of the Citadel, supra* note 1, at 824.
56 See text at note 19 *supra.*
57 RESTATEMENT (SECOND) OF TORTS, § 402A, comments *h* and *n* (1965).
58 Ford Motor Company v. Wagoner, 183 Tenn. 392, 192 S.W.2d 840 (1946).

is as true between the manufacturer and the third party as it is between the manufacturer and the consumer. A more liberal defense against third parties could leave the consumer without a remedy if the intervening negligent party is beyond the reach of service of process.

Section 106: *Seller Liability for Non-Disclosure*

COMMENT: This section has the effect of making all sellers, lessors, or distributors liable for the damage caused by defective products they marketed if they cannot or will not reveal the name of the manufacturer upon a good faith written request by the injured party or his agent. The injured consumer is given a means of discovering the ultimately liable party, and sellers will not be unnecessarily burdened by the exchange of letters necessary to find out the identity of the manufacturer. Should a seller be unable to provide the necessary information after a reasonable time, he may rely upon all provisions of this act applicable to the manufacturer defendant.

Section 107: *Effect on Other Rights of Recovery*

COMMENT: This section merely affirms that rights of recovery under state law are preserved. This statute does not presume to be a definitive solution for liability for consumer products, and it should not discourage any further experiments by the states.

The phrase beginning with "but provided . . ." reaffirms that a plaintiff cannot bring a suit in strict liability in one forum and then, if unsuccessful, bring the same suit in another forum.

Section 108: *Compliance with Safety Codes*

COMMENT: Since the existence of a defect is measured by the standard of reasonable consumer expectations,[59] failure to comply with a governmental standard is evidence of the existence of a defect but is not conclusive. To give compliance with governmental norms an exculpatory effect would conflict with the in-

59 Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, n.38 at 370 (1965); *see*, RESTATEMENT (SECOND) OF TORTS, § 402A, comment *g* (1965).

tent of such statutes as the National Traffic and Motor Vehicle Safety Act of 1966. Section 108(c) of that statute provides in part that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."[60]

Proof that the product is defective under section 108(2) must show that the failure to comply with official standards occurred either while the product was in the control of the manufacturer or as a result of the manufacturing process. This paragraph bears only on the definition of "defect" or "defective condition" in section 102(3), and proximate cause still must be proven.

ALTERNATIVE DRAFT

One member of the drafting committee was not persuaded by "The Case For Direct Manufacturer Liability," as set out in Part II of the introduction to this statute and in the comment to section 102(2). He drafted alternate sections to extend liability to a large class of "sellers." These sections, and the comments explaining the reasons therefore, follow directly below.

Section 102.

(6) "Seller" includes any person engaged in the business, in or affecting interstate commerce, of retailing, leasing, distributing or wholesaling a consumer product or its component parts, provided that the net sales of such business for the previous calendar year shall be no less than one million dollars.

Section 103.

[Change "A Manufacturer . . ."] to A manufacturer or seller . . .

Section 106.

[The changes in sections 102(6) and 103 require the following modification in section 106.]

A seller, lessor, or distributor of a defective consumer product,

60 15 U.S.C. §§ 1381-1425 (Supp. IV, 1969). *See also,* Gottsdanker v. Cutter Laboratories, 182 Cal. App.2d 602, 6 Cal. Rptr. 320 (1st Dist. 1960) (Held manufacturer's compliance with FDA guidelines regarding polio vaccine did not have exculpatory effect). *See* Comment, *Strict Liability for Drug Manufacturers: Public Policy Misconceived,* 13 STAN. L. REV. 645 (1961).

with net sales for the previous calendar year less than one million dollars, shall be liable under this act . . . (continue as in first alternative draft).

Section 107.

Any seller of a consumer product, if found liable under section 103 of this statute, shall have full rights of recovery against the manufacturer of such consumer product to the full extent that the seller has been found liable to the consumer.

Section 108.

Upon institution of any suit against a seller for injury resulting from a defective product under the provisions of this statute, the seller either:

(1) shall implead the manufacturer as a third-party defendant, subject to the Federal [state] Rules of Civil Procedure; or

(2) shall notify the manufacturer, within ten days of seller's receipt of the complaint, of the commencement of such suit, and shall request that the manufacturer paritcipate in the defense of the suit.

Upon receiving such notification, a manufacturer shall have the right to intervene in the suit upon request properly filed with the court of jurisdiction. Failure of a manufacturer to defend after receiving such notification renders any adverse judgment in the action conclusive against him and makes him liable for all costs of the action, including reasonable attorney's fees.

Section 109.

[Section 107 of the main statute becomes section 109 of this alternative.]

Section 110.

[Section 108 of the main statute becomes section 110 of this alternative.]

Section 102(6).

COMMENT: The question at issue concerns who should be held liable under the statute. The majority of the drafting committee chose to include only the manufacturer or assembler. The reasons for doing so are analyzed in the comments to the statute and will not be repeated in detail here.

The main problem with limiting liability to manufacturers

and assemblers is that it may provide a potentially inadequate remedy to an injured consumer. It is a step away from the goal of an optimal system of compensation for injuries from defective products. It is likely that there will be cases in which the manufacturer will be so small that he will not be able to pay the liability bill himself and will have failed to insure against such eventualities. If the consumer cannot recover against him, he might be forced to bear the full costs of his injury.

It might be argued that the injured consumer could always resort to state common or statutory law remedies where an action in warranty or strict liability might lie against the retailer or distributor. Thus, there is no need to include such businesses in the class of potential defendants in a federal statute. However, this seems a strange argument to make in the context of defending a federal law at all. If the state remedies were thought uniformly clear or adequate, there would be no need for this statute. The model statute has been drafted upon the assumption that state law is not yet adequate or clear enough, at least on certain points.

This reasoning suggests the solution of including all retailers, lessors, and distributors under the coverage of the statute with the proviso that such parties could recover against manufacturers where such recovery is possible. This would shift from the individual consumer to the person or business from whom he acquired the product the risk of the inability of the manufacturer to pay for injuries resulting from a defect. This can be rationalized on the grounds that since the retailer or lessor was in the business of selling the product and profited from the sale, it is reasonable to have him guarantee to the consumer that the products bought from his shelves will be safe. It is also true that *generally* the retailer, distributor, or lessor will be in a better position to absorb and distribute the costs of injuries than the individual consumer.

The problems with the above approach are several. First, the retailer, distributor, or lessor will not always be in a better position to distribute the costs. The small business, such as the corner grocery or hardware store, will often be unable to pay for any major injury or even a series of minor injuries. Second, the small

businesses may find it difficult or impossible to carry insurance against liability resulting from injuries. Third, admittedly even if he has rights against the manufacturer, it is not advisable to subject the small businessman to a law suit, with the attendant delay and expense involved, when the action could be taken directly against the manufacturer. As distinguished from the larger retailers, lessors, and distributors, no real social purpose is served by including smaller businesses because: (1) the small businessman is in no real financial position to distribute social costs, and (2) he is too small to exert any positive influence on the manufacturers.

Thus these two solutions are either under-inclusive in coverage or over-inclusive. What is needed is a solution that will establish liabilities to approximate better the policy goals set forth in the introductory comments to the statute.

The solution presented here is admittedly imperfect, but it satisfies the policies of this statute better than either of the two extreme proposals mentioned above or any of a number of other proposals considered by the drafting committee and ultimately rejected. The proposal would include those retailers and distributors who seem able to carry insurance and/or pay a judgment, *i.e.*, those who would be able to spread the cost of accidents, while excluding those who would not. The monetary level used here is only a tentative suggestion. Further research on the subject might suggest a more appropriate figure at which to draw the line.

It may be argued that the inclusion of sellers is uneconomical because an arbitrary inflation of the retail price of the product would result from the duplication of insurance premiums paid for similar protection by the two different classes of potential defendants — the manufacturer and the seller. However, the seller's insurance policy will not be similar to the manufacturer's. The only time that a seller will ultimately have to pay for an injury will be when the manufacturer cannot pay. (See sections 107 and 108.) Thus, the insurance premiums paid by the seller would be not to cover liability for any and all judgments under the statute, but merely to cover those judgments which the seller could not recover from the manufacturer. Thus, the probability

of a seller's ultimate liability would be considerably lower than a manufacturer's, and the level of his insurance premiums would be correspondingly lower. Most importantly, the increase in the retail price due to such inclusion of sellers within the liability of this statute would merely reflect such probabilities and premiums. Rather than *duplicating* charges for social costs of injuries, it fixes a charge for the social costs involved *if* a manufacturer cannot pay the liability judgment. Thus, the cost-spreading goal of the statute is furthered by the inclusion of sellers within the liability provisions of section 103.

Section 103.

COMMENT: Section 103 now makes it clear that in a suit by a consumer or user, manufacturers and sellers, as defined in new section 102(b), will both be strictly liable.

Section 106.

COMMENT: Section 102(6) of this alternative draft added sellers with net sales of one million dollars or more to the liability provisions of the statute. Therefore, section 106 had to be amended to limit seller liability for non-disclosure to those sellers who still would not be liable in any event under the provisions of sections 102(6) and 103.

Section 107.

COMMENT: Section 107 places primary liability on the manufacturer and allows the seller to recover any damages he may have suffered at the hands of the consumer or user. Thus, if a consumer brought suit under section 103 against the seller and won, the seller would have a right to recover the full amount of the judgment from the manufacturer.

Section 108.

COMMENT: Section 108 deals with the situation in which the consumer-plaintiff brings suit only against a seller. This circumstance will probably be rare, since most plaintiffs, to protect themselves, will bring suit against both the seller and the manufacturer. A mechanism is necessary to limit litigation to one suit without

jeopardizing either a seller's right to recover from a manufacturer or a manufacturer's due process rights to defend his own suit.

Rule 14(a) of the Federal Rules of Civil Procedure permits a defendant to implead a third-party defendant, subject to the service of process requirements of Rule 4. Since the jurisdictional sections of this statute provide for nationwide service of process, any manufacturer in the country could be impleaded in a suit brought in a federal court. If a suit were brought in a state court, the state procedural rules would apply, perhaps making it more difficult to implead a third-party defendant.

Section 108 *requires* the seller-defendant either to implead the manufacturer or to notify him of the institution of the suit and request that he intervene and defend. If the manufacturer receives such notification, he may either do so or allow the seller to defend by himself. If he chooses the latter course, however, then in any subsequent suit by the seller to recover a lost judgment from the manufacturer, the manufacturer will be precluded from adjudicating any issues of fact decided in the original suit against the seller. This is done to encourage rapid disposal of the issues through one law suit and to avoid clogging up the courts with duplicate suits arising from the same accident.

This mechanism is nothing more than a statutory version of the common law device of vouching-in.[61] It has been codified in the Uniform Commercial Code, section 2-607(5)(a), in cases involving warranties, and is used by seller-defendants to vouch-in *their* warrantors (usually manufacturers) in state actions. While there may be some due process limitations to the use of the vouching-in device in *state* warranty actions as a means of extending state jurisdiction over parties not otherwise subject to such jurisdiction, none have ever been explicitly set forth by the United States Supreme Court, nor has the UCC been so limited.[62] In any event, such problems certainly do not exist in federal question actions in United States district courts when Congress has provided for nationwide service of process.[63]

61 See RESTATEMENT OF JUDGMENTS §§ 107-109 (1942).

62 See Note, *Constitutional Limitations on Vouching*, 118 U. PA. L. REV. 237 (1969).

63 *Id.* at 254.

COMMENT TO TITLE II

Section 201: *Jurisdiction*

COMMENT: This section grants jurisdiction to federal and state courts concurrently, although federal jurisdiction would be automatic under 28 U.S.C. § 1337 (1964). Federal venue is left to the general venue provisions for federal question litigation in 28 U.S.C. § 1391(b) (1964); state venue rules are unaffected by the Act.

The basic constitutionality of the concurrent jurisdiction provision, forcing jurisdiction on state courts, has been upheld in a Federal Employers' Liability Act[64] line of cases, including *Second Employers' Liability Cases*[65] and *McKnett v. St. Louis & S. F. Ry. Co.*[66]

Even though 28 U.S.C. § 1337 relieves the necessity for a minimum "matter in controversy," one has been included for federal courts. Admittedly, the amount chosen, $3,000, is the result of a largely intuitive judgment as to what amount would result in a desirable distribution of case-load between federal and state courts. Operating in conjunction with section 207, which sets $10,000 as a minimum for removal, the drafters have tried to keep the number of suits brought in district courts to a manageable level, without depriving parties of the procedural advantages of a federal forum so long as the "matter in controversy" justifies the additional burden on the federal system.

The drafters are not completely confident that their choice is a correct one. It is, therefore, recommended that the jurisdictional and removal amounts be reexamined after the Act has been in effect for a few years. As a point of interest and possible alternative should our determination prove unsatisfactory, the drafters also seriously considered having no minimum "matter in controversy," and, with that, no removal. The present amounts were chosen because there are some defendants that will have legitimate need for such federal procedures as Rule 19 impleader and the whole range of the discovery apparatus; but should this prove

64 45 U.S.C. § 51 *et seq.* (1964).
65 223 U.S. 1 (1912).
66 292 U.S. 230, *reh. denied*, 292 U.S. 613 (1934).

to be too great a burden, Congress should, without hesitation, increase the removal amount in section 207, and, if necessary, deny removal altogether. If the latter course is taken, consideration should also be given to the possibility of removing any minimum "matter in controversy" for those actions brought in district courts.

This section is adapted, in part, from 45 U.S.C. § 56 (1964).

Section 202: *Service of Process*

COMMENT: The purpose of this section is to bypass the provisions for domestic service found in Rule 4 of the Federal Rules of Civil Procedure. Even though Rule 4(d)(7) permits the district courts to use those procedures found in state statutes, thus allowing courts to avail themselves of long-arm provisions, nationwide service of process, specifically provided for, is important. There are states in which there are no long-arm statutes or in which the long-arm statutes are very narrowly construed by the state courts. To restrict federal courts to these limits, as well as the other Rule 4 restrictions, would prevent the action from being brought in a proper venue. Allowing the defendant to be served wherever he may be found in no way deprives him of any rights. Venue must still be proper and, if the forum is inconvenient, the action may be transferred under 28 U.S.C. § 1404(a) (1964).

This section is both a key part of this title, the policy being that wherever venue is proper, the plaintiff should be able to initiate suit, and a key part of the Act as a whole, the ease of initiating suit being an important component of a national system of cost-spreading.

As for service in foreign countries, the provisions of Rule 4 of the Federal Rules of Civil Procedure are retained.

This section is adapted from 15 U.S.C. § 22 (1964).

Section 203: *Limitation of Actions*

COMMENT: This section is self-explanatory. Three years has been chosen as an appropriate limitation, based on the same provision in the Federal Employers' Liability Act,[67] with the exception that

67 45 U.S.C. § 56 (1964).

wrongful death actions under section 206(b) must be brought within two years after the death.

Subsection (c) protects the consumer who suffers latent injury or damages since the statute is tolled until he should reasonably be aware of the damage.

Section 204: *Aggregation of Claims in Class Actions*

COMMENT: The purpose of this section is to bring these actions outside of the decision of the United States Supreme Court in *Snyder v. Harris*,[68] where it was held that Rule 23(b)(3) of the Federal Rules of Civil Procedure did not provide for aggregation of claims in a class action arising under that subsection, in order to attain the minimum "matter in controversy." It is important for the victims of relatively minor injuries, where the defendant has sold many products with the same defect, to be able to proceed, if they desire, in the federal system. This section should not subject the defendant to any undue hardship since all other requirements of Rule 23 are, of course, retained.

Section 205: *Trial by Jury*

COMMENT: While this section is probably superfluous, it has been inserted to make explicit that jury trial for claims arising under this Act is appropriate because the nature of both the cause of action and the relief fall within the traditional scope of the seventh amendment jury right.[69] The provisions of Rule 38 of the Federal Rules of Civil Procedure regarding trial by jury are, of course, still applicable.

Section 206: *Survival of Action; Wrongful Death*

COMMENT: Two years has been used as the time within which a wrongful death action must be brought, since this seems to be a fairly common period in state statutes.[70]

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68 394 U.S. 332 (1969).

69 U.S. CONST. amend. VII.

70 *See, e.g.*, FLA. STAT. ANN. § 95.11 (1960); ILL. ANN. STAT. ch. 70, § 2 (Smith-Hurd 1959); IND. ANN. STAT. § 2-404 (1967); MASS. GEN. LAWS ANN. ch. 229, § 2 (Supp. 1970); N.J. REV. STAT. § 2A:31-3 (1952); N.Y. EST., POWERS & TRUSTS § 5-4.1 (McKinney 1967); OHIO REV. CODE ANN. § 2125.02 (Page 1968); WIS. STAT. ANN. § 330.21 (1958).

There is no limit on the amount recoverable in a suit under this act, despite the frequent use of limitations in statutory causes of action. This decision is dictated by the cost-spreading concept which forms the basis for the statute, because the expense suffered by an individual plaintiff should be distributed among all consumers, no matter how great the increase in product cost might be.

This section has been adapted, in part, from 45 U.S.C. §§ 51 and 59 (1964).

Section 207: *Removal*

COMMENT: This section has been discussed above in the comment to section 201.

This section has been adapted from 28 U.S.C. § 1445(b) (1964).

A LAND SALES PRACTICES ACT*

I. THE PROBLEM

The proliferation of land sales promotions during the past fifteen years has created a new range of problems for the law governing the sale and development of real estate. Both public and private interests are affected when a developer moves into a local area, buys up lands, and then subdivides and offers them on the market in a large-scale promotional scheme. The public interest in intelligent use of land resources, conservation of the environment, economic growth, and a well-ordered market has usually been secured by state and local laws for zoning, subdivision control, licensing of real estate brokers, and the like.

As the land market has continued to expand, however, the inadequacy of such provisions to protect individual interests has become more evident. Today the typical promotion often involves the sale of unimproved land located in one state to purchasers in a number of states. The largest enterprises may be nationwide or even international in scope.[1] Solicitation is frequently by local sales agents or through the mails, and the purchaser generally relies on promotional materials and the salesman's description as a substitute for first-hand inspection of the land he is being urged to buy. The impression he receives may bear little or no relation to actual development on the ground.[2]

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1 Gaitanis, *Recent Florida and Federal Laws Regulating Promotional Land Sales*, 43 FLORIDA B.J. 90 (Feb. 1969). "In recent years, the out-of-state demand for land in Florida has widened to include substantial numbers of residents of other countries." *Id.*

2 *Cry, Vermont*, TIME, Sept. 26, 1969, 50; Sanford, *Thinking of Buying Some Land?*, THE NEW REPUBLIC, Oct. 11, 1969, 17, at 18. Sanford contrasts advertising material for a development in Pennsylvania with its property report required under the federal Interstate Land Sales Full Disclosure Act. "From the ad: 'Your inspection will show you all of the *fully-developed* advantages of Charnita — finest ski area in the East with one of the largest snow making plants in the world, picturesque 18-hole championship golf course, private swimming club, lovely fishing and boating lakes fed by sparkling mountain streams, playgrounds, parks, and miles of wooded trails for hiking and riding. Charnita is the only *complete* four-seasons

II. Existing Law

The interests of purchasers of land can be protected in two ways. Before the sale, the law can compel *disclosure* of the material facts relating to the land and its prospective development. After the sale, the purchaser can be afforded appropriate legal *remedies* where there has been sharp practice, misrepresentation, or other unfair dealing on the part of the seller.

The common law is deficient in both of these areas. As regards disclosure, the general rule is that there is no duty to disclose, on the theory that the purchaser must protect himself by careful inspection of the land.[3] Caveat emptor is very much in force. Furthermore, silence as to a material fact does not ordinarily constitute fraud.[4] Since the provision of incomplete information is the principal problem when there is no opportunity for inspection, the common law sets up a major obstacle to knowledgeable dealing in such situations.[5] In addition, most land frauds involve representation about future improvements which are never made, and thus they fall outside the rule that only representations about past and present facts will constitute an action for deceit.[6]

With respect to remedies the picture is no better. The common law action for fraud places a heavy burden of proof on the purchaser,[7] making it very difficult for him to recover from a

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Private Club recreation community in our area.' From the property report (Item 20): 'It is the intention of the developer to construct an airport, an additional artificial lake, an additional golf course, a clubhouse, a shopping center, a motel and additional ski facilities. However, none of the foregoing is under construction except the clubhouse, on which construction has commenced, and are merely in the planning stage. . . . There are no escrow accounts or separate accounts, or completion bonds to assure the construction of any of the foregoing facilities. In most cases the proposed locations have not been determined.' In other words, there is no guarantee that Charnita will ever be either 'fully-developed' or 'complete.' "

See generally Note, *Regulating the Subdivided Land Market*, 81 Harv. L. Rev. 1528 (1968).

3 Swinton v. Whitinsville Savings Bank, 311 Mass. 677, 42 N.E.2d 808 (1942).

4 Palson v. Martin, 228 Md. 343, 180 A.2d 295 (1962).

5 Lake, *Fraud in Realty Transactions*, 13 Cleveland-Marshall L. Rev. 511 (1964), *passim*.

6 *See* Sawyer v. Prickett, 86 U.S. (19 Wall.) 146, 22 L. Ed. 2d 105 (1873); Seavey, *Caveat Emptor as of 1960*, 38 Texas L. Rev. 439 at 442-43 (1960).

7 He must prove that the misrepresentation of the vendor was a statement of fact and not of opinion, that the vendor knew the statement was untrue, that the vendor intentionally made the untrue statement, that he relied on the vendor's statement in making his decision to purchase the land, and that he suffered

dishonest vendor. Equitable remedies also present difficulties. Specific performance and reformation are seldom available because the misrepresentation complained of is not normally a term of the contract.[8] Rescission is often denied because the purchaser fails to meet the complex prerequisites for the exercise of the court's discretion.[9] In sum, although there are several avenues of recovery in theory, the obstacles to making out a case under any one of them are so considerable that as a practical matter recovery is often precluded.[10]

A number of states have tried to alleviate these problems by including land sales within the ambit of consumer protection laws.[11] A more specific approach is that taken by the Uniform Land Sales Practices Act,[12] which has been substantially enacted into law in Florida.[13] The Uniform Act establishes a state administrative agency which is provided with detailed investigative and regulatory powers, including the authority to promulgate rules and conduct quasi-judicial proceedings.[14] The Act also contains important provisions for registration, disclosure, and private remedies.[15] An important weakness of the Uniform Act is that smaller states may find its administrative machinery unduly burdensome and expensive.

In the area of federal legislation, Congress has passed the

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damage as a result of the reliance. *See* RESTATEMENT OF TORTS § 525 (1938); McKay v. Anheuser-Busch, Inc., 199 S.C. 335, 19 S.E.2d 457 (1942); Safety Investment Corp. v. State Land Office Board, 308 Mich. 246, 13 N.W.2d 278 (1944); 21 RUTGERS L. REV. 714 (1967).

8 *But see* Junius Construction Corp. v. Cohon, 257 N.Y. 393, 178 N.E. 672 (1931).

9 See Spencer, *Remedies Available Under a Land Sale Contract*, 3 WILLAMETTE L.J. 164 (1965) for a discussion of the various legal and equitable remedies available to a purchaser of land.

10 Spencer indicates some tendency on the part of the courts to relax the strict standards for recovery in cases involving sale of land. Nevertheless, common law remedies are still by and large based on outmoded assumptions and are too often unsatisfactory. *Id.*

11 *See, e.g.*, the Iowa Consumer Fraud Act, 35 IOWA CODE ANN. § 713.24 (Supp. 1970), which includes "subdivided lands" within its terms.

12 26 SUGGESTED STATE LEGISLATION D-4 (1967) [hereinafter referred to as the Uniform Act]. This act was promulgated by the National Conference of Commissioners on Uniform State Laws.

13 Florida Uniform Land Sales Practices Law, FLA. STAT. ANN. § 478 (Supp. 1969). For a discussion of the Florida statute, see Gaitanis, *supra* note 1.

14 §§ 2, 7, 10, 11. The Florida Law establishes a seven-man commission with staff to administer the statute. FLA. STAT. ANN. § 478.031 (Supp. 1969).

15 §§ 5, 6, 8, 16.

Interstate Land Sales Full Disclosure Act[16] to regulate interstate promotions and promotions by mail.[17] The Interstate Act emphasizes disclosure rather than remedies,[18] and it applies only to promotions of fifty or more lots[19] of unimproved land.[20]

III. The Proposed Act

Two basic approaches were considered. The first was to include land sales within the terms of a general consumer protection law, leaving enforcement to the attorney general through recourse to the courts. Such a statute would establish no separate administrative machinery and no specific requirements for registration or disclosure. However, the attorney general would be given broad powers to seek injunctions and penalties in cases of unlawful dealing.[21] Sales to out-of-state residents would fall under the Interstate Act. This approach was considered unsatisfactory for several reasons. Basically it provides a minimum of administration but at the cost of effective disclosure. Land is not just another consumer good, and knowledgeable dealing in the land market calls for specific kinds of information not provided for in a consumer protection statute. Leaving disclosure to the provisions of the Interstate Act would be inadequate because of the number of exceptions it contains.[22] Furthermore, such an approach would be weak in private remedies. The Interstate Act gives only statutory damages,[23] and since there is no cause of action under the state consumer protection law for violation of specific disclosure provisions, the purchaser would be left to a

16 15 U.S.C.A. §§ 1701 *et. seq.* (1970) [hereinafter cited as Interstate Act]. This is Title XIV of the Housing and Urban Development Act of 1968. See 21 Rutgers L. Rev. 714 (1967) for a discussion of the federal statute.

17 § 1404(a).

18 Although the Act contains detailed disclosure provisions, §§ 1406, 1408, the only remedy is statutory damages, § 1410.

19 § 1403(a)(1).

20 § 1403(a)(3).

21 *See* the Iowa Consumer Fraud Act, 35 Iowa Code Ann. § 713.24 (Supp. 1970) and the Vermont Consumer Fraud Act, Vt. Stat. Ann. tit. 9, ch. 63 (Supp. 1968). Both states have a Consumer Protection Office.

22 For example, there is a development with 1735 houses in Vermont that would probably be exempt under § 1403(a)(3) because of the farmhouses already on the land.

23 § 1410.

more general statutory action for fraud or failure of consideration.[24]

The second approach was to provide for registration and disclosure by developers, as in the Uniform Act, but to make the system largely self-administering. This could be accomplished without any sacrifice of effectiveness if the scope of statutory exemptions for violations was provided. Full disclosure is the first and best way of protecting the purchaser, and if disclosure requirements are backed up by adequate remedies and sanctions they are more likely to receive compliance. The proposed act takes this second approach. The general scheme of section 103(c) is to place responsibility for administering the statute upon a division of the attorney general's office rather than to establish a new administrative agency.[25] Each state will thus have flexibility in establishing an office of a size which will be consistent with its need for regulation and with its financial and manpower resources.

This office, referred to as the consumer protection office, is charged with granting exemptions under section 104(b); administering registration under sections 201-204; and taking administrative action to prevent and correct violations under sections 301-302. It has the authority to promulgate rules regulating the requirements for exemption under section 104(b) and (d); registration under sections 202(a), 204(a), (c), and (e); and sales of out-of-state land to residents under section 102(d). It can also issue administrative orders rejecting a registration under section 203(b); revoking a registration under section 301; or requiring a developer to cease and desist from violation of the Act under section 302. In each of these areas the office has discretion as to how far it will proceed, so that it can exercise as little or as much control as is practical and appropriate. The underlying protection is

24 The Iowa Act is part of the criminal code and, therefore, provides no private remedies at all, although a purchaser who has suffered damages may participate in the proceeds of a court-ordered dissolution of a corporation violating the Act. 35 IOWA CODE ANN. § 713.24(8) (Supp. 1970). Under the Vermont Act a purchaser may rescind automatically within 24 hours, but there are no damages. VT. STAT. ANN. tit. 9. § 2454 (Supp. 1968).

25 This was in part to accommodate the already existing Consumer Protection Office in Vermont, the state for which the original draft was written by the Bureau.

afforded by the express statutory requirements, but the office may enlarge on these to a considerable extent if this is considered necessary.

The scope of exemptions has been kept narrow, so that mainly small developers are exempt. The consumer protection office does, however, have discretion to make further exemptions under section 104(b). It was felt that exemption based on lot size[26] or the presence of buildings or structures on the land[27] might provide an unnecessarily easy means of avoiding registration. There are two kinds of exemptions: an automatic exemption under section 104(a) or a discretionary exemption under section 104(b) upon formal application by the developer. Automatic exemption might lead to clouding of title in borderline cases, but this danger should be minimal. The qualifications for automatic exemption are straightforward, and in cases of genuine doubt it is contemplated that the consumer protection office will be consulted for its opinion as to whether the subdivision is exempt. In any case, failure to comply with the statute in the disposition of non-exempt land does not in itself impair the ability to convey good title, although such a violation does render the developer liable to the penalties in section 306.

The registration provisions are directed towards ensuring full disclosure of material facts which will aid the prospective purchaser in making his decision. The emphasis is, therefore, on the content of the application for registration (which includes the public offering statement, under section 202(a)) rather than on detailed administrative procedures for registering. Registration is automatic under section 203(a) if no rejection order is entered within thirty days of the notice of filing. However, the facts to be stated in the public offering statement have been extended beyond those required under the Uniform Act and the Interstate Act.[28] In particular, the seller is restricted from making optimistic and extravagant representations about improvements which do not yet exist and with regard to which there is no legal

26 § 1403(a)(2) of the Interstate Act.

27 § 1403(a)(3) of the Interstate Act and § 3(a)(3) of the Uniform Act. See note 22 *supra*.

28 Uniform Act § 6; Interstate Act § 1408(a).

obligation or other guarantee as to their development in the future. Section 204, in effect, requires the seller to state that he is selling remote farmland which he is under no obligation to develop, if that is the case. Furthermore, under section 204(b) the seller is required to provide a map of the subdivision showing its present condition in order to give the prospective purchaser a clearer idea of what he is being asked to buy.[29] The emphasis throughout is on what already exists, rather than on what is planned.

In order to make the public offering statement a meaningful form of disclosure, section 201(b) requires that the prospective purchaser be allowed three days to examine it. Sections 102(b) and (c) prevent the seller from circumventing this requirement by such practices as having the buyer check a box on the contract form or sign a statement of waiver or compliance.[30]

Full disclosure is necessary for an adequate protection of the buyer of land, but it is not sufficient in the absence of legal remedies. This act provides for such remedies by administrative action and by recourse to the courts. Administratively, the consumer protection office can enforce the act by cease and desist order and by revocation of registration where there is failure to comply with a cease and desist order. With the exception of the three situations covered in section 301(a), it is contemplated that the office will always move by cease and desist order first. Thus, even in a case where the office could have entered a rejection order under section 203(a), if it fails to do so within the thirty day period, it would then have to issue a cease and desist order instead. The cease and desist order also gives control over advertising material under section 302(a)(2), which is likely to be insufficiently controlled at the registration stage.

An important feature of the Act is the remedies it provides

29 A map is required by the Interstate Act, § 1406(2), but not by the Uniform Act.

30 David Sanford describes various methods by which sellers avoid the provisions of the Interstate Act and the Truth in Lending Law allowing the buyer to cancel his contract within 48 and 72 hours, respectively. THE NEW REPUBLIC, Oct. 11, 1969, 17 at 18, 19. He observes, "This recision provision is particularly odious to real estate operators who depend for their sales on impulse buying and who know that after the glow of a sales pitch has faded customers often wish they hadn't signed."

to the purchaser by way of civil action. It was felt that comprehensive provisions for civil remedies should include damages, restitution, and performance. No one of these would be adequate in every case, so the purchaser should have the option to elect his remedy according to the circumstances of his individual case.[31]

Performance proved to be the most difficult remedy to provide. Because the seller is normally under no contractual obligation to construct such improvements as sewers and paved streets, let alone lakes or skiing facilities, it would be impossible to reach him by way of the contract of sale. And clearly it would be unreasonable to impose a statutory obligation to make improvements where none existed under the contract. One approach would be to require the filing of a performance bond to be conditioned on performance of any section 202(a)(9) improvements included in the application for registration. However, such a requirement was omitted from the act both because it would logically belong in a subdivision control act and because considerable difficulty was encountered in devising an equitable system for distributing the proceeds of the bond among all parties aggrieved by nonperformance. It was decided instead to provide a single statutory remedy under section 303(b) which would allow the purchaser to recover his purchase money and, in addition, any consequential loss he suffered in reliance on the seller's representations. Under section 303(e), the statutory remedy is without prejudice to any cause of action a purchaser might otherwise have, and it extends to subsequent purchasers who can prove reasonable reliance on the seller's misrepresentations.

A final word should be said about the application of the statute to the purchase of out-of-state land by state residents. Although many states have "blue-sky" securities laws governing such transactions,[32] and interstate sales now come under the Interstate Act, these laws do not provide sufficient remedies. Furthermore, many

31 For instance, damages would be inadequate for a purchaser who had invested a substantial amount of resources in land for a retirement home if the developer failed to put in sewers. In such a case, the purchaser would be unable to afford putting them in himself, and without them the land would be useless for his purpose.

32 *See* 21 RUTGERS L. REV. 714 (1967) and the Vermont Securities Act, VT. STAT. ANN. tit. 9, § 4202 (1959).

states have no statute regulating land sales practices within that state. Therefore, section 102(d) specifically provides that sellers of out-of-state land come under the remedies sections. Although there is no way to compel such sellers to file a consent to service of process under section 304, those who fail to do so are denied any recourse against the purchaser under state law by section 304(c). It should be noted that the provisions of the Act cover sales of out-of-state land to state residents, rather than merely sales of out-of-state land *within* the state. This was done to prevent evasion of the statute in mail order sales by having the purchaser's signature on the contract form constitute an offer which is then completed by the seller's acceptance when he signs the contract in another state. In such cases the sale would be deemed to have taken place in the foreign state and thus would fall outside the Act.

A LAND SALES PRACTICES ACT

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- **Section 308. Judicial Review**

AN ACT

To regulate land sales practices, to protect purchasers of land against fraudulent and deceptive practices, and to provide for fair, knowledgeable, and informed dealing by all parties in the sale of land, and for other purposes.

Part I. *General Provisions*

Section 101: *Short Title*

This act shall be known as the [state] Land Sales Practices Act.

Section 102: *Scope of Coverage*

(a) No person shall sell or offer for sale any interest in any subdivision located in this state, unless such sale or offer for sale is exempt under section 104 below, without complying with the provisions of this act.

(b) Any stipulation or provision purporting to bind any person acquiring an interest in any subdivision to waive the protection of this act or any order under it shall be void.

(c) Any admission, agreement, or statement by a purchaser of land, in which compliance with any provision of this act is acknowledged, may be rebutted by competent evidence that such compliance has not in fact occurred. The preceding sentence shall apply to, but shall not necessarily be limited to, acknowledgments of receipt and perusal of a public offering statement or any other instrument received or signed by a purchaser.

(d) Part III of this act, and such other provisions as the Consumer Protection Office may specify by rule, shall apply to the sale and offer to sell to a resident of this state any interest in land located outside of this state.

COMMENT: Many consumer protection statutes are rendered ineffective when vendors incorporate various waivers and admissions, unintelligible to the layman, into long, fine-printed, "boiler plate" contracts. Subsections (b) and (c) are designed to eliminate this possibility and thus ensure that the provisions of this act will protect all consumers.

The increase in land sales by mail makes it important to include out-of-state land under these disclosure requirements, even though the interstate sale of land is regulated by the federal In-

terstate Land Sales Act[33] and the Truth in Lending Law[34] and even though some states have their own land sales practices acts.[35] Whether the above subsection is included will depend on whether the state feels that its residents are sufficiently protected by the above-mentioned laws. To be weighed against this are the obvious difficulties in enforcing the Act against out-of-state developers. Supplemental schemes of regulation are specifically provided for in the federal act.[36]

Depending on state law, subsection (d) may be held to be an improper delegation of authority. If so, all of the sections which apply to out-of-state land must be enumerated in the statute.

Section 103: *Definitions*

When used in this act, unless the context otherwise requires,

(a) "Agent" means any person acting for a developer in any capacity connected with the sale or prospective sale of an interest in a subdivision, but does not include an attorney whose sole connection with the developer is the provision of legal services;

(b) "Blanket encumbrance" means a trust deed, mortgage, judgment, easement, or any other lien or encumbrance, including an option or a contract to sell or a trust agreement, affecting a subdivision or affecting more than one lot offered within a subdivision;

(c) "Consumer Protection Office" means any division of the Office of the Attorney General created to deal in any way with consumer affairs;

(d) "Developer" means any person who, directly or indirectly, sells or offers to sell, or advertises for sale, any interest in a subdivision;

(e) "Lot" and "interest in land" are interchangeable, and mean any undivided interest in land, whether freehold or leasehold, including, but not limited to, interests created by trusts, partnerships, corporations, cotenancies, and contracts;

(f) "Offer" means any offer, inducement, solicitation, advertisement, or attempt to encourage a person to acquire an interest in a subdivision;

(g) "Person" means an individual, partnership, corporation, as-

33 See note 16 *supra*.
34 Consumer Credit Protection Act, 15 U.S.C.A. §§ 1601 *et. seq.* (1970).
35 *See, e.g.*, Uniform Act, *supra* note 12.
36 Interstate Act at § 1708(a).

sociation, unincorporated organization, trust, estate, or any other legal or commercial entity;

(h) "Promotional plan" means any plan of solicitation, using substantially the same methods of inducement or solicitation, to two or more prospective purchasers;

(i) "Purchaser" means an actual or prospective purchaser, contract purchaser, or lessee of any interest in a subdivision;

(j) "Sale" means any transfer of any interest in land for consideration and any contract to transfer such an interest, including leases and any other temporary interests;

(k) "Subdivision" means any tract of land divided into two or more undivided interests for the purpose of resale;

(l) "Year" means any continuous period of 365 days.

COMMENT: In defining "agent," it would be foolish to exclude a collaborator who happened to be an attorney or who happened to provide legal services. However, it was felt dangerous to include an attorney who may have been consulted on a particular problem without having any connection with the overall operation. Therefore, attorneys have been excluded but it is expected that the concept of "sole connection" will be strictly construed.

This act is designed to be administered by a small division of the Attorney General's Office. See definition (c). The Act recognizes that the Consumer Protection Office may often be understaffed and underfinanced. Some states may choose to replace the Consumer Protection Office with another type of agency or with some sort of real estate board.[37] Use of the latter would probably result in less day-to-day regulation but more insulation from the political process. In reference to the definition of developer, it is definitely not contemplated that newspapers and radio or television stations would become developers merely by printing or broadcasting advertisements.

Section 104: *Exemptions*

(a) Unless, in the opinion of the Consumer Protection Office, the method of disposition is adopted for the purpose of evading any requirement of this act, the provisions of this act shall not apply to a sale of or offer to sell an interest in a subdivision

37 *See, e.g.*, Uniform Act § 2, FLA. STAT. ANN. § 478.031 (Supp. 1969).

(1) containing ten or fewer lots;

(2) pursuant to a promotional plan offering ten or fewer lots for sale in a period of one year;

(3) pursuant to a promotional plan or offer which disposes of lots to ten or fewer persons in a period of one year;

(4) containing only cemetery lots;

(5) under or pursuant to court order or administrative decree; and

(6) by any government or governmental agency.

(b) The Consumer Protection Office may exempt from the requirements of this act the sale of or offer to sell interests in a subdivision if it finds that

(1) the plan of promotion and disposition is primarily directed to persons residing in the local area in which the subdivision is situated; or

(2) the proposed offering is primarily directed to industrial or commercial purchasers; or

(3) enforcement of this act with respect to the subdivision is not necessary for the protection of the public interest because of the small monetary amount involved, the limited character of the public offering, or other reasons which the Consumer Protection Office may formulate by rule.

(c) No provision of this act shall be construed to exclude from the requirements of this act, as a matter of right, any subdivision or offering except those specifically enumerated in subsection (a) of this section.

(d) Exemptions under subsection (b) of this section shall be granted only upon formal application to the Consumer Protection Office, pursuant to such regulations and procedures as the Consumer Protection Office shall specify by rule.

COMMENT: The exemptions under subsection (a) are automatic, and it is hoped that this will allow small developers to avoid any contact at all with the administrative machinery and procedures of this act. It is possible, of course, that there may be problems of clouding of title without formal exemption procedures. Self-exemption also makes the whole exemption procedure less precise and makes it harder for the administrative agency to locate those improperly claiming exemptions. For these reason, a state that can afford the added manpower might consider requiring all

developers to make preliminary registration, and then the agency could grant exemptions to those who qualify.[38]

The opening statement of this section allows the Consumer Protection Office to eliminate exemptions for those, among others, who divide their operations solely to qualify for the "small scope" exemptions.

Any attempt further to define "area" in (b)(1) would result in problems when subdivisions were located on or near town or county lines. It is intended that areas larger than the size of an average county would not normally be exempted.

In reference to (b)(2), if the number of residential lots is such as to exceed the maximums for exemption specified in subsection (a) of this section, the subdivision should not be exempted even if it contains a large number of commercial lots. The Consumer Protection Office would not be prohibited from exempting only the commercial offerings in such a mixed subdivision.

The last clause in (b)(3) makes it necessary for the Consumer Protection Office to make specific rules if it wants to grant exemptions above and beyond those enumerated. It allows exemptions to be tailored to changing conditions, but eliminates the possibility of favoritism and injustice which may result from granting exemptions on an individual basis. If this act is administered by a bipartisan or nonpartisan board or agency, it may be possible to grant the exemptions on an individual basis.

Subsection (c) makes it clear that, despite the specific enumeration found in subsection (b), the Consumer Protection Office is under no *obligation* to grant any of the subsection (b) exemptions.

Part II. *Registration of Land*

Section 201: *Registration Required*

(a) Unless the sale or offer to sell is exempt under section 104 of this act,

(1) No person shall sell or offer to sell any interest in a subdi-

38 The Uniform Act is not clear on this point, although the Florida Board has required all subdivisions to be filed and then gives certificates of exemption. *See* Gaitanis, *Recent Florida and Federal Laws Regulating Promotional Land Sales*, 43 FLORIDA B.J. 90, 91 (Feb. 1969).

vision prior to the time the subdivision is registered in accordance with this act;

(2) No person shall sell any interest in a subdivision unless a current public offering statement in the form most recently designated by the Consumer Protection Office is delivered to the prospective purchaser, its purpose explained to him, and the purchaser afforded a period of at least three days to examine the public offering statement prior to the sale.

(b) No person shall purchase any land in this state of over fifty acres unless that person discloses to the prospective seller prior to the making of any agreement relating thereto the identity of the person or persons for whose account, on whose behalf, or for whose benefit such purchase is made and, if one or more of such persons is a corporation, the identity of all stockholders holding ten percent or more of the outstanding shares of the capital stock thereof and the president, treasurer, and secretary or clerk thereof.

(1) Within ten days after such purchase is consummated, the purchaser shall notify the Consumer Protection Office of the location and size of the property, the date of the sale, and the information about the purchaser specified above in this subsection.

(2) Any purchaser failing to meet these requirements may be denied the right to register his land for sale by the Consumer Protection Office.

(c) No developer or agent or employee of a developer shall make any representations about future or contemplated improvements to his subdivision unless the fact that the improvements have not yet been made and that the developer is under no legal obligation to make the improvements is stated clearly and, in the case of a written representation or advertisement, conspicuously.

COMMENT: Subsection (b) serves to stifle or eliminate the use of "straw" buyers, which will inevitably cause land prices to rise and development to be retarded. Very few developers could buy land at a price low enough to make their investment worthwhile if they had to divulge their true existence as land developers to all prospective sellers. Therefore, this section is only recommended for those states who have a desire to slow down the development process. However, it does help residents of the state get fairer prices for their land and will enable the Consumer Protection Office to keep track of all large buyers and thus will make enforcement of the entire act easier.

Section 202: *Application for Registration*

(a) An application for registration of a subdivision shall be filed as prescribed by the rules of the Consumer Protection Office and shall contain the public offering statement and the following documents and information:

(1) The applicant's name, his address, the address of each of the applicant's offices in this state, and, where the applicant is not an individual, the form, date of formation, and jurisdiction of the applicant;

(2) The name, address, and principal occupation for the past five years of every director and officer of the applicant, or of persons occupying a similar status or performing similar functions, and of every holder of ten percent or more of the ownership interest of the applicant, and the extent and nature of such holder's interest in the applicant or the subdivision as of a specified date within thirty days of the filing of the application;

(3) The states or jurisdictions in which an application for registration to sell land, or a similar document, has been filed and any adverse order, decree, or judgment entered in connection with such lands by the regulatory authorities of the jurisdiction or by any court;

(4) Copies of the instruments which will be delivered to a purchaser to evidence his interest in the lot or subdivision and copies of the contracts and other agreements to which a purchaser will be required to agree or which he will be required to sign;

(5) Copies of the instruments pursuant to which the subdivision was acquired;

(6) Copies of any instruments creating easements, restrictions, or other encumbrances affecting the subdivision;

(7) A narrative description of the promotional plan for the subdivided lands, including the geographic scope of the promotion, the approximate price of each of the lots to be sold, and any inducements or promises to be made to the prospective purchaser; this description shall be accompanied by copies of all advertising material which is to be used;

(8) A narrative description of the plan of development for the subdivided lands, including any improvements which the developer plans to make and the expected schedule for their completion;

(9) Any other information, including any current financial statement of the applicant, which the Consumer Protection Office by its rules may require for the protection of purchasers.

(b) If an applicant or his successor registers additional subdivided lands to be offered for disposition, he may consolidate the subsequent registration with any earlier registration offering subdivided lands for sale under the same promotional plan.

(c) The applicant or his successor shall immediately report any material changes in the information contained in the application for registration, including all additional advertising material.

Section 203: *Notice of Filing and Registration*

(a) Upon receipt of the application for registration in proper form, the Consumer Protection Office shall issue a notice of filing to the applicant. If, within thirty days from the date of the notice of filing, no order of rejection is entered by the Consumer Protection Office, the land shall be deemed registered.

(b) If the Consumer Protection Office determines upon inquiry and examination that any of the requirements of this act or the regulations issued hereunder have not been met, the office shall notify the applicant that the application for registration must be corrected in the particulars specified in that notice within a specified period, which shall be no less than ten days. If the requirements are not met within the time allowed, the Office shall enter an order rejecting the registration. Such order shall include the findings of fact upon which the order is based. The order rejecting the registration shall not become effective for twenty days, during which time the applicant may petition for reconsideration and shall be entitled to a public hearing before a representative of the Consumer Protection Office.

COMMENT: This automatic registration was designed to make the administrative burden as light as possible and to avoid any need for additional personnel in the Consumer Protection Office. In addition to the simple mechanical process of sending out notices of filing, implementation of the registration provisions will require little more than a few new filing cabinets. Other provisions of this law make it possible to revoke registrations, so there is no problem if the Consumer Protection Office does not get a chance to read the registration materials within the thirty day period. Where manpower and finances would permit it, it would obviously be preferable to have the registration materials read in advance and registration be contingent on receipt of a formal statement of registration from the Consumer Protection Office. This

is much closer to the procedures authorized by the Uniform Act.[39]

It is intended that the rejection shall become effective after twenty days, even if the hearing has been requested but has not yet been held. This act has deliberately avoided any attempts to specify the nature and details of the hearing, except for the requirement that it must be public. It was felt that it would be better for each state to set the hearing procedures so that they would be consistent with those used in other administrative procedures.

Section 204: *Public Offering Statement*

(a) Every public offering statement shall disclose fully and accurately any information necessary for a prospective purchaser to make an informed and intelligent decision concerning an offer to purchase an interest in the subdivision to which such public offering statement applies. The public offering statement submitted with the application for registration shall be identical to the one presented to the prospective purchaser and shall be in a form specified by the Consumer Protection Office and shall include, without limitation:

(1) The name and address of each person having an interest in the subdivision or in the promotional plan and the extent of such interest;

(2) A legal description of all land included in the subdivision;

(3) The use for which the property is offered;

(4) A topographic description of the land in the subdivision, including such physical description of the property as would indicate its suitability for various types of construction and residence;

(5) The condition of the title to the land comprising the subdivision, including all encumbrances and deed restrictions applicable thereto;

(6) The number and size of the lots comprising the subdivision;

(7) The accessibility to the subdivision and the individual lots therein, including, without limitation, location, number, and condition of roads and highways, the burden of responsibility for their maintenence, and available public transportation;

(8) The proximity in miles to nearby municipalities, and the accessibility, by public and private transportation, to such municipalities from the subdivision;

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39 Uniform Act § 8; FLA. STAT. ANN. § 478.25 (Supp. 1969).

(9) The current availability and cost of utilities, including, without limitation, sewage, electricity, gas, telephone, and public water supplies;

(10) The feasibility and estimated cost of providing water to the individuals lots if public water supplies do not supply the individual lots;

(11) In the case of any subdivision or portion thereof against which there exists a blanket encumbrance, the consequences to an individual purchaser of the failure, by the person or persons bound, to fulfill obligations under the instrument creating the encumbrance and the steps, if any, taken to protect the purchaser against such consequences;

(12) The proximity and accessibility to hospitals, doctors, schools, food stores, shopping areas, and automobile service stations;

(13) The legal obligations, if any, of the developer to develop the subdivision. If no such obligations exist, this must be stated clearly and directly;

(14) Any planned improvements to the subdivision, the current state of such improvements, and whether the developer has made any guarantees that such improvements will actually be made;

(15) The taxes applicable to the land;

(16) Any zoning or other governmental restrictions on the use of the land;

(17) The consequences of the failure of a purchaser to fulfill obligations under an installment sales contract; and

(18) A map of the subdivision and surrounding areas including, without limitation, the location and boundaries of individual lots, topographical features, and existing means of access. The map shall not in any way portray features or structures which are not then in existence.

(c) If, in the opinion of the Consumer Protection Office, the developer or persons materially connected with the developer present a history of financial weakness or a failure to meet legal obligations, the Consumer Protection Office may require such additional information in the public offering statement as it deems necessary to protect the interests of potential buyers.

(d) The public offering statement shall not be used for any purpose before registration. After registration the public offering statement shall be used only in its entirety. No person may represent that the Consumer Protection Office or any other state agency or office approves or recommends the subdivided lands or the disposition

thereof. No portion of the public offering statement may be underscored, italicized, or printed in larger or heavier or different color type than the remainder of the statement, except to the extent required by the Consumer Protection Office.

(e) The Consumer Protection Office may require the developer to alter or amend the proposed public offering statement in order to assure full and fair disclosure to prospective purchasers. If any changes are made that would make the public offering statement as filed inaccurate, the developer must notify the Consumer Protection Office of the changes and must make appropriate amendments to the public offering statement. A public offering statement is not current unless all amendments are incorporated.

COMMENT: It was felt advisable to leave the actual form of the documents to the discretion of the Consumer Protection Office, but it is expected that the office will permit developers to file the forms and statements required by the federal act with such additions as this act requires. The developer should not be required to provide the same information in a number of different documents for several different agencies. This would only serve to increase the costs of entering the development business and thus would do little more than force out the small developer. This would reduce competition and ultimately work against the public interest.

Paragraph (12) includes those services which it was felt were considered essential by most people today. There will be obvious differences of opinion on what is or is not essential, and services such as dentists, pharmacists, lawyers, plumbers, and carpenters might also be included. Exactly which services are included will depend on the needs of a particular state.

The second sentence of paragraph (18) was added to prevent developers from showing parks, shopping areas, etc., and then adding in very small print that such facilities were still in the planning stage.

Part III. *Remedies*

Section 301: *Revocation*

(a) The Consumer Protection Office, after notice and a public hearing, may revoke a registration upon written findings of fact that the developer has

(1) failed to comply with the terms of a cease and desist order issued under section 302 of this act;

(2) been convicted in any court subsequent to the filing of the application for registration for a crime involving fraud, deception, misrepresentation, false advertising, or any unlawful dealing in real estate transactions, or has been held civilly liable in an action involving fraud, deception, or misrepresentation;

(3) disposed of, concealed, or diverted any funds or assets of any person so as to defeat the rights of a purchaser of an interest in subdivided land; or

(4) made intentional misrepresentations or intentional omissions of material facts in an application for registration of land in this state.

(b) Findings of fact under the previous subsection, if set forth in statutory language, shall be accompanied by an explicit statement of the underlying facts supporting the findings.

(c) If the Consumer Protection Office finds, after notice and a public hearing, that a developer has been guilty of a violation for which revocation could be ordered, it may issue a cease and desist order instead of ordering revocation of a registration.

COMMENT: Revocation of a developer's registration is one of two administrative remedies provided by this act, the other being a cease and desist order. These administrative remedies are preventive as well as remedial, since they may be invoked against unlawful practices whether or not there has been any damage to any individual purchaser. Revocation is the ultimate administrative remedy and normally will be used only if a cease and desist order would not be adequate or appropriate to deal with the unlawful practice. A registration may be revoked only after a public hearing by the Consumer Protection Office, whose determination should be subject to judicial review according to the ordinary rules of administrative law. See section 308. This section is taken substantially from section 13 of the Uniform Act.[40]

Section 302: *Cease and Desist Orders*

(a) If the Consumer Protection Office determines, after notice and a public hearing, that the developer has

(1) violated any provision of this act;

40 Uniform Act § 13; FLA. STAT. ANN. § 478.161 (Supp. 1969).

(2) engaged, directly or through an agent or employee, in any false, misleading, or deceptive advertising, promotional or sales method to offer or attempt to dispose of an interest in subdivided land; or

(3) engaged in any other unfair or deceptive acts or practices relating to the sale of land,

then the Consumer Protection Office may issue an order requiring the developer to cease and desist from such practice and to take such affirmative action as in the judgment of the Consumer Protection Office will carry out the purposes of this act.

(b) If the Consumer Protection Office makes a written finding of fact that the public interest will be irrevocably harmed by delay in issuing an order, it may issue a temporary cease and desist order. Every temporary cease and desist order shall include in its terms a provision that it is to become permanent unless within thirty days of its issuance the developer requests a public hearing to determine whether or not it shall become permanent. Under no circumstances shall a temporary cease and desist order remain in force for more than sixty days.

(c) A cease and desist order may be issued under this section even though the practices made subject to such order were not done with intent to violate a provision of this act or with intent to mislead or to deceive.

(d) Compliance with the terms of a cease and desist order may be ordered by any court in this state.

COMMENT: A cease and desist order provides the administrative analogue of the judicial injunction without the necessity of going to court. Since this section gives broad administrative discretion to the Consumer Protection Office in issuing such an order, a public hearing is required before the order is made, and the action of the Office is subject to judicial review. See Section 308. Cease and desist orders are enforceable by the threat of revocation as provided in section 301(a)(1). Section 302(b) is a somewhat novel provision that places the burden of challenging a temporary order on the developer against whom it is issued. It is hoped that this will relieve the administrative burden placed on the Consumer Protection Office without abridging the rights of the developer, who still has ultimate recourse to the courts in the case of administrative abuse. Since a cease and desist order merely requires

the developer to comply with the law, it appropriately applies to unlawful acts whether intentional or unintentional. It should be noted that section 302(a)(1) includes failure to register land and failure to present in proper form or to amend a registration or public offering statement.

Section 303: *Civil Remedies*

(a) Any developer who

(1) sells an interest in subdivided land in material violation of this act; or

(2) in disposing of an interest in subdivided land makes an untrue statement of a material fact; or

(3) in an application for registration or in a public offering statement makes an untrue statement of a material fact or omits a material fact required to be stated therein; or

(4) in disposing of an interest in land located outside this state violates the provisions of any rule made under section 102(d) of this act shall be liable as provided in this section to any purchaser who is thereby induced to purchase an interest in subdivided land from such developer, unless in the case of an untruth or omission it is proved that the purchaser knew of the untruth or omission or that the developer offering or disposing of the interest in the subdivided land did not know and in the exercise of reasonable care could not have known of the untruth or omission. In the case of a material untruth or omission there shall be a rebuttable presumption that the sale was induced by such untruth or omission.

(b) In addition to any other remedies available to him, the purchaser may bring the action provided by subsection (a) of this section in law or equity to recover the consideration paid for the interest in the subdivided land, any other damages incurred in reasonable reliance on the acts complained of, and interest on the consideration at the maximum legal rate prescribed by [statutory citation] of the [state] Statutes from the date of the first payment to the developer. Any profit received by the purchaser from the land in question shall be subtracted from the amount of the judgment. Before judgment is entered, the purchaser shall tender to the developer appropriate instruments of reconveyance.

(c) Every person who materially participates in any sale of subdivided land in the manner specified in subsection (a) of this section, and who directly or indirectly controls the developer, or who is a general partner, officer, director, salesman, agent, or an employee

with authority of the developer, shall also be liable jointly and severally with and to the same extent as the developer, unless such person otherwise liable did not know, and in the exercise of reasonable care could not have known, of the existence of the untruth or omission by which such liability is alleged to exist.

(d) There shall be a right of contribution, as in cases of contract, among persons liable under subsection (c) of this section.

(e) Any remedies available to the purchaser under this section shall be available to any subsequent purchaser claiming under him, provided that the subsequent purchaser can show that he reasonably relied on the unlawful statements or omissions of the developer.

COMMENT: This section is equitable in character and is designed to enlarge the remedies available to a purchaser of land under the common law. The common law remedies are preserved, so that a purchaser could still recover expectancy damages for breach of contract or consequential loss resulting from fraud, to give two examples. However, the act provides that a purchaser may recover his consideration (with interest) and any damages he may have incurred if the developer is found liable under subsection (a). The purchaser is thus relieved of the heavy burden of proving fraud at common law and does not have to satisfy the complex prerequistites for recovery under the ordinary law of restitution. This type of statutory remedy is particularly appropriate in cases where the purchaser does not have the opportunity of inspecting the land (which is assumed at common law) and where mere damages might be an inadequate remedy. The paradigm would be an out-of-state resident purchasing land in the state in order to build a summer home or a retirement home. Because the section does grant such wide remedies, the vendor must at least have been in violation of the registration requirements of the act or have been guilty of a negligent misrepresentation. The burden of proof is on the vendor to show that he was not negligent, however. Finally, the remedies under this section are available to subsequent purchasers on the same terms as original purchasers (e.g., the action must be brought within the limitation period which would apply to the original purchaser), provided that he can prove reliance on the misrepresentation of the vendor. Since many sales covered by this act will be through advertising and solicitation by mass media, it is rea-

sonable to contemplate that some subsequent purchases might be made on the basis of the vendor's statements, although the vendor or developer is not a direct party to such a sale. In such cases it seems appropriate to extend the protection of the act. The deduction of profits in subsection (b) is designed to prevent the purchaser from collecting possibly several years of rental income and then, in addition, getting his entire purchase price back. The interest should be sufficient compensation for the purchaser's loss of use of his money. The first four subsections of this section are derived in part from section 16 of the Uniform Act.[41]

Section 304: *Consent to Service of Process*

(a) Upon applying for registration, a developer shall file with the Secretary of State a stipulation appointing the Secretary of State as attorney upon whom process against or notice to the developer may be served.

(b) Such stipulation shall be in form and substance like that prescribed by [statutory citation] of the [state] Statutes and shall be authenticated by the seal of the corporation and if it is a copartnership or company, by the signature of a member thereof or, if it is an incorporated or unincorporated association, by the signatures of the president and secretary thereof, in which case it shall be accompanied by a duly certified copy of the order or resolution of the board of directors, trustees, or managers of the company authorizing the president and secretary to execute the stipulation.

(c) Any developer who fails to file a stipulation in the manner prescribed by this section shall have no cause of action in connection with the sale of land under the laws of this state against a purchaser to whom such developer has sold an interest in subdivided land.

COMMENT: In addition to the obvious protection against out-of-state developers, requiring consent-to-service-of-process documents to be completed by all developers should eliminate the problem of developers who maintain offices within the state while engaged in the promotional offering, but who leave after all the land has been sold. This section is derived in part from the Vermont Securities Act.[42]

41 Uniform Act § 16; FLA. STAT. ANN. § 478.191 (Supp. 1969).
42 VT. STAT. ANN. tit. 9, §§ 4209, 4210 (1959).

Section 305: *Service of Process*

Any process or pleadings under this act which are served upon the Secretary of State shall be by duplicate copies, one of which shall be filed with the Consumer Protection Office, and the other immediately forwarded by registered mail to the principal office of the developer or other persons against whom the process or pleadings are directed.

Section 306: *Criminal Penalties*

(a) Any developer who willfully violates any provision of this act or the terms of a cease and desist order made under it, or who willfully, in an application for registration or in a public offering statement, makes any untrue statement of a material fact or omits to state a required material fact shall be guilty of a felony and upon conviction thereof may be fined in an amount not to exceed fifty thousand dollars or may be imprisioned for not more than two years, or both.

(b) Any person other than a developer who willfully violates any cease and desist order issued under this act, or who willfully, in an application for registration or in a public offering statement, makes any untrue statement of a material fact or who omits to state a required material fact shall be guilty of a misdemeanor and upon conviction thereof may be fined in an amount not to exceed five thousand dollars or may be imprisioned for not more than six months, or both.

COMMENT: This section is derived in part from section 15 of the Uniform Act.[43]

Section 307: *Limitations*

Except as otherwise provided in this act, no civil action shall be brought hereunder later than five years from the date of the first payment to the developer, and no criminal action shall be brought hereunder later than three years from the date of the offense.

Section 308: *Judicial Review*

Nothing in this act shall be construed to abridge the right of judicial review of administrative decisions normally available under the laws of this state.

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43 Uniform Act § 15; FLA. STAT. ANN. § 478.211 (Supp. 1969).

NOTES

THE TEXARKANA AGREEMENT AS A MODEL STRATEGY FOR CITIZEN PARTICIPATION IN FCC LICENSE RENEWALS

Introduction

On June 8, 1969, representatives of local black and religious groups and of television station KTAL-TV in Texarkana, Texas-Arkansas, signed a sweeping private agreement redressing racial grievances and guaranteeing future citizen participation in station programing.[1] Among the highlights of that agreement were the following provisions:

> 1. Greater employment of minority group members by the station, including, as a minimum, two full-time Negro on-camera reporters;
> 2. Regular programs for the discussion of controversial issues, with both black and white participants;
> 3. No pre-emption of network programs of particular interest to any substantial segment of the viewing audience without appropriate advance consultation; and
> 4. Monthly meetings between the station and a committee composed of representatives of the signatory groups and other viewers in the area.[2]

In return, the coalition of groups[3] dropped its petition to deny the licensee's (KCMC, Inc.) application, which was pending before the Federal Communications Commission, and actively supported renewal of the station's license.[4]

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1 N.Y. Times, June 11, 1969, at 95, col. 2. KTAL-TV serves the Texarkana, Texas-Arkansas and Shreveport, Louisiana viewing area. Texarkana was 26.5 per cent nonwhite in 1960. U.S. BUREAU OF THE CENSUS, COUNTY AND CITY DATA BOOK, Table 4 at 554 (1967). The 1960 census listed Shreveport as 34.5 per cent nonwhite. U.S. BUREAU OF THE CENSUS, 1 STATISTICAL ABSTRACT OF THE UNITED STATES, Table 21 at 22 (90th ed. 1969).

2 KCMC, Inc. (KTAL-TV): Renewal of License Upon Settlement of Complaints, 16 P & F RADIO REG. 2d 1067, 1080 (1969).

3 The twelve organizations included two churches, three fraternities, the local chapter of the National Association for the Advancement of Colored People, the Negro Community Leaders Committee, and a Model Cities Planning Area. Also involved in negotiations was the Office of Communications of the United Church of Christ. 16 P & F RADIO REG. 2d at 1071.

4 *Id.* at 1079.

The Agreement and the Statement of Policy were filed with the Commission as an amendment to the renewal application.[5] The parties agreed that any material variance from the Statement would be deemed a failure to operate as set forth in the license.[6] The FCC's opinion renewing KCMC's license, which was adopted on July 29th and released on August 18th, had the effect of making the Agreement provisions enforceable by the Commission.[7]

Thus, private negotiation, rather than existing institutional procedures, yielded a workable settlement. Of what significance is this to other local viewer groups attempting to reform broadcasting? To analyze this question, we must begin with a consideration of the strengths and weaknesses of the administrative-judicial process which the Texarkana coalition largely bypassed. Next, those facets of the Texarkana method which commend it to the resolution of other license renewal controversies will be examined. Having followed these analytical steps, we may conclude that this strategy for inducing settlement has the greatest potential of all current alternatives for consistently producing results consonant with the public interest and deserves recognition as the primary model for the solution of similar future disputes between local community groups and commercial broadcasters.

I. The Administrative-Judicial Process

A. *Procedures*

Congress empowered the FCC in 1934[8] to grant a broadcasting license to an applicant if "the public interest, convenience, and necessity would be served."[9] An initial grant or a renewal of a license is for a three-year period.[10] Because the airwaves are a scarce public resource, broadcasting is to be conducted in the interest of the inhabitants of the service area. Licensees are obligated to "take the necessary steps to inform themselves of the real needs and interests of the areas they serve, and to provide programming

5 *Id.*
6 *Id.*
7 *Id.* at 1068.
8 Communications Act of 1934, 47 U.S.C. § 301 *et seq.* (1964).
9 *Id.* § 309(a).
10 *Id.* § 309(d).

which in fact constitutes a diligent effort to provide for those needs and interests."[11]

Other provisions of the 1934 Act set forth procedures for the contesting of a grant or renewal of a license. One who wishes to see another party prevented from receiving a license or wishes the license to be issued subject to certain conditions may file a "petition to deny" the application with the Commission.[12] A petitioner must meet the requirements of a "party in interest,"[13] which is the status accorded to a party whose grievance is sufficiently direct and substantial to entitle him to appear at an administrative hearing. The Commission shall deny the petition unless it finds not only that the petitioner is a party in interest but that his complaints present a "substantial and material question of fact"[14] and that the granting of the application would be "prima facie inconsistent" with the public interest.[15] If these conditions are met, the Commission shall notify the applicant and all known parties in interest of a hearing and shall specify "with particularity the matters and things in issue."[16] Other unnotified protestants may attempt to gain the status of parties to the proceeding at this point by timely filing of a "petition for intervention" showing the basis for their interest.[17] Any subsequent hearing shall include all parties granted standing by the Commission.[18]

Congress gave the right of standing to appear at a hearing and the right of judicial appeal to persons "aggrieved or whose interests are adversely affected" by FCC action.[19] Judicial interpretation through the years has served to broaden the Commission's

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11 Commission Policy in Programing, 20 P & F RADIO REG. 1901, 1913 (1960). An FCC Public Notice dated August 22, 1968 imposes an affirmative duty on broadcasters to consult with a "representative range of groups and leaders" as part of its effort to determine community needs. Ascertainment of Community Needs, 13 P & F RADIO REG. 2d 1903, 1904 (1968).

12 47 U.S.C. § 309(d)(1) (1964).

13 *Id.* See text *infra* at notes 19-29 for discussion of changing FCC definitional criteria.

14 *Id.* § 309(d)(2).

15 *Id.* § 309(d)(1).

16 *Id.* § 309(e).

17 *Id.*

18 *Id.*

19 *Id.* § 402(b)(6). *See* Philco Corp. v. FCC, 257 F. 2d 656 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 946 (1959).

limited conception of this statutory standard. In 1940 *FCC v. Sanders Brothers Radio Station*[20] conferred standing to seek judicial review upon persons vulnerable to financial loss resulting from FCC orders. For example, an existing station which would likely lose revenue from competition with another station was accorded standing. *FCC v. National Broadcasting Co. (KOA)*[21] three years later held that a licensee suffered "legal wrong" when his license was modified without a hearing by permitting another party to transmit on the same frequency, thereby creating electrical interference. Prior to 1966, "party in interest" had been applied to parties only on the bases of economic injury and "legal" interest.[22] A group such as the Texarkana coalition which claimed only to be representative of the public interest would not have been a party in interest under these standards.

In 1966, however, the United States Court of Appeals for the District of Columbia handed down the landmark decision of *Office of Communications of the United Church of Christ v. FCC*.[23] The court held that the Commission had to admit some of the petitioners as parties in interest on the basis of the prior Commission determination that they were "responsible spokesmen for representative groups having substantial roots in the listening community."[24] Church and civil rights groups were accorded standing as concerned viewers representing the public and gained the right to appear at a full evidentiary hearing concerning the relicensing of WLBT-TV (Jackson, Mississippi) to contest the station's racially discriminatory practices.[25] The Com-

20 309 U.S. 470 (1940).

21 132 F.2d 545 (D.C. Cir. 1942), *aff'd* 319 U.S. 239 (1943).

22 Note, *TV Service and the FCC*, 46 TEXAS L. REV. 1100, 1167 (1968).

23 359 F.2d 994 (D.C. Cir. 1966).

24 *Id.* at 1005. The court suggested that the Commission develop rules which would exclude "captious or purely obstructive protests" and mitigate "floodgate" fears raised by the 1966 *Church of Christ* decision. The language of the judicial description of the Commission's determination of the Church of Christ's qualifications, however, frames a good standard for future application. 80 HARV. L. REV. 670, 673 (1966).

25 Blacks comprise almost forty-five per cent of the total population of WLBT's prime service area. 359 F.2d at 998. The Reverend Dr. Everett C. Parker, Director of the Office of Communications of the United Church of Christ, had initiated a method of monitoring certain Southern television stations to ascertain which broadcasters in the region did not allot fair air time to news of Negro individuals and institutions and presented programs generally disrespectful toward Negroes. *Editorial*, N.Y. Times, June 25, 1969, at 46, col. 2. A Ford Foundation grant of $160,000

mission thereupon designated the following hearing issues with regard to WLBT's performance as the current licensee: (1) reasonable opportunity for the discussion of conflicting views on issues of public importance and for the use of its broadcasting facilities by significant groups comprising its service area, (2) good faith efforts in matters of racial discrimination, and (3) the potential effect of relicensing on the public interest.[26] The hearing resulted in a three-year renewal in June 1968 for WLBT, Commissioners Nicholas Johnson and Kenneth Cox dissenting.[27]

In *Office of Communication of the United Church of Christ v. FCC*, [28] announced in June 1969, Circuit Judge Warren Burger held that the Commission's conclusion that license renewal was warranted was not supported by substantial evidence on the record considered as a whole. He found that the hearing was permeated with the FCC Examiner's erroneous concept that the burden of proof is on the intervenors and that the pervasive impatience, if not hostility, of the Examiner made fair and impartial consideration of the case impossible. The recently renewed license was vacated, and new license applications were invited. Circuit Judge Burger stressed that "broadcasters are temporary permittees — fiduciaries — of a great public resource, and they must meet the highest standards which are embraced in the public interest concept."[29] This decision reinforced the earlier holding that a representative local group is now guaranteed rights as a party in interest.

Finally, a recent development may favorably affect the fortunes of citizens' groups, although it explicitly pertains to commercially oriented challengers only. A Commission policy statement issued January 15, 1970, establishing a "substantial" public interest standard in comparative renewal proceedings,[30] contained a provision

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announced in February, 1968 enabled the Office of Communications to monitor stations in nearly a dozen more cities. N.Y. Times, February 26, 1968, at 75, cols. 3-4.

26 Office of Communications of the United Church of Christ v. FCC, 16 P & F RADIO REG. 2d 2095, 2099 n. 5 (1969).

27 Lamar Life Broadcasting Co., 14 FCC 2d 431 (1968).

28 16 P & F RADIO REG. 2d 2095 (1969).

29 *Id.* at 2103.

30 18 P & F RADIO REG. 2d 1901 (1970). The new statement provides less protection to licensees than pending legislation [S. 2004, 91st Cong., 1st Sess. (1969)], chiefly sponsored by Senator John A. Pastore (D.-R.I.), which would limit the right to contest license renewals and make relicensing virtually automatic. Dean

prohibiting a current licensee from presenting evidence of improvement in programing after a petition to deny application has been filed.[31] This change eliminates the opportunity for a broadcaster to obtain renewal on the basis of interim improvements by making prior performance determinative as to whether the license is to be renewed, renewed conditionally, or vacated. The Commission might well extend this doctrine to licensees challenged by groups with noneconomic interests.

B. *Difficulties Encountered by Local Groups*

Despite the recent gains for local groups embodied in the *Church of Christ* decisions of 1966 and 1969, significant problems remain which make the administrative-judicial process less than satisfactory for purposes of their desired ends.

While a bona fide local group may now secure standing, its effort may still be frustrated to the extent that an appeal of an unsatisfactory outcome of a hearing is hindered by the limited scope of judicial review of administrative decisions. The 1946 Administrative Procedure Act[32] enacted the "substantial evidence" rule,[33] which sets a stricter standard for upsetting administrative findings than the "clearly erroneous" test employed in reviewing the findings of a judge without a jury. Professor Davis points out that "because findings may be clearly erroneous without being unreasonable so as to be upset under the substantial-evidence rule, the scope of review of administrative findings is narrower."[34] The APA's requirement of viewing both sides of the evidence was clarified by Justice Frankfurter's statement in *Universal Camera*

Burch, new chairman of the Commission and principal author of the policy statement, had previously endorsed the Pastore bill but said that it now would no longer be needed. N.Y. Times, January 16, 1970, at 1, col. 3, and at 95, col. 3. Both the legislation and the policy statement aim to reduce the risk of broadcaster investment loss. 18 P & F RADIO REG. 2d at 1904 (1970). During the previous year fear was stirred in the industry by the Commission's reassignment of the WHDH license in Boston principally because of undue concentration of media ownership. See Jaffe, *WHDH: The FCC & Broadcasting License Renewals*, 82 HARV. L. REV. 1693 (1969), and Goldin, *"Spare the Golden Goose"—The Aftermath of WHDH in FCC License Renewal Policy*, 83 HARV. L. REV. 1014 (1970).

31 *Id.* at 1906-1907.

32 Administrative Procedure Act, 5 U.S.C. § 500 *et seq.* (Supp. IV, 1969).

33 *Id.* § 706(2)(e).

34 K. DAVIS, 4 ADMINISTRATIVE LAW TREATISE 121 (1958).

Corp. v. NLRB[35] that "the substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement . . . that *courts consider the whole record.*"[36]

In contrast, some difficulties faced by local groups stem more from the operational realities of the FCC. The decisions of the FCC may be subject to the vagaries of shifting ideological composition and the impact of change in national administrations. Moreover, pervasive broadcasting industry influence stifles impartiality. One observable result of this pressure is the Commission's consistent acquiescence in the non-community and non-public interest orientation of existing licensees, as amply documented by the case study of Oklahoma stations conducted by Commissioners Johnson and Cox.[37] Local stations are allowed to maximize profits by carrying a heavy schedule of network entertainment programing. Yet, an interagency committee, appointed by President Johnson and chaired by Undersecretary of State Eugene V. Rostow, to propose future telecommunications policy concluded that broadcasting "should provide an effective means of local expression and local advertising to preserve the values of localism and to help build the sense of community both locally and nationally."[38]

Another disadvantage of the administrative-judicial process is the FCC's employment of warnings rather than more stringent sanctions against offending licensees, although warnings alone can sometimes be effective. Politics and industry lobbying probably

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35 340 U.S. 474 (1951).

36 *Id.* at 488. (Italics are mine.).

37 Cox and Johnson, Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study, 14 FCC 2d 1, 10-11 (1968). They concluded, *inter alia*, that local stations are overwhelmingly transmitters of entertainment and news from national centers such as New York and Los Angeles; there is little, if any, relevant information available to local citizens about local radio and TV stations; the listening and viewing public is almost totally excluded from, and uninformed about its rights in, the station's program selection process; and the stations generally failed to provide their audiences with local news, entertainment, community dialogue and the airing of local controversial issues.

Two instances where the Commission denied applications for insensitivity to community needs are Henry v. FCC, 302 F.2d 191 (D.C. Cir. 1962), *cert. denied* 371 U.S. 821 (1962) (initial radio license) and Robinson v. FCC, 334 F.2d 534 (D.C. Cir. 1964), *cert. denied* 379 U.S. 843 (1964) (renewal of radio license).

38 N.Y. Times, Dec. 10, 1968, at 41, col. 1.

account for the infrequent use of the intermediate remedies[39] which Congress entrusted to the FCC. But the very nature of licensing is probably the primary reason for failure to invoke more severe sanctions. Professors Hart and Sacks assert that one of the purposes of the license requirement in administrative law is as a sanction for the enforcement of self-applying rules,[40] *i.e.*, standards which are to be observed by private persons in return for the enjoyment of a privilege without direct government supervision. Paradoxically, suspension or revocation[41] is so powerful a sanction that it is virtually useless as a punishment for violation of the self-applying rules of licensing, and the history of the FCC proves it. As a remedy it has been traditionally reserved for only the most extreme cases.

Pragmatic problems of time and money further discourage organizations with limited funds for legal resources[42] or at significant distances from Washington[43] from petitioning the FCC. Deadlines and the length of filing periods for petitions and other motions are important matters to local groups. Once the deadline is missed, a protestant such as the Texarkana coalition may only submit complaints to the Commission alleging licensee misconduct until the license is due for renewal in three years, unless another party has made timely filing of its own petition to deny, in which case previously unincluded parties may file petitions for intervention prior to the hearing. An FCC report and order[44] adopted

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39 These sanctions are money forfeitures, 47 U.S.C. § 503(b); short-term licenses, *id.* § 307(d); and a strengthened cease-and-desist order, *id.* § 312(b). See Rollo, *Enforcement Provisions of the Communications Act*, 18 FED. COM. B. J. 4 (1963).

40 H. M. HART AND A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 908-09 (Tentative Edition, 1958).

41 47 U.S.C. § 312(a).

42 For a discussion of the recent establishment of facilities to counsel and assist local groups, see text accompanying notes 61-67 *infra*.

43 Congressman John Moss (D.-Calif.) has proposed that "it is time to make every single broadcast license renewal application subject to a public proceeding within the city or region where the station is located." Johnson, *The Easy Chair: What You Can Do to Improve TV*, HARPER'S, February, 1969, at 14-20 reprinted in 115 CONG. REC. E836, E837 (February 5, 1969). Short of this, even conducting closed hearings in the locality in which citizen groups with standing may participate would be of great practical benefit to potential petitioners.

44 License Renewal Applications, 16 P & F RADIO REG. 2d 1512 (1969). Dissenting Commissioner Johnson pointed out, *inter alia*, that "a group having negotiated a contract with a licensee similar to the Texarkana agreement . . . may wish to examine the licensee's application to determine whether it has performed its promises.

May 14, 1969, now requires licensees to announce publicly that they are filing for renewal within six weeks of the date when the renewal application is due. The advantages of this order to citizen groups may be counterbalanced by the reduction in the filing period for a petition to deny (*i.e.*, between filing of a renewal application and the cut-off date) from ninety days to sixty days, but most groups with hopes of petitioning the FCC will already have informed themselves of the timetable and will now adjust to the sixty day limit.

In conclusion, nevertheless, it is evident that all these factors suggest to a local group such as the Texarkana protestants that there may be too many obstacles to pursuing reform exclusively through administrative-judicial channels.

II. The Hybrid Approach: Private Ordering in Conjunction with the Administrative-Judicial Process

Analysis of the administrative-judicial process reveals that these legal institutions alone lack adequate responsiveness and efficiency to satisfy fully the immediate needs of petitioning groups. Moreover, it is also reasonable to assume that legislative action to aid local groups is not politically available. The Texarkana settlement has demonstrated that private ordering[45] has the most potential. Through private ordering individuals and organizations solve their problems by negotiation in the absence of government. "[I]t is the primary process of social adjustment in the dynamics of a legal system. . . . The problems which private orderers are able to solve never reach officials at all."[46] A settlement reached between a licensee and a local group requires additional action by the parties in the future to fulfill its purposes, a characteristic which accords it status as a "planful act" of private activity rather than an "unplanful" one. It may further be categorized as a pri-

Much of this information may become available only when the renewal application is filed. Members of the public may have difficulty assimilating and analyzing (much less even obtaining) this information in the eight short weeks now allotted them by the majority." *Id.* at 1516b.

45 The following terminology and analysis is based on the materials set forth in H. M. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 6-9, 183-85 (Tentative Edition, 1958).

46 *Id.* at 183.

vate arrangement which depends upon official support but which, as an unstandardized relationship, has not been officially formulated and elaborated.[47]

It is important to note that the Texarkana method of settlement represented not a "pure" form of private ordering, but rather a "hybrid" of the administrative-judicial and the private ordering approaches. The citizen group initiated action in the administrative-judicial process by filing with the FCC its petition to deny the station's application, to which the station filed a reply. This institutional action promoted purposeful negotiation by enhancing the group's bargaining position[48] and by accelerating any timetable for possible settlement. Commissioner Nicholas Johnson has observed that "there will, of course, be instances in which fruitful citizen-broadcaster discussion is not possible without the threat of a contested license renewal — or even with such a contest."[49] Because the substance of the applicant's reply to the petition to deny is considered by the Commission when he requests renewal, and because the failure of private ordering may lead to an expensive and time-consuming hearing, the broadcaster is encouraged by this "regulation by raised eyebrow" to settle the issues raised in the petition.[50] The licensee is further encouraged to negotiate in good faith by the knowledge that a breakdown of the discussion will lead to resumption of the other party's search for a remedy in the administrative-judicial process. Finally, after agreement is reached, both sides rely on administrative-judicial institutions for effective enforcement of the private settlement.

The moderate tone and substance of the Texarkana petitioners' demands made them particularly amenable to prompt settlement. W. E. Hussman, president of Palmer Newspapers, of which KTAL-TV is a subsidiary, maintains that "if the complaining party had come to us directly, instead of filing a complaint with the Federal Communcations Commission without first giving us

47 *Id.* at 184.

48 A local group's power consists of community opinion and the implicit threat of economic boycott of the station's commercial sponsors.

49 16 P & F RADIO REG. 2d at 1070 (1969).

50 Comment, *The FCC and Broadcasting Renewals: Perspectives on WHDH*, 36 U. CHI. L. REV. 854, 867 (1969).

a chance to review their requests, I feel certain that no formal complaint would have been necessary."[51]

In situations where the petitioner's demands are arguably less reasonable, the system of countervailing power inherent in the hybrid of the administrative-judicial and the private ordering approaches acts to protect the public interest. If a group with self-serving and unfair demands marshals its bargaining power against the licensee, the broadcaster can rely upon the FCC's support and threaten to resolve the controversy within administrative-judicial channels. The gray areas between demonstrably reasonable demands and demonstrably unconscionable demands, of course, will present the most strategic difficulties for each side.

Two relicensing disputes in Washington, D.C., are instructive examples of cases in which private settlements were not reached. Early in September 1969, the Black United Front, a coalition of black groups and leaders including the Reverend Channing Phillips and Julius Hobson, filed a petition to deny the license renewal application of WMAL-TV (Channel 7), an affiliate of ABC.[52] *Inter alia*, the BUF charged the station with failure to devote adequate air time to exploring racial problems or to air programs of interest to the majority of the black community; insufficient public service announcements for black organizations; failure to convey black culture; discriminatory hiring practices; and presentation of demeaning motion pictures.[53] The licensee's reply brief expressed some understanding of the BUF's impatience with the social problem of racial discrimination but countered that "WMAL-TV is an accidental and inappropriate target, apparently selected on the basis of inadequate and inappropriate investigation and criteria."[54] The factual situation differed from the circumstances in Texarkana in that the city has a substantial majority of black residents[55] but the group's position also was much more militant. The

51 Letter from W. E. Hussman to Michael Smooke, Sept. 24, 1969.

52 Washington Post, Sept. 3, 1969, at C2, col. 1-4.

53 *Id.*, cols. 2-4.

54 Reply Brief for Applicant-Respondent, quoted in Washington Evening Star, Oct. 4, 1969, at B1, col. 4.

55 The population of Washington, D.C. was 54.8 per cent black in the 1960 census, 1 U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, Table 21 at 22 (90th ed. 1969), and at present estimates run over 70 per cent. N.Y.

station, having judged the demands to be extreme, chose not to initiate negotiations, and the matter is currently pending before the FCC.

The other Washington, D.C., dispute raises intriguing public interest questions on the other side of the racial and political spectrum. Allen C. Phelps, a member of the D.C. Federation of Citizens' Associations, filed a petition with the FCC to deny the application for renewal of the license of WTOP-TV (Channel 9), an affiliate of CBS.[56] Mr. Phelps complained that WTOP suppresses news contrary to its avowed liberal creed, that conservatives are either ignored or presented unfavorably, that WTOP's news coverage encouraged Negro migrations to Washington and the April 1968 riot, and that opposition to open housing by whites who feared higher crime rates was wrongly condemned by the station's editorials.[57] In this case the station also found the aggrieved party's accusations unreasonable and felt no need to bargain. The Commission absolved it of charges of news distortion and renewed the license by a vote of 5-0.[58]

III. Future Developments

Monitoring of the current licensee's programing[59] is certain to become the standard technique employed by concerned citizens to document their cases, whatever avenue of redress they choose to pursue. The FCC has effectively relinquished to local citizens the primary guardianship of the public interest in community orientation of broadcasting at least in part because of its lack of resources to conduct this type of investigatory surveillance. A local group, in contrast, is well-equipped for the task: it has available

Times, December 22, 1969, at 67, cols. 3-4. The surrounding suburbs of Maryland and Virginia, also included in the viewing area, are overwhelmingly white.

The FCC declared in December 1969 that the programing obligation of licensees is principally to the cities where they are stationed rather than to the often larger suburban communities where they are also received. Implementation of this policy could dramatically affect broadcasting content in Washington. N.Y. Times, December 22, 1969, at 67, cols. 3-4.

56 Washington Post, Sept. 24, 1969, at C1, cols. 6-7.

57 *Id.* at C1, col. 7, and C2, col. 1.

58 N.Y. Times, Nov. 29, 1969, at 66, cols. 1-2.

59 See note 25 *supra* for discussion of the monitoring conducted by the Office of Communications of the United Church of Christ.

television and radio receivers, volunteer viewers and listeners, and the necessary time. Rather than leaving this activity to the spontaneous efforts of existing or ad hoc organizations, however, the American Civil Liberties Union has suggested that the FCC move to set up local committees of citizen volunteers to conduct monitoring.[60] In any event, as the phenomenon of private monitoring becomes more widespread, broadcasters will increasingly be confronted with audience representatives knowledgeable about specific deficiencies in existing practices.

In another development, nationally-oriented support facilities have recently been established to aid local groups and are likely to grow in strength. There is a growing realization that local groups need national representation to deal effectively with the networks, Congress, and local licensees who retain law firms of the Federal Communications Bar Association.[61]

One of the most ambitious is the Citizens Communications Center, founded in Washington, D.C., in the fall of 1969 with assistance from the RFK Memorial[62] as a "coordination and professional service center" for local noneconomic groups which apply for help.[63] Albert H. Kramer, executive director, reports that current projects include providing direct legal representation in three FCC hearings, investigating complaints, and preparing handbooks on citizen participation.[64] The Center hopes to develop relations with law firms, law schools, and other suppliers of personnel for work or training.[65]

The New York-based National Citizens Committee for Broadcasting, headed by Thomas B. Hoving, plans to organize civic groups around the country to petition the FCC for revocation of licenses from unsatisfactory broadcasters.[66] The organization also is planning this year to hold "national citizens hearings on the role of television in a democratic society" and is inviting govern-

60 115 CONG. REC. E837 (February 5, 1969).

61 STATEMENT OF PURPOSE, CITIZENS COMMUNICATIONS CENTER, Washington, D.C., 2-3 (1969) [hereinafter cited as STATEMENT OF PURPOSE].

62 N.Y. Times, Oct. 4, 1969, at 71, col. 4.

63 STATEMENT OF PURPOSE 2.

64 Letter from Albert H. Kramer to Robert Heiss, Dec. 3, 1969.

65 STATEMENT OF PURPOSE 4.

66 N.Y. Times, Aug. 8, 1969, at 67, col. 4.

ment officials, industry leaders, representatives of national social organizations, and all concerned citizens to attend.[67]

Not only are support organizations appearing on the national level, but groups of viewers themselves are following the example of the Office of Communications of the United Church of Christ and are developing interstate affiliations.[68] Action for Children's Television (ACT) is a grass roots organization of mothers in 17 states with a common interest in improving the quality of programing for children by reducing its allegedly exploitative commercialism. It is Boston-based and has as its president Mrs. Evelyn Sarson.[69] Local contingents of ACT have negotiated with community licensees, while other representatives have talked with network executives, testified before Senate committee hearings, and discussed their grievances with the Federal Communications Commissioners. Their principal demand is the institution of fourteen hours a week of noncommercial programing for children of different ages.[70] Like environmentalism and consumerism in general, the issue of quality in children's television has considerable middle class appeal, and citizen lobbyists can potentially exert much greater leverage upon a local broadcaster or network than is possible through a minority group such as the Texarkana coalition. While a broadcaster may not be prepared to accede wholly to ACT's demands, its basic grievances are reasonable enough so that he would often negotiate rather than rely on the administrative-judicial process. Because the alleged practices are equally evident on the local and national levels of commercial television, which perhaps cannot be said of racial matters, there seems to be compelling reason for ACT to pursue this two-pronged approach.

These trends suggest that citizens are developing local awareness and national aggregations which eventually may manifest their strength in a movement for legislative reform in Congress. Demands might center around a restructuring of the FCC, perhaps into a Department of Communications, and stricter federal standards for broadcaster conduct.

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67 *Id.*, Nov. 20, 1969, at 12.

68 The Rostow Committee, see text accompanying note 38 *supra*, characterized this trend as a "salutary development." N.Y. Times, Dec. 10, at 41, col. 6.

69 Boston Globe, Feb. 8, 1970, at A-1, col. 1.

70 *Id.*, at col. 2.

Reducing concentration of media ownership among commercial AM, FM, and television stations would lessen the inequality of bargaining position between station management and petitioning local groups. It also would increase diversity of station programing policy and encourage greater local ownership of broadcasting, which in most cases would be more attuned to community needs than distant multimedia control. Declaring that the public interest requires "the maximum diversity of ownership that technology permits in each area,"[71] a recent FCC policy statement proposes to prevent the formation of any new combinations of radio, television, and newspaper control in an urban market area.[72] The Commission also reported that it will undertake a fresh study of a 1968 Justice Department proposal to break up existing multimedia combinations through divestiture.[73] The Antitrust Division memorandum recommended that a single ownership rule be applied at renewal time for existing licensees so that complete nationwide divestiture would occur within three years.[74]

Technology promises to provide a dramatic increase in the number of television channels available in a locality by means of Ultra High Frequency (UHF) transmission, cable TV (CATV), satellite relay, and other techniques.[75] Such current and future developments should enable the industry to meet the Rostow Committee's[76] recommendation that broadcasting "cater to as wide a variety of tastes as possible, the taste of small audiences and mass audiences, of cultural minorities and cultural majorities."[77] While some new licenses would be commercial in any case, Associate Professor Goldin asserts that "the greater potentiality for diversity and superior quality in program service lies in the full-scale development of public broadcasting."[78] But even if public broadcasting should fail to become the dominant operator of these new channels, the fact that a greater number of commercial television licensees will transmit in an area may well encourage the same

71 N.Y. Times, March 27, 1970, at 59, col. 4.
72 *Id.* at 1, col. 7.
73 *Id.*
74 *Id.*, Aug. 3, 1968, at 51, cols. 3-4.
75 *See* Jaffe, *supra* note 30, at 1700.
76 See text accompanying note 38 *supra*.
77 N.Y. Times, Dec. 10, 1968, at 41, cols. 1-2.
78 Goldin, *supra* note 30, at 1034.

type of programing specialization which has occurred in radio. It should become commercially feasible, and even attractive in urban areas, for some stations to beam programs of special interest to various ethnic and racial communities within the viewing area, for others to devote their air time to news and public affairs, and for still others to present perhaps a split schedule of noncommercial children's programing during the day[79] and cultural programing during prime time. Diversification of this sort would adequately respond to the interests and needs of minorities as well as of the majority within a locality, not in the programing of one station but within the total spectrum of broadcasting conducted by all stations in the area. This prospect may suggest optimism for the future. In the interim, the Texarkana method of negotiation offers hope for station-by-station reform.

IV. Conclusion

The Texarkana strategy, a hybrid of private ordering and the administrative-judicial process, promises to be the primary model for settlement in renewal of license disputes brought by citizen groups demanding programing attuned to community needs. The employment or non-employment of the private ordering phase of the procedure, however, will depend upon the workings of the checks and balances in the given controversy. FCC Commissioner Nicholas Johnson asserted in his concurring opinion in the Texarkana case that:

> just as the settlement procedure has been widely used throughout the legal process, so I believe we should experiment with its use in the administrative license renewal process of this agency. If local groups can be satisfied with the terms of agreements they can work out with local broadcasters, I believe they are entitled to great — although perhaps not conclusive — weight.[80]

Viewers and listeners have only lately begun to assert their rights to democratic participation in programing. It can be argued that investing complete authority over broadcasting in a bureau-

79 See text accompanying notes 69-70 *supra*.
80 16 P & F Radio Reg. 2d at 1070-71 (1969).

cratic institution such as the Federal Communications Commission, however well it may function, is inimical to democratic political theory. If this be one's viewpoint, the Texarkana method possesses the virtue of largely bypassing the Commission in favor of more direct involvement of the citizenry. In any event, however, the approach examined in this Note provides a reasonable, orderly, and effective way by which citizen groups with legitimate concerns can help recapture the "public trust" of the airwaves.

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TENANTS' HEARINGS AND RENT INCREASES IN FHA-INSURED PROJECTS

Introduction

In *Hahn v. Gottlieb*[1] the tenants in an FHA-financed project in Boston brought a class action against the landlords and the Boston Regional Director of the Federal Housing Administration (FHA) in the federal district court to enjoin the FHA from granting a rent increase to the landlords and to provide the tenants the opportunity to be heard on the question of the appropriateness of the increase and of the form of lease to be used.[2] They also asked the court to rule that the FHA's method of evaluating applications for rent increases was incorrect because it did not consider the effect of such increases on the tenants and because in computing the fair economic return to the landlord it inappropriately included certain cost items.

The project is financed under the 221(d)(3) program of the National Housing Act,[3] which authorizes the FHA[4] to insure mortgages which will provide housing for low or moderate income families in urban renewal areas. The section authorizes the agency to regulate the mortgage "in such form and in such manner as . . . will effectuate the purposes of this section."[5]

In accordance with this provision, the FHA and the landlords entered into a standard regulatory agreement which covered not only the financial terms of the FHA's guarantee to the bank, but also some aspects of landlord-tenant relations. One paragraph of the agreement gives the landlords the right to charge only the rentals approved in writing by the FHA. However, the landlords

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1 Civil No. 69-847-W (D. Mass., Feb. 2, 1970).

2 Though the tenants devoted considerable space in their complaint and elsewhere to what they alleged were unconscionable provisions in the lease drafted by the landlords, the court, for some reason which it never mentions, completely ignored the issue in the two opinions it handed down. For one possible — but unsatisfactory — reason why, see note 34 below.

3 12 U.S.C. § 1715*l*(d)(3) (1969).

4 The statute specifically delegates this authority to the Secretary of Housing and Urban Development. But 24 C.F.R. § 200.95(j) delegates the duty to approve or disapprove rent increases in rental projects covered by insured or Commissioner-held mortgages to Field Office Chiefs of Operations and to Field Office Directors.

5 12 U.S.C. § 1715*l*(d)(3) (1969).

may apply for an increase in the rental charges, which will be considered if "properly supported by substantiating evidence." The FHA then will approve a new schedule to compensate for increases in taxes (other than income taxes) and operating and maintenance expenses over which the owners have no effective control. But if it denies the increase, it will state the reasons for that decision.

At the termination of the current leases in 1969, the landlords presented new ones to the tenants of the project and asked approval for a rent increase from the FHA. The tenants' request that the FHA grant them a hearing on the landlords' application was denied by the FHA.

In the initial action plaintiffs were granted a preliminary injunction. The court held that due process of law required that the FHA give the tenants an opportunity to examine all the information relevant to the landlords' application, to submit evidence, and to be heard in opposition. The preliminary injunction was vacated by a stipulation of all the parties which provided that the landlords would supply the tenants with information in connection with their application for rental increase. The tenants were given information relating to the landlords' financial statements and the FHA's rent formula. But they were not given information about the project's design and construction, which they had requested because they believed that there existed construction defects having a direct and substantial effect on the increased operating and maintenance expenses. The FHA said that it had approved the construction of the project when it issued the completion certification and that it would not review that determination.

At the hearing the tenants argued that the FHA should do more than merely seek to assure that the landlords under this program are able to meet their debt service requirements and increased operating and maintenance expenses and receive a reasonable return on their equity.[6] The tenants suggested the

6 Interview with an official of FHA Boston Regional Office, March 2, 1970. The FHA does review and question the allegations presented by the landlords in the financial statements which must be submitted with an accountant's audit statement. Once the proper figures are determined by the FHA, they are worked into the FHA rent formula. This is also reflected in the regulatory agreement that the

following factors should be considered also: (1) the causes for increases in the operating expenses and the extent to which they are in fact outside the landlords' control; (2) the inefficiencies due to the existence of construction and maintenance deficiencies; (3) the adequacy of services provided for rentals received; (4) the reasonableness of the rentals to the tenants;[7] (5) the rate of return to the landlords and their real economic gains or losses.

After the hearing the FHA granted a two-phased rent increase. The plaintiffs requested the court to enjoin the implementation of that increase, asserting they had been given a hearing in form only. The court reversed its earlier decision and granted the defendants' motion to dismiss the complaint,[8] holding that it had erred earlier in deciding that the tenants were owed a hearing by the FHA. The court reasoned that no statute required the FHA to hold hearings or provided for judicial review where rent increases were involved. Instead, Congress gave the agency the discretion to promulgate whatever procedures it thought would effectuate the purposes of the National Housing Act. The agency's choice would be invalidated only if it violated the constitutional rights of someone who had standing to object. In light of these considerations the court concluded that the tenants lacked the necessary standing because neither the Act nor the contract between the FHA and landlords gave them a legal right that would be protected by the court.

I. Tenants' Standing in Court

Given the factual situation and the relevant legislation in this case, the court could have reached its conclusion only by applying the rule that standing requires a showing that the party has sus-

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FHA makes with the landlord. The FHA also tries to set the rents at amounts that the tenants can afford because it realizes that if the market will not bear the rental set, the unit will become vacant, and the project will eventually end.

Also, this is consistent with 24 C.F.R. § 221.531(c) which says consideration should be given "to the following and similar factors:

(1) Rental income necessary to maintain the economic soundness of the project.

(2) Rental income necessary to provide reasonable return on the investment consistent with providing reasonable rentals to tenants."

7 But see note 6 *supra*.

8 Civil No. 69-847-W (D. Mass., Feb. 2, 1970).

tained or will sustain immediate direct harm to a private legal or vested interest.[9] In general, tenants do not seem to have any recognized legal right to protest the amount of rent charged by the landlord. If they are to have any such right, it must be found in a statutory grant or recognition. The New York Rent Control laws, for example, specifically grant tenants the right to a hearing to challenge a landlord's rent increase application.[10] Tenants in rent-controlled housing have standing to challenge approvals of rent increases which they charge were made on the basis of incorrect or incomplete data.[11]

A possible statutory source of standing for tenants in FHA-insured housing is section 10(a) of the Administrative Procedure Act which provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.[12]

Professor Davis reads this section to give standing to anyone aggrieved *in fact* by agency action, without requiring that the injury be to a legally protected interest.[13] Professor Jaffe,[14] however, disagrees with this reading, noting that the words "in fact" were in the proposed draft of the section, but omitted in the finally enacted statute. He gives greater weight to the words "*relevant* statute," which, he asserts, act to limit standing clauses in particular statutes.[15] Jaffe's interpretation requires that standing be based on a statute other than the APA. Such a statute would be needed in order for tenants to raise any of the desired issues before the court. The APA, he argues, merely reflects existing law,[16] which requires a vested legal right for standing.

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9 Harrison-Halsted Community Group, Inc. v. Housing and Home Finance Agency, 310 F.2d 99 (7th Cir. 1962).

10 N.Y. UNCONSOL. LAWS § 8584, sub d. (4)(e) (McKinney 1949).

11 Realty Agency, Inc. v. Weaver, 7 N.Y.2d 249, 196 N.Y.S.2d 953 (1959); Pucciarelli v. McGoldrick, 206 Misc. 381, 129 N.Y.S.2d 796 (Sup. Ct. 1954).

12 5 U.S.C. § 702 (1969).

13 3 DAVIS, ADMINISTRATIVE LAW TREATISE §§ 22.02, 22.04 (1958).

14 Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 288 (1961) [hereinafter cited as Jaffe, *Private Actions*].

15 *Id.* at 288.

16 *Id.*

The theory behind the approach of Davis might be stated as follows: administrative agencies, though set up to protect, promote, or regulate certain interests, must exercise their duties and powers under the law, which includes the very statutes which created the agencies and delegated power to them; if any person is injured by an action taken by an agency, he is at least entitled to be assured by an independent, competent body that the action was legal; it is unacceptable to allow injury resulting from an unauthorized act to go unremedied. Granting standing for review would be doing no more than allowing someone who has suffered injury to ask the court to tell him if the relevant statutes are constitutionally permissible, and if so, whether the agency action in question was proper under those statutes. Construing section 10 (a) in this light does away with all previous requirements of a "legal right" in order to obtain standing; this section recognizes such a legal right in all persons "adversely affected or aggrieved."

As applied to the tenants in *Hahn*, Professor Davis' interpretation of section 10(a) seems to provide a simple means of gaining standing to challenge the FHA action, which "adversely affected" the tenants by making them pay more for their apartments. Yet, as to their standing before the agency as compared to standing on judicial review, the tenants may well need further statutory support because section 10 of the APA does not literally apply. That support may be found in the National Housing Act, which can be viewed as the "relevant statute" under Jaffe's analysis.

The courts have generally held that they can find no congressional intent in the National Housing Act to give tenants the legal right to have the courts review and supervise administrative functions entrusted by Congress to the agency's judgment or discretion.[17] Nor have they found any indication that Congress intended to give tenants a right of action on a contract between the federal government and a local redevelopment agency where the contract was required as a condition for granting federal aid under the statute.[18] Even if the plaintiffs are the admitted *bene-*

17 Choy v. Farragut Gardens, 131 F. Supp. 609 (S.D.N.Y. 1955).

18 Johnson v. Redevelopment Agency of the City of Oakland, California, 317 F.2d 872 (9th Cir. 1963).

ficiaries of the contract, federal law does not recognize any standing for those who are not *parties* to that contract.

A series of recent cases in several areas, however, has shown a tendency towards expanding the relevant definition of standing. The decisions seem to point to the conclusion that protection of the public interest, if such can be inferred from a relevant statute, may be sufficient to grant standing. The narrow notion that standing requires a direct personal economic interest is also being expanded. In a broadcast license case where listeners wanted to present testimony before the FCC about the licensee's practices, the court said:

> The theory that the Commission can always effectively represent the listener interests . . . without the aid and participation of legitimate listener representatives fulfilling the role of private attorneys general is one of those assumptions we collectively try to work with so long as they are [sic] reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it. The gradual expansion and evolution of concepts of standing in administrative law attests that experience rather than logic or fixed rules has been accepted as the guide.[19]

The same reasoning has been applied in cases involving housing. In *Powelton Civic Home Owners Association v. Department of Housing and Urban Development*,[20] homeowners who were trying to prevent the taking of their homes for an urban renewal project under the National Housing Act were held to have the right to some procedural opportuntity to show why the project did not meet the statutory requirements. Though the applicable statute provides only for the relationship between the federal government and the recipient local public authority, the owners

19 Office of Communication of United Church of Christ v. F.C.C., 359 F.2d 994, 1003 (D.C. Cir. 1966); Scenic Hudson Preservation Conference v. Federal Power Commision, 354 F.2d 608 (2d Cir. 1965) (conservationist organization held to have standing to challenge FPC licensing order on grounds that it failed to consider natural preservation).

20 284 F. Supp. 809 (E.D. Pa. 1968). The statute involved was 42 U.S.C. § 1450 (1964).

still had standing to raise procedural issues because they had sufficient interest in the project. They also had standing in a more "traditional" sense in that the National Housing Act conferred substantive legal rights upon them by recognizing the interests of displacees,[21] and in that they were appropriate representatives of those legal rights which the Act conferred on the general public. The court could find no explicit statutory requirement for such a procedural opportunity, but rather said it was implicit in the statute under a due process argument.

The purposes of the National Housing Act seem to show an interest in protecting and promoting the adequate housing of low-income families. The congressional declaration of national housing policy[22] lists as one of its objectives the provision of adequate housing for "families with income so low that they are not being decently housed in new or existing housing." The Act hopes to encourage and assist in the reduction of housing costs[23] without sacrificing sound housing standards.

The lack of other forms of redress seems to be a persuasive argument for allowing the claimants to have these congressionally recognized interests preserved in court.[24] If their interests are not protected by the agency, they should be protected by the courts. Moreover, it is impossible to disregard the stake that the tenants have in the outcome,[25] no matter how large or how small the rent increase would be in this or any other case.[26] Not only

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21 Similarly Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968), specifically recognized that one congressional purpose in enacting the National Housing Act was to protect the interests of displacees of urban renewal projects.

22 42 U.S.C. § 1441 (1969).

23 Elsewhere, Congress has again recognized "the acute shortage of decent, safe, and sanitary dwellings for families of low income." 42 U.S.C. § 1401 (1969). It has defined the term "low rent housing" as "decent, safe, and sanitary dwellings within the financial reach of families of low income, and developed and administered to promote serviceability, efficiency, economy, and stability." 42 U.S.C. § 1402 (1969).

24 Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1284 (1961) [hereinafter cited as Jaffe, *Public Actions*].

25 Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968).

26 *See, e.g.*, Bebchick v. Public Utilities Commission of District of Columbia, 287 F.2d 337 (D.C. Cir. 1961) (public transit rider had standing to appeal rate increase); Reade v. Ewing, 205 F.2d 630 (2d Cir. 1953) (consumer of oleomargarine held to have standing to challenge orders affecting ingredients thereof).

is the amount immaterial to the question of standing, but any increase in the cost of any of the basic necessities of life to people of limited income can affect the amount available for the other necessities.

Even if one does not accept the arguments that there is a clear recognition on the part of Congress of the interests of low-income families to proper housing and that the personal interests of the tenants in this case are sufficient to obtain standing in court to challenge the FHA actions, a reason for granting that standing can still be suggested. It must be recognized that the National Housing Act at least is evidence of some general public interest in the housing situation. As such, the courts ought to be able to control agency action to ensure that the public interest is observed. Moreover, it has been suggested that standing to make agencies more responsive seems inherent in a democratic form of government.[27] The right implementing that notion derives from the application of the constitutional theory of checks and balances to the fourth branch of the government, and thus does not depend entirely on the particular statute involved.[28] This is the essence of the concept of judicial review.

But our legal system prevents the courts from raising these issues on its own; other parties must bring the matters to the attention of the courts. If the principles of the National Housing Act are not being followed by the FHA, who will bring that fact to the attention of the courts? The regulated landlords could appear in court since the statute and the regulatory agreement explicitly recognize their relationship with the government, but there is little reason to believe they will adequately represent tenant interests. Abuses injurious to tenants are no less against the public interest as expressed in the statute. Therefore, standing ought to granted to vindicate that interest.[29] If the tenants

27 Note, *Administrative Law—Expansion of "Public Interest" Standing*, 45 N.C.L. REV. 998, 1007 (1967).

28 Agencies, it has been noted, are a combination of the various branches ususally separated in American political framework. But the complete subordination of judicial and legislative functions to the executive has the danger of bringing concomitant injury to the public. Murray, *The Right to Hearing and Consideration: A Case Study of the Maritime Administration*, 17 AM. U. L. REV. 466, 499 (1968).

29 Office of Communication of United Church of Christ v. F.C.C., 359 F.2d 994

in the project involved cannot be heard in court, then perhaps no one can.[30] Clearly that is unacceptable.[31]

II. Judicial Review of FHA Procedures and Determinations

The *Hahn* court in reaching its conclusion contrasts the lack of any statutory provision *for* judicial review with the explicit grant of discretion to the agency to formulate its own procedures. The presence or absence of a reference to judicial review, however, is not important. As codified in section 10 of the Administrative Procedure Act, the legal presumption is in favor of judicial review except where statutes preclude judicial review, or agency action is committed to agency discretion by law.[32]

Since the National Housing Act does not expressly or impliedly deny judicial review of the FHA decisions relating to the Act, the court is relying on the second exception noted above. As applied to this case, this theory of discretion means that the

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(D.C. Cir. 1966); Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608 (2d Cir. 1965).

It might be useful to give an example of how this vindication of the public interest concept may apply to the FHA determinations here. 42 U.S.C. § 1441 (1969) declares that HUD shall exercise its powers in such manner as will encourage the production of housing of sound standards of design, construction, etc. The FHA checks the construction of the project when it has been completed, and upon approval, grants a certificate of completion. It does not reconsider that determination at any later date. If part of the increased cost of maintaining the building is due to latent construction defects, then the argument could be made that passing this cost on to the tenants is not consistent with the public policy of encouraging sound standards of design and construction; rather it seems to encourage construction that will just pass the initial evaluation. Even though using higher standards means higher initial costs to the landlord, which will be reflected in higher initial rentals to the tenants, as opposed to lower initial rentals followed by rental increases, the posibilities for abuse are so great that the "against the public interest" argument remains persuasive.

Any pressure generated through legal action to increase the standards of the buildings constructed can only further the goals of preventing slums and providing "a decent home and suitable living environment for every American family." Tondro, *Urban Renewal Relocation: Problems in Enforcement of Conditions on Federal Grants to Local Agencies*, 117 U. Pa. L. Rev. 183 (1968).

30 Reich, *The Law of the Planned Society*, 75 Yale L.J. 1227, 1244, 1254 (1966).

31 "I find it difficult to accept the conclusion . . . that an issue in every other respect apt for judicial determination should be nonjusticiable because there is no possibility of a conventional plaintiff . . . ." Jaffe, *Private Actions*, *supra* note 14, at 305.

32 5 U.S.C. § 701 (1969). *See* L. Jaffe, Judicial Control of Administrative Action (1965), pp. 336 et. seq. [hereinafter cited as Jaffe, Judicial Control].

mere delegation of power to make appropriate regulations to effectuate the Act's purposes renders the agency regulation, including its choice of procedures and of the factors to be considered, unreviewable by the court except on constitutional grounds.

Earlier cases[33] had held that even if there had been a dereliction of duty on the part of the agency vested with discretion, in the absence of a plaintiff with a recognized legal right that has allegedly been infringed, any review or redetermination would have to be undertaken by the government itself and not by individuals who merely claim to be affected by it. This is no longer the accepted rule. Recent cases have granted judicial review by giving weight to the absence of other adequate court remedies for agency actions.[34] There is certainly a need to provide a forum independent of the one which is making the decisions if there is to be any check on the exercise of agency discretion.[35] Wherever possible, correction of abuses should not be left solely to the same governmental unit charged with abuse of discretion.

There is the theoretical opportunity to appeal to the Congress, which mandated the discretion to the agency in the first place,

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33 *See, e.g.*, Choy v. Farragut Gardens, 131 F. Supp. 609 (S.D.N.Y. 1955).

34 *See, e.g.*, Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967); *Cf.* Johnson v. Redevelopment Agency of the City of Oakland, California, 317 F.2d 872 (9th Cir. 1963). Codified in § 10(c) of the Administrative Procedure Act, 5 U.S.C. § 704 (1969): "*Actions reviewable*: . . . [F]inal agency action for which there is no other adequate remedy in a court [is] subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action."

The "no other adequate remedy in a court" concept may account for the *Hahn* court's failure to discuss the lease issue. See note 2 supra. That is, if there are indeed any unconscionable provisions in the lease, a tenant here would have the same opportunity to challenge their application to him as would a tenant under any other lease. Of course, the court at that time should not give any weight to the fact that the FHA "approved" this lease. But it is precisely this seeming "approval" that makes the "no other remedy in a court" concept inappropriate. The FHA's permission to use the form carries with it connotations of state action, perhaps involving the supremacy clause, which might deny the tenants a remedy in some other court. But even if such a remedy were available, the government should not be found lending its prestige to a contract that might be held void as against public policy. Therefore the lease provisions should be considered in court at the same time as the other issues in this case and not deferred for a remedy at a later date.

35 Tondro, *Urban Renewal Relocation: Problems in Enforcement of Conditions on Federal Grants to Local Agencies*, 117 U. PA. L. REV. 183, 225 (1968). Jaffe, *Public Actions*, *supra* note 24, at 1284.

for review of the manner in which that discretion was exercised. Even a superficial consideration of this alternative, however, will show it is unacceptable. First, Congress cannot — and should not — be burdened with the requirement of policing *every* agency decision.[36] Second, even if Congress were to consider the merits of the particular case worthy of special action, any legislation or statement that would result might have a prospective effect only, unless it required the agency to reconsider past decisions. In the interim, the harm to the people who claim to have been wronged might have continued, perhaps beyond the stage where mere reimbursement would compensate for the loss incurred.[37] Perhaps even more significantly, there is a basic common law of judicial review upon which the Congress has relied on granting powers to agencies.[38]

It is a very broad definition of the word "discretion" that permits everything save that which is not constitutionally permissible. It is hard to accept this as the meaning of the "committed to agency discretion" doctrine. Were the doctrine to refer to all decisions left to the discretion of a federal agency, few if any decisions would be reviewable. Before applying the "agency discretion" doctrine, a court must first decide what relevant discretion has been granted by the statute.[39] Courts have interfered with agency actions on showings that the agency exceeded limitations on its powers which were designed to protect certain interests.[40] This concept has been codified in section 10(e) of the APA,[41] which provides that "[t]he reviewing court shall (2) hold unlawful and set aside agency action findings, and conclusions found to be

36 This is not to say that Congress ought not to be stimulated somehow to conduct a review and updating of administrative agency policy on a regular basis, as Judge Friendly suggests in *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 1263, 1308-1317 (1962).

37 It is also unacceptable to enjoin the agency approval from being put into effect until Congress has a chance to act. There is no guarantee that they will act (one way or the other); there is certainly no guarantee *when* they will act.

38 Jaffe, *Private Actions*, *supra* note 14, at 256.

39 JAFFE, JUDICIAL CONTROL, at 181.

40 *See, e.g.*, Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608 (2d Cir. 1965). *See also* JAFFE, JUDICIAL CONTROL, at 339-353, on the development of the presumption of reviewability.

41 U.S.C.A. § 706 (1969) (scope of review).

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ."[42]

Aside from statutory language, there are various practical and policy grounds which courts find convincing enough to deny judicial review.[43] Admittedly, one of the rationales for administrative agencies is that they will develop a certain degree of expertise in a particular field, but the courts should defer to administrative expertise only in those situations where the court would be straining its own competence in trying to decide an issue. Though the court may not feel — and in fact may not be — competent to decide what the appropriate rent should be to effectuate all the purposes of the National Housing Act, it does have the competence to tell the agency that the policy of the Act requires it to take certain factors into account. Expertise is of value only as long as it evaluates considerations properly and only as long as it weighs all the factors which Congress intended it to take into account. If the agency does not consider the appropriate factors, it is no longer acting within the scope of its congressional mandate and the value of its expertise is lost.[44] This applies not only to the issue of which factors the agency considers, but also to that of the relative weight given those factors.[45] To the extent that such matters relate to statutory interpretation or construction, the courts have competence to review them. Furthermore, it has been suggested, the courts can carve out areas of

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42 Not all commentators are in agreement on the matter of resolving the apparent conflict between § 10(e)(2) and § 10 (see text at note 32 *supra*) of the APA. Davis emphasizes the word "committed," which, he argues, suggests a practical interpretation of a statute which will carry out the probable intent and which will provide sound substantive results. 4 DAVIS, ADMINISTRATIVE LAW TREATISE 80 (1958). Berger challenges this view, arguing the position adopted by this note that "committed to agency discretion" means only lawful discretion, and not arbitrary action. *See, e.g.*, Berger, *Administrative Arbitrariness and Judicial Review*, 65 COL. L. REV. 55 (1965).

43 Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion"*, 82 HARV. L. REV. 367, 368 (1968).

44 JAFFE, JUDICIAL CONTROL, at 181-2, 188; Note, *Abuse of Discretion: Administrative Expertise vs. Judicial Surveillance*, 115 U. PA. L. REV. 40, 41-42 (1966).

"While courts have no authority to concern themselves with FPC policies, it is their clear duty to see that the commission's decisions receive the careful consideration which the statute contemplates." Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608 (2d Cir. 1965).

45 JAFFE, JUDICIAL CONTROL, at 181-2.

agency action where expertise is not required, thus creating at least a degree of partial review.[46]

It may be argued that even if the court determined the current practices of an agency were invalid and remanded the question to the agency to exercise its discretion in a more appropriate manner, there is a good chance that the agency would come up with the same result. If so, there is no benefit to the exercise of the right of judicial review. This reasoning seems to have some validity in cases where the agency really has only two choices before it on any particular question. In licensing cases, for example, the agency has the choice of granting or not granting the license; there are few, if any, meaningful compromise solutions.[47] But in rate determination cases there is a sufficiently broad range of choices for the agency that no one factor or set of factors need be totally controlling. In such cases, judicial review should not be deterred by the fact that the choice will eventually have to be made by the agency. Even if the control such review can exercise is far from perfect, it is still likely to deter some unjustifiable agency actions.[48]

One final theory for denying review in FHA project rent increase cases must be noted. The *Hahn* court places some emphasis on the contract (regulatory agreement) which the FHA had with the landlords, and which included the procedures to be used for granting rent increases. As stated above, the procedure does not include participation on any level by the tenants. The contract is obviously permissible under the provisions of the National Housing Act. It is also appropriate as a means of specifying what requirements recipients must meet in order to receive federal aid.

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46 Saferstein, *supra* note 43, at 398.

47 Office of Communication of United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966). The courts have recognized the effect of this problem: "Familiar doctrines limit the occasions on which particular judicial remedies, if any, are appropriate. In determining whether there has been compliance . . . courts will evaluate agency efforts and success at relocation with a realistic awareness of the problems facing urban renewal programs." Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 937 (2d Cir. 1968).

48 Saferstein, *supra* note 43, at 390. The fact that on remand to the agency the petitioners might not convince the agency to change its decision did not deter the court from granting procedural relief in Powelton Civic Home Owners Association v. Department of Housing and Urban Development, 284 F.Supp. 809 (E.D. Pa. 1968).

Perhaps its provisions should not be subject to judicial review. The reasons for judicial review of direct agency regulation, however, seem to apply with equal force when enforcement and effectuation of congressional intent are accomplished by contracts. The same dangers are present in both cases.[49]

III. Tenants' Right to Procedural Due Process

Having discussed the bases for standing and review in cases raised by tenants, we turn to the remaining question: do the tenants have the right to any form of hearing before the FHA?

The argument can be advanced that the government is under no constitutional compulsion to recognize the needs of any particular class such as the low-income tenants in *Hahn*,[50] and that, therefore, when it does recognize them, it can do so in whatever way it sees fit. The government is conferring a privilege on these tenants by the very act of promoting these projects for them and also by the act of regulating and controlling the landlords. The tenants have no judicial redress if the mode of conferring the privilege is unsatisfactory to them.

However, it has been argued that although the government may refuse to give assistance or relief altogether, once it has been extended, it cannot be taken away without some procedural controls.[51] Thus students at a state college could not be expelled without a hearing.[52] More recently, the Supreme Court held that it is unconstitutional to remove a person from the public assistance rolls before providing him a hearing.[53] Similarly, constitutional due process may require meaningful hearings before any changes are made in the rents of tenants in FHA-insured housing.

It has been argued that government largess often replaces the

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49 But see argument made below in section III that the contracts used do not necessarily preclude tenant participation.

50 *But see* Reich, *The New Property*, 73 Yale L.J. 733 (1964).

51 Davis, Administrative Law Treatise § 7.12, at 455, 456 (1958). Professor Davis makes the analogy to the tort concept that, whereas a passerby has no legal obligation to help someone in distress, once he begins to give aid, he must do so properly.

52 Dixon v. Alabama, 294 F.2d 150, 159 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

53 Goldberg v. Kelly, 38 U.S.L.W. 4223 (U.S. Mar. 24, 1970).

more traditional forms of property which were accorded the due process protection of the fifth amendment.[54] Such benefits should now be viewed as having the same constitutional protection as traditional property. Pursuing the argument, this protection should be extended to the "property" interests the tenants have in housing, a basic human need which the government provides. The action which the FHA took in *Hahn* may make it impossible for large numbers of tenants to meet their rental payments, forcing them either to leave the project or eventually to be evicted. Either is a serious deprivation to the tenants, especially if there has in fact been some miscalculation or omission of a material factor in the consideration of the rental change. To protect their interests against arbitrary action some opportunity to protest and present conflicting evidence in a meaningful way is necessary.[55]

So stated, this due process notion may be no more than a reflection of simple justice and fairness in a factual situation in which the governmental agency worked out the terms of the arrangement without any negotiation with the tenants. No emphasis should be placed on the fact that the tenants enter the project after it has been completed. Voluntary entrance into a government-sponsored program should not be conditioned on the applicants' waiver of their constitutional rights[56] or submission to future capricious government action. In section 221(d)(3) projects, the agency does not draft the lease provisions, but rather approves those submitted by the landlords, who can scarcely claim the detached interest in the lease which the government may assert it displays. The tenants have no opportunity to negotiate the "approved" lease. Therefore, neither the lease nor the regulatory agreement should be read to exclude reasonable opportunity to have the tenants' views considered on a rental change

54 Reich, *The New Property*, *supra* note 50.

55 *See* Vinson v. Greenburgh Housing Authority, 29 App. Div. 2d 338, 288 N.Y.S.2d 159 (Sup. Ct. App. Div. 2d Dept. 1968); Reich, *The New Property*, *supra* note 50, at 783.

56 *See* Frost & Frost Trucking Co. v. Railroad Commission, 271 U.S. 583 (1926); United States v. Chicago, Milwaukee, St. Paul and P.R.R., 282 U.S. 311 (1931); Reich, *The New Property*, *supra* note 50, at 780.

that is crucial to their economic well-being.[57] The hearing need not be a full judicial or quasi-judicial trial; it will suffice if the opportunity to be heard is a meaningful one.[58]

It has been suggested[59] that, despite their good intentions, members of administrative agencies cannot really be said to know and represent the interests of the poor and low-income segments of society. The agency officials' background and orientation are usually not those of the tenants. Since these officials are the final arbiters and guardians of the interests which the statute creates, they should be exposed to the viewpoints of all interested parties — as seen by those parties. In this way the agency will have a record upon which to base its decision and upon which a basis for judicial review can be formulated. But the greatest virtue of instituting procedures which include the tenants perhaps lies in the heightened perception of agency officials of the particular interests they represent and the likelihood that they will respond more adequately to those interests.[60] The argument for such increased awareness should be seen not so much as a criticism of agency action or intentions, but more as proposing a means to increase the confidence of all parties concerned in the decisions rendered.[61]

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57 *Cf.* Goldberg v. Kelly, 38 U.S.L.W. 4223 (U.S. Mar. 24, 1970). The hearing need not be judicial or quasi-judicial trial; it will suffice if the opportunity to be heard is a meaningful one.

58 See section IV *infra.*

59 Bonfield, *Representation for the Poor in Federal Rulemaking,* 67 MICH. L. REV. 511, 512 (1969) [hereinafter cited as Bonfield]; Reich, *The New Property, supra* note 50, at 787; Reich, *The Law of the Planned Society, supra* note 30, at 1254.

60 Friedman, Klein, Romani, *Administrative Agencies and the Publics They Serve,* 26 PUB. AD. REV. 192, 201 (1966).

61 In Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608, 620 (2d Cir. 1965), Judge Hays quoted with approval the following excerpt of a dissent by Commissioner Ross to an FPC decision:

> I do feel the public is entitled to know on the record that no stone has been left unturned. How much better it would be if the public is clearly advised under oath and cross examination that there is truly no alternative? . . . This Commission of its own motion, should always seek to insure that a full and adequate record is presented to it. A regulatory commission can insure continuing confidence in its decisions only when it has used its staff and its own expertise in a manner not possible for the uninformed and poorly financed public. With our intimate knowledge of other systems and to a lesser extent of their plans, it should

Since procedures of the FHA allow the landlord of a project to present his evidence to substantiate his claim for a rent increase, it may be inferred that the agency considers the landlords as at least part of the constituency it is established to serve. But tenants are also part of the agency's constituency; it seems to follow that their interest ought to be represented before the agency to the same extent the landlords' are.[62]

To the extent that the element of unfairness to the tenants in *Hahn* seems to rest on the fact that a hearing is provided only to the landlord, this unfairness might not exist if the landlord were not permitted to apply for a rent increase. But such a solution would be unrealistic. The agency would have an almost impossible task supervising all aspects of the projects under its control in order to determine on its own when rent increases should be considered. Yet, even if such were the case, it might be argued that if the agency were focusing its interest almost exclusively on the financial position of the landlord, the reasons for giving the tenants a degree of participation in the final deliberations would still apply.

Finally, the inclusion of the tenants in the process does not work any unfairness to the landlords. Their only claim to such unfairness would be that their contract with the FHA does not include any intervention from the tenants. Yet the agreement does not seem to exclude them either. The contract does leave the decision on the rent increase to the FHA. How the FHA gathers the information needed to make that decision is not subject to attack on contractual grounds; and there is really no reasonable expectation on the part of the landlords that the tenants' interest will not be considered.[63] When it is remembered that the landlords are receiving the benefits of government aid, which

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be possible to resolve all doubts as to to alternative sources. This may have been done but the record doesn't speak. Let it do so. *Id.* at 620.

62 BONFIELD, *supra* note 59.

63 The greater problem seems to be in deciding how knowledge of the tenants' inclusion in the rent increase proceedings will affect potential builders under this program in the future. This does not seem insoluble, though. In the actual case at hand, the FHA fashioned a solution after the hearing that it thought equitable to all. Certainly the FHA can develop incentives to attract more participants in the program should that prove necessary.

they voluntary applied for, it is not too much to expect them to recognize that other interests are at stake in the project. When an individual avails himself of a part of the public domain,[64] or of a significant amount of governmental funds, subsidization, or backing, it has been suggested that the benefits he is receiving may be sufficient to justify subjecting him to some additional obligations, similar to those generally imposed on the government itself.[65] Thus, landlords who get government assistance in financing building projects should be subject to at least some due process limitations when they want to increase the amount of rents to their tenants. It can further be argued that since the government puts its power and prestige behind the project, it has an additional obligation to ensure strict adherence to constitutional guarantees.[66]

IV. Form of the Hearing

Nothing in the previous section leads to the conclusion that the agency is restricted in the means that it uses to hear the tenants' views.[67] The courts which have granted hearings in other cases have always recognized that if the delegation of discretion to the agency is to have any meaning, the agency must have the right to limit the parties that can appear before it and the manner of their appearance.[68] It is desirable to ensure the efficient con-

64 Office of Communication of United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966).

65 Hartman, *The Private Sector and Community Development: A Cautious Proposal*, in Staff of Joint Economic Committee, Urban America: Goals and Problems 272, 277-81 (Jt. Comm. Pr. 1967).

66 Colon v. Tompkins Square Neighbors, Inc., 294 F. Supp. 134 (S.D.N.Y. 1968).

67 It may apear from the doctrine of Wong Yang Sung v. McGrath, 339 U.S. 33 (1950), that, if the constitutional argument made out above is accepted, the regulations regarding agency rule making set out in §§ 4, 7, 8, and 11 of the APA, 5 U.S.C. §§ 553, 556, 557, 3105 (1969), would apply here. However, they do not apply because the situation comes under one of the exceptions of § 4 as "a matter relating . . . to public property, loans, grants, benefits, or contracts." *Cf.* Barrington Manor Apartments v. United States, 392 F.2d 224 (Ct. Cl. 1968).

68 Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608 (1965); Office of Communication of United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968); Powelton Civic Home Owners Association v. Department of Housing and Urban Development, 284 F. Supp. 809 (E.D. Pa. 1968); Reich, *The Law of the Planned Society*, *supra* note 30, at 1252; 61 Mich. L. Rev. 978, 982 (1963).

duct of hearings by avoiding unnecessary delays, voluminous records, and additional expense, not only from the viewpoint of the agency, but also from that of the public interest.[69]

Thus, the agency could reasonably decide that a tenant cannot appear to represent his individual interests, but that the tenants must consolidate their grievances and their petitions. The agency, after all, is established to protect the interests of a class, not of individuals. It would be unnecessarily burdensome to the agency if it were required to consider how each individual tenant would be affected by its decision.

Consolidation of tenants' claims would probably require the tenants to organize some form of union.[70] Some protection must be provided against potential landlord mistreatment of the tenants who organize those unions.[71] This problem, however, does not seem any more difficult to solve in the housing context than it is for the National Labor Relations Board in the analogous situation of labor union organizing. The best solution, of course, would be congressional or state legislative recognition of tenant unions.[72] This might also serve to facilitate organization in projects where the tenants either do not know how or are reluctant to form such unions.

It would appear from the foregoing discussion that the FHA could appropriately limit the procedures on rent increases to the submission of written statements from the various interested parties. At present, the landlords do not appear to have a right to an oral hearing as a matter of course. Thus, on the basis of fairness, the FHA could similarly limit the rights of the tenants to the submission of written evidence and arguments. Such limitations have been recognized by the courts[73] as valid. As far

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69 61 MICH. L. REV. 978, 981 (1963).

70 Even if they do not succeed in changing the results of FHA determinations, there are other benefits to creating tenant unions, such as creating better community organization. Note, *Tenant Unions: Collective Bargaining and the Low Income Tenant*, 77 YALE L.J. 1368, 1399 (1968).

71 *See* Edwards v. Habib, 227 A.2d 388 (D.C. App. 1967), *rev'd*, 397 F.2d 687 (D.C. Cir. 1968). Housing Authority of City of Durham v. Thorpe, 267 N.C. 431, 148 S.E.2d 290 (1966), *vacated and remanded*, 386 U.S. 670 (1967); Note, *Tenant Unions: Collective Bargaining and the Low Income Tenant, supra* note 70, at 1399.

72 *See, e.g.*, Legislative Development, *The Michigan Tenants' Rights Statute*, 6 HARV. J. LEGIS. 563 (1969).

73 See note 68 *supra*.

as the submission of testimony and arguments concerning the tenants' ability to absorb the additional rental charges, this procedure seems adequate. However, when the tenants oppose the increase because of conditions in the building which are within the exclusive control or knowledge of the landlord, the tenants should be afforded the opportunity to obtain that information from the landlord in some form of cross-examination of him or his witnesses in an oral hearing before the FHA or, alternatively, in conjunction with some kind of discovery proceeding. Some of the policies behind the Federal Rules of Civil Procedure might appropriately be adapted by the agency to provide the parties involved in its proceedings with some of the concomitants of due process.[74]

Thus the agency might find it advisable to make some use of pre-hearing proceedings to see if there are really any issues that need a more extensive hearing and to protect against "fishing expeditions" on the part of tenants. Similarly, the concept of res judicata could be employed for certain issues. For example, if the matter of a particular construction defect and who should bear the financial burden for it is "litigated" in the proceedings for a rent increase, the finding of the agency on the question should be binding on the landlords and tenants in later proceedings on other applications, unless the party against whom the decision was made can show that additional facts have come to light since the original decision. Because the tenants would have to present their claims as a class, any decision could be made binding on all members of the class in the future, even if the individual members change over time.[75]

There are some substantial arguments against such a scheme. The onus of investigating the building whenever the landlord applies for a rent increase because of increased maintenance costs seems particularly burdensome when placed on the tenants. In reply it might be said that the procedural opportunities given the tenants should not be interpreted to mean that the FHA is

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74 Fitzgerald, *Trends in Federal Administrative Procedure*, 19 Sw. L.J. 239, 253 (1965); Cox, *Adherence to the Rules of Evidence and Federal Rules of Civil Procedure as a Means of Expediting Proceedings*, 12 AD. LAW REV. 51 (1959).

75 Gart v. Cole, 263 F.2d 244 (2d Cir. 1959), *cert. denied*, 359 U.S. 978 (1959).

preempted from conducting its own investigation with its own resources. Furthermore, effective use of discovery procedures can ease the burden considerably. The rules suggested above merely reflect an attempt to find a means of maximizing the fairness to the interested parties without impairing the speed and efficiency with which the agency can properly dispose of the applications it receives.

Yet, the scheme does seem to invite an unmanageable and undesirable degree of legal manuvering in order to defeat or delay final agency determinations since the various rules entail the right to judicial review. One result of this might be a situation where tenants and landlords look upon each other as legal and permanent adversaries — that one side, to make any progress, must do so at the expense of the other — instead of acting in a spirit of cooperation. The fostering of such hostile attitudes should be carefully avoided where possible. Flexibility in promulgating the procedures hopefully would help in achieving a more desirable attitude.

In any event, it seems obvious that one of the major drawbacks to the current FHA arrangements is that the tenants are not given the opportunity to participate in decisions that have a large impact on their lives. The middle and upper classes do have access to and influence on the government institutions that make the rules and implement them. It has been noted that part of the frustration of the lower-income class is their apparent inability to have a similar influence on decisions made about their futures.[76] This may manifest itself in procedures that do not at all seem responsive to their needs.[77] It has been suggested that these classes ought to be involved even more in rule-making proceedings; a fortiori they should be involved in the application of rules which affect them, but which they did not have the opportunity to influence when they were originally being formulated.

Whether or not the increased confidence the poor would have in the rule-making and decision-making processes will cure the social disorder that has been attributed to the frustrations of lack of participation may be mere speculation. Yet the involvement of

76 Bonfield, *supra* note 59, at 512.
77 Reich, *The Law of the Planned Society, supra* note 30, at 1253.

people who feel disenfranchised by the current system does not appear, at least in this case, to work any great hardship on the system, and may even improve it by increasing the government's confidence in its own decisions, because it knows it has heard as many of the relevant viewpoints as possible.[78]

As to the possibility that excessive and overburdensome use of the rights to procedural due process and judicial review, or "mischief" as the courts often call it, will defeat the efficient functioning of the agency, any number of restraints can be noted. Generally, appeals are not undertaken frivolously, and those that are can be as easily dismissed as are frivilous appeals in other areas of the law.[79] The cost, both in terms of money and emotional energy, perhaps, is too great to undertake a serious, prolonged challenge either to a landlord's application or to an FHA decision if there does not appear to be at least some basis to believe that the tenants' viewpoint has a chance of eventually prevailing.[80] Moreover, where judicial review has been allowed, as in the New York rent control laws, the benefits of administrative action have not been defeated. It has indeed been stated that the mere possibility of judicial review itself reduces the number of improper determinations.[81]

Moreover, the burden of assuring that the right decisions are

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78 Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 STAN. L. REV. 767, 800 (1969). Reich has also argued that citizen participation in governmental planning sessions should be protected by the first amendment: "free" speech means "free" expression, which requires "effective" expression, which in this context requires adequate procedural participation in the government's decision-making process, because it is the citizen's only way of "reaching" his government "effectively." Reich, *The Law of the Planned Society*, *supra* note 30, at 1251.

79 Norwalk CORE v. Norwalk Redevelopment Association, 395 F.2d 920 (2d Cir. 1968); Fitzgerald, *Trends in Federal Administrative Procedure*, 19 SW. L.J. 239 (1965).

80 The court in Office of Communication of United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966), noted that lawyers will not be attracted to these cases by the lure of any large fees. Those who volunteer their services would not use their time in obviously lost causes. It might be expected that counsel to the tenants unions would advise them when such was the case.

Davis has also suggested that the "theoretical right of review is often illusory," especially when a small amount is involved relative to the hardship and cost of appeal and the court is strongly influenced by the agency's view or limits its inquiry to the reasonableness of the agency action. 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 7.10 at 451 (1958).

81 Tondro, *supra* note 35, at 226.

made seems to be greater if a hearing is deferred until after the decision is made.[82] If a tenant protest comes before the agency makes its determination, not only is it likely to be minimal, but it is likely to discourage litigation by reaching a solution acceptable to the parties or at least one unchallengeable on procedural grounds.[83]

V. Agency-initiated Reform

The courts, it appears, have sufficient basis for deciding that the FHA procedures now violate concepts of due process. However, even if the courts remain unpersuaded that the tenants have a right to procedural opportunities, it is suggested by many of the arguments presented above that a change in the FHA procedures would be desirable. Whether or not the right is first recognized in the courts, the agency itself seems to be a most appropriate source for changing the rules and improving its own performance.[84]

There are substantial benefits to be gained by any self-initiated efforts to include all parties directly involved in its decision-making processes. Of benefit to the agency itself is the flexibility it can maintain in the processes it chooses. For example, if the need for discovery is recognized, the agency would still not be bound to accept the complete discovery concept as worked out in the federal court system.[85] The ability to change as experience dictates is also an important consideration; it would be undesirable for the agency to get locked into a set of procedures that it could not adapt to emerging problems. Not knowing how successful the first set of procedures are going to be, some "testing"

82 Powelton Civic Home Owners Association v. Department of Housing and Urban Development, 284 F. Supp. 809 (E.D. Pa. 1968).

83 "[P]rocedure carries its own virtues. It can make certain that all points of view are heard. It can ventilate the decision-making process by exposing it to the light of day and thus make some forms of abuse more difficult. . . . [I]f we cannot guarantee the 'right' decisions, we can perhaps insure that more decisions are made by the right processes . . ." Reich, *The Law of the Planned Society*, *supra* note 30, at 1240, 1251.

84 Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv. L. Rev. 1263 (1962).

85 Berger, *Discovery in Administrative Proceedings: Why Agencies Should Catch Up with the Courts*, 46 A.B.A.J. 74 (1960). Fitzgerald, *supra* note 74, at 244.

might be in order.[86] Finally, if the right to a hearing will be eventually recognized by the courts in any event, it may be wise for the agency to grant such recognition before the courts — or perhaps even the Congress — take the initiative in determining the parameters of that right.

*Ronald J. Nussbaum**

86 *Recommendations Adopted December 10 and 11, 1968, by the Administrative Conference of the United States With Respect to Representation of the Poor in Agency Rulemaking of Direct Consequence to Them* urged that the agencies use as many of the procedures suggested by the Conference for informing the poor of such rulemaking "as are feasible, practicable, and necessary. . . ." Quoted in Bonfield, *supra* note 59, at 555.

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