

## COMPARATIVE ADMINISTRATIVE LAW: EXERCISE OF POLICE POWER

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Upon reflection, few will deny that industrial society, in its consolidating phase, demands for its own security and stability the presence of standards of public regulation and of auxiliary social services essentially uniform throughout the economy.<sup>1</sup> Viewed realistically, therefore, the contemporary trend toward a nationally integrated framework of administrative effort is both inevitable and welcome.<sup>2</sup> Yet it is no less true that the weight of immediate operational responsibility must rest in the local area. As an industrial commonwealth, we shall soon be forced to come to grips with this problem.

So much is clear: there are two practical approaches toward solution. On the one hand, federal or state administration may decentralize authority to a sufficient degree to give their field apparatus full opportunity for displaying constructive initiative in adapting general rules to local needs.<sup>3</sup> On the other hand, the central organization, state as well as federal, may stimulate and utilize responsive implementation of over-all policy through the activities of local government. How widely we have been able to rely on such cooperation is attested by the conspicuous rise of intergovernmental relationships.<sup>4</sup> But even where no formal cooperative bonds exist, it is altogether obvious that in the day of the "service state"<sup>5</sup> municipal authorities must play an increasingly

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1. For an incisive analysis cf. DICKINSON, *HOLD FAST THE MIDDLE WAY* (1935). On the economic factors involved see BURNS, *THE DECLINE OF COMPETITION* (1936); LYON, *GOVERNMENT AND ECONOMIC LIFE* (vol. 1, 1939; vol. 2, 1940). See also Lerner, *The Burden of Government Business* in *PUBLIC MANAGEMENT IN THE NEW DEMOCRACY* (Morstein Marx ed., 1940) 3 *et seq.*

2. Cf. BENSON, *THE NEW CENTRALIZATION* (1941); CLARK, *THE RISE OF A NEW FEDERALISM* (1938); KEY, *THE ADMINISTRATION OF FEDERAL GRANTS TO THE STATES* (1937); WILLIAMS, *GRANTS-IN-AID UNDER THE PUBLIC WORKS ADMINISTRATION* (1939).

3. Cf. ATKINSON, *THE FEDERAL ROLE IN UNEMPLOYMENT COMPENSATION ADMINISTRATION* (1941); GAUS AND WOLCOTT, *PUBLIC ADMINISTRATION AND THE UNITED STATES DEPARTMENT OF AGRICULTURE* (1940); MACMAHON, *THE ADMINISTRATION OF FEDERAL WORK RELIEF* (1941); TRUMAN, *ADMINISTRATIVE DECENTRALIZATION: A STUDY OF THE CHICAGO FIELD OFFICES OF THE UNITED STATES DEPARTMENT OF AGRICULTURE* (1939).

4. Cf. WELLS, *AMERICAN LOCAL GOVERNMENT* (1939); *INTERGOVERNMENTAL RELATIONS IN THE UNITED STATES*, 207 *ANNALS* (Graves ed., 1940).

5. WHITE, *TRENDS IN PUBLIC ADMINISTRATION* (1933) 341. On the problems surrounding the "service state" see also MORSTEIN MARX, *THE WORKING PATTERN OF PUBLIC ADMINISTRATION* (now in press).

active role in promoting the welfare of their citizens. Hence, it is not surprising that the scope of their police power and the technical alternatives available for its exercise are acquiring a new prominence in the current flow of judicial decisions.

In this entire sphere, however, local bodies confront peculiar uncertainties with regard to the legal limitations which courts might impose upon them. Just as in England one can observe a noticeable retrogression from the judicial liberality of the *Arlidge* case<sup>6</sup> to those strictures of hostile construction which have adversely affected the development of public housing,<sup>7</sup> so have American courts since the turn of the century gravitated in the direction of more exacting scrutiny of municipal undertakings. True enough, the traditional doctrine emphasizing creative freedom in the choice of means within the scope of existing power has never been abandoned,<sup>8</sup> but actual adjudication of concrete issues often veered far away from it, especially when property rights were involved, as they usually are.

The difficulties thus arising for the exercise of the municipal police power were not minimized by the fact that the judicial reaction to individual cases appeared to lack broader consistency one way or the other.<sup>9</sup> On the contrary, the sole result was an elimination of the mental comfort of predictability. More specifically, when local authorities left the choice of the means in the enforcement of policy to their administrative agencies or officers, they could not be sure that the courts would endorse so much discretion. Conversely, when the means was explicitly designated in an ordinance, litigation might lead to an invalidation of the ordinance itself, on the ground that another means would accomplish equally well the desired end.

The present paper is intended as a comment on the ensuing dilemma, a dilemma particularly aggravating at a time in which a premium is being put on municipal inventiveness. The method shall again<sup>10</sup> be that of the comparative approach turned toward "situational" case analysis.

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6. *Local Government Board v. Arlidge* [1915] A. C. 120.

7. See Jennings, *Courts and Administrative Law—The Experience of English Housing Legislation* (1936) 49 HARV. L. REV. 426.

8. I McQUILLIN, *MUNICIPAL CORPORATIONS* (Rev. 2d ed. 1940) § 390.

9. The range of variations is well illustrated on the one extreme by *Bohn v. Salt Lake City*, 79 Utah 121, 8 P. (2d) 591 (1932), 80 U. OF PA. L. REV. 1167, and on the other by *Fisenne v. Bay Ridge District Local Board*, 250 App. Div. 460, 294 N. Y. Supp. 595 (1937), in which the board's demand for construction of a fence around petitioner's lot, cost thereof to be assessed against his property, was held legislative and therefore not reviewable by certiorari, although petitioner was given a hearing.

10. Cf. Morstein Marx, *Comparative Administrative Law: A Note on Review of Discretion* (1939) 87 U. OF PA. L. REV. 954; *Comparative Administrative Law: Economic Improvisation by Public Authorities* (1940) 88 U. OF PA. L. REV. 425; *Comparative Administration Law: Public Employer-Employee Relationships* (1941) 4 U. OF DETROIT L. J. 59.

## I

The municipal legislature of the city of New Orleans passed an ordinance<sup>11</sup> making it an offense to wreck, dismantle or store for commercial purposes any motor-driven vehicle or junk on the sidewalks, streets and other public places, and to store for sale such or similar materials on open lots not fenced in as described in the ordinance. The prescribed specifications required an enclosure "all around on all boundary lines" made of a "proper, suitable and substantial fence not less than seven (7) feet nor more than ten (10) feet high." The fence was required to be "kept in a constant state of good repair." A subsequent ordinance<sup>12</sup> amended the specifications by demanding a "substantial feather-edged board fence not less than seven (7) 1" x 12" 'Nominal Size' feather-edged boards high, nailed horizontally across 4" x 6" 'Nominal Size' wood posts on 8'-0" centers and set three feet into the ground."

On the basis of these provisions, the city took action against a company operating an auto-wrecking and scrap-material yard at a street corner in one of the industrial districts. The president and general manager of the company was prosecuted in the First Recorder's Court of the City of New Orleans, the affidavit charging that the yard was not fenced off in the proper manner. A demurrer and a motion to quash the affidavit on the dual ground that the ordinance was uncon-

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11. "Ordinance 14194, Commission Council Series . . . reads as follows, omitting Section 3, which prescribes the penalty for violating the ordinance, and Section 4, which provides that each day after the conviction a violation shall constitute a separate offense:

"An ordinance to prevent the wrecking or the dismantling or storage for commercial purposes of any motor-driven vehicle or junk on the sidewalks, public streets and other public places, and/or to prevent the storing for sale of the wreckage or parts of any motor-driven vehicles; also, any iron or steel junk or rags on any open lot or parcel of ground not fenced in as described in Section 2 of this Ordinance, and to fix penalties for failure to comply with the provisions and requirements of this Ordinance.

"Whereas, it is necessary in the interest of public safety and comfort that the sidewalks, streets and other places be kept from any obstruction that might make same unsafe, and

"Whereas, the operation of many automobiles [sic] and other junk yards encroach on the sidewalks without any line of demarkation for property lines by fence or otherwise much to the inconvenience of the public good and welfare.

"Section 1. Be it ordained by the commission council of the city of New Orleans, that from and after the passage of this Ordinance it shall be unlawful for any person, firm or corporation to wreck, dismantle or store for commercial purposes any motor-driven vehicle, automobile, auto truck or iron or steel junk or rags on the public sidewalks, public streets and other public places.

"Section 2. Be it further ordained, etc., that no person, firm or corporation shall be permitted to store or offer for sale any iron or steel junk, rags or wreck or wreckage of motor-driven vehicles or automobiles and/or auto truck or any open lot or parcel of ground that is not properly inclosed all around on all boundary lines with a proper, suitable and substantial fence not less than seven (7) feet nor more than ten (10) feet high, and further that the said fence must be kept in a constant state of good repair." City of New Orleans v. Southern Auto Wreckers, 193 La. 895, 899, 192 So. 523, 524 (1939).

12. Ordinance 14283, Commission Council Series. It confined itself to amending § 2 of the earlier ordinance (see note 11 *supra*) by providing for the more detailed specification quoted in the text.

stitutional and an illegal exercise of the police power were overruled by the judge. Against the conviction of its responsible officer, defendant company appealed successfully to the Supreme Court of Louisiana.<sup>13</sup>

The appellate court formulated the legal issue as follows: "The question presented is whether the ordinance is constitutional. If it is, defendant is guilty, for it is admitted that the fence now surrounding the yard, where the scrap material, and possibly other junk, is stored, is not built according to the specifications set out in Section 2 of the ordinance as amended."<sup>14</sup> In other respects, however, the existing fence was in good condition and not in need of repair. Evidence had been presented at the trial to show that the auto-wrecking and scrap-material yard in question "is enclosed on all sides by a substantial mesh-wire fence, described as a 'steel Page cyclone fence,' seven feet high, topped with three strands of barbed wire, built at considerable expense. It was proved—in fact, it is admitted—that this fence adequately serves the purpose of preventing any material stored on the yard from encroaching upon the sidewalks or public ways; that it protects those who may use the public ways from injury or damage by coming in contact with the material stored on the yard; that those who use the sidewalks and public ways are as safe in such use as if no material of any kind were stored on the yard. It was proved that a strip seven feet wide along the fence on all sides was left, on which no material whatever was stored. The purpose of leaving this vacant space apparently was to prevent any of the material from protruding onto the sidewalk."<sup>15</sup> In fact, even the police officer in charge of this case had conceded as a witness that the present fence did keep all stored materials from obstructing free passage on the street.<sup>16</sup>

Nor was the trial judge unaware of the actual circumstances. He summed up the evidence as demonstrating that "all of the junk, autos and wreckage is in an open wire fence enclosure and does not encroach on the sidewalk or street . . . the junk, autos and wreckage is kept seven (7) feet from the said wire fence surrounding the described junk yard."<sup>17</sup> Nevertheless, it was also true that the "open wire fence . . . does not comply with the City Ordinance which requires

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13. *City of New Orleans v. Southern Auto Wreckers*, 193 La. 895, 192 So. 523 (1939).

14. *Id.* at 901, 192 So. at 525.

15. *Id.* at 901-902, 192 So. at 525.

16. "Q. Isn't true that the metal fence which presently surrounds this area suffices to keep in all the automobile wreckage or scrap iron from encroaching on the sidewalk or street or public ways? A. That is true." *Id.* at 902, 192 So. at 525.

Defendant's president and general manager was asked a similar question: "Q. Does this fence serve to keep the public side walk, streets and other public places in the vicinity of your yard free from any obstruction that may make them unsafe? Yes." *Ibid.*

17. *Id.* at 903, 192 So. at 525.

a seven (7) foot tight board fence around such wrecking and junk yards . . . ." <sup>18</sup> He added that defendant company "could easily comply with the law by erecting a legal fence within the wire fence . . . or . . . could comply otherwise or discontinue business if . . . [it] sees necessary." <sup>19</sup> This consequence served as the pivot in the appellate decision. The court said, "under the judge's ruling, the defendant . . . , although the company has erected an expensive fence which protects those who use the public ways from all danger, must, under the penalty of fine or imprisonment, either build a fence that conforms to the letter with the specifications in Section 2 of the ordinance, as amended, or cease business. Therefore, if the ordinance is unconstitutional, defendant will be deprived of his liberty and his property without due process of law." <sup>20</sup> From this vantage point, the court inquired into the legal foundation of the contested measure.

Under the laws of Louisiana,<sup>21</sup> the state has delegated to the city of New Orleans all those powers, privileges and functions which are constitutionally conferred upon other municipalities, and specifically the authority "to exercise full police power." Could it be claimed that the controversial provision represented a proper exercise of the expressly granted police power? The court prefaced its answer with a sharper delineation of the dispute before it: "Counsel for the city argue that the adoption of the ordinance was a reasonable and constitutional exercise of the city's police power. It is not disputed by counsel for defendant that the city may, in the exercise of its police power, regulate and control the occupation of dealing in junk. It was held by this court in *Shreveport v. Schultz*, 154 La. 899, 98 So. 411, that, if the public health, welfare, or safety requires it, junk stores may be excluded from prescribed limits of a municipality, but that such a regulation must be reasonable. The same rule would necessarily apply to junk yards such as this defendant operates. Whether the City of New Orleans may legally require that junk yards adjacent to sidewalks or streets be fenced in, is not the point at issue. That is conceded by defendant. The defense here is that, in view of the declared purpose

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18. *Ibid.* As to the legal basis, the trial judge observed that "it is within police powers to enforce said Ordinances under the Constitution of the State of Louisiana, and of the United States." *Id.* at 901, 192 So. at 525. The state constitution provides that "No person shall be deprived of life, liberty or property, except by due process of law." LA. CONST. ART. I, § 2.

19. *City of New Orleans v. Southern Auto Wreckers*, 193 La. 895, 903, 192 So. 523, 525 (1939).

20. *Ibid.* Leaving no stone unturned, defendant had amplified this conclusion at the trial by arguing that "the ordinance, and particularly Section 2 thereof as amended, is unconstitutional because it is arbitrary, oppressive, and unreasonable" as well as "discriminatory, and its adoption was an unauthorized, unwarranted, and illegal exercise of the city's police power." *Id.* at 901, 192 So. at 525.

21. 4 LA. GEN. STAT. ANN. (Dart, 1939) § 6175 (d).

of the ordinance under attack, the requirements of Section 2 of the ordinance, relating to the kind of fence which operators of junk yards must erect around their yards, is an arbitrary and unreasonable exercise of the police power, because the requirement of a tight board fence instead of a substantial fence built of other material in no way tends toward the accomplishment of the object for which the city's power was exercised in this case."<sup>22</sup> Thus the court arrived at a differentiation between end and means, between the objective of the regulation and the method of attaining it.

Proceeding from established legal principle,<sup>23</sup> the court first focused its attention upon the end of the regulation. It satisfied itself that the municipal authorities, on this score, had not transcended the bounds of the law: "The ordinance has a lawful purpose, and the city was authorized under its police power to prescribe reasonable means to accomplish that purpose. The ordinance is a safety measure pure and simple. According to its clear and express language, it has but one purpose, which is to keep the sidewalks and public ways adjacent to junk yards free from rubbish or obstructions, so that such public ways may be safe passages for those who use them."<sup>24</sup> The problem, then, reduced itself to the legality of the means adopted by the city council. Section 2 of the ordinance, in its amended form, defined the means, as we saw earlier, in considerable detail, without allowing for modifications or departures. In the words of the court, "These specifications are inflexible. The planks must be 'feather-edged' and twelve inches wide, and must be nailed to posts 'horizontally'. Fourteen six-inch 'feather-edged' planks, nailed horizontally, would not suffice, although they would suffice to build the fence seven feet high. Nor would a tight plank fence made of twelve-inch 'feather-edged' planks suffice if the planks stood upright, or perpendicular to the ground. Nor would a solid stone, brick, or cement wall seven feet high, built on all sides of a junk yard, meet the requirements of the ordinance. The ordinance

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22. *City of New Orleans v. Southern Auto Wreckers*, 193 La. 895, 904, 192 So. 523, 525-526 (1939).

23. The court quoted the "general rule which prevails here and elsewhere" as follows: "In order that a municipal regulation be sustained as an exercise of the police power, the regulation must have for its object the prevention of some offense or manifest evil or the preservation of the public health, safety, morals, or general welfare. The exercise of the police power must have a substantial basis. The power cannot be made a mere pretext for legislation that does not fall within it. There must be some clear, real, and substantial connection between the assumed purpose of the regulation and the active provisions thereof, and the provisions must in some plain, appreciable, and appropriate manner tend toward the accomplishment of the object for which the power is exercised." 43 C. J. § 228 at 227. Finding "this general statement of law . . . supported by many decisions," federal as well as state, the court declared it unnecessary to review them. *City of New Orleans v. Southern Auto Wreckers*, 193 La. 895, 904-905, 192 So. 523, 526 (1939).

24. *Ibid.* The court substantiated this conclusion by considering the content of the preamble of the ordinance and the declaration of purpose embodied in it. See note 11 *supra*.

calls for a 'feather-edged' board fence."<sup>25</sup> It plainly left no room for the recognition of any other method of achieving the end which the city council had in mind. There was but a single avenue of compliance.

While the court could not well proclaim the means itself inappropriate, it refused to sanction the exclusiveness of the legal prescription: "The declared purpose of the ordinance being to make the sidewalks and public ways safe for pedestrians, there is no reason why a tight or solid wall fence of any particular kind should be required when a substantial fence of another kind, built of different material, serves the same purpose, as is the case here. The provisions of the ordinance, requiring that junk yards be inclosed with board fences and with no other kind, do not tend in any appreciable or appropriate manner toward the accomplishment of the object or purpose for which the city's police power was exercised. This requirement is purely arbitrary and unreasonable."<sup>26</sup> Hence, to insist upon the requirement would virtually result in a destruction of defendant's property<sup>27</sup> without warrant in law.<sup>28</sup> "The means adopted to attain the purpose sought to be accomplished by a municipality, under its police power, must be reasonable."<sup>29</sup> That there might be some justification for distinguishing between the means proper and the stipulation that it alone be used apparently escaped judicial attention.

The court raised only one further question, namely, whether defendant's enterprise, in view of its character, might call for stricter standards than would apply to others. But the question proved rhetorical: "Dealing in junk is a legitimate and harmless business. Junk yards are not necessarily nuisances. They do not affect the public

25. *City of New Orleans v. Southern Auto Wreckers*, 193 La. 895, 906-907, 192 So. 523, 526 (1939).

26. *Id.* at 907, 192 So. at 527.

27. As the court put it, "Defendant's property is enclosed by an expensive, substantial fence, which serves the purpose and intent of the ordinance. If, in order to escape punishment and remain in business, defendant must build another fence in literal compliance with the ordinance as written, his present fence will be worthless. It will, in effect at least, be destroyed for no purpose whatever." *Ibid.*

28. In the language of the court, "While the police power of municipalities is broad and far-reaching, it is not without limitations. In the exercise of that power, municipalities may go to the boundaries of reason but no further. The exercise of that power must have a substantial basis. On proper occasion and for adequate reasons, the power may be exercised to limit the use of private property, or even to destroy it. But the exercise of that power for such purposes, without adequate reasons, is a violation to the Due Process Clause of the State and Federal Constitutions." *Id.* at 908, 192 So. at 527.

29. *Ibid.* Referring to 43 C. J. §§ 227, 229-230, at 226, 228, 230, and to 6 R. C. L. §§ 194, 208, at 197, 213, the court added, "Municipal police power may not be exercised to infringe arbitrarily or unreasonably upon personal or private property rights." *City of New Orleans v. Southern Auto Wreckers*, 193 La. 895, 908, 192 So. 523, 527 (1939). For further support, the court specifically quoted 6 R. C. L. § 227, at 237, to the effect that "there must be obvious and real connection between the actual provisions of a police regulation and its avowed purpose, and the regulation adopted must be reasonably adapted to accomplish the end sought to be attained." It also referred to 6 R. C. L. § 228, at 239.

health, nor do they offend against public morals. Individuals have the constitutional right to use their private property for junk yards as long as such use does not offend public morals or jeopardize the health and safety of the public.”<sup>30</sup> Dismissing other points of argument at the bar as irrelevant,<sup>31</sup> the court reached its closing line by pronouncing “that portion of Section 2 of Ordinance 14194, as amended by Ordinance 14283, Commission Council Series, of the City of New Orleans, which requires junk yards of the character specified in the ordinance to be enclosed on all sides with a fence built according to the specification therein contained, is unconstitutional; the conviction and sentence of the defendant are set aside, and it is ordered that he be released.”<sup>32</sup> In short, to specify a means, even though it be appropriate in itself, to the exclusion of any other means conceivably equally appropriate, invalidates the regulation.

The decision invites several observations touching upon both legal construction and administrative practice. In the first place, it puts in bold relief the tendency toward greater judicial stringency with regard to the municipal police power at a time when the latter is bound to draw wider circles. One may fruitfully compare the outcome of the present decision with the solution achieved in an earlier case in which the New Jersey Supreme Court faced an identical situation.<sup>33</sup> A local ordinance, imposing certain sanitary standards for the use of stables, contained specific provisions as to the required mode of laying the stable floor, without allowance for alternatives. The court took a more sympathetic view of the regulation: “The ordinance stands as a protection to those who conform to it. If the owner secures the sanitary condition of his building by adopting some other plan, he is not amenable to prosecution. In departing from the directions contained in the ordinance, he takes the risk of creating a nuisance. If the plan

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30. *City of New Orleans v. Southern Auto Wreckers*, 193 La. 895, 908-909, 192 So. 523, 527 (1939). Concerning the “right of individuals to use their private property as they see fit, as long as their use of it is not offensive or dangerous,” the court quoted 11 AM. JUR. § 279, at 1037: “Nevertheless, the owner has the right to erect such structures or to use the property for such legitimate purpose as he may see fit, utilizing such portions of it as he pleases, as long as in so doing he in no manner injuriously affects the public health, safety, morals, and general welfare. Any law abridging rights to a use of property, which use does not infringe the rights of others, or limiting the use of property beyond what is necessary to provide for the welfare and general security of the public is not a valid exercise of the police power.”

31. *City of New Orleans v. Southern Auto Wreckers*, 193 La. 895, 909, 192 So. 523, 527 (1939). “There was considerable discussion at the bar relating to the question as to whether the city, under its police power, may restrict the use of private property for junk yards to designated areas of the city, and whether the city may, under its police power, limit or restrict the use of private property for aesthetic reasons. This discussion and the decisions cited which touch these points have no application here, for the reason that the ordinance is a safety measure.” *Ibid.*

32. *Id.* at 909-910, 192 So. at 527.

33. *Morford v. Board of Health of Asbury Park*, 61 N. J. L. 386, 39 Atl. 706 (Sup. Ct. 1897).



he resorts to is a failure he may be held for the penalty, not on the ground that he has not conformed to the plan specifically set out in the ordinance, but on allegation and proof that his stable is a nuisance.”<sup>34</sup> Accordingly, instead of invalidating the regulation, the court held, “not that the ordinance is void, but that the owner is not restricted to the manner of laying the floor which is prescribed by the ordinance.”<sup>35</sup> Nevertheless, he would be responsible for the inadequacy of any other means of his own choosing. The framework of the regulation thus survived.

In one respect, however, there is little difference between earlier and current decisions: in the critical attitude which courts tend to display toward a specification of the means by administrative authorities. Even in a day when the judicial mind was less eager to examine the degree of necessity and propriety, a New York court declared: “And it seems that whoever, in abating an alleged nuisance, injures private property, or interferes with private rights, whether he be a public officer or private person, save when he acts under the judgment or order of a court having jurisdiction, acts at his peril, and this principle is applicable to boards of health.”<sup>36</sup> This point of view is qualified only by greater judicial reluctance toward interfering with the technical operation of vital public safety functions<sup>37</sup> or with individual acts of the representative organs of local government themselves.<sup>38</sup> On the

34. *Id.* at 391, 39 Atl. at 708.

35. *Ibid.* The Louisiana Supreme Court did not consider this ingenious accommodation at all.

36. *Eckhardt v. City of Buffalo*, 19 App. Div. 1, 14-15, 46 N. Y. Supp. 204, 213 (4th Dep't 1897). The court's general doctrine was much more conciliatory: “Within the power granted, the degree of necessity or propriety of the exercise of the power of abatement rests exclusively with the proper corporate authorities; but in all cases the power exercised, or attempted to be exercised, must depend upon the nature and extent of the power granted; and whenever the question of the existence or limit of the power is in question, it becomes the plain duty of the court to see that the corporate authorities do not transcend the authority delegated to them.” *Id.* at 6, 46 N. Y. Supp. at 207.

37. *Fire Department of New York v. Atlas Steamship Co.*, 106 N. Y. 566, 13 N. E. 329 (1887). Here the court declared, “The [board of] examiners had jurisdiction of the matter [mode of construction of a building], and their determination cannot be reviewed by the courts, even if their requirement was unreasonable, so long as it was not wholly impracticable.” *Id.* at 578, 13 N. E. at 333. Reference may be made also to *Russo v. Miller*, 221 Mo. App. 292, 3 S. W. (2d) 266 (1928), where the court said that “police officers may not be enjoined from the performance of their proper duties in connection with the exercise of the general police power, and this is true even though their acts may be performed in an offensive, oppressive, or unlawful manner.” *Id.* at 298, 2 S. W. (2d) at 268. Italics are the court's.

38. *General Outdoor Advertising Co. v. City of Indianapolis*, 202 Ind. 85, 172 N. E. 309 (1930). “When a municipal corporation exercises its police power, the courts will not interfere unless there has been a clear abuse of discretion.” *Id.* at 91, 172 N. E. at 311. Or, more recently, *Appeal of Bell Telephone Co.*, 138 Pa. Super. 527, 10 A. (2d) 817 (1940), in which the court held itself “limited to a consideration of errors of law, which means that we may only reverse the order [sustaining the borough government in its demand that the telephone company remove its wires from part of a street or place them under the street] if the evidence is not sufficient to support the findings of fact or if the conclusions are so unreasonable, capricious, or arbitrary as to amount to an error of law.” *Id.* at 531, 10 A. (2d) at 818-819.

whole, it can well be said that "American courts have in the absence of clear language leaned rather against an administrative power to specify methods, so long as the required result would be obtained in some manner."<sup>39</sup> It is, therefore, a perfectly natural consequence that, in general, municipal authorities have come to prefer a legislative specification of the means to leaving the choice of means to administrative judgment. This fact must be appreciated in appraising the decision of the Louisiana court.

Clearly, the municipal council of New Orleans considered it safer to obviate an attack upon the individual administrative determination of the means by writing a detailed specification into its ordinance. In its original form, the ordinance had merely demanded a "proper, suitable and substantial fence not less than seven (7) feet nor more than ten (10) feet high." That formulation still involved a great deal of administrative freedom in giving concrete meaning to the fairly broad phraseology of the legislative prescription. As its inevitable counterpart, there would remain the same amount of freedom of argument on the part of each junk yard operator affected by the regulation. One need not search widely in the annals of due process of law to realize the ambiguity of terms such as "proper, suitable and substantial."<sup>40</sup> By amending the formula in the interest of clarity and definiteness, the city in effect transferred responsibility for the choice of the means from the police department to the legislative chamber. From now on, there could no longer be any doubt as to what a "proper, suitable and substantial fence" might be. Because of the misgivings which courts so often register concerning administrative power inadequately guided by legislative direction,<sup>41</sup> the result in itself was certainly not without its merits. It simultaneously brought into the picture, however, the demerit of exclusiveness. And the demerit proved legally decisive.

Thus the city found itself neatly placed between two stools. It had substituted a legislative recipe for an administrative recipe, but it did not earn judicial gratitude for it. It had sacrificed an elastic clause for the sake of unequivocal conciseness, only to discover that thereby it had departed from the narrow path of legality. It had tried to be "practical", but heard itself berated as "unreasonable". In fact, the court did not even bother to look into the factors behind the amendment of the ordinance. Yet it must have been plain that the reformulation of the controversial clause was hardly inspired by mere whim. In the eyes of the law, however, that seemed to make no difference.

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39. FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY (1928) 149.

40. Cf. MOTT, DUE PROCESS OF LAW (1926).

41. Cf. Morstein Marx, *Comparative Administrative Law: A Note on Review of Discretion* (1939) 87 U. OF PA. L. REV. 954, 966, 973 *et seq.*

It may be of interest to discover whether the same dilemma is present in other national jurisdictions, more exactly, in those influenced by the traditions of continental administrative law.<sup>42</sup> If it is, has there been any attempt at evolving a solution? How satisfactory is the solution? Might it help us in meeting our own problem? These are the questions to concern us now.

## II

One way of outlining the approach of continental administrative law toward the difficulty here indicated is to give a general account of abstract rules. Another way is to present a picture of these rules in operation. No doubt a systematic exposition has its value. But the concrete setting of a representative case usually affords a better perspective. We take our illustration from the official reports of the Prussian Supreme Administrative Court.<sup>43</sup> In this instance, the controversy portrayed in the Louisiana case did not arise between a private enterprise and a public authority, but between a local government and the hierarchy of state agencies charged with the exercise of the police power. As will be seen, however, the legal situation was not influenced by the public character of the parties.

The City of *H* owned a parcel of land located in the rural municipality of *M*. The lot had been acquired because on it there was a spring from which the city drew part of its drinking water. Subsequently, the rural municipality decided to operate a quarry on ground it owned in the vicinity, no more than some 250 yards from the spring enclosure. Upon the city's remonstrance, the State Minister for Welfare<sup>44</sup> instructed the district prefect<sup>45</sup> to prohibit the operation of the quarry. The latter communicated the decision to the county prefect,<sup>46</sup> subordinate to him, who in turn informed the rural municipality that further use of the quarry could not be tolerated because of the danger to public health in the City of *H*. While the rural municipality might have carried the matter before the administrative courts, it took no steps against the ministerial decision within the period of time fixed

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42. For the essential unity of this body of law see Morstein Marx, *loc. cit. supra* note 10. Needless to say, we are dealing here with the legal pattern prior to its destruction by totalitarianism. It would hence be more accurate to put the questions that follow in the past tense.

43. 85 Entscheidungen des Preussischen Oberverwaltungsgerichts 283 (1929).

44. Unlike the normal functions of an American State Department of Welfare, the Minister was empowered to concern himself with this matter. His authority was not in doubt.

45. For his area the district prefect exercises the general police power of the state. On the functions of this officer see WELLS, *GERMAN CITIES* (1932) 22, 133-134; Morstein Marx, *Germany in LOCAL GOVERNMENT IN EUROPE* (Anderson ed., 1939) 223, 259.

46. The county is not only a unit of local government, but also a subdivision of state administration, being in this respect a part of the district area. See note 45 *supra*. On the functions of the county prefect see WELLS, *op. cit. supra* note 45, at 23, 134, 185 *et seq.*; Morstein Marx, *loc. cit. supra* note 45, at 252, 259.

by statute for bringing action. Instead, at a later date, it submitted to the county prefect a request for reconsideration of the question by the higher authorities. The request was accompanied by an explanatory memorandum setting forth the municipal interest in utilizing the quarry; it also contained specific suggestions for measures which the municipality was willing to take in order to safeguard the purity of the spring water.

Although the county prefect proved amenable to this proposal, it was rejected by the district prefect who felt that there was not sufficient reason for initiating a ministerial reconsideration. He pointed out, however, that he would assume a different attitude if the rural municipality could secure a change in the advisory opinion prepared for the Minister for Welfare by the State Institute of Public Hygiene, either by asking a geologist of the Institute to reexamine the site or by supplying an additional advisory opinion from another geologist. In transmitting this reply to the municipal council, the county prefect added: "I must leave it to your discretion to follow one or the other alternative. Without such a further exploration, I would not know how a change of the ministerial decision could be achieved. For the time being, my earlier communication concerning the prohibition of the operation of the quarry must remain effective."<sup>47</sup> Now the rural municipality brought action. It had no success before the lower administrative court, but on appeal the contested decision was annulled.

The Supreme Administrative Court dealt first with the formal grounds on which the action had been dismissed. The lower court had declared plaintiff to be barred by laches. The earlier administrative decision could no longer be attacked because plaintiff's right of action had expired; and the county prefect's subsequent reference to the earlier decision was not a new decision opening up a new opportunity of judicial redress. With this view the appellate court took issue: "In the case at hand, the facts fail to sustain the inference that nothing more is involved than the repetition of an administrative act. The Supreme Administrative Court has consistently adhered in its decisions to the principle that the party affected by an administrative act creating a permanent legal condition is entitled at any time to demand the revocation or modification of this act when its factual presuppositions have in the meantime changed in such a way that the previous danger justifying police measures appears removed."<sup>48</sup> Citing precedents,<sup>49</sup> the court restated the rule as follows: "If a demand of this kind is rejected

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47. 85 Entscheidungen des Preussischen Oberverwaltungsgerichts 283, 284 (1929).

48. *Id.* at 284-285.

49. 15 Entscheidungen des Preussischen Oberverwaltungsgerichts 413 (1887); 29 Entscheidungen des Preussischen Oberverwaltungsgerichts 429 (1896).

by the police authority, the rejection must be regarded as a new administrative act, which brings into being an independent right of action."<sup>50</sup> We may note in passing that French administrative justice has likewise come to recognize an independent right of action against confirmatory orders whenever the aggrieved citizen was able to point to a new factor which had not been present originally.<sup>51</sup> Here, as there, the adjustment in favor of the individual interest affected was accomplished, not by legislation, but by judicial decision.<sup>52</sup>

However, had not the district prefect in his response to the request of the rural municipality plainly intimated that his position was predicated on the absence of any change in the situation? Had he not rather hinted at some practical way of working toward such a change? The Supreme Administrative Court took the opposite position: "The [earlier] prohibition of the operation of the quarry was issued because the police authorities were fearful that [in the course of its operation], and owing to the geological formation of the ground, substances dangerous to public health might penetrate into the water supply system of the City of *H*. In its later request, however, the rural municipality has proposed to remove this danger [by specific arrangements] which it declared itself explicitly willing to provide. It has repeated this offer before the court, adding that it would forbid its workers to do anything that might impair the quality of the spring water, and that it would put up posters prohibiting any trespassing by others. The offer thus made represents a new circumstance, having an immediate bearing upon the appraisal of the situation; consequently, the police authorities were under an obligation to review the situation again, and to issue a new order on the basis of the implied request for revocation of the permanent prohibition of the enterprise."<sup>53</sup> In countering merely with suggestions for further steps to be taken by plaintiff, the police authorities, notwithstanding their good intentions, had failed to do their duty.

In the elaboration of the court, "Any one affected by an administrative act establishing a permanent state must be regarded as justified in demanding its revocation not only when the original danger has ceased to exist on account of a change of factual conditions, but also when by a method other than that applied in the order the danger can be removed effectively, provided that he be ready and able to make use of the other method. If the elimination of the danger is insured, the purpose underlying the exercise of the police power will be accomplished with equal effectiveness in either case. The police authorities

50. 85 Entscheidungen des Preussischen Oberverwaltungsgerichts 283, 285 (1929).

51. Cf. HAURIU, PRÉCIS DE DROIT ADMINISTRATIF ET DE DROIT PUBLIC (12th ed. 1933) 415.

52. Delacour case, 98 Recueil des Arrêts du Conseil d'État 836 (1928).

53. 85 Entscheidungen des Preussischen Oberverwaltungsgerichts 283, 285 (1929).

are not empowered to insist on the means chosen by them for all time simply because the period during which action was required to be brought has expired. If they refuse to sanction another means of meeting the danger, the refusal must be treated as a new administrative act, itself subject to litigation. The sole controlling consideration in the exercise of the police power must always be the question whether or not the objective in eliminating the danger is reached. Hence it is legally one and the same thing if the new means offered in the face of an order creating a permanent situation results from scientific or technological progress, or if the aggrieved party suggests a means which was known to it before but which has occurred to it only afterwards as the fruit of a more thorough analysis of the whole matter."<sup>54</sup> In other words, ignorance or lack of imagination cannot be charged to the aggrieved party's account. Even if the party comes to court belatedly, having been slow in finding a less burdensome means, it will obtain a hearing and may secure a remedy.

On the substantive aspect, the court did not deny the power of the police authorities to prohibit the operation of the quarry in so far as that would appear necessary for the protection of public health.<sup>55</sup> However, "in doing so, they must take into consideration the legal institution of property which carries with it the conceptual implication that the owner is free on principle to use his property as he sees fit, in particular, to utilize it for economic purposes in accordance with prevailing standards. On the other hand, this freedom finds its limitation in the maxim that the doings of the owner may not result in injury to the public interest. Those charged with the exercise of the police power must therefore raise the question in each individual case whether or not property rights are made use of in a manner transcending the bounds of a social order dedicated to the common welfare."<sup>56</sup> Or, as the Weimar Constitution of 1919 expressed it, "Property implies duties. The use to which it is put shall also be of service to the welfare of all."<sup>57</sup> And the reenforcement of the obligations of property is one of the main tasks of the police power.<sup>58</sup>

54. *Id.* at 285-286.

55. Without error, the court declared this power to be founded upon general legal principle, disposing simultaneously of the notion that the Prussian Water Act of April 13, 1913 (GESETZSAMMLUNG 53) might offer a supplementary justification, since the Water Act reserved action only for the private interests adversely affected by unlawful exercise of property rights. 85 Entscheidungen des Preussischen Oberverwaltungsgerichts 283, 286-287 (1929).

56. *Id.* at 287.

57. Art. 153, ¶ 3. Whether this constitutional provision had the character of an immediately applicable legal rule, or whether it rather addressed itself to the legislative branch as a guide of policy was a matter of debate among the jurists of the republican period. Cf. ANSCHÜTZ, DIE VERFASSUNG DES DEUTSCHEN REICHS (14th ed. 1933) 721.

58. As John Dickinson put it in his argument before the Supreme Court in *Carter v. Carter Coal Co.*: "The liberty which our Anglo-Saxon ancestors have fought to

Applying these propositions, the court held that "the original measures of the police authorities against plaintiff were wholly within the law. It is true the utilization of the parcel of land in question as a quarry undoubtedly falls into the scope of normal use. An enterprise of this kind, however, leads inevitably to [conditions] which may have effects upon the purity of the spring water. The earlier statements prepared by experts in connection with the case now before the court are agreed on the fact that because of the geological character of the ground, injurious substances are most likely to impair the quality of the drinking water, be it at present, be it in the course of further operation. In the circumstances, the operator of the quarry must be held accountable for encroaching upon the public interest . . . It accords with this consequence that § 202 of the Water Act<sup>59</sup> . . . enjoins the owner from putting into the ground any substances that would enter a subterranean flow of water to the disadvantage of others. In view of the situation the police authorities were empowered to take steps against an enterprise which interfered with public safety and order."<sup>60</sup> Indeed, the boundary of rightful use calls for public vigilance.

Nor did the court condemn the original choice of method. "In the initial phase, even the complete prohibition of the operation was no inappropriate means for preventing the danger anticipated. Nevertheless, that applied . . . only so long as the entrepreneur did not make any effort to bring his enterprise in harmony with the generally recognized postulates of public hygiene, and thereby remove the obstacles which from the viewpoint of public safety stood in the way of a utilization of his property—a utilization in itself lawful. Plaintiff has made such an offer, declaring its willingness to provide for [arrangements] to satisfy the requirements of public health. Plaintiff is also prepared to implement these arrangements by [additional precautions] and by supervision at the site. If permission were given to carry out the specified measures, the result in the opinion of this court would be an elimination, not of every possibility, but of the tangible probability of ill effects upon the drinking water. Beyond that, the police power may not be invoked. In the light of public safety, the operation of the quarry under the described stipulations would represent an orderly form of property use which the legal system guarantees the owner. As plaintiff has stated without being contradicted, the quarry has been fenced off and is no longer accessible to any one but the workers.

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maintain for 50 generations has been liberty under law, and law means regulation." SEN. DOC. NO. 197, 74th Cong., 2d Sess. (1936) 15.

59. See note 55 *supra*. The court used this illustration only as a suggestive parallel, but not as a basis for the exercise of the police power.

60. 85 Entscheidungen des Preussischen Oberverwaltungsgerichts 283, 287 (1929).

Should some prowler climb across the fence and cause damage to the spring, plaintiff could not be looked upon as responsible. Finally, since the expert opinion of Professor G. suggests that the operation of the quarry might not only impair the quality of the drinking water but possibly also lower the capacity of the spring, it must be pointed out that this contingency is not a matter of public law, and therefore cannot be considered here."<sup>61</sup> It is familiar doctrine that the police power may not attempt to substitute for private litigation.<sup>62</sup> The City of *H* would be forced to sue if it wished to protect its property rights.

The court concluded, "For the reasons put forth, the contested measure, by reaffirming the complete closing of the quarry, went beyond the scope of what was necessary in the interest of public safety. It therefore must be rescinded. It will be the task of the county prefect to advise the rural municipality, on the basis of this decision and in cooperation with the county physician, as to the safe conduct of operation, and to make certain that the enterprise conforms with the requirements of public health, if necessary, by issuing either an order or an ordinance. Should the City of *H* deem it desirable to protect itself against the conceivable curtailment of its water supply or to prevent the actual occurrence of the more remote possibilities of an impairment of the quality of its drinking water, it can avail itself of the opportunity of obtaining the necessary guaranties either through agreement or [in other ways]."<sup>63</sup> But such marginal interests would not lend themselves to a defense by the state's police power. It would be necessary for the city to proceed in its own name and on its own right.

Two factors incidental to our main theme stand out in this decision with sufficient clarity to warrant a special word of comment. In the first place, it is worth noting that the Supreme Administrative Court saw no reason for concerning itself with one interesting feature of the case, namely, the fact that the prohibition of the operation of the quarry rested essentially on ministerial instruction of the state's field authorities. But the court was entirely right in not considering the minister's

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61. *Id.* at 287-288.

62. On the former scope of jurisdiction of the German administrative courts, as contrasted with that of the "ordinary" judiciary, cf. Uhlman and Rupp, *The German System of Administrative Courts: A Contribution to the Discussion of the Proposed Federal Administrative Court* (1937) 31 ILL. L. REV. 847, 1028. On France (under the Third Republic) cf. Riesenfeld, *The French System of Administrative Justice: A Model for American Law?* (1938) 18 B. U. L. REV. 48, 400, 715. Cf. also FRAENKEL, *THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* (1941); Morstein Marx, *loc. cit. supra* note 10. On the present status of German administrative justice cf. Morstein Marx, *The Effects of the War on the Government of Germany in Government in Wartime Europe* (Zink and Cole ed., 1941) 74, 79; Morstein Marx, *Book Review* (1941) 54 HARV. L. REV. 1264.

63. 85 Entscheidungen des Preussischen Oberverwaltungsgerichts 283, 288, 289 (1929).



order, for, as the head of a central department charged with the protection of public health, he too was bound to observe the limitations surrounding the exercise of the general police power. His status as a member of the State Cabinet did not place him in a separate category. It is altogether probable that he would have been disinclined to alter his original instruction if the district prefect had submitted to him the subsequent request of the rural municipality, since that request did not undertake to disprove the danger to public health. But even if the Minister for Welfare himself had reaffirmed the prohibition, the legal consequences would have remained the same. Though largely recruited from the government career service, the life-appointed administrative judiciary was assured of its institutional independence, and therefore free from hierarchical pressures which might emanate from the State Cabinet.<sup>64</sup> Minister or prefect, both were required to acknowledge the borderline of law. There could be no sanctity about ministerial instructions.

On the other hand, the decision of the Supreme Administrative Court demonstrates a considerable amount of sympathetic appreciation of the administrative situation presented in the case, as contrasted with the legal questions posed by it. Instead of expounding the law with divine aloofness from the practical effects flowing from it, the court felt impelled to offer specific guidance with regard to the further handling of the issue. The county prefect was urged to render assistance to the rural municipality in meeting the requirements of public health in the operation of the quarry. He was reminded that the decision did not relieve him of his responsibility as the state's exponent of the general police power. It would be necessary for him to make a decision with reference to the necessity of additional safeguards to be provided under his authority. He would also be required to watch for any conceivable change of circumstances that might put the matter in a different light. Such a change of circumstances could conceivably lead to a complete reappraisal of the danger to public health, and to that extent make the court decision virtually obsolete. Similar words of counsel were addressed to the city anxious to preserve the quality of its drinking water. Thus one may say that the court tried consciously to give adequate emphasis to the interests which shaded into the case. More than that, it projected its decision into the administrative situation without forcing an undesirable definiteness upon the parties in litigation. It showed itself aware of the flux of relevant conditions and predicated its judgment upon it. It did not claim the last word, binding for all time to come. The administrative insight

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64. On this point compare the authorities cited note 62 *supra*.

of the bench, typical of continental administrative justice,<sup>65</sup> sharpened the court's sense of judicial relativity. It saw its task as that of a link in a longer chain.

Aside from these incidental points, however, the decision introduces a new element into our discussion by exemplifying the so-called Rule of the Mildest Means. In the exercise of the police power, public authorities are entitled to commit themselves to any appropriate method, but they must yield to an alternative equally appropriate, though less onerous to the aggrieved party, provided the latter proposes such an alternative. The significance of the second case here reviewed<sup>66</sup> lies not only in the fact that it gives expression to the Rule of the Mildest Means, but also in the application of this rule to a factual setting which in essence had not changed, except for the proposal of a less burdensome method of satisfying the public interest. For the development of German administrative law, the second aspect was more important, since it brought with it a measurable expansion of a principle which had crystallized much earlier.<sup>67</sup> For our purposes, the decision is instructive primarily as a conspicuous manifestation of the principle itself. It will be useful to investigate its implications a little more closely. This we shall attempt to do in the next section.

### III

As Hauriou remarks with subtle irony, "Even in the exercise of the police power, the end does not justify the means."<sup>68</sup> Nevertheless, the end often dictates the means. On the other hand, no less often will there be a competition of appropriate means for recognition by the governmental authority called upon to remove an encroachment upon the public interest. If the means chosen is appropriate in a legal sense, it would pass the judicial test on that count alone. Yet one appropriate means may rest more heavily on the individual affected than another means also appropriate. Has the individual a legal claim to the means less onerous? The question is rarely raised in this form by American courts. Continental administrative law not only keeps the question in focus but also offers an unequivocal affirmative reply.

One may notice, however, a certain difference in the French and the German approach—a difference more in nuance than in content. The administrative law of Republican France stressed the freedom of the individual in selecting an appropriate means for the elimination of

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65. It will again be sufficient to refer to the authorities cited note 62 *supra*.

66. 85 Entscheidungen des Preussischen Oberverwaltungsgerichts 283 (1929).

67. Cf. Drews and Lassar, *Allgemeines Polizeirecht* in 2 VON BRAUCHITSCH, VERWALTUNGSGESETZE FÜR PREUSSEN (22d ed. 1932) I, 101.

68. HAURIOU, *op. cit. supra* 51, at 550.

a danger to the public which he had caused through his conduct. It was the function of the proper authorities to take cognizance of the danger and to determine its nature. But in their order addressed to the responsible individual, they would confine themselves to demanding the removal of the interference, without prescribing a specific means. In so far as the means chosen by the individual might prove inadequate, the obnoxious state would continue to exist, making it necessary for the authorities to press for further steps. On principle, however, the initiative for selecting the means could not be taken from the individual.<sup>69</sup> We may regard this doctrine as an illustration of the broader conceptions underlying French administrative law, of which Mestre has justly said that "it appears founded on the prerogative of the individual."<sup>70</sup>

The Rule of the Mildest Means, as evolved in the judicial consolidation of German administrative law, starts with the same premise. In Jellinek's words, "The prohibition of any excess in the exercise [of the police power] leads to the important principle that the choice among several means of equal effectiveness from the official point of view must be left to the individual affected."<sup>71</sup> Needless to say, the principle is intertwined with the wider problem of the appropriate means. As early as 1886, the Prussian Supreme Administrative Court defined the limits of the police power in a way suggestive of the Rule of the Mildest Means. A retail store in a rural community had sold and offered for consumption on the premises liquor and beer without the required permit. After the owner had been convicted several times, the police authority informed him that in case of any further violation the store would be closed. The court quashed the order, referring the police authority to stricter vigilance as the proper means.<sup>72</sup>

In a similar case, plaintiff intended to enclose his property adjoining a public road with a fence. Some of the fence posts had been set into ground until then used by pedestrians as part of the road, though actually belonging to plaintiff's property. Because after dark people unaware of the construction were in danger of colliding with the posts, the police authority ordered the posts to be removed. Rescinding the order, the court said, "The police measures must aim at the elimination of dangers arising from the construction of an enclosure which in itself does not conflict with the law; they may not go

69. Vial case, 79 *Recueil des Arrêts du conseil d'État* 30 (1909); cf. also HAURIUO, *op. cit. supra* note 51 at 552-553; Note (1909) 3 *SIREY* 113.

70. MESTRE, *I Limiti del Sindacato Contenzioso nei Riguardi degli Atti dell'Autorità Amministrativa* in 2 *STUDI DI DIRITTO PUBBLICO IN ONORE DI ORESTÈ RANELLETTI* (1931) 133, 142.

71. JELLINEK, *VERWALTUNGSRECHT* (2d ed. 1929) 423.

72. 13 *Entscheidungen des Preussischen Oberverwaltungsgerichts* 424, 426 (1886).

so far as to prohibit the construction." 73 Instead of demanding the removal of the fence posts, defendant should have insisted on adequate lighting of the site by the owner.

In sharpening the official conscience, the Prussian Supreme Administrative Court has repeatedly exhorted police authorities to refrain from "shooting sparrows with cannon balls." 74 When setting aside a restriction imposed without a time limit although a temporary restriction would have achieved the end, the court declared, "The police agency, in meeting a danger, prevention of which was within its power and even its duty, has resorted to a means which exceeds the scope of what was necessary." 75 In the same vein, judicial sanction was withheld from the prohibition of the public playing of a tune to which some people had come to sing a politically offensive text. 76 The correct alternative would have been to turn against those singing the insulting version. Other decisions, still more germane for our topic, underscored the proposition that the police power should not strike like lightning, but fit itself rationally into the complex processes of modern society, especially economic relationships. Before the police power be exercised, the public authorities would be required to familiarize themselves thoroughly with the situation which called for readjustment in the common interest.

In one case, for example, plaintiff had been ordered to lower the water level of a dammed-up reservoir which he used for industrial purposes. The measure was to make possible a cleaning of the brook bed below. However, "according to the contents of its official files placed before the court, the police agency has done nothing to give due consideration, as far as possible, to those of plaintiff's interests here involved. It has failed to get in touch with him prior to issuing its order, nor has it in this matter communicated with him at any time." 77 In the circumstances, the order could not be upheld. In another case, the court enunciated identical standards in an even more exacting formulation: "The police agency was under an obligation to examine and determine the extent of the restriction required for the elimination of the danger to public health. It was required to consider objectively plaintiff's special industrial interests in the light of the interests of the public. In order to achieve an accommodation of the two conflicting interests—both entrusted to its proper care . . . it was neces-

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73. *Id.* at 426, 428.

74. FLEINER, *INSTITUTIONEN DES DEUTSCHEN VERWALTUNGSRECHTS* (8th ed. 1928) 404.

75. 75 *Entscheidungen des Preussischen Oberverwaltungsgerichts* 339, 343 (1920). The same conclusion is reached in 78 *id.* at 267, 270 (1923).

76. 80 *id.* at 176, 191 (1925).

77. 51 *id.* at 284, 289 (1907).

sary for it to inquire into these interests before issuing its order.”<sup>78</sup> Of course, once the duty of conscientious exploration of all the facts influencing the administrative act is legally acknowledged, the Rule of the Mildest Means need not await formal remonstrance on the part of the aggrieved individual.

Moreover, the legal interest which qualifies him to raise the demand for the least burdensome means need not rest on ownership. Thus, in one case, the police authority required the removal of a shack-like building because it had been found unfit for dwelling purposes. Only one person lived in it. The owner was willing to comply with the order, but the single tenant objected. Bringing action, he declared himself prepared to carry out all changes and repairs necessary in order that the building conform with legal standards. The court sided with him. It held that a building which can be made inhabitable by modifications of its structure may not be ordered torn down if a serious offer is made to eliminate the existing danger to the occupants. In this matter, the tenant would be able to proceed of his own right. Consent to the demolition on the part of the landlord could not impair the right of the tenant. The only legitimate concern of the police authority was with an effective method of barring the danger. It was not empowered to specify a method more disadvantageous to the tenant than the equally appropriate one proposed by him.<sup>79</sup>

On the other hand, in specifying such a method, the individual was not limited to the choice of a means which objectively appeared milder as compared with that originally chosen by the public authority. He was free to base his selection on an evaluation of his interest as a whole, independent of the factors which properly entered into the exercise of the police power. If a building, for example, proved unsafe for habitation so that extensive repairs were unavoidable, the landlord was entitled to make a decision with regard to the desirability of maintaining an unprofitable investment. Should he prefer to rid himself of it by having the building torn down, he was not blocked from proposing, as an alternative to carrying out the repairs, the complete eradication of the structure, although this would normally be the more far-reaching means of removing the danger. If the tenants failed to come forth with a counterproposal for financing the repairs jointly, the police authority would be forced to accept the landlord's method, leaving it to him to settle his legal accounts with the tenants.<sup>80</sup>

The court's reasoning in coping with this issue deserves fuller quotation: "In removing a state injurious to the public interest, it is

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78. *Id.* at 313, 314-315.

79. 77 *id.* at 464 (1922).

80. 78 *id.* at 431 (1923).

an established legal rule that the police authority, should there be several means of eliminating the danger, must choose among those promising sufficient effectiveness the one which is least onerous to the individual affected. Which of the several means weighs least heavily on him is a question of fact, indeed, a question of a subjective character. In any event, the method which the individual concerned is himself ready to select should be deemed equivalent to another conceivable method, at least from a subjective point of view, so long as it is suitable objectively for the removal of the danger. Among equivalent means, however, the individual responsible for the injurious state must retain free choice. It is not permissible that the police authority under such conditions prescribes the application of only one method, and at that the method which he himself considers the more burdensome. In eliminating a state of danger resulting from the dilapidated condition of a building occupied for dwelling purposes, the appropriate means, aside from a restoration of the building, may be either the evacuation of the endangered apartments, if not the whole house, or the complete demolition of the structure. Consequently, the police authority had the duty, in order to meet the danger emanating from the defective chimneys, to concede plaintiff the choice between the repair of the chimneys, which was the preference of the police authority, and tearing down the building, which plaintiff preferred to do."<sup>81</sup>

Here, as so often occurs in the determination of the appropriate means, the method specified by the public authority was neither arbitrary nor unreasonable in a technical sense. In fact, the official preference was supported by persuasive considerations. The housing agency, eager to preserve the available dwelling space at a time of acute shortage, had naturally favored repairs. It had successfully impressed its view upon the police authority. From the vantage point of the housing agency, both evacuation and demolition were distinctly at variance with the public interest entrusted to it. Yet the housing law encompassed no special power under which a landlord might be compelled to abstain from tearing down a residential building. In the absence of such special power, however, the public interest closest to the housing agency could not validly be projected into the exercise of the general police power. Being unrestricted by law in the alternatives of his own decision, the individual affected remained the master of his choice. There was nothing improper in the housing agency's indication of its official interest in the matter, but recognition of this interest could be granted only within the canons governing the exercise of the police power, and the Rule of the Mildest Means was one of them.<sup>82</sup>

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81. *Id.* at 433-434.

82. *Id.* at 434 *et seq.*

Having traced some of the more important implications of the Rule of the Mildest Means, we may suggest a few general conclusions in the remaining pages. That will involve to a certain extent a return to our point of departure.

#### IV

The great body of continental administrative law has not been the product of systematic legislation, but of judicial inventiveness and adjustment. It originated as judge-made concepts and solidified around precedents.<sup>83</sup> In its character and its organic growth, it offers an interesting parallel to the evolution of our Anglo-American common law. Yet it reflected a difference both in spirit and orientation. That difference was the immediate result of the channels of communication between administrative justice and administrative practice. True enough, administrative courts were far from being mere appendages of the executive power. Their independence was guarded by institutional autonomy. But on the bench one found experienced administrators who were equally well groomed for the law. Their intellectual freedom was buttressed by guaranties of status. In the exercise of this freedom, however, they were able to rely on their intimate familiarity with the administrative process. At the same time, they remained conscious of the fundamental task of administrative justice, which is "judicial protection against administrative power."<sup>84</sup>

The Rule of the Mildest Means is an illustration of the tendencies that permeated continental administrative law. Its recognition emanated from the inner validity of its practical justification. It achieved definitive form in a series of judicial decisions, with the Prussian Supreme Administrative Court in the leading role and the highest administrative courts of the other German states in that of the supporting cast. In fact, even the "basic concept of the scope and limitations of the police power was not contained in the written law"<sup>85</sup>—in sharp contrast to the continental tradition of codification dominating other legal spheres. For Prussia, the sole foundation of the police power as elaborated by the Supreme Administrative Court was a single clause, broad in formulation, embodied in the General Code of 1794.<sup>86</sup>

Only in 1931 did the legislative branch embark upon a formal enactment of the principles controlling the exercise of the police power.<sup>87</sup> Section 41 restated the Rule of the Mildest Means as fol-

83. For a fuller discussion compare the authorities cited note 62 *supra*.

84. I RUCK, SCHWEIZERISCHES VERWALTUNGSRECHT (2d ed. 1939) 157.

85. Drews and Lassar, *Allgemeines Polizeirecht* in 2 VON BRAUCHITSCH, *op. cit. supra* note 67, at 1.

86. Section 10, pt. II, tit. 17.

87. Prussian Police Administration Act of June 1, 1931, GESETZSAMMLUNG (1931)

lows: "(1) Police orders, unless they are based on a police ordinance or a special statute, are valid only in so far as they are required for the removal of a disturbance of public safety or order, or for the elimination of a danger to public safety or order arising from a concrete situation. (2) If several means are available for the removal of a disturbance of public safety or order, or for the effective elimination of a danger [in the above sense], determination of one of these means by the police authority suffices. As far as possible, the means least burdensome to the individual affected and to the public must be chosen. At his request, the individual affected must be permitted to use another means of his own choice, provided the danger can be eliminated through it equally effectively. Rejection of his request is to be considered a new police order." The legislature had ratified the improvisations of administrative justice.

Since the statutory provision refrains from stipulating any specific time at which the request for a less onerous method must be presented to the police authority, it upholds the judicial rule laid down by the Supreme Administrative Court in the second case.<sup>88</sup> As an authoritative commentary puts it, "If the individual confronted with an officially designated means seriously offers another means equally effective but for him more convenient, it is the duty of the police authority to choose this means should it be proposed before the order is issued, and to change the order should the offer occur afterwards. It is necessary, however, that the offer is not only possible, but is also actually made."<sup>89</sup> The burden of its execution, of course, falls on the individual. But the police authority is neither compelled nor entitled to assume that there will be a satisfactory execution. The final test for the adequacy of the means proposed is the elimination of the interference with the common interest. Should the means fall short of this expectation, further steps must be demanded. To that extent is the individual's free choice of an alternative at his own risk. He cannot be heard with the argument that, after all, he has "done something" to satisfy the requirements of the public order.<sup>90</sup>

Perhaps the most significant aspect of the Rule of the Mildest Means lies in its capacity for automatic operation, so to speak; that is to say, it relieves the legislative branch of the difficult, if not impossible, task of specifying the method for the accomplishment of a policy

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88. 85 Entscheidungen des Preussischen Oberverwaltungsgerichts 283 (1929). See p. 276 *supra*.

89. Drews and Lassar, *Allgemeines Polizeirecht* in 2 VON BRAUCHITSCH, *op. cit. supra* note 67 at 101.

90. It is worth recalling that these considerations did find recognition in *Morford v. Board of Health of Asbury Park*, 61 N. J. L. 386, 39 Atl. 706 (1897). See p. 273 (1939). See p. 268 *supra*.



purpose, without encouraging simultaneously an uncontrolled discretion for administrative determination of the method. Even the absence of any legislative suggestion as to the means to be applied cannot result in administrative "despotism", for it is peculiar to the rule that it is ubiquitous and inherent in the very character of the police power. Its rational foundation must be seen in the axiom basic to constitutional government that in the face of individual right, the administrative command can force subordination only in the name of public necessity. This necessity is not simply to be imputed into an act which issues from governmental authority. The necessity must be demonstrable in terms of facts and reasons. It follows that the compulsion of necessity may not widen its span as a result of the method chosen for the restoration of a state of law. The means is here the servant of the end. It is not entitled to exactions for its own sake.<sup>91</sup>

As the Rule of the Mildest Means relieves the legislature, so does it also serve to shorten the court docket. In referring the police power to the need for inquiry into the interests affected by its exercise, the rule tends to minimize the frequency of litigation. Conference procedure has proved its benefits in crucial areas of government regulation.<sup>92</sup> When the public interest conflicts with that of the individual, it appears sensible to provide the individual with a chance of pondering the infringement of the legal order which he has caused, and to give him an opportunity for assuming a share in designing a method which would remedy the situation. Power thus cloaks itself with the symbols of consent. In doing so, it gains a deeper authority and secures more genuine deference. There is less likelihood of quarrel when alternatives are sought out and thought through with an eye to their effectiveness. "The most stringent means can only be the last resort."<sup>93</sup> Since the individual has good reason for avoiding it, he is likely to exert himself more strongly in giving effect to a method that calls for less.

The Rule of the Mildest Means transfers the immediate responsibility for public safety and order from the legislative body to the administrative agency. This accords entirely with the inner logic of our problem. A purely legislative solution is impossible of attainment. If the legislative formula were specific, it would be too narrow and too inflexible to attain its purpose. The first case<sup>94</sup> made that painfully evident. If, on the other hand, the legislative prescription were

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91. For a good discussion of this point on the basis of German administrative law cf. JELLINEK, *GESETZ, GESETZESANWENDUNG UND ZWECKMÄSSIGKEITSERWÄGUNG* (1913).

92. GELLHORN, *FEDERAL ADMINISTRATIVE PROCEEDINGS* (1941) 54 *et seq.*

93. FLEINER, *op. cit. supra* note 74 at 404.

94. *City of New Orleans v. Southern Auto Wreckers*, 193 La. 895, 192 So. 523 (1939). See p. 268 *supra*.

general and noncommittal with regard to the detail, as it normally is, it would fail to offer any tangible check upon administrative exuberance and irrationality. It is plain, then, that the issue by its very nature gravitates toward the level of policy enforcement rather than that of policy making. The Rule of the Mildest Means provides an implicit standard for the operation of the police power on the administrative plane. It looks toward the individual case. It calls for a weighing of those interests which overshadow each given dispute. It affords a yardstick for adjusting concrete situations. Its superiority over general criteria springs from its character as an individualizing device.

American courts, on the whole, have been prone to press upon the conduct of administrative business formal, if not formalistic, conceptions which have created more confusion and bewilderment than certainty and predictability.<sup>95</sup> Yet it is also true that this predisposition was inspired, at least in part, by the slow and incomplete emergence of implicit standards of administrative legality.<sup>96</sup> Perhaps it is not an extravagant assumption that judicial review will take a more constructive turn as these implicit standards are increasingly observed in the practical work of government agencies. In such a perspective, the Rule of the Mildest Means may prove deserving of further thought.

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95. Cf. Hart, *Judicial Review of Administrative Action: A Thesis* (1941) 9 GEO. WASH. L. REV. 499.

96. Cf. Morstein Marx, *Comparative Administrative Law: A Note on Review of Discretion* (1939) 87 U. OF PA. L. REV. 954.