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I
ENVISAGING AMENITIES RIGHTS

A number of economists and political scientists have expressed concern about the problem of environment protection. Their proposals have generally been based on either establishing an administrative agency, or a group of agencies to regulate pollution,[1] or by imposing a graduated system of pollution taxation whereby the amount of tax levied reflects an enterprise's gain from pollution. An example of the latter is Norman F. Ramsey's suggestion of a pollution tax to provide the financial means of removing pollution and for creating disincentives for pollution-creating industrialists.[2] Another advocate, Dr. Mishan, has suggested a graduated "spillover tax" or a "disamenities tax"[3] geared to the profits earned from pollution, thus removing its incentive. (Dr. Mishan defines "spillovers" as the contaminations, congestions, pollutions and blights which industry produces simultaneously with the cornucopia of goods it appears to spill before us all for the satisfaction of human needs.)[4] Reasonable as such a remedy may appear to be, it should not blind us to other means whereby the law can give society leverages for its protections against pollutions and allied harms.

Recently, the state of Michigan enacted the Thomas J. Anderson, Gordon Rockwell Environmental Protection Act of 1970[5] whereby private citizens can obtain judicial scrutiny of private or public conduct which might have unreasonable adverse impact on the environ-

†This brief comment is intended to be a preliminary statement while a longer study is in the process of completion.

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1. An example of entrusting control of pollution to administrative control rather than various more subtle forms of social manipulation is to be found in the British White Paper, The Protection of the Environment: The Fight Against Pollution, Cmd. No. 4373 (1970).

2. Ramsey, *We Need a Pollution Tax!*, 36 Bull. of Atomic Scientists 3, 4 (Apr. 1970). *See also* Mishan, *The Spillover Enemy*, 33 Encounter 3 (Dec. 1969) [hereinafter cited as Mishan].

3. Mishan 5-6 *passim*.

4. *Id.* at 4 n. 1. Dr. Mishan limited his argument to those spillovers whose effects become immediately obvious. He said, "I disregard here the veritable wilderness of ecological consequences of man's shortsighted interference with nature. . . ."

5. Mich. Comp. Laws Ann. § 691.1201 (Supp. 1970). For an indication of federal interest in this field see note 9 *infra*.

ment.[6] This legislation recognizes that each person has a legally enforceable right to the protection, preservation and enhancement of that environment from unreasonable impairment.[7] The main thrust of this act is to prevent such barriers as lack of standing to sue to be interposed between the citizen and the granting of declaratory and other equitable relief. Professor Sax, a prime mover and thinker in the preparation of this legislation, has characterized it as an "environment *protection* bid."[8]

In addition to this state activity, the United States Congress has before it a legislative proposal which would arm the individual citizen with power to vindicate his claim to a protected environment.[9] Both the federal and the state of Michigan versions provide procedural remedies without specifically indicating any substantive rights. The proposal here, by contrast, is whether from such procedural starting points as those offered in the present Michigan statute, or merely by developing a strictly common law substantive right, courts and legislatures have an opportunity of developing amenities rights directly ascribable to individuals. These could be framed so as to provide citizens with both the means of effective self-protection in the contemporary mass production, mass consumption and mass entertainment society, and the incentives, in addition to altruism or indignation, for utilizing those means to the full.

II

THE INDIVIDUAL AND HIS CLAIM

Of what should an individual's amenities rights consist? They would appear to be emerging as an enforceable claim for the protection of a right to health, by preventing the pollution of the air by chemicals and by noise, and a right to vindicate the individual's stake in the community's heritage of a beautiful landscape. There also appears to be a right of recreation in quiet places or in areas of dramatic and unspoilt grandeur. Property and community values of a novel kind seem not to be excluded. They include claims to prevent erosion of the countryside and blight of the cities. Procedurally, the

6. *Id.* § 691.1202.

7. *Id.*

8. Testimony of Joseph L. Sax, *Hearings on H.B. 3055 Before the Michigan House Committee on Conservation and Recreation* (mimeo, Jan. 21, 1970) [hereinafter cited as *Hearings on H.B. 3055*].

9. *See also* S.3575, 91st Cong. 2d Sess. (1970). Professor Sax has characterized this Bill as "version of the Michigan bill adapted to the requirements of federal legislation." *See* Testimony of Joseph L. Sax, *Hearings on S. 3575, Environmental Protection Bill Before the Subcomm. on Energy, Environment and Natural Resources of the Senate Comm. on Commerce,* 91st Cong. 2d Sess. (mimeo, May 12, 1970) [hereinafter cited as Sax, *Senate Testimony*].

vindication and such types of personal and property claims as these could well be undertaken by groups or communities, or by representative suits, as well as by individuals acting to vindicate rights which are specifically their own.

The development of individuals' amenities rights to provide the basis for protection when spillovers invade those individuals' claims would have the following advantages: (a) Decentralization—the enforcement of the obligation not to pollute or deteriorate the environment would be performed by the individuals who are most directly harmed by its breach; (b) Building-in spillover costs as a cost of production—enterprises running the risk of inflicting pollutions on the environment as a concomitant of their operations would need to insure against claims, and so the amenities liability insurance premium would have rather similar effects on costs of production as would the spillover tax; (c) International operation—judgments won for invading amenities rights could become entitled to transnational recognition either by treaty or through extending conflict of law rules of recognition to them. By analogy, similar rights to these could be developed to govern international legal relations among states themselves. This proposal of the development of individuals' amenities rights is not intended to provide a complete substitution of Dr. Ramsey's proposed disamenities tax. This amount of taxation levied could be combined with the insurance system. For example, an adequate proportion of the spillover tax could be a variable used to bring up an entrepreneur's production costs when he fails to take out adequate amenities liability insurance in an attempt to reduce his premiums below a minimal figure requisite for effective protection.

To this writer the most signficant advantage of the formulation of private law amenities rights would be their direct and decentralized effect, in contrast with the centralizing effect of disamenities taxation or of governmental regulation in the pollution field. Amenities rights as a branch of private law could give the party harmed the right to pursue his remedy, rather than depend on the discretion of a bureaucrat. In addition, the courts' jurisdiction to award compensation should be combined with an authority to issue orders forbidding, or conditionally limiting, polluting activities, so that spillovers causing disamenities could be reduced to a level where they would have to become tolerable to the individuals and communities whom they discommoded in the first place. In this way the old and basic justification of democracy "let the wearer say where the shoe pinches" would apply. This may be contrasted with a system relying entirely on disamenities taxes. Under that regime the taxing authority would presumably collect the amount of the social cost

from the entrepreneurs and an anonymous bureaucrat would determine what the disamenity felt like, where it pinched, and whether (and if so how) relief should be given. One may suggest, furthermore, that court orders prohibiting, or conditionally allowing, a spillover activity on the terms it prescribes may have all the advantages of the government regulation method of controlling spillovers with few of the disadvantages of that most centralizing and illiberal of all methods of meeting the challenge of pollution.

This proposal calls for a further development in terms of the public interest. Since it clearly has an enormous stake in most spillover claims, the state should be recognized as being the custodian of the future, and thus have the right of being joined as a party plaintiff in any action to restrain spillovers. In addition, and because the state must perform a unique custodial function on behalf of the future, it should also be entitled to bring causes of action independently of those which individuals may pursue. Such actions should not be limited to suits to remedy and restore the situation in cases of immediate damage or harm. The state should, for example, be able to bring actions to restrain pollution of the atmosphere in order to prevent possible danger to health in the future. It should also be entitled to prevent abuses of woodlands and lakes in general and preserve their natural beauty for generations to come. It should have standing to prevent the slow poisoning of streams and lakes, to protect the whole chain of life itself as it moves onward through time.

III
THE PUBLIC SECTOR

Establishing "an environmental common law"[10] of individual, substantive, and procedural rights requires complementary protections in the public sector. The Michigan statute provides for such protections. It adds to the existing considerations which administrative licensing authorities are required to apply, where relevant, for the prevention of the possibility of pollution. Thus Mich. Comp. Laws Ann. Sect. 691, 1205 provides:

> In any such administrative, licensing or other proceedings, and in any judicial review thereof, any alleged pollution, impairment or destruction of the air, water or other natural resources or the public trust therein, shall be determined, and no conduct shall be authorized or approved which does, or is likely to have such effect so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare.

10. *Hearings on H.B. 3055, supra* note 8.

Although, at least in the federal sphere, such a provision might appear to duplicate the function of the Water Quality Improvement Act[11] and the National Environmental Policy Act of 1969,[12] in point of fact it does not do so. The watchdogs of the Michigan Act are the concerned citizens, they have the authority to insist on being assured that administrative agencies are paying more than mere lip service to the nation's need for conservation. Had there been, prior to the federal government's granting of oil leases in the Santa Barbara Channel in 1967, federal legislation on the books equivalent to the Michigan statute, together with a growing specific federal common law on amenities rights intertwined with the federal comptences over resource management and exploitation, the citizens of Santa Barbara would have brought suits to enjoin those grants, or to enjoin drilling on the oil properties granted.[13] In that event the disasters at the Union Oil Company's sites in the Santa Barbara Channel might never have occurred. Indeed, they never should have occurred.

IV
PROBLEMS OF ABUSE OF RIGHTS

Should laws restraining pollution, protecting the environment, and vindicating amenities rights be translated into an interdiction of further development by business enterprises? Are we faced by a choice between the reduction of pollution coupled with industrial and commercial stagnation and a continuously increasing deterioration of the environment as the cost of continued prosperity and economic development? Clearly we are not faced by an "either/or" situation of mindless exploitation versus rigid conservation. The rule of reasonableness should prevail. Section 3(1) of the Michigan Act[14] offers a formula for ensuring that a court should not impose unreasonable restrictions on progress nor license abuses of the state's resources. The party objecting to an enterprise or a project first must show, *prima facie,* that the "conduct of the defendant has, or is likely to pollute, impair the air, water or other natural resources or the public trust therein." Should the plaintiff succeed in carrying this burden, the defendant must then present as an affirmative defense "that there is no feasible and prudent alternative to [his] conduct and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern

11. 33 U.S.C.A. § 1151 notes, 1152, 1155, 1156, 1158, 1160-75 (Supp. 1970).
12. 42 U.S.C.A. § 4321, 4331-35, 4341-47 (Supp. 1970).
13. *See e.g.,* Sax, Senate Testimony at 4.
14. Mich. Comp. Laws Ann. § 691.1203 (Supp. 1970).

for the protection of its natural resources from pollution, impairment or destruction."

Secondly, to discourage frivolous or vexatious plaintiffs, Section 2(a) of the Michigan Act gives the courts competence to require the plaintiff to post a "surety bond or cash not to exceed $500.00" when it has reason to believe that the plaintiff is not solvent or may otherwise be unable or unwilling to pay any costs of judgment which might be rendered against him.[15]

It is submitted, however, that this legislation does not adequately protect defendants against the full range of possibly unmeritorious lawsuits–when, for example, a wealthy plaintiff is resolved to persecute a rival enterprise regardless of cost and in order to drive him from business, or when it is utilized as a leverage for extortion or exercising undue influence. The possibility that amenities rights legislation may expose defendants to the possibility of racketeering and blackmail should not be lost sight of. It is suggested, accordingly, that antipollution laws should also authorize courts to award punitive damages when they have been satisfied that a suit has been brought frivolously, vexatiously, maliciously or with a criminal intent. In the last situation, as are all the others, the court should be satisfied with a civil, not a criminal burden of proof and weight of evidence. This provision should be written clearly into the legislation in case courts may adopt the opposite viewpoint as a matter of "interpretation." The reason for the choice of the civil burden of proof is that only a civil result is envisaged and so policy is best served by giving the *bona fide* enterprise the opportunity of exculpating itself by means of the less onerous burden of proof. It is suggested, furthermore, that since the problem of the unmeritorious suit touches upon a court's inherent jurisdiction to protect its process from abuse or contempt, the judges before whom the original frivolous, vexatious, malicious or criminal suit has been brought might well be empowered to award punitive damages in the proceedings if they are satisfied that such an award is appropriate. Vesting such a competence in the trial judge should not be preclusive of a right of the jury, in deciding a case in which the issue that the case had been frivolously, vexatiously, maliciously or criminally brought had been raised in the pleadings as a counterclaim, to award such punitive damages. Nor should the competence of either the judge or the jury to award damages to the defendant in the original proceedings be viewed as preclusive of a right to bring a subsequent and separate claim for punitive damages arising out of the defendant's

15. Mich. Comp. Laws Ann. § 691.1202a (Supp. 1970).

having been forced to submit to a frivolous or otherwise unmeritorious lawsuit and not sought satisfaction by means of a counterclaim.

V
THE INTERNATIONAL SCENE

The New York Times has recently been carrying news items of another Liberian-flag tanker casualty[16] which, like the *Torrey Canyon* disaster of March 1967, threatens major oil pollution damage to the French and English coasts, as well as, possibly, those of other Channel and North Sea countries. The recurring maritime pollution disasters which are appearing with increasing regularity in the newspapers underscore the need for the international, as well as federal and state recognition of amenities rights. In the international sphere these should not only be seen as rights of states in the traditional sense, but in addition, as human rights and thus, to whatever extent may be practicable at a given point of time, as enuring to individuals as subjects of international law. In this way an international law of amenities rights could be evolved on two levels of international and transnational relations. On the interstate level, states should be able to invoke international amenities rights in order to vindicate their own claims as entities and to espouse claims on behalf of their own citizens. On the individual and transnational level, they should recognize and respect each others' citizens as individual human beings independently of governmental rights of recovery or of espousal. Indeed, the law on amenities rights should be so developed that states and individuals should, in calculating the spillover effect of new industrial developments, respect, as having equal claims as their own citizens, the amenities accorded to foreigners beyond the planners' national borders. This transnational goal, which may seem so idealistic, might well be made practical by means of the international recognition of judgments and without having to wait for the clothing of individuals with the international legal personality recognized in the *Danzig Railway Officials* case.[17]

16. *See e.g.*, N.Y. Times, Oct. 25, 1970 at 1, col. 1 and at 14, col. 4.

17. Advisory Opinion Concerning the Jurisdiction of the Courts of Danzig, [1928] P.C.I.J., ser. B, No. 15, at 17-21.