AIR POLLUTION
EXPANDING CITIZENS REMEDIES†

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"Apparently, in this strange country we just continue practices which injure our neighbors until enough people get mad and make us quit."
Vannevar Bush, Pieces of the Action 12 (1970)

I
INTRODUCTION

"Like a breath of fresh air" goes the expression. It may soon be necessary to replace that expression with "as filthy as the air."

Air pollution contaminates persons and property causing damage totalling billions of dollars, as well as taking a huge toll as a psychological depressant and efficiency drain.[1] Recent focus on air and other pollution has produced predictions of environmental holocaust. Prophets of doom argue that population expansion may destroy man as a race.[2] Some reformers argue for birth control and severe limitations on the birth of additional children. Expanding population is said to be "polluting" in itself, threatening not only the human and animal habitat but the vitality of the human spirit. Thus, persons concerned with ecology urge preservation of open space areas for man, animals, and plants necessary or helpful to the regenerative cycles which sustain life.

Some are not so pessimistic as to forecast nature's day of judgment. Biologist Rene Dubois in common with the doomsday prophets recognizes that unlimited economic growth may be incompatible with continued human life. But he finds inherent limits on population expansion and the amount of goods that can be produced. Confirming a fundamental faith in the adaptability of man and his institutions to the challenge of the environment, he finds that man will draw a line short of his own extinction.[3]

Those concerned with environmental catastrophe have had occasion to review the automobile. Auto exhaust causes at least 60% of the air pollution in major cities.[4] Some feel that the internal combustion engine is

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[1] *See, e.g.*, Comment, *Regional Control of Air and Water Pollution in the San Francisco Bay Area*, 55 CALIF. L. REV. 702, 703-04 (1967) and note 45 *infra*.

[2] *See generally* P. EHRLICH, POPULATION BOMB (1968).

[3] Lecture at Florida State University Lecture Series by R. Dubois April 14, 1970; *see* Blakeslee, *Industry Urges to Seek Quality*, N.Y. Times, June 18, 1970, at 48, col. 1; Dubois, *The Limits of Adaptability* in THE ENVIRONMENTAL HANDBOOK 27 (1970).

[4] *See* Comment, *Regional Control of Air and Water Pollution in the San Francisco Bay Area*,

an inveterate polluter unsalvagable by a number of smog control devices.[5] They would call for a complete changeover to electric or steam, or an abandoning of the automobile itself.[6]

At stake, besides the future of man, is much of the conventional wisdom and folklore of capitalism, and the scientific and technological revolutions proceeding from the industrial revolution. We need not subscribe to the doomsday theory to see the questions implicit in this confrontation. Is there validity in the assumptions drawn from the Adam Smith economic model that if men pursue their own self-interest the public good will emerge?[7] What will be the cost in terms of environmental destruction if the continued multiplication of gross national product is the chief end of mankind?

II

THE NEED FOR LEGAL CONTROLS

At the outset, we ask whether industry is likely to allocate resources in an attempt to remedy pollution problems without external impetus. Historically, many questions of resource allocation have been determined by the federal government through the income tax, or to some extent by legislative and judicial decisions which place liability on industry.[8] Industry has generally responded to increased tax and liability by passing on substantial portions through increased prices.[9] The public response has gen-

55 CALIF. L. REV. 702, 709 (1967) citing a 1966 interview with D. J. Cauaghan, Bay Area Air Pollution Control District Officer in San Francisco who was referring to California's Bay Area air pollution.

Some estimates of the percentage of photochemical smog caused by automobile exhaust go as high as 90%. *See* Rheingold, *Civil Cause of Action for Lung Damage Due to Air Pollution of Urban Atmosphere*, 33 BROOKLYN L. REV. 17, 19 (1966-67).

[5] Bill #778 passed the California Senate banning the internal combustion engine in California after 1975. The bill did not get out of the Assembly Committee. *Cf.* Kennedy, *The Legal Aspects of Air Pollution Control with Particular Reference to the County of Los Angeles*, 27 SO. CALIF. L. REV. 373, 394 (1954) (implying that if the hazard to life and property were great enough autos could be banned).

But see 2 CCH CLEAN AIR AND WATER NEWS, No. 12 at 7 (March 19, 1970). A joint committee of the N. Y. Legislature considering a bill to ban the internal combusion engine after 1975 brought forward a statement from a spokesman for the oil industry. He said that an essentially pollution free engine could be developed before a feasible alternative vhicle could be effectively marketed.

[6] *See* V. BUSH, PIECES OF THE ACTION 213, 230 (1970) (Steam engine better—air pollution will ultimately force us to get rid of the internal combustion engine); H. STILL, THE DIRTY ANIMAL 201 (1967) (automobile itself with its internal combustion engine is obsolete).

[7] P. SAMUELSON, ECONOMICS 38 (6th ed. 1964) (Adam Smith found that each individual pursuing his own selfish good achieves the best good for all). While the Adam Smith model has been rejected at least in part by later economists, a good deal of the lore of it seems to remain. *Cf. id.* at 621-22 (rejecting the notion that the public interest is necessarily served by such model and arguing that even Adam Smith himself only would have argued that it was efficient in economic terms not that it necessarily achieved any other societal goals).

[8] *See generally* Green, *The Law Must Respond to the Environment*, 47 TEXAS L. REV. 1327 (1969).

[9] *See* R. NADER, UNSAFE AT ANY SPEED 167 (1965). The automobile industry tends to

erally been increased wage demands, and presumably some response through the political process, coupled with less effective complaints about the weather and letters to the editor. While the market provides some check through, for example, refusals to buy or shifts to alternative products, by and large, corporate decisions on allocation of resources and price may be subject to even less popular check than governmental decisions.

Given a wide latitude in decision making, business attitudes have varied in the exercise. "The public be damned" summed up one nineteenth century view of the responsibility of business to the public. Perhaps industry today cannot be as cavalier about some aspects of the public interest as this statement indicates. Many products today are relatively standardized and the emphasis turns more to consumer conditioning through advertising and attendant concern for corporate image. Professor Berle points out certain further limitations on the unfettered exercise of corporate decision making power. He points to corporate conscience, potential legal intervention through regulatory agencies and the danger that if corporate power is abused dramatically against a public consensus, additional legal intervention may occur.[10]

But corporate managers have wide discretion over which the public has no substantial check. Corporate power perpetuates and protects itself. Corporate use of Madison Avenue tends to mold a consensus through advertising image making and curtail a consensus from developing against it. Corporations also exercise considerable control over government. Corporate conscience, also, tends to be tempered if not directed by a built-in logic of ever expanding profits which is not always conducive to the public interest. Shareholder democracy as a potential check is, of course, a myth. There is increased awareness of the potential forum of shareholder meetings as a place to question decisions. But the separation of real control from shareholder ownership and the concentration of corporate power in the very few mitigates against any broad based democratic check through the existing structure.[11] We also have little access to information on why corporate decisions are made. No one representing the public interest is necessarily present when the decisions are made. Presidents of automobile

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absorb the billions required for restyling, but for improvement to control exhaust emissions they will have to "bill the public."

The costs of prevention of pollution are substantial and, if necessary, must be passed on to the ultimate consumer. *See* Renkin v. Harvey Aluminum, Inc., 226 F. Supp. 169, 172 (D. Ore. 1963).

10 A. BERLE, POWER WITHOUT PROPERTY 90-93 (1959).

11 *See* A. BERLE & G. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 124, 125 (1933); A. BERLE, POWER WITHOUT PROPERTY 74 (1959) (stockholders politely called "owners" exist on the condition they do not interfere with management).

See also A. BERLE & G. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY, 46 (1933) (as early as 1930 ultimate control of nearly half of industry in the hands of a few hundred men); A. BERLE, POWER WITHOUT PROPERTY 51 (1959) (small oligarchy of men controlling trust fund wealth will begin to exercise vote to control of shares).

companies may feel under no obligation to answer public questions about why it is necessary to pollute the environment. Perhaps some institutional or legal procedures should be developed whereby the public eye can be focused on the corporate decision making process.

Some would put the case against the corporations much stronger. Powerful interests resist pollution control overtly and covertly since they find pollution profitable and its remedy expensive.[12] In the context of the automobile and air pollution, Vannevar Bush, though generally friendly to corporate enterprise, finds the auto industry is "incapable of effective innovative cerebration." He notes the historical failure of the auto companies to even attempt to find out if there are better engines. He concludes that where a few companies make a single product, have no forceful incentive to change, and the cost of entry into the field is prohibative, no substantial innovation is likely.[13(a)]

Ralph Nader suggests that the automobile industry has ignored the problem of air pollution because of its own economic interest.[13(b)] Supporting this thesis, a leading economist has recently taken the position that industry has very little, if any, duty to remedy social problems, including pollution. The essense of this position is indicated in his title: *The Social Responsibility of Business is to Increase its Profits.* Pollution control costs money and does not normally increase profits. Hence, business has a duty, but that is to refrain from spending money for pollution control or other social problems.[14(a)] Nader further criticises the general indifference of the auto industry toward the social effects of its business. Photochemical smog discovered by Arlie Haagen-Smit was not only not defined by the auto industry, but the industry denied the relationship between exhaust and smog for several years.[14(b)] He also indicates that only when competition outside the auto industry created an exhaust control device did the auto companies surface with the one they had developed.[15]

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[12] *See* Reitz, *The Role of the "Region" in Air Pollution Control,* 20 CASE W. RES. L. REV. 809, 812 (1969).

[13(a)] *See* BUSH, PIECES OF THE ACTION 211, 228-230 (1970).

[13(b)] R. NADER, UNSAFE AT ANY SPEED 152-53 (1965) (Industry seems to have decided that cleaning exhaust neither reduces costs not increases sales so why do it?). *See also* VERLEGER & CROWLEY, *Air Pollution, Water Pollution, Industrial Cooperation and the Antitrust Laws,* in 4 LAND & WATER L. REV. 475, 480 (1969), implying that industry research to control pollution produces not a nickel more of profit and competition is no impetus, so "cooperation" within industry should be allowed.

[14(a)] *See* Freidman, *The Social Responsibility of Business is to Increase Its Profits,* New York Times, Sept. 13, 1970, (Magazine) at 32.

[14(b)] R. NADER, UNSAFE AT ANY SPEED 147-49 (1965) (The role of the auto in producing smog was found by Mr. Haagen-Smit who was outside the automobile industry — the industry itself felt no obligation to engage in research themselves or support outside inquiry).

[15] *See* ESPOSITO, VANISHING AIR 40-41 (1970); R. NADER, UNSAFE AT ANY SPEED 159-61 (1965).

The tactic was to delay the implementation until a higher profit margin could be gained on its sale.[16]

It has been suggested, on the other hand, that some companies are conscious of the social effects of their products and voluntarily spend large sums to mitigate the harm.[17] Unfortunately, this does not seem to be the prevailing pattern. It is also suggested that a "new breed" of corporate managers sensitive to the environment may be emerging or simply that it will be good business to protect the environment as part of corporate image building. Some trend may be recognizable but any really significant developments remain to be seen.

A recent antitrust complaint alleging suppression of technological development of smog control devices against the major automobile companies has highlighted the possibility of corporate irresponsibility in the field of air pollution. The complaint makes the following allegations: for at least the period from 1964 to 1967 the major automobile manufacturers were capable of installing smog control devices and agreed to delay their introduction.[18] Despite the fact that the companies were able to install the devices in 1966, they agreed to tell California regulatory agencies that exhaust auto pollution measures would be technologically impossible before 1967. Only under regulatory pressure made possible by competing device manufacturers not in the auto industry did they agree to a requirement that devices be installed in 1966. The complaint also alleged that the auto companies agreed to restrict publicity relating to research and development efforts concerning the motor vehicle as a pollution problem.[19]

The suit presents interesting alleged data. It may be surmised that a reason for settling on a consent decree was to avoid the unfavorable publicity.[20] If true, the allegations would indicate that some independent check on what is technologically feasible is necessary. That industry may not be worthy of complete trust in operating in the public interest seems supported. Regulatory agencies may not be able to take all statements of industry at face value as to what is technologically feasible. One reason alleged as to why the devices were suppressed was the desire for a higher profit margin before they were released.[21] This tends further to sup-

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[16] Lecture by Ralph Nader at Pitzer College, May 22, 1968, from typed transcript of tape recording at p. 2 (hereinafter referred to as the NADER LECTURE).

[17] Industry has come a long way voluntarily by the action of individual companies although they may well have acted in anticipation of government controls. *See* J. PERRY, OUR POLLUTED WORLD, CAN MAN SURVIVE? 176 (1967). Industry, with very few exceptions, will do the job and cooperate fully in air pollution abatement, if officials charged with abatement are honest and competent. Seamans, *The Mechanics of Legislative & Regulatory Action*, in NATIONAL CONFERENCE ON AIR POLLUTION 315, 316 (1963).

[18] Complaint, United States v. Automobile Manufacturers Ass'n, Civil No. 69-75-J.W.C. (C.D. Cal., filed January 10, 1969).

[19] *Id.*

[20] *See* ESPOSITO, VANISHING AIR 45 (1970).

[21] *See* note 16 *supra*, and accompanying text.

port the conflict between emphasis on ever-increasing profits—corporate greed if you will—and the public welfare. This action is discussed further in a later part of this article.[22]

In addition to the lack of innovation in terms of a major change of auto engines, there is no substantial independent check on what is technologically feasible. The present locus of major research in engineering also does not promote overpowering confidence in industry's statements about its lack of technological capability to cope with pollution. No substantial research exists in the universities on many aspects of automotive engineering. The schools turn out generalized engineers which feed into Detroit. The monopoly of technological information concentrated at Detroit makes it very difficult to have external sources call them to account for possible misrepresentations, delays, and suppression of technological developments.[23]

In summary, there are a number of reasons for pessimism about a *laissez faire* approach to environmental problems: the corporate emphasis on ever larger profits, the large unchecked area of discretion in management, the frustrating inability of the public to know where to bring about change, and the lack of substantial checks on industry's representations about its ability to comply with standards. Still, the rising tide of public sentiment seems to have been effective in bringing about a climate receptive to enactment of laws relating to pollution. Some have seen the only hope for meaningful and sustained enforcement arising out of an aroused citizenry.[24] That it will continue and be able to translate itself into real enforcement is problematic. Thus, without some interposition of legislative, judicial or other governmental action through coercion, incentives, or both, the corporate managers will probably not respond significantly to the pollution problem.[25] De-emphasis on profits and on ever increasing gross national product runs counter to much deeply embedded economic, religious, and psychological preconditioning of the American character. That a real change may come in this area is perhaps the real hope — and one about which it is difficult to be optimistic.

III

ADMINISTRATIVE AGENCY OR JUDICIAL APPROACH

If the public cannot rely upon industry to voluntarily counter pollution problems, what role should the courts play in resolving conflicts between

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[22] *See* notes 92-120 *infra* and accompanying text.

[23] *See* NADER LECTURE *supra* note 16, at 3, in support of this paragraph.

[24] *See* Reitze, *The Role of the "Region" in Air Pollution Control*, 20 CASE W. RES. L. REV. 809, 820 (1969).

[25] *See* Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 DUKE L. J. 1126, 1127 & n.4 (1967) (coal, steel and electrical power industries by strong opposition gained defeat of national uniform emission standards for specific pollutants in Air Quality Act of 1967).

the competing interests? In assessing the role of the courts, it may be helpful to look briefly at the legislative and administrative responses. Generally, legislatures have responded to pollution problems by setting up administrative agencies to set standards and police the problems. Some reasons for being pessimistic about the role of administrative agencies in the pollution context are:

(1) Access to and influence over administrative agencies may be so limited that they are controlled or rendered ineffective by the interests they regulate;[26]
(2) Agencies tend to be remiss in enforcement and without adequate sanctions in the event of violation;[27]
(3) Agency effectiveness may be hampered by delays in the administrative process.[28]

It is often conceded that administrative agencies have been taken over or rendered ineffective by the interests they seek to regulate.[29] It has been argued that administrative agencies *per se* are outmoded and unresponsive to the public needs. Often the heads of administrative agencies do not conceive their role as innovative forceful regulators, due to their own policy views, pressures from those on whom their jobs depend, general bureaucratic inertia, fear of making waves, inadequate financing and the like. Often when an agency official is innovative, industry is heard through the political processes it controls and the offender is removed. There is also a tendency for the officials of boards to go to work for the industry they regulate.[30] This process is not conducive to decisions which

[26] *See* Sax, *The Public Trust Doctrine in National Resource: Law Effective Judicial Intervention*, 68 MICH. L. REV. 473, 498 (1970): The author calls inequality of access to and influence over administrative agencies one of the very difficult problems of American government and low visibility decision making the most pervasive manifestation of the problem. A diffuse majority is made subject to the will of a self-interested and powerful minority which often has undue influence on the public resource decisions of legislative and administrative bodies and cause those bodies to ignore broadly based interests. *Id.* at 560.

[27] *See* Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 DUKE L. J. 1126, 1126-27 (1967) (state and local control programs with very few exceptions are non-existent, ineffective, or poorly enforced).

[28] A case study in agency ineffectiveness including a delay of at least 11 years and corporate obstinacy in relieving air pollution in West Virginia; *see* Kenworthy, *West Virginia Representative Tells of 11-year Struggle, Still Going on to Cut Pollution at Power Plant*, N. Y. Times, July 6, 1970, at 30, col. 1.

[29] *See* DOUGLAS, POINTS OF REBELLION 81 (paperback (... ed. 1970) (established interests control agencies); *cf.* N.Y. Times, April 19, 1970, at 47, col. 1-4. That article states that the Eckhardt bill in Congressional Committee would allow consumer class actions against manufacturers for fraudulent, unfair and deceptive practices. A committee of the American Bar Association opposed this and offered instead that after the Justice Department had successfully prosecuted an offender the F.T.C. be authorized to give damages. Congressman Eckhardt preferred his bill on the basis that Washington lawyers could plead over lunch to agency commissioners and "had ways" of influencing them, whereas class actions litigated in open court were not subject to such methods. *Cf.* Jaffee, *Going After the F.T.C.*, 5 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 192, 195 (1970) (growing conviction that direct judicial enforcement offers a greater potential than administrative process).

[30] *See* DOUGLAS, POINTS OF REBELLION 80 (paperback ed. 1970) (agencies are proving grounds for high salaried industrial positions).

might appreciably damage the business interest of the future employer. Moreover, sometimes the air pollution boards are composed of members of the polluting industries, a system hardly designed to bring about dynamic change.[31] Moreover, lobbying by industry tends to prevent changes with real teeth.[32]

Existing legislation may not include adequate sanctions for enforcement. The Air Quality Act of 1967 has been described as unenforceable and unworkable due to procedural disabilities with virtually no meaningful sanctions for violation.[33] Such sanctions as exist for failure to implement programs under the Act probably will be reduced in effectiveness by possible delays which industry can utilize. Hence, critics maintain that the Air Quality Act is a window dressing and that until public pressure demands meaningful legislation nothing will be done.[34]

Yet the administrative agency approach to pollution control could be effective.[35] Expertise could be gathered. Agencies could set air purity standards without the cumbersome and polka dot effect of a case-by-case approach of the courts. Also, there is some injustice in a case-by-case approach which causes one company to expend millions of dollars on air pollution control, and allows a competitor company or industry to go by unscathed. It is not certain, however, that administrative agency enforcement would be industry-wide or across the board. The very nature of a state rather than federal approach involves danger of a crazy quilt enforcement. Companies in states having strict enforcement could suffer *vis a vis* their competitors in states with lax enforcement.[36]

Even potential effectiveness of the administrative process is not good enough. In absence of proof of responsiveness of the administrative agencies something must be done. We turn to the judicial process. Criticisms of court action are:

(1) expertise is not sufficient;

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[31] *See* ESPOSITO, VANISHING AIR 194 (1970).

[32] *Id.* at 259.

[33] *See* Reitze, *supra* note 24 at 814-816 (Air Quality Act of 1967 is grossly underfinanced, meaningful sanctions largely non-existent and probably will not work); ESPOSITA, VANISHING AIR 152-168 (1970); 2 CCH CLEAN AIR & WATER NEWS, No. 20, at 4 (May 14, 1970). (Federal Bar Association President Paul Treusch finds the present Clean Air Act unenforceable from the practical standpoint); *see generally* O'Fallon, *Deficiencies in The Air Quality Act of 1967*, 33 LAW & CONTEMP. PROB. 275 (1968).

[34] *See* note 33 *supra.*

[35] *See* NADER, UNSAFE AT ANY SPEED 155-56 (1965): Los Angeles County air pollution control authority has cleaned up stationary sources of pollution—steel, refineries, shipping, railroads, smelters. This is a statement by an official of the district, but even allowing for the self-serving nature, it seems readily conceded that Los Angeles has made great strides in that direction. And *see*, Mix, *The Misdemeanor Approach to Pollution Control*, 10 ARIZ. L. REV. 90, 92 (1968) (arguing that effectiveness has depended on criminal misdemeanor approach as opposed to injunctive); N. Y. Times, April 19, 1970, at 50, cols. 1-2, stating that the air pollution division of the Ohio Pollution Control Board ordered Republic Steel Corporation either to stop discharging red iron oxide dust from its oxygen furnaces within 90 days or close down the furnaces.

[36] This is a strong argument for a federal approach to the problem.

(2) separation of powers;
(3) irregular enforcement by happenstance of court suits.

It is submitted that the basic policy choices are ones the courts are in no worse position to reconcile than a harassed legislature or a timid industry-controlled air pollution control agency. True, technical expertise is not necessarily present. But courts handle some very complex questions, such as sanity, intent and medical malpractice.

Some might claim a desirability of judicial restraint out of reverence for separation of powers. But, for one example, the law of nuisance provides adequate precedent for resolving the competing values. Historically courts have not hesitated to make decisions designed to protect business. Courts struck down workman's compensation laws, and created contributory negligence to limit the spread of accident losses by insurance through the community. Courts in the twentieth century have dealt expansively with tort concepts. Courts have found strict liability for defectively manufactured and designed products. Wards of the admiralty may recover on almost strict liability through the unseaworthiness doctrine. The question posed in these tort areas is who pays, and who is in the best position to spread the cost among the community. Thus, ample precedent exists to justify an expansive role of the court in coping with pollution through nuisance or other remedies.[37]

Courts, while not totally insulated from political pressure, are admirably secure from excessive retaliation or capture by the very industries they in effect regulate with a particular judicial decision. Also judges do not usually envision that they will work for the industries they judicially regulate upon leaving the bench. Moreover, one break-through can lead to a pattern in the industry.[38]

In sum, the following premises have been suggested:

(1) air pollution is a major community problem;
(2) the legislative response of administrative agencies has been and may well continue to prove ineffective;
(3) industry will not act significantly to control air pollution without intervention of the legal process.

Based on these premises, the courts should increasingly concern themselves with the problem.[39] The following recommendations and theories are submitted as vehicles for courts and litigants to review in rethinking the role of private law in the air pollution field:

(1) Private and public nuisance remedies should be reappraised in view

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[37] *See generally* Green, *The Law Must Respond to the Environment*, 47 TEXAS L. REV. 1327 (1969).

[38] *See* discussion of Harvey Aluminum at and following note 58 *infra*.

[39] *See generally* Roberts, *The Right to a Decent Environment; $E = MC^2$: Environment Equals Man Times Courts Redoubling Their Efforts*, 55 CORNELL L. REV. 674 (1970).

of the proliferation of contaminants: and remedies including injunctions and damages for personal injury and property damage from smog and air pollution should be granted increasingly and recognition of increased citizen standing effectuated.[40]

(2) The right to a clean environment should be recognized.[41]

(3) The theory that public lands, water and air are held in trust should be reexamined to release its potential as a private remedy against spoilation of the atmosphere.[42]

(4) Where public interest in the environment is concerned, the degree of discretion involved in administrative decisions including antitrust, should be reviewed.[43]

IV

NUISANCE

A growing amount of legal literature is being devoted to the ramifications of the nuisance remedy. Recent comment is becoming more favorably disposed to the nuisance remedy.[44] Certain problems involved in nuisance actions, including the standing aspect, deserve further notice.

Problems deserving further attention are: (1) air pollution and smog, in particular, as a contaminant causing personal injury and property damage; (2) determining the party to be sued for damages resulting from smog; (3) special damage as the key to standing in a public nuisance action, and (4) the use of injunctions in cases where polluters can argue that pollution is occurring despite their use of the most modern protective devices.

Personal injury action based on nuisance may be substantiated as medical studies are becoming increasingly available linking air pollution to lung cancer, emphysema, bronchitis, and asthma.[45] In general, and perhaps in this area, medical experts seem more willing to testify to aggravation of a preexisting condition.[46] Causation in the area of property damage,

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[40] *See* notes 44-63 *infra* and accompanying text.

[41] *See* notes 64-74 *infra* and accompanying text.

[42] *See* notes 75-91 *infra* and accompanying text.

[43] *See* notes 92-120 *infra* and accompanying text.

[44] *See, e.g.*, Comment, *Equity and the Eco-System: Can Injunctions Clear the Air?*, 68 MICH. L. REV. 1254 (1970).

Other possible remedies for air pollution include negligence, strict liability, product liability, and inverse condemnation. *See generally* Juergensmeyer, *supra* note 27. Developing concepts of strict tort liability for products creating an unreasonable risk of harm may create a major means for pollution control. *Id.* at 1128-30 n.7.

[45] Congressional hearings have revealed that air pollution causes substantial property damage, as well as being a contributing factor to a rising incidence of lung cancer, emphysema, bronchitis and asthma. *See* Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.-2d 312, 320 (1970) (dissenting opinion).

For a detailed economic study of the costs of air pollution in terms of health and some attempt at quantifying property damage, see R. RIDKER, ECONOMIC COSTS OF AIR POLLUTION (1967) (Air pollution effect on health 30-56; collecting sources).

[46] *See* Rheingold, *supra* note 4 at 20, stressing studies of aggravation of diseases from pol-

though seemingly potentially a problem, has been handled without much trouble in the cases. In one case, the plaintiff convinced the court that alfalfa leaves whitened and vegetation dropped off due to sulphur dioxide.[47] Perhaps more difficult problems would arise in showing causation from a generalized condition of smog. However, there is increasing awareness of property damage done by smog.[48] But when stationary sources of air pollution have been largely curtailed and the pollution cannot be traced to a specific factory, who is the defendant? One possibility is to consider a class action against all drivers of motor vehicles with or without smog control devices.[49] The major automobile manufacturers may be another potential defendant.[50] An action against the oil and gasoline corporations to curtail the lead content of gasoline has also been suggested.[51]

Another problem in this area is the relationship of technological development to the application of the nuisance remedy of the injunction. In the recent case of *Boomer v. Atlantic Cement Co.*,[52] the court, affirming a finding of nuisance and damage to plaintiffs' property from defendant's cement plant which emitted dirt, smoke, and vibrations, denied an injunction which would close the plant until the condition was remedied. The court of appeals affirmed, seemingly because of the economic importance of the plant. The court made two other interesting arguments in support of its decision. A conditional decree closing the plant, which would have been effective eighteen months after entry of the decree, was denied because there would be no assurance that any significant technological development would occur within the eighteen months. The court found it unlikely that the cement company could develop any dust control technology in a short period of time. Such development depended on the total resources of the national and worldwide cement industry. The court stated: "For obvious reasons the rate of research is beyond control of defendant."[53]

The dissent looked at the matter differently:

> I am aware that the trial court found that the most modern dust control devices available have been installed in defendant's plant, but, I sub-

luted air. The writer has found in workmans compensation practice that doctors are often more comfortable testifying to aggravation.

47 Jost v. Dairyland Power Cooperative, 45 Wis. 2d 164, 172 N.W.2d 647 (1969).

48 *See* note 45 *supra.*

49 Such an action could be against some defendant drivers as representatives of a class of defendant drivers. *See, e.g.*, FED. R. CIV. P. 23, stating that one or more members of a class may sue or be sued as representative parties.

50 *Cf.*, Rheingold, *supra* note 4, at 29, suggesting a products liability action on the theory that automobiles allowing pollutants to escape are defectively designed.

51 *Id.* at 29 n.64, where there is a hint of such an action against gasoline manufacturers presumably based in part on the lead content producing pollution.

52 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

53 26 N.Y.2d at 226, 257 N.E.2d at 873, 309 N.Y.S.2d at 317.

> mit, this does not mean that *better* and more effective dust control devices could not be developed within the time allowed to abate the pollution.
> . . . .
> In a day when there is a growing concern for clean air, highly developed industry should not expect acquiescence by the courts, but should, instead, plan its operations to eliminate contamination of our air and damage to its neighbors.[54]

Thus, the defendant was able to rely on the existing state of technology to justify its conduct. This is an unfortunate precedent in an era of increasing pollution. First, there is some doubt that all of industry's statements about its technological development can be taken at face value.[55] Secondly, the profit ethic does not seem conducive to allocation of resources by private industry to combat pollution without external controls and stimulus.[56] Thirdly, industry should bear part of the blame and the cost of developing a product which is not made by means which are extremely damaging or which in itself produces dangerous effects. It seems that industry is pleading its own negligence in defense of its present practices. In short, with decisions like *Boomer* there is relatively little incentive for the cement industry to expend the necessary funds to develop alternative means of production. Furthermore, if technology is not equal to the task, and there is some indication that further technology is not the sole answer, hard choices will really confront us involving a major restructuring of life as we know it.[57]

Boomer also highlights the reluctance of courts, at least verbally, to look beyond the private litigation to broad public objectives. The court observed that it was rare to use a decision in private litigation to achieve direct public objectives greatly beyond the rights and interests before the court. But surely courts expand rules by applying them to different situations and in so doing consider the possible effects and implications of their decisions on the community and similar situations. For example, the court in *Renkin v. Harvey Aluminum Inc.*[58] granted an injunction in similar circumstances. Therein, plaintiff, owner of a fruit farm, sought to enjoin the defendant aluminum company from emitting harmful fluorides onto his land and trees. The *Renkin* court notes that when not dealing with the public as such, it recognized that air pollution is one of the greatest problems facing the American public. It is true that the court in *Renkin* found that existing technology could curtail the fluorides from defendant's plant.

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[54] 26 N.Y.2d at 231-32, 257 N.E. 2d at 877, 309 N.Y.S.2d at 322.

[55] *See* note 23 *supra* and accompanying text.

[56] *See* notes 13(a)-15 *supra* and accompanying text.

[57] That technological "solutions" may be incompatible with perpetuation of the environment is foreign to the thought patterns of twentieth century minds—except some. *See* Murdoch and Connell, *All About Ecology*, THE CENTER MAGAZINE 56, 62-63 (1969).

[58] 226 F. Supp. 169 (D. Ore. 1963).

Renkin gives an answer to another argument of the *Boomer* court. The court in *Boomer* noted that defendant was only one of the many plants polluting the Hudson Valley. But the *Renkin* court, having a precedent which compelled Reynolds Aluminum to adopt the control device, was able to bootstrap by using that as a precedent for Harvey Aluminum to adopt. Similarly, putting one of the polluters on notice could provide precedent for bringing the others into line.

Several other pitfalls await the reformer who uses nuisance as a remedy. The finding of nuisance itself, involving unreasonable harm, substantial harm, causation, balancing the equities if an injunction is involved, as well as defenses of "coming to the nuisance," laches and the statute of limitations all indicate punch holes where a plaintiff can be left.[59] Another impediment is created by the rule that if the nuisance is public, the citizen does not have standing unless he is particularly damaged.[60] The basic consideration in all these doctrines is a balancing of the gravity and degree of harm of the activity of the polluter with that recipient.

Courts have not been unduly shy in expanding standing. Courts avoid the particular damage rule by allowing exceptions for persons who can show personal injury or property damage.[61] Courts also strain to avoid the concept. In *Fishermans Protective Union v. St. Helens*,[62] the court found the particular damage concept satisfied. There, fishermen seeking to enjoin the discharge of waste into the Columbia River were met with the defense that they were not affected by the pollution any more than others. The court avoided that rule by contrasting the rights of those who actually do fish with those who do not, and then by saying that the fishermen who used the river were more affected than those who do not.

In many cases denying standing for lack of particular damage, the damage done to plaintiff was remote and insubstantial. But in the air pollution context at least the gravity of the harm is present and substantial, and the benefits from the activities producing them weighed against the activity of the citizens in living is often not sufficient to justify the continuation of the activity.

A frequent policy reason given for the rule limiting private actions against nuisances, has been a desire to prevent a multiplicity of suits.[63] Focus should be shifted to the kind and pervasiveness of the harm inflicted. Some multiplicity of suits might be beneficial, particularly when, as it seems, the attorney general does not act to abate public nuisances. Moreover, the procedural advent of class actions would reduce effectiveness of the multiplicity argument. Individuals harmed by smog could

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[59] *See generally* Juergensmeyer, *supra* note 25.

[60] *See* W. PROSSER, TORTS 608 (3rd ed. 1964).

[61] *See generally* Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997 (1966).

[62] 160 Ore. 654, 87 P.2d 195 (1939).

[63] W. PROSSER, TORTS 608 (3rd ed. 1964).

gather in a class action, for example, to press a remedy for loss of property values either specifically to their houses or more generally. Perhaps, also, individuals or groups could sue for relief from deterioration of health or lung damage. It is in any event questionable that undue multiplicity would occur. Private litigants with sufficient funds to bring private actions may not abound.

The rigidity of the particular damage rule as applied to environment oriented litigation should be softened judicially. Or, if it is to remain a potential bar to actions against the polluting automobile and gasoline producers, its presence indicates the need for adoption of other theories to give private litigants access to the courts and legislation which would expand standing.

V

THE RIGHT TO LIFE

A growing body of legal literature is forming the contours of a constitutionally protected right to life or right to a clean environment.[64] Commentators have posited the right on the basis of *Griswold* v. *Connecticut*,[65] including these pleasant ingredients: the fifth amendment's protection of the sanctity of life; the ninth amendment's indication that certain rights are retained by the people not enumerated in the Bill of Rights; and the Declaration of Independence guarantee of life and the pursuit of happiness.[66] There could also be added the recognition of rights found where relief had been granted somewhat piecemeal in a series of specific situations. Examples include a right of free travel[67] and though not a constitutional right, the right of privacy.[68]

Recalling the traditional rights of the people to air and water and concomitant rights,[69] such rights may form a basis for recognition of a right to a clean environment as a tradition regarded as fundamental. Some courts have argued in a property context that the "right" of inheritance derives

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[64] *See* Roberts, *The Right to a Decent Environment; E = MC²: Environment Equals Man Times Courts Redoubling Their Efforts*, 55 CORNELL L. REV. 674, 688-692, 704 (1970) noting that decisions as incredibly unresponsive as *Boomer* illustrate urgent need for a constitutionally recognized right to an environment sustaining decent human life; Esposito, *Air and Water Pollution: What To Do While Waiting For Washington*, 5 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 32, 45-52 (1970) (ninth amendment plus guarantee of life implicit in the fifth and fourteenth amendments—pollution threatens life); *cf.* Ottinger, *Legislation and the Environment: Individual Rights & Government Accountability*, 55 CORNELL L. REV. 666, 672 (1970), proposing a constitutional amendment guaranteeing a wholesome and unimpaired environment. Such an amendment was apparently introduced into the House of Representatives by the author in 1968.

[65] 381 U.S. 479 (1965).

[66] *See* Roberts, *supra* note 64 at 690-91.

[67] *See* Schapiro v. Thompson, 394 U.S. 618 (1969).

[68] The right to privacy was recognized in large part due to the influence of Warren and Brandies, *The Right to Privacy*, 4 HARVARD LAW REV. 193 (1890).

[69] *See* note 76 *infra.*

from the pursuit of happiness part of the Constitution and supported by inherent rights declared by the Declaration of Independence.[70] If "happiness is property," happiness is also relief from the mental and physical problems of air pollution.

In the recent landmark case of *Environmental Defense Fund, Inc. v. Hoerner Waldorf Corp.*, the Montana District Court found a constitutionally protected right to life and to the health which sustains that life under the fifth and fourteenth and possibly the ninth amendment.[70b] The Court, however, dismissed the complaint in that it found that alleged pollution by the private corporation did not involve state action. Thus, the parameters of such a right have not been fully explored. One commentator seems to suggest that the practical thrust of the right would be a kind of procedural due process with expanded standing requiring governments to consider the environment in its decisions.[71] In suggesting a "procedural" remedy in which policy decisions are referred back for consideration of the environment and alternate ways of proceeding, this seems to parallel the suggestions of Professor Sax, except his approach is through the utilization of the possible flexibility of public trust doctrine rather than constitutional rights. Left open is the question of whether such a right would allow the individual citizen a right to: (1) attack the inaction of state and federal officials charged with the responsibility of enforcement or (2) allow a direct action against the private polluter on terms better for the pollution controller than now exist for nuisance actions. A constitutional right to a clean environment could force consideration of conservation and environmental factors in government decision making. But a better vehicle for such a decision as respects federal administrative decision making seems to exist under the National Environmental Policy Act.[72]

One application of such a right is suggested by a case now pending. A complaint by a private citizen in a class action makes the claim that the National Environmental Policy Act creates a statutory right to a healthful environment with the language, ". . . each person should enjoy a healthful environment. . . ." The complaint requests intervention in a suit by a smelting company against an air pollution control agency to prevent enforcement of regulations governing air pollution.[73] Thus, a federal constitutional

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[70] *See* Nunnemacher v. State, 129 Wis. 190, 108 N.W. 627 (1906) (Right of inheritance is an inherent right based on a "right to happiness' 'and the Declaration of Independence).

[70b] Environmental Defense Fund, Inc. v. Hoerner Waldorf Corp., order and memorandum no. 1694 (D. Mont., filed Aug. 27, 1970); also reported at 1 ERC 1640, 1641 (D. Mont., 1970).

[71] *See* Roberts, *supra* note 64(a) at 691.

[72] *See* Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612, 643-50 (1970) (every federal agency must consider environment in decision making).

[73] 2 CCH CLEAN AIR & WATER NEWS, No. 7 at 2 (Feb. 11, 1970).

right could support standing in suits between control agencies and alleged polluters.

It may also be productive to search state constitutions for possible grounds for a state recognized right to a clean environment.[74]

VI

TRUST

The focus on the development of existing law to cope with problems of environmental abuse suggests consideration of a trust theory. Natural resources have traditionally been subject to some kind of trust held by the government for the people. The problem is in recognizing a remedy in the citizen to enforce a breach of the trust, or interference with the trust rights. A central theory in proscribing such a remedy seems to be that government acts in the public interest and is therefore not subject to second guessing by its citizens. Some exceptions have been made where individuals are particularly affected, a similar concept to the one which entitles citizens to bring actions where a nuisance is public. However, the general approach of restricted standing remains, though the premise that government does act in the public interest is subject to renewed questioning. Such an assumption is worthy of as much scrutiny as the Adam Smith premise that each corporation and private business doing its thing results in the public interest.

The historical origin of resource trust law goes back to the common law, and behind that to Roman law.[75] At common law, the sovereign "crown" held in trust for the people numerous rights among which are navigation, bathing and fishing.[76] Private ownership of navigable waterways was limited generally to the high water mark. The watercourse bed, and the shore area between high and low tide belonged to the sovereign in trust for the people. After the American Revolution, title to these and other lands passed to the new sovereign, referred to as the sovereign people of each state, subject to rights since surrendered by the Constitution to the general government.[77] As new states were admitted, the states were ceded the title to the streambed and shores subject to the trust in favor of its own

[74] *See, e.g.*, ORE. CONST. art. 1, §10, providing that every man shall have remedy by due course of law for injury to his person, property or reputation (emphasis added); FLA. CONST. art. I §2 (inalienable rights, life, liberty, and pursuit of happiness).

[75] *See generally* Sax, *supra* note 26.

[76] *See generally* Note, *The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine*, 79 YALE L.J. 762 (1970), which traces the development from the Roman Law to the present and distinguishes between a common rights theory and private ownership subject to the easements retained by the people.

At least ten such rights have been claimed at one time or another: navigation, ports, free passage (as a means to another protected activity), commerce, fishing, sand and stones, seaweed and shells, bathing (recreation), conservation and aesthetics and the "public interest." *Id.* at 777-78.

[77] *See* Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842); Sax, *supra* note 26 at 476.

citizens.[78] One potential area of application of the trust theory would seem to be in the area of water pollution. Such pollution may well interfere with fishing, swimming, boating, taking oysters and the like.

The trust theory is equally applicable to the air. Under Roman Law, it appears that air was one of the common things (*res communes*) whose ownership belongs to no individual, classified with the sea and seashore. Reference is made to the Civil Code of Louisiana defining things which all may freely use which belong to nobody in particular such as air, sea and its shores. In the English common law, the air, sea, seashore, rivers and harbors are ordinarily common and available to the public.[79] In most states, the common law is a source of American unwritten law.[80] The ninth amendment is complementary in that it reserves to the people rights traditionally held by them. If all things in the state must be either property of the state or private property,[81] then, not being private property, ambient air may be property, title to which is held by the state. A paramount right of free use may exist in the citizens, superior to any particular individual rights, similar to a public right of free navigation. When so viewed, the title in the state subject to beneficial use in the people, indicates a traditional trust relationship.

Under some circumstances at least, the state may institute an action to reclaim trust property.[82] One commentator has suggested, however, that it has never been clear that the public had a right to compel government to protect those rights.[83] However, it appears that some direct remedy existed in Roman Law against the private infringer when he interferred with the common rights[84] and, the citizen may have a right to enforce the trust by invoking analogies from trust law.[85] Failure of the state or federal government properly to protect such trust property as air space would constitute a breach of trust. A trustee is, of course, under a duty to the benefi-

[78] Sax, *supra* note 26 at 476.

[79] C SHERMAN, 2 ROMAN LAW IN THE MODERN WORLD 140-41 (1917).

[80] *Id.* at 14.

[81] *Id.* at 141.

[82] Sax, *supra* note 26 at 489.

[83] *Id.* at 475.

[84] *See* INSTITUTES OF JUSTINIAN 159 (Sanders ed. 1876). If proprietors attempted to exercise their rights so as to hinder the public use of a bank of a river, they would be restrained by an interdict of the preator.

[85] *Cf.* Note, *supra* note 76 at 774, stating that one suggested model for maximizing benefit from tidal water areas is to treat the state as active trustee and enforce a duty to protect rights considered common or public easements by cost-benefit balancing.

Cf. Sax, *supra* note 26 at 556-57. Public trust problems are found whenever government regulation comes into question such as controversies involving air pollution. A court decision on a private action seeking more extensive enforcement of air pollution laws could provide the public with substantial protection.

Public trust law includes park lands, at least to the extent of forbidding use for non-park purposes. *Id.* at 556. Might a park ruined by air pollution be interference with a public right held by the state in trust subject to the above analysis? Yosemite Valley is now subject to extensive air pollution.

ciary to use reasonable care and skill and preserve the trust property. And if the trustee does not bring action to protect the corpus (air), well established trust doctrine would allow a beneficiary citizen to bring an action either against the state or directly against the polluter.[86]

Also, citizens have traditionally had a right to free navigation, both of the waterways and airspace. Private rights, though coexistent in the same matter—water or air—meet the end of their definition when they infringe the navigational right. Air pollution has interfered with and promises to present future hazards to air travel.[87] Thus, to protect the right of navigation it is necessary to curtail air pollution. The same objection may be leveled, however, that the public had no clear right to compel government to protect navigation. The absence of a remedy severely restricts a "right." But, a private remedy to the citizen at large to protect trust property was not unknown to the civil law.[88] The general elasticity of the standing concept has been adequately illustrated[89] and recent precedents expanding standing recognize the public interest in that flexibility.[90] Recognition of a citizen remedy against the state or polluter would be complementary to an underlying premise of these recent developments—that "private attorneys general" are necessary to preserve the rights of citizens against determined special interests seeking private gain.

Professor Sax's stricture that courts are better confined to procedural type remedies such as due process and referral back to government for more adequate hearings, or consideration of other factors, would allow a citizen to question with procedural devices the substance of decisions.[91] Perhaps such caution is appropriate to preserve in government a freedom to change decisions in resource use and allocation. For the courts to adopt a supervisory power over the questions of when and where dams, roads, atomic energy plants and other "improvements" will be built may go too far. But, leaving the substance of governmental decisions to government, and prodding an inactive government to protect the air may be different policy objectives. Also different is providing some mechanism to countervail the built in favoritism of private corporations and business which may act in disregard of public interest, and control and render inactive the government designed to protect the public interest. Thus, a substantial part of the air pollution problems seems to be more one of incompatibility of the profit motive and the public interest and government inactivity rather

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[86] *See* RESTATEMENT (SECOND) OF TRUSTS §282 (1959).

[87] *See, e.g.*, Edelman, *Federal Air and Water Control: The Application of the Commerce Power to Abate Interstate and Intrastate Pollution*, 33 GEO. WASH. L. REV. 1067, 1078 (1965) (hazard to air and ground transportation).

[88] *See* note 84 *supra.*

[89] *See generally* Jaffee, *The Citizen as Litigant in Private Actions: The Non-Hohfeldian or Ideolofical Plaintiff*, 116 U. PA. L. REV. 1033 (1968).

[90] *See* Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970).

[91] Sax, *supra* note 26 at 560, 564-65.

than of bad decisions by government on resource allocation. Hence, it seems more appropriate to allow private actions directly against the polluter and government bodies responsible for enforcement.

VII

POLLUTION AND ANTITRUST

In the recent case of *United States v. Automobile Manufacturers Association*,[92] the Supreme Court affirmed a lower court opinion allowing the Justice Department to settle an antitrust suit under the Sherman Act without intervention by numerous states, cities and counties, as well as class action litigants. In *Automobile Manufacturers*, the United States alleged that the major auto companies:

> (1) agreed to install motor vehicle air pollution control equipment only on a uniform date determined by agreement;
> (2) agreed subsequently on three separate occasions to attempt to delay the installation of air pollution control equipment;
> (3) in early 1964 agreed to attempt to delay the introduction of new exhaust pollution control measures on motor vehicles sold in California until the model year 1967 despite the fact that they were capable of installing the improvement for the model year 1966, and agreed to tell California regulatory officials that installation of exhaust antipollution measures would be impossible before 1967.

Only under regulatory pressure made possible by competing device manufacturers not in the automobile industries did the defendants agree to a California regulatory requirement that exhaust devices be installed for the model year 1966. Defendants were also charged with agreeing to restrict publicity relating to research and development efforts concerning the motor vehicle air pollution problem.[93]

The list of intervenors was substantial and was composed of nine governmental bodies including the States of New York, New Jersey, Connecticut and Maryland.[94] They sought to intervene under Rules 24(a) and 24(b) of the Federal Rules of Civil Procedure. The lower court held that the intervenors were not entitled to come into the lawsuit either permissively or as a matter of right in that the intervention would prejudice and delay the rights of existing parties. The court stated, correctly, that the purpose of the intervention was to cause the matter to be litigated so a favorable decree could be obtained. Under the legal posture, such a decree could be used as prima facie evidence by the litigants who sought treble damages.

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92 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd*, 90 S. Ct. 1105 (1970).
93 *Id.* and Complaint, *supra* note 18.
94 307 F. Supp. at 619.

In deciding against intervention, the court addressed itself to two basic arguments. First, the desirability of intervention as a block to the entry of the consent decree so the decree could be used in the intervenors' treble damage actions; and secondly, whether the decree was in the public interest. The court stated that the main goal of the intervenors, the blocking of the proposed decree so as to obtain a favorable decree to be used in their own treble damage actions, was not supportable. Consent decrees were useful means of terminating the majority of antitrust suits. The decision to bring and end a suit is administrative and not subject to review by the court. However, the court did have the power to disapprove settlements based on adverse consequences to persons not parties and to the public interest. The court found that the government had no duty to pursue the action to obtain a decree helpful to treble damage claimants. The treble damage claimants could pursue their own actions. The court surmised:

> The Government is the designated representative of the public, and sound policy requires that it be free to conduct and control its litigation in the public interest.[95]

Was the decree in the public interest? Yes, since it gave all the relief the Government could have obtained: the Government could lose the case, delay was avoided and expense to an antitrust division with limited manpower and resources was conserved. Apparently, the automobile company resources were unlimited.

Previously a grand jury was impaneled to investigate criminal antitrust charges against the automobile companies, but no indictment was returned. Volumes of testimony were gathered. The decree provided that all evidence and the transcript be impounded in the hands of the Justice Department and made available by subpoena or upon showing of good cause to treble damage claimants.[96]

The City of New York appealed in an action styled *City of New York v. United States*,[97] as did class action litigants in the companion case, *Grossman v. Automobile Manufacturers Association, Inc.* In the latter, the Supreme Court dismissed "for want of jurisdiction."[98] *Grossman* involved a class action on behalf of the American public on similar grounds to the antitrust suit. Relief in the form of consolidation or intervention was denied by the trial court. On appeal, the plaintiffs argued that the lack of notice of hearing with respect to the consent decree violated due process

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[95] 307 F. Supp. at 621.

[96] 307 F. Supp. at 620.

[97] 90 S. Ct. 1105 (1970).

[98] *Id.*

and in effect that approval of the decree without an admission of violation was against the public interest.[99]

The effect of the Supreme Court's dismissal for want of jurisdiction is not entirely clear. Presumably, no federal issue of substance was posed. Arguably, the Supreme Court affirmed the dismissal of the class action litigation. More likely, however, the Supreme Court's opinion just refuses to review the lower court's exercise of discretion in refusing to allow consolidation or intervention by the class action litigants. Granting of such discretionary intervention in an appropriate future case may not be precluded. The Court could have thought, however, that the public interest was sufficiently protected by the private actions themselves. In this respect, however, enormous resources may be required properly to present the case. When the government acquiesced in a consent decree, the other litigants and the public lost a valuable litigant.

The crucial question revolves around whether the acceptance of the decree was in the public interest. Some questions posed, some of which will be dealt with here, are: (1) Was anything substantial gained by the consent decree or was it academic in view of the competing devices already marketed? (2) Would a decree potentially obtainable through litigation have been better than the one obtained? (3) Is the public's right to know an appropriate criterion for rejection of a consent decree? (4) If it is unclear if the government theory of "product fixing" would not have been sustained, is clarification of the anti-trust laws indicated to include the alleged conduct? (5) Was the settlement a political accommodation to a powerful industry?

When should courts second guess the parties proferred resolution of the litigation? That approval of consent decrees may be in the public interest and intervention ought not be allowed in all cases of consent decrees may be readily conceded.[100] However, some criterion for intervention and reversal upon abuse of discretion should be established. As an aid to such appraisal, there is considerable merit to the suggestion of Professor Kenneth Culp Davis that a decision to accept a consent decree should be accompanied by a publicly available statement of findings and conclusions embodying the policy reasons for the decision.[101] Commentators have also suggested an informal hearing to inquire into the desirability of a consent decree which is more extensive in some cases than others where third

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[99] *See* 38 *U.S.L.W.* 3349 (U.S. March 10, 1970).

[100] *See* Comment, *The Automobile Pollution Case: Intervention in Consent Decree Settlement*, 5 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 408 (1970). Some advantages to the procedure of consent decree are: (1) Cost savings, (2) immediate relief, (3) obtaining more than might be obtained by litigation of a doubtful claim on the facts and law, (4) mutual adjustment according to facts known only to the parties, (5) effect on similar cases, (6) increased control of the terms of the degree.

[101] *See* note 113 *infra*.

parties are represented.[102] The court might then be in a better position to weigh the nature and extent of the public interest involved.

In evaluating the consent decree decision, we may consider the identity of the litigants and a comparison of relief granted to what could have been obtained. States, counties and cities were presumably not in the litigation to increase their revenues with treble damages. Perhaps intervention by state units should be allowed more often than other treble damage litigants. In viewing the relief obtained, it is said that the government got all the relief it could have obtained, under a successful trial. We see through a glass darkly. Evaluation is quite difficult. The auto companies succeeded in eliminating a powerful litigant at very little net loss to themselves. Benefit from the delays between at least 1964-1967 was already obtained. Smog control devices had already been marketed by someone outside the industry so that the impetus to suppress technology was lessened. And, the wording of the decree seems to give sufficient flexibility to avoid major impact.[103] Whether decree obtained through litigation might have been better is extremely difficult to answer. We may also question whether either a decree obtained through litigation or by consent will be policed and enforced.

Reasons for allowing the litigation to proceed then come down to publicity of the alleged conduct. As it was, unfavorable publicity was confined to a few newspapers where it could easily be lost from sight. It could have been hoped that such publicity might produce a public outcry leading to a legislative investigation or a strengthening and increased enforcement of the criminal anti-trust laws. Thus, though it is difficult to incorporate into a specific legal criterion, the lack of access of the public to the alleged information can be formulated into the broad legal concept of public interest in deciding whether to approve or reject consent decrees and in ruling on requests for intervention. Another doctrinal possibility is to consider that the state units or other litigants may have an "interest" in the litigation in addition to the treble damage claim, which supports intervention.

This litigation may indicate the inability of the presently constituted anti-trust framework substantially to deter this kind of conduct. It has been suggested that such conduct does not run afoul of the anti-trust laws.[104] Public benefit results, goes the argument, because of the use of

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[102] *See* Comment, *The Automobile Pollution Case: Intervention in Consent Decree Settlement*, 5 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 408 (1970), suggesting the Justice Department should justify the proposed decree in an informal hearing where third parties were represented. The writer felt the justification necessary since the reasons for the settlement are known peculiarly to the attorneys. How "informal" such a proceeding could be and whether it would become pro forma can be questioned.

[103] *See* ESPOSITO, VANISHING AIR 46 (1970).

[104] *See* Verleger and Crowley, *Air Pollution, Water Pollution, Industrial Cooperation and the Antitrust Laws*, 4 LAND AND WATER L. REV. 475, 480 (1969).

cooperative effort. This suggestion of non-regulation of pooling agreements such as those attacked in *Automobile Manufacturers* may overlook the potential adverse effect based on the enormous vested interest of the automobile companies in the existing technology. On one level, it is unlikely that the automobile industry will without external incentive come up with any proposal which would not be based on the modification of the internal combustion engine. The impetus to make major innovative changes of technology in oligopolistic industries with one product is quite small. No threats may be posed from other auto companies due to the difficulty of access into the market because of capital requirements.[105] Thus, pooling arrangements may only shackle technological developments further.[106]

Furthermore, at least by hindsight, the fact that a group, not party to these agreements, came out with a device also casts doubt on the efficacy of this particular pooling agreement. In any event, the deterrent effect of the present law in this field may be doubted. First, it may be unclear whether such arrangements violate anti-trust law.[107] Commentators have maintained that under existing anti-trust law industry has a right to collaborate and give false information to the government, and to meet generally, whether the result is the enforcement or the delay of progress. The position is based on a protected right to assemble, and to assemble to influence and impede proposed laws and regulations effecting them.[108] *Automobile Manufacturers* disputed this. If they are allowed to continue, it is a tacit recognition of the right of very powerful corporate forces, not only individually but collectively to combine to continue polluting the atmosphere. While anti-trust action could be helpful, the ability of the legal structure to control corporate conduct under the present power relationships in the society may be limited. Thus, interestingly enough, it may not have been the government suit, valuable as it might have been, that turned this particular behavior from its course. It may instead have been the advent of the possibility that a competitor might commercially market a smog control device.[109] Nothing substantial emerges out of the episode to discourage the companies from engaging in the alleged conduct. No fines are provided for civil anti-trust violations and in any event, the effect of monetary sanctions on General Motors may be doubted. Accordingly,

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[105] V. BUSH, PIECES OF THE ACTION 230 (1970). Bush believes that better engines exist, and chides the auto industry for failure to innovate. He finds that the investment required is not encouraged where an industry is structured as an oligopoly with limited access by potential competitors.

[106] ESPOSITO, VANISHING AIR 43, 45 (1970) (suggesting that pooling agreements result in controlling the quality of products in other industries by agreements not to introduce advances).

[107] *See generally* Verleger and Crowley, *supra* note 104.

[108] Verleger and Crowley, *Pollution: Regulation and the Anti-trust Laws*, 2 NATURAL RESOURCES LAWYER 131, 141 (1969).

[109] *See* ESPOSITO, VANISHING AIR 40-41 (1970).

though anti-trust pressure should not be relaxed, what may be more appropriate is governmental competition with the automobile companies to keep check on what is technologically feasible.[110]

It is even more difficult to speculate further on the criminal charges. The premise that the public interest is best served by initiation and termination of litigation of this kind is worthy of scrutiny. Executive decisions of this kind are similar to those of a regulatory agency and are no more necessarily in the public interest than any other administrative decision. Both may have extremely low level visibility. While some remedy may be found through pressures of the electoral process on the executive and legislature, this has not been enough.

Both the failure to return an indictment and the acceptance of the consent decree raise the problem of administrative discretion, and the relationship between a powerful industry and government. Traditionally, judicial review of executive decisions has been somewhat limited.[111] Though administrative inaction is theoretically reviewable under the Administrative Procedure Act, anti-trust decisions not to prosecute have been thought unreviewable.[112] Professor Kenneth Culp Davis has recently argued that rule making and public accounting be made for decisions not to prosecute.[113] It is submitted that the need for review of anti-trust decisions not to prosecute is suggested by the *Automobile Manufacturers* situation. The Nader study group states that:

1. The grand jury wanted to return an indictment against the automobile manufacturers.

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[110] *But cf.* V. BUSH, PIECES OF THE ACTION 230-31 (1970), who expresses a lack of confidence in state research efforts, and suggests instead subsidizing a private industry presumably not the existing auto industry to come up with $100,000 steam vehicles for its own use.

[111] *See* K. DAVIS, ADMINISTRATIVE LAW TEXT 513-15 (1959); ordinarily the district attorney has almost unlimited discretion not to prosecute. *Id.* at 76.

[112] Section 10 of the Administrative Procedure Act deals with judicial review. Agency action is defined to include agency rules, etc., "or the denial thereof *or failure to act.*" Section 2(g) (emphasis added). Unreviewability is generally assumed with regard to enumerated conduct of the Department of Justice, such as refusal to compromise or choice of criminal rather than equity proceedings. *Id.* at 514.

[113] *See* DAVIS, DISCRETIONARY JUSTICE A PRELIMINARY INJURY 198-205 (1969). Professor Davis calls for administrative rule making with respect to decisions not to prosecute. A main emphasis is the advantage of definity to industry to indicate proscribed conduct. He states that when the antitrust division "prosecutes a case, when it decides not to prosecute, when it decides to dismiss or to nolle prosequi, when it enters a consent arrangement, and when it grants a clearance, it can and should state publicly the policy reasons for its action. . . ." One argument against announcing reasons for decisions not to prosecute is the reluctance to acknowledge a practice as legal. Other reasons for not disclosing reasons are set out. *Id.* at 203. Nonetheless, he states that, "the general practice should be to accompany all significant decisions of substantive policy with statements of findings and reasoned opinions." *Id.* at 205.

Professor Davis also argues for court review of prosecution decisions to prosecute, and not to prosecute. *Id.* at 207-14. He rejects separation of powers as a reason for failure to review as unsound and absurd since numerous decisions in fact review executive discretion. In support, his argument is based on abuse, and on the tradition of reviewing some administrative decisions without actually exercising the executive function. One other reason might be the potential of public pressure resulting from an informed populace.

2. The Department of Justice decided at the last minute not to seek criminal sanctions.[114]

When Attorney General Ramsey Clark was asked why he dropped the criminal case. He stated in effect:

1. It was not political pressure; it was unthinkable that the executive would have interferred with a 'legal' decision not to prosecute;
2. That the government knew of the agreements all along and therefore, were susceptible to a 'condonation' type defense.[115]

Of course it is not provable whether Professor Davis' suggestion for a review of a decision not to prosecute would have resulted in court decreed prosecution in this instance. Such a requirement would have compelled reasons which might inform the public and give a better basis on which to assess the decision. Another unanswered policy question is how vigorous a decreed prosecution would be. The hope is that it would lead to a greater potential public check on these significant and otherwise unexplained governmental decisions.

The courts disallowance of intervention seems inconsistent with trends widening the rights of the public to attack administrative decisions. These problems were posed in a context of lack of administrative agency responsiveness to environmental concerns. Some examples are decisions of pollution control agencies not to prosecute offenses and failure to set standards, and the failure of the attorney general to seek to enjoin public nuisances. It has been indicated that twenty-nine states allow any citizen to test the legality of official conduct through mandamus.[116] California now has a bill pending and an initiative which allows a citizen to bring a writ of mandamus against officials to enforce administrative action on air pollution.[117]

The issue of private standing to challenge administrative conduct though confused and confusing seems to be broadening. Legislation to broaden standing so that private citizens can intervene in administrative proceedings has been introduced.[118] Recent cases have broadened the kind

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[114] ESPOSITO, VANISHING AIR 42-43 (1970).

[115] Lecture by former attorney general Ramsey Clark, Florida State University, April, 1970.

[116] Comment, *supra* note 44 at 1273 n.102 (reviewing availability of writs to compel administrative action).

[117] *See, e.g.*, proposed California Assembly Bill 109, Jan. 7, 1970, allowing a writ of mandamus against officials to enforce Air Resources Act, orders and regulations thereof, and class action by any citizen residing in the county at the time an order or regulation is violated against the violator with recovery of civil penalty.

See also, California Initiative Measure amending CALIF. HEALTH & SAFETY CODE by adding §39600 to §39690 to be submitted to the voters. Under the initiative, polluters must reduce and eventually eliminate their activities. If the attorney general or other state enforcement officers refuse to bring actions, any citizen may compel them to do so by mandamus. Huge fines result for failure to comply.

[118] Legislation has been introduced in California to allow "any person" to maintain an action against a polluter. The court could allow intervention of any person in any administrative or

of interest which will sustain standing to include aesthetic, conservational and recreational values.[119] Some statutes allow private citizens to sue in the name of the state if the attorney general does not bring certain public nuisance actions.[120] And, positing a right to sue on the right to a clean environment or a trust theory could provide prima facie support for standing to challenge state action or inaction.

The general problem is how to bring some pressure for the public interest to bear on low level visibility administrative and executive decisions. Stress on procedures, with the courts slowing down decisions so as to bring them back to legislative and administrative bodies for public focus may be helpful in the general area of resource decisions. But the problem of air pollution is more a problem of state and industry inaction than action, more one of no decisions than shortsighted regulatory decisions. Insertion of the gadfly of citizen initiated actions and increased citizen rights to question administrative type decisions recommended by this article will be a countermeasure to the enormous inertia now choking and poisoning the country.

VIII

CONCLUSION

The presence of other people, values and interests in a society will call for some mutual accomodation of values. We are not free to totally ignore economic considerations. Certain actions by the legislature and by existing uses of land are going to injure segments of the population. For example, a freeway is going to wreak some havoc on adjoining landowners which courts may refuse to enjoin or to give compensation. Dams are going to injure certain interests, *e.g.*, use of a dam to lower a pond may ruin the fishing in the interest of promoting log driving. But what

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judicial proceeding involving conservation issues and this allows the court to make an independent judgment based on conservation in judicial review of decisions of public entities. SENATE BILL No. 660 (March 18, 1970).

[119] *See, e.g.*, Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150, 154 (1970) agreeing in dictum with Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965) that aesthetic and recreational values may be a basis for challenging administrative conduct.

See also Jaffee, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1037-38 (1968) arguing that the *Scenic Hudson* type plaintiff is as reliable as one with an economic interest in challenging agency action.

See generally Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970).

[120] Under the principal of Qui Tam, where a statute provides a reward for an informer, and the government fails to bring the action in a reasonable time, the informer himself may sue in the name of the United States. Such an action has been brought under the Rivers and Harbors Act of 1899 by a congressman for alleged water pollution. N.Y. Times, March 29, 1970, at 55, col. 1.

See Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 1005 n.76 (1966) citing two cases, one involving a Mississippi statute which allowed a private person to bring an action against the nuisance created by possession of liquor, and a decision in Montana where a private citizen can seek to enjoin the public nuisance of gambling.

is required is a redress in certain values revolving around a cleaner environment to right a balance long favoring economic considerations.

Clearly, the presence of increasing population and urbanization and other values and interests in the community will not allow perfection in the environment. But in many respects, though, there are serious distribution problems, the affluent society is here. Without undue damage, courts can play a significant role in allocation of resources and in leading us toward new goals of a clean and healthy environment. The alternative is at least unpleasant, and possibly fatal.