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Common Law and the Toxic Tort: Where Does Superfund Leave the Private Victim of Toxic Torts?

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> To say that Congress has spoken is only to begin the inquiry; the critical question is what Congress has said?[1]

I. Introduction

The surgeon general recently declared that toxic chemicals are creating a major and growing public health problem.[2] Discoveries of previously undisclosed dangerous waste sites and other recalcitrant chemical tragedies have produced a pandemic effect on society.[3] Hazardous substances, toxic wastes, and industrial by-products are instilling national fear of uncertainty.

The existing statutory and common law has dealt ineffectively with hazardous waste accidents.[4] The aggregate effect of the statutes does not provide a comprehensive strategy to deal with the ominous qualities of hazardous substances.[5] Furthermore, neither the judici-

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1. City of Milwaukee v. Illinois, 451 U.S. 304, 339 n.8 (1981).

2. 125 CONG. REC. 14984 (daily ed. Nov. 24, 1980) (remarks by Senator Culver, introducing a letter from Nathan Stark, Undersecretary of Health and Human Services). "The surgeon general believes that, while at this time it is impossible to determine the precise dimensions of the toxic chemical problem, it is clear that it is a major and growing public health problem." *Id. See also* 11 ENV'T REP. (BNA) 909 (1980).

3. *See, e.g.,* EPA, TENTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY (1979), which contained the following summaries:

> In Lowell, Massachusetts, one million gallons of mixed toxic wastes stored in 15,000 rotting drums and tanks were discovered at a closed waste dump only one quarter of a mile from inhabited homes. . . . In Hardeman County, Tennessee, now called the Valley of the Drums, forty families drink from wells polluted with such pesticides as endrin, dieldrin, aldrin and heptachlor. The Chemical Company had used a neighboring 300-acre site from 1964 to 1972 for the burial of 300,000 55-gallon drums of pesticide production residues.

Id. at 179. 11 ENV'T. REP. (BNA) 139 (1980).

4. *See infra* notes 61-67 and accompanying text.

5. *See, e.g.,* The Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-87 (1976 and Supp. III 1979) (implementing cradle-to-grave legislation for the disposal of hazardous waste); The Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-376 (1976 and Supp. III 1979) (regulating interstate water pollution); The Toxic Substances Control Act, 15 U.S.C. §§ 2610-29 (1976 & Supp. III 1979) (attempting to regulate toxic substances by requiring premarket testing of toxic substances). Congress intended the Substances Control Act to fill the gap between pesticide control and the jurisdiction of the Food and Drug Administration. The Federal Hazardous Substances Control Act, 15 U.S.C. §§ 1261-274 (1976 and Supp. IV 1980), purports to regulate hazardous substances vis-a-vis the Consumer Product Safety Commission. *See generally* S. REP. NO. 848, 96th Cong., 2d Sess. (1980) (analysis of the inadequacy of the existing environmental legislation to protect against improper disposal of hazardous sub-

ary nor the legislature has acted affirmatively to compensate the victims of improper handling of toxic chemicals.[6] Thus, the victim lacks any means of compensatory redress against the industrial defendant.[7]

The Comprehensive Environmental Response, Liability, and Compensation Act of 1980,[8] commonly referred to as Superfund, focuses on the victim's lack of redress. The legislation purportedly constitutes the most comprehensive environmental legislation. Superfund, however, contains no explicit provision for compensating victims of toxic torts.[9] In the year following the passage of Superfund, the Supreme Court determined that federal common-law concepts[10] and the theory of implied rights of action[11] do not apply to environmental legislation similar in scope to Superfund. These recent developments suggest that both Congress and the courts are perpetuating the void between legislative schemes or common-law remedies, and uncompensated toxic tort victims. This comment analyzes those recent developments and suggests that both Congress and the courts must act to effectuate compensatory mechanisms for victims of toxic wastes.

II. The Void

Typically, environmental catastrophes have been addressed in four ways: traditional common-law theories, out-of-court settlements, statutory law, and federal common law. Traditional common-law theories, out-of-court settlements, and statutory law do not uniformly address the scope of environmental harm cases.[12] The disposal of hazardous substances poses a national problem that requires federal action to ensure uniform responses.

A. Common-Law Remedies

Traditional common-law tort theories do not adequately address the widespread problem of hazardous substances.[13] Establish-

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stances). The environmental legislation listed above covers only a narrow class of substances and focuses on a single purpose, thus creating a void in the overall legislative scheme.

6. *See infra* notes 12-40 and accompanying text.

7. *See infra* notes 12-40, 159 and accompanying text.

8. 42 U.S.C. §§ 9601-57 (Supp. IV 1980) [hereinafter cited as Superfund].

9. *See infra* notes 41-74 and accompanying text.

10. City of Milwaukee v. Illinois, 451 U.S. 304 (1981) (construing the Federal Water Pollution Control Act).

11. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n., 453 U.S. 1 (1981); California v. Sierra Club, 451 U.S. 287 (1981) (construing the Rivers and Harbors Appropriation Act of 1899, ch. 425, 30 Stat. 1151 (codified at 33 U.S.C. §§ 401, 403-04, 406-09, 411-15, 502, 549, 686-87 (1976)).

12. *See generally* Pfennigstory, *Environmental Damages and Compensation,* 1979 A.B.A. RES. J. 349 (1979) (determining when an activity becomes abnormally dangerous differs among jurisdictions).

13. *See* SENATE COMM. ON ENV. AND PUBLIC WORKS, SIX CASE STUDIES OF COMPEN-

ing a prima facie case of tortious conduct frequently creates a barrier, particularly when a litigant seeks recovery for actual bodily harm caused by exposure to toxic chemicals.[14] The latent nature of most toxic substances often makes proof of causation an insurmountable hurdle for private litigants.[15] The victim confronts substantial difficulty in providing the requisite legal proof and lacks the resources to acquire the necessary information.

Environmental litigants have successfully used nuisance and strict liability, two common-law theories, to recover.[16] Nuisance is often considered the forerunner to environmental harm theories.[17] Injured victims may pursue a cause of action in nuisance against both governmental entities[18] and private individuals.[19] Strict liability, as reflected in the Restatements of Torts, has developed two approaches to impose liability. The Restatement of Torts, First,

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SATION FOR TOXIC SUBSTANCES POLLUTION: ALABAMA, CALIFORNIA, MICHIGAN, MISSOURI, NEW JERSEY, AND TEXAS, S. DOC. NO. 13, 96th Cong., 2d Sess. (1980) [hereinafter cited as SIX CASE STUDIES]. The study canvassed recent environmental catastrophes and concluded that common-law remedies cannot begin to address environmental harm causes.

14. *See, e.g.,* Easton Fruit Co. v. California Spray Chemicals, 103 Ariz. 461, 445 P.2d 437 (1968). A farmer recovered for crop damage against the manufacturer of pesticides containing 2-4-D and Silvex. The 2-4-D, however, a human carcinogen, posed a risk of cancer to the farmer for which he did not recover. *See* EPA, TENTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY (1979).

15. *See generally* Milhollin, *Long-Term Liability for Environmental Harm,* 41 U. PITT. L. REV. 1 (1979).

16. Litigants have also used trespass and negligence theories in environmental harm cases. A trespass action requires the plaintiff to show ownership or possession of the land and an invasion by the defendant onto the land. Martin v. Reynolds Metal Co., 221 Or. 86, 342 P.2d 790, *cert. denied,* 362 U.S. 918 (1959). *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 13, at 63 (4th ed. 1971). The concept of trespass has been used recently in the context of air pollution cases. *E.g.,* Borland v. Sanders Lead Co., 369 So. 2d 523 (Ala. 1979); Roberts v. Permanente Corp., 188 Cal. App. 2d 526, 10 Cal. Rptr. 519 (1961). The required duty analysis under a negligence theory creates problems in environmental tort litigation. *See* W. PROSSER, *supra* § 30 at 143; V. YANNACONE, JR., B. COHEN, 1 ENVIRONMENTAL RIGHTS AND REMEDIES § 3.4 at 83 (1972). Litigants have successfully utilized a negligence cause of action to recover for reckless interference with land. Copart Industries, Inc. v. Consolidated Edison Co., 41 N.Y.2d 564, 394 N.Y.S.2d 169, 362 N.E.2d 968 (1977).

17. The nuisance cause of action developed in the early 1800's and addresses interferences with another person's or class of persons' right to enjoy the use of the land. A condition may constitute either a public or private nuisance. For cases categorically defining nuisances as private, public, or mixed, see, e.g., Selma v. Jones, 202 Ala. 82, 79 So. 476 (1918); Burnham v. Hotchkiss, 14 Conn. 311 (1840); Dean v. State, 151 Ga. 371, 106 S.E. 792 (1921); Acme Fertilizer Co. v. State, 34 Ind. App. 346, 72 N.E. 1037 (1905); Riggins v. District Court, 89 Utah 183, 51 P.2d 645 (1935). For application of the nuisance theory in air pollution cases, see, e.g., Chicago v. Commonwealth Edison Co., 24 Ill. App. 3d 624, 321 N.E.2d 412 (1974) (although plaintiffs did not prevail, the court articulated the requirements for a nuisance action).

18. The Federal Torts Claims Act, 28 U.S.C. §§ 2671-80 (1976), does not preclude a nuisance action. Board of Supervisors v. United States, 408 F. Supp. 556 (E.D. Va. 1976), *appeal dismissed,* 551 F.2d 305 (4th Cir. 1977). *But see* Moore v. Hampton Roads Sanitation Dist., 11 Env't Rep. Cas. (BNA) 1191, *aff'd,* 557 F.2d 1030 (4th Cir. 1977), *cert. denied,* 434 U.S. 1012 (1978).

19. *See, e.g.,* Clinic and Hospital, Inc. v. McConnell, 241 Mo. App. 223, 236 S.W.2d 384 (1951); Boomer v. Atlantic Cement Co., 26 N.Y.2d 192, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970); Evans v. Reading Chemical Fertilizing Co., 160 Pa. 209, 28 A. 902 (1894). Both the *Clinical Hospital* and the *Evans* cases recognize private damages for public nuisances. *See generally* Prosser, *Private Action for Public Nuisance,* 52 VA. L. REV. 997 (1966).

classifies certain activities as ultra-hazardous.[20] The Restatement of Torts, Second, however, delineates criteria for determining when an abnormally dangerous condition exists.[21] The trend follows the second version of the Restatement.[22] A cause of action based on nuisance or an abnormally dangerous theory of strict liability, however, involves a cost-benefit analysis of the condition, which analysis may pose an insurmountable hurdle to plaintiffs.[23] While recovery in a nuisance action may consist of an injunction,[24] damages,[25] or both[26]

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20. The RESTATEMENT OF TORTS § 519 (1938) provides the following:

> [O]ne who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm.

21. THE RESTATEMENT (SECOND) OF TORTS § 520 (1976) provides the following criteria for determining when an abnormally dangerous condition exists:

> (a) Existence of a high degree of risk of some harm to the person, land or chattels of others;
> (b) likelihood that the harm that results from it will be great;
> (c) inability to eliminate the risk by the exercise of reasonable care;
> (d) extent to which the activity is not a matter of common usage;
> (e) inappropriateness of the activity to the place where it is carried on; and
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

See also RESTATEMENT (SECOND) OF TORTS § 519 (1976).

22. Courts originally adopted the ultrahazardous theory to impose strict liability on unnatural activities. Turner v. Big Lake Oil Co., 128 Tex. 155, 96 S.W.2d 221 (1936). The *Turner* case borrowed from principles explained in *Rylands v. Fletcher,* L.R. 3 H.L. 330, 37 L. Ex. 161 (1868), which imposed strict liability on mill owners whose reservoirs overflowed onto adjoining property. In *Turner,* the court strictly construed *Rylands v. Fletcher* to apply only to a condition unnatural for an area. The court, therefore, refused to find that storing in Texas salt wastes produced during oil drilling constituted an unnatural activity. The Restatement Second has adopted the unnatural activity analysis. *See, e.g.,* Fritz v. E.I. duPont deNemours Co., 75 A.2d 256 (Del. Super Ct. 1950); Sun Pipe Line Co. v. Kirkpatrick, 514 S.W.2d 789 (Tex. Civ. App. 1974). Courts have relied on both the first and second Restatement of Torts in finding strict liability. Cities Service Co. v. State, 312 So. 2d 700 (Fla. Dist. Ct. App. 1975); City of Bridgeton v. B.P. Oil Inc., 146 N.J. Super. 169, 369 A.2d 49 (1976).

23. Both the abnormally dangerous concept of strict liability and the theory of nuisance have developed as regional concepts. *See* Cities Service Co. v. Florida, 312 So. 2d 799 (Fla. Dist. Ct. App. 1975); City of Chicago v. Commonwealth Edison, 24 Ill. App. 3d 624, 321 N.E.2d 412 (1974). The classic example is Love Canal, where Hooker Chemical actively generated waste. The actions of Hooker may not have been declared a nuisance or abnormally dangerous because a substantial economic benefit inured to the community. LOVE CANAL PUBLIC HEALTH TIME BOMB: SPECIAL REPORT TO THE GOVERNOR OF NEW YORK AND LEGISLATURE (1970). At that time, experts did not realize the long-range effects of dioxin. *See* Milhollin, *supra* note 15. *See also* Doniger, *Federal Regulation of Vinyl Chloride: A Short Course in the Law and Policy of Toxic Substances Control,* 7 BERKLEY ECOLOGY L.Q. 500 (1978) (citing Schelling, *The Life You Save May Be Your Own,* PROBLEMS IN PUBLIC EXPENDITURE ANALYSIS § 127 (S. Chase ed. 1968)). Doniger reviews the procedures that agencies may undertake to implement a cost-benefit analysis and concludes that: "First, all decisions must be made under substantial uncertainty about the medical and ecological risks, technological difficulties and economic costs associated with different degree of exposure. Second, all decisions involve trade-offs among groups with interests that are not readily comparable." Doniger, *supra* at 519.

24. *E.g.,* City of Chicago v. Stern, 96 Ill. App. 3d 264, 421 N.E.2d 260 (1981); City of Cloquet v. Cloquet Sand & Gravel, Inc., 251 N.W.2d 642 (Minn. 1977); Leatherbury v. Graylord Fuel Corp., 276 Md. 267, 347 A.2d 826 (1975) (required finding of nuisance per se in order to abate activity); Nothaus v. City of Salem, 585 S.W.2d 244 (Mo. App. 1979) (denied injunctive relief but articulated what would satisfy a claim for an injunction); Commonwealth v. Barnes & Tucker Co., 455 Pa. 392, 319 A.2d 871 (1974), *on remand,* 23 Pa. Commw. 496, 353

strict liability actions generally address personal injury damages, not economic loss.[27]

Recovery under common-law theories for personal injury from toxic substances, however, represents the exception to the general rule. In most cases, the parties settle in the pretrial phase.[28] Although judicial economy favors pretrial settlement, settlement resulting from toxic tragedies exemplifies the disparity between the industrial defendant and the private litigant.[29] Ostensibly, both parties favor settlement because the injured victim receives instant compensation and both parties save litigation expenses. Despite egregious statutory violations by the chemical industries, victims re-

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A.2d 471 (1974), *aff'd,* 472 Pa. 115, 371 A.2d 461 (1974), *appeal dismissed,* 434 U.S. 807 (1974); Commonwealth v. Wyeth Laboratories, 12 Pa. Commw. 227, 315 A.2d 648 (1974).

25. *E.g.,* Kasparek v. Johnson County Bd. of Health, 288 N.W.2d 511 (Iowa 1980); Botsch v. Leigh Land Co., 205 Neb. 401, 288 N.W.2d 31 (1980); Hauser v. Calawa, 116 N.H. 676, 366 A.2d 489 (1976); Lunda v. Matthews, 46 Or. App. 701, 613 P.2d 63 (1980); Pate v. City of Martin, 614 S.W.2d 46 (Tenn. 1981).

26. Krulikowski v. Polycast Corp., 153 Conn. 661, 220 A.2d 444 (1966); Earl v. Clark, 219 N.W.2d 487 (Iowa 1974); Mandell v. Pasquaretto, 76 Misc. 2d 405, 350 N.Y.S.2d 561 (1976); Maenchen v. Sand Products Co., 626 P.2d 332 (Okl. Ct. App. 1981); Conkin v. Ruth, 581 P.2d 923 (Okl. Ct. App. 1976); Evans v. Moffat, 192 Pa. Super. 204, 160 A.2d 465 (1960).

27. For example, a cause of action in strict liability, premised on products liability principles, forces a more onerous burden on a potential plaintiff who can only document economic loss and not personal injury. *E.g.,* Morrow v. New Moon Homes, Inc., 543 P.2d 279 (Alaska 1976); Hawkins Construction Co. v. Matthews Co., 190 Neb. 546, 209 N.W.2d 643 (1973); Inglis v. American Motors Corp., 3 Ohio St. 2d 132, 209 N.E.2d 583 (1965); Nobility Homes, Inc. v. Shivers, 557 S.W.2d 77 (Tex. 1977). Nonetheless, courts addressing environmental fiascos have applied strict liability even when the parties have not claimed personal injury damages, *e.g.,* Cities Service Co. v. State, 312 So. 2d 799 (Fla. Dist. Ct. App. 1975), and at least one state has extended strict liability to include economic loss by applying the doctrine of strict liability under the Uniform Commercial Code. Herbstan v. Eastman Kodak Co., 68 N.J. 1, 342 A.2d 181 (1978); A-Leet Leasing Corp. v. Kingshead Corp., 150 N.J. Super. 384, 375 A.2d 1208 (1977). Presently, however, the weight of authority precludes a plaintiff from solely recovering economic loss.

28. *See* SIX CASE STUDIES, *supra* note 13, at 515. *Cf.* Silkwood v. Kerr McGee Corporation, 485 F. Supp. 566 (W.D. Okla. 1979) (lengthy trial resulting in an award of $505,000 dollars for actual damages and $10 million dollars for punitive damages). The *Silkwood* case, an aberration, involved a settlement exceeding many of the settlements canvassed in the SIX CASE STUDIES.

29. The Kepone incident in Virginia illustiates the disparity. An allied chemical plant discharged Kepone into the James River and permitted the chemical to permeate the plant. As a result, a substantial number of employees suffered Kepone poisoning. The estimated aggregate amount of loss to the employees exceeded two billion dollars, including 119 million dollars of documented medical payments. The claims totalled 108.9 million dollars. Settlement negotiations commenced shortly after the claimants filed. The court fined the responsible party, Allied Chemical, 13.2 million dollars. Thereafter, Allied Chemical established a fund for Kepone-related problems. In the end, Allied expended over 13 million dollars in satisfaction of claims, while receiving tax reductions of four million dollars. Further, Allied experienced no adverse business ratings as a result of the Kepone incident. *See* Soble, *A Proposal for the Administrative Compensation of Victims of Toxic Substance Pollution,* 14 HARV. L. LEG. 683 (1977) (Soble received the compilation of the damages from Timothy G. Hayes, Assistant Attorney General, Commonwealth of Virginia). *See generally, Hearings on the Kepone Contamination in Hopewell, Virginia Before the Subcommittee on Agricultural Research and General Legislation of the Senate Committee on Agriculture and Forestry,* 94th Cong., 2d Sess. (1976). *See also* SIX CASE STUDIES, *supra* note 13 (discussion of the incident); *Hazardous and Toxic Waste Disposal: Joint Hearings Before the Subcommittee on Environmental Pollution and Resource Protection of the Committee on Environment and Public Works,* 96th Cong., 1st Sess. Part I-II (1980) [hereinafter cited as *Hazardous and Toxic Waste Report].*

main unaware and unapprised of the harm associated with the exposure to toxic substances. Thus, unequal bargaining power and inadequate information have dominated settlements and resulted in inequitable compensation.[30]

B. Current Statutory Regulation

Ranging from pesticide control to solid waste management, environmental statutes, more than traditional common-law theories, represent the product of environmental fiascos.[31] Consequently, the statutes more closely apply to current environmental problems.[32] Legislatures have geared environmental statutes primarily to enforcement against the chemical industries[33] and have thus provided regulatory mechanisms at both state and federal levels.[34] These regulatory statutes provide extensive administrative remedies to the government, but no compensatory remedies to the injured party.[35]

Regulatory statutes do provide some relief for private individuals. For example, many environmental statutes authorize civil

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30. *See, e.g.,* SIX CASE STUDIES, *supra* note 13, at XIV. The study revealed the following statistics:

State	Compensation Sought ($)	Compensation Obtained ($)
Alabama	1.6 billion	private plaintiffs settled for undisclosed amount; Alabama settled its 100 million suit for 67,500
Michigan	fines and 15 million clean-up operation; 60 million	settled for $15 million cleanup and 1 million fine; claimed 59,350,000 won 120,000
Missouri	2.5 million	227,000 and 1 suit pending
New Jersey	confidential	settled for 200,000
Texas	19 million	580,000 in settlements; 2 suits pending.

31. The National Environmental Policy Act, 42 U.S.C §§ 4321-61 (1976 & Supp. III 1979), provided the basis for environmental legislation. Thereafter, the legislature promulgated and amended statutes to reflect current environmental problems. *E.g.,* Federal Waste Pollution Control Act, 33 U.S.C. §§ 1251-376 (1976 & Supp. III 1979); Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 135-36y (1976 & Supp. III 1979 and Supp. IV 1980); Oil Pollution Act, ch. 316, § 1, 43 Stat. 604 (1924) (current version at 33 U.S.C. § 1001 (1976 & Supp. III 1979)); Oil Pollution Act, § 1961, 33 U.S.C. §§ 1001-15 (1976); Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-87 (1976 and Supp. III 1979); Toxic Substances Control Act, 15 U.S.C. §§ 2601-29 (1976 & Supp. 1979).

32. *See supra* notes 5 and 31.

33. The statutes address specific and narrow problems relevant solely to the industry. For example, the Toxic Substance Control Act, 15 U.S.C. §§ 2601-29 (1976 & Supp. III 1979), applies only to substances presenting a certain risk prior to manufacture; the Resources Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-87 (1976 & Supp. III 1979), addresses hazardous wastes at the generator and disposal level.

34. *See supra* note 31. *See generally* Wooley, ENVIRONMENTAL QUALITY ISSUES: THE RELATION OF FEDERAL LAWS TO STATE PROGRAMS (1981).

35. The dichotomy in statutes broadens the void between the toxic tort remedy and the injured victim. Statutes generally either regulate or compensate. Consequently, two statutes may contain two different triggering mechanisms. *See generally supra* note 31.

suits.[36] Thus, private individuals may pursue an injunction to enforce the provisions of the particular statute. In addition, a private individual, as an aggrieved party, may seek judicial review of action taken by the Administrator of the Environmental Protection Agency.[37] Significantly, the civil suit mechanism operates on the presumption that private citizens know when the Administrator of the Environmental Protection Agency has acted or failed to act in enforcing a statute.[38] Finally, environmental statutes generally preserve existing causes of action.[39]

Theoretically, the private individual enjoys both statutory and common-law protection. In reality, however, the civil suit provisions and the common-law causes of action have failed to compensate the victim of toxic time bombs.[40] A major environmental catastrophe causes the government to sue for massive civil penalties, resulting from the statutory violation, and causes the commencement of settlement negotiations. Aside from these settlement negotiations, which inevitably end unfairly, the victim must contend with whatever latent harm manifests itself without compensatory redress.

III. Bridging the Gap

A. Superfund

Legislative bills designed to aid victims of toxic torts inundated the 95th and 96th sessions of Congress,[41] resulting in the enactment

36. *E.g.,* Deep Water Port Act, 33 U.S.C. § 1516 (1976 & Supp. III 1979); Marine, Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. § 1415(g)(5) (1976 & Supp. III 1979); Solid Waste Disposal Act, 42 U.S.C. § 6972(b) (1976) & Supp. III 1979); Toxic Substances Control Act, 15 U.S.C. § 2619(c)(3) (1976 & Supp. III 1979).

37. Administrative Procedure Act, 5 U.S.C. § 702 (1976 & Supp. III 1979).

38. *See, e.g.,* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); California v. Sierra Club, 451 U.S. 287 (1981); City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979), *cert. denied,* 444 U.S. 1025 (1979). In all of these cases, the plaintiffs pursued an implied right of action because the time limitation set by the express statutory provisions had lapsed. The inability of the litigants to satisfy the time limitations indicates the impracticality of the civil suit provisions in protecting victim rights. *See* Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor, 619 F.2d 231 (3d Cir. 1980). *See also* Pymatuning Water Shed Citizens for a Hygenic Env't Etc. v. Eaton, 644 F.2d 995 (3d Cir. 1981). One court, however, has required compliance with the statutory time limitation under an implied right of action. Brede v. Scharbath, 483 F. Supp. 809 (E.D. Wis. 1980).

39. *E.g.,* 33 U.S.C. § 1365(a) (1976 & Supp. III 1979); 33 U.S.C. § 1515(e) (1976 & Supp. III 1979); 15 U.S.C. § 2617 (1976 & Supp. III 1979); 42 U.S.C. § 7604(e) (1976 & Supp. III 1979); 42 U.S.C. § 6972(f) (1976 & Supp. III 1979).

40. *See supra* notes 28-30, 36-38 and accompanying text.

41. *See, e.g.,* H.R. 1049, 96th Cong., 1st Sess., 125 CONG. REC. 1213 (daily ed. January 18, 1979); H.R. 5291, 96th Cong., 1st Sess., 125 CONG. REC. 7951 (daily ed. September 14, 1979); H.R. 5074, 96th Cong., 1st Sess., 125 CONG. REC. 72001 (daily ed. August 2, 1979); H.R. 5617, 96th Cong., 1st Sess., 125 CONG. REC. 9331 (daily ed. October 17, 1979); H.R. 4571, 96th Cong., 1st Sess., 125 CONG. REC. 4957 (daily ed. June 21, 1979); H.R. 4566, 96th Cong., 1st Sess., 125 CONG. REC. 4957 (daily ed. June 21, 1979); H.R. 4075, 96th Cong., 1st Sess., 125 CONG. REC. 3121 (daily ed. May 14, 1979); H.R. 5790, 96th Cong., 1st Sess., 125 CONG. REC. 10246 (daily ed. November 2, 1979); H.R. 5749, 96th Cong., 1st Sess., 125 CONG. REC. 10057-58 (daily ed. October 31, 1979); H.R. 85, 96th Cong., 1st Sess., 125 CONG. REC. 3283 (daily ed.

of the Comprehensive Environmental Response, Liability, and Compensation Act of 1980.[42] This most recent attempt to regulate industrial wastes attempted the novel approach of combining regulation with compensation.[43] The Act, commonly labelled Superfund, articulates new standards of liability in addressing the release of hazardous substances into the environment.[44] Currently, however, the Act does not explicitly provide personal injury compensation.

Superfund seeks to identify and remedy the problems resulting from the release of hazardous substances into the environment by imposing stringent reporting requirements. Also, Superfund imposes liability for noncompliance with the reporting requirements and the permissible release requirements.[45] The Act establishes a 1.6 billion dollar compensation fund[46] financed by taxes levied on oil importers and refineries, and on the manufacturers and producers of inorganic chemicals.[47] These taxes will continue in effect until 1985.[48]

Superfund establishes a lexicon of statutory definitions in delineating those subject to the duties imposed by the Act.[49] Many of Superfund's definitions incorporate various provisions of existing legislation. For example, the definition of "environment" applies Superfund to both navigable waters and drinking water supplies.[50] A federally permissible release of a hazardous substance must comply with the specifications set forth in both the Federal Water Pollution Control Act and the Solid Waste Disposal Act.[51] The definition of a "hazardous substance" encompasses hazardous substances included in the Federal Water Pollution Control Act, the Solid Waste Disposal Act, and any inherently hazardous substance regulated under the Toxic Substance Control Act.[52]

May 15, 1979); S 1341, 96th Cong., 1st Sess., 125 CONG. REC. 7694 (daily ed. June 14, 1979); S. 1480, 96th Cong., 1st Sess., 125 CONG. REC. 9173 (daily ed. June 11, 1979).

42. 42 U.S.C. §§ 9601-57 (Supp. IV 1980).
43. The compensation provision was deleted from the liability section.
44. *See* 42 U.S.C. §§ 9601-57 (Supp. IV 1980).
45. *Id.* §§ 9602, 9607.
46. *Id.* § 9631(b)(2).
47. *Id.* § 9631(b)(1)(A).
48. *Id.* § 9653.
49. *Id.* § 9601.
50. *Id.* § 9601(8). This section defines "environment" as follows:

> (8) Environment means (A) The navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Fishery Conservation and Management Act of 1976 [16 U.S.C.S. § 1801 et seq] and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States.

51. The following definition of "release" reinforces the broad underlying purposes of the Act: "Release means any spilling, leaking, pumping pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment. . . ." *Id.* § 9601(22).
52. 42 U.S.C. §§ 9601(14), 9602 (Supp. IV 1980).

The compensation provisions of Superfund address response costs for both active[53] and inactive[54] disposal facilities. Victims may secure compensation through the response fund for those releases or discharges emanating from the active facility[55] or through the Post-Closure Trust Fund, a fund created specifically for inactive waste disposal sites.[56]

Criminal and civil penalties complement three of the Act's crucial liability aspects. First, failure to notify the Environmental Protection Agency of a facility generating or disposing hazardous wastes may result in fine, imprisonment, or both.[57] Second, failure to provide sufficient remedial action in the event of a release, or a threat of release, may result in punitive treble damages based on the total cost of clean-up.[58] Third, evidence of the manufacturer's willful negligence or willful misconduct may require the manufacturer to pay the total cost of clean-up, despite liability limitations.[59]

The legislative history of Superfund consistently communicates that the legislation must address compensation for injured victims.[60] Superfund arrived after three years of legislative action spurred by toxic time bombs. Polychlorinated by-phenyls,[61] kepone,[62] dioxin,[63]

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53. *Id.* § 9607.
54. *Id.* § 9631.
55. *Id.* §§ 9607, 9611.
56. *Id.* § 9641.
57. *Id.* § 9603.
58. *Id.* § 9607(c)(3).
59. *Id.* § 9607(c)(2).
60. *See, e.g.,* 126 CONG. REC. 11791 (daily ed. December 3, 1980) (statement of Mr. Broyhill); 126 CONG. REC. 11794 (daily ed. December 3, 1980) (statement of Mr. Vento); 126 CONG. REC. 14963 (daily ed. November 24, 1980) (statement of Senator Randolph). *See generally* S. REP. NO. 848, 96th Cong., 2d Sess. (1980). *See infra* notes 69-70.
61. The Environmental Protection Agency has recently banned polychlorinated bi-phenyls, commonly referred to as PCBs. PCBs, carcinogenic in nature, escape from the insulation fluid of transformers. For example, when the General Electric Company discharged the fluid into the Hudson River, PCBs pervaded prepared foods and spread through 19 states. *See* S. REP. NO. 848, 96th Cong., 2d Sess., 6, 7 (1960); EPA, NINTH ANNUAL REPORT OF THE COUNCIL FOR ENVIRONMENTAL QUALITY 180 (1978). *See also* 126 CONG. REC. 14963 (daily ed. November 24, 1980) (statement of Senator Randolph).
62. Kepone absorbs into the human body through the bloodstream and may cause neurological damage, metabolic disturbances, liver damage, and testicular damage resulting in sterility. *See Hearings on the Kepone Contamination in Hopewell Virginia Before the Subcommittee on Agricultural Research and General Legislation of the Senate Committee on Agriculture and Forestry, supra* note 29.
63. Dioxin, the lethal carcinogen that captured the primary attention at Love Canal, has proved one hundred times more deadly than strychnine. *See* EPA, TENTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 177 (1979). The health problems include spontaneous abortions, birth defects, epilepsy, rectal bleeding, and possible latent illness. *See Hazardous and Toxic Waste Disposal: Hearings before the Subcomm. on Env'l Pollution and Resource Protection of the Senate Comm. on Env. and Public Works,* 96th Cong., 1st Sess., Part I (1980) (testimony of Dr. Beverly Diagen) [hereinafter cited as the *Hazardous and Toxic Waste Disposal Report*]; LOVE CANAL—PUBLIC HEALTH TIME BOMB: A SPECIAL REPORT TO THE GOVERNOR AND LEGISLATURE (1978). According to one report, the damage caused by dioxin remains unknown:

> Still worse, as the company recently acknowledged, Hooker buried up to 3700 tons of trichlorophenol waste, which contains one of the world's most deadly chemicals, di-

benzene,[64] and other carcinogens catalyzed the growing alarm over hazardous substances. Investigators discovered toxic contaminants in well waters and traced the contaminants to closed-waste sites containing rotting drums that were leaking poisonous wastes.[65] The resulting ailments included cancer of the liver, leukemia, spontaneous abortions, and birth defects in chicken.[66] These findings motivated the legislation.[67]

Congress considered third-party personal injury claims in contemplating the Act.[68] The House offered an array of proposals, which, though not an integral part of Superfund, would have created a separate agency to adjudicate third-party personal injury claims.[69] The Senate strongly advocated third-party personal injury claims as part of the strict liability regime of Superfund.[70] In addition, the Senate set forth a private cause of action that comported with the remedial provisions of the Act.[71]

As the 97th Congress approached adjournment, the Senate com-

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oxin, at various sites in Niagara County between 1947 and 1972. Investigators immediately sought to determine whether dioxin had seeped out and indeed the substance was identified in small quantities within leachate taken from the periphery of the Love Canal, an indication that it may have begun to migrate. There are now believed to be an estimated 141 pounds of dioxin in the Canal site and as much as 2,000 pounds buried elsewhere in the County.

S. REP. NO. 848, 96th Cong., 2d Sess. (1980).

64. Studies have associated benzene with leukemia and chronic blood disorders: "A recent study found that typical exposure of a householder using benzene to strip furniture would exceed not only the current standard for occupational exposure but also the standard established before benzene's leukemogenic properties are taken into account." EPA, NINTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 179 (1979).

65. *See Hazardous and Toxic Waste Disposal Report, supra* note 63, Part I, at 39 (300,000 barrels and about 10 million chemicals found on an isolated 24 acres).

66. *See generally* EPA, TENTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY (1979); EPA, NINTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY (1978); *Hazardous and Toxic Waste Disposal Committee Reports, supra* note 63; S. REP. NO. 848, 96th Cong., 2d Sess. 1980); LOVE CANAL: PUBLIC HEALTH TIME BOMB: A SPECIAL REPORT TO THE GOVERNOR AND LEGISLATURE OF NEW YORK (1978).

67. *See Hazardous and Toxic Waste Report, supra* note 63, at Parts I-II.

68. *See supra* note 41 and accompanying text; *infra* notes 161-68 and accompanying text.

69. *See, e.g.,* H.R. 1049, 96th Cong., 1st Sess. (1979), combined with H.R. 1048, 96th Cong., 1st Sess. (1979) and reoffered as H.R. 5291, 96th Cong., 1st Sess., 125 CONG. REC. 7951 (daily ed. Sept. 14, 1979); H.R. 5790, 96th Cong., 1st Sess., 125 CONG. REC. 10246 (daily ed. November 2, 1979); H.R. 5749, 96th Cong., 1st Sess. (1979), 125 CONG. REC. 10057-58 (daily ed. October 31, 1979). *See also* H.R. 5074, 96th Cong., 1st Sess., 125 CONG. REC. 72001 (daily ed. August 2, 1979). Representative Brodhead introduced this bill on August 8, 1979. The bill, The Toxic Substance Pollution Victim Compensation Act, would have established an independent agency, the Administrative Board for Compensation of Victims of Toxic Substances, to compensate victims of hazardous substances. The bill closely paralleled a Model Act proposed in Soble, *A Proposal for the Administrative Compensation of Victims of Toxic Substance Pollution: A Model Act,* 14 HARV. J. LEG. 683 (1977). The proposal resulted from extensive research that canvassed the problems of third-party recovery and reviewed the aspects of a similar act that Japan has successfully implemented. The House concentrated on the scope of the bill's coverage. *See* H.R. 85, 96th Cong., 1st Sess., 125 CONG. REC. 3283 (daily ed. May 15, 1979).

70. S. 1480, 96th Cong., 1st Sess., 125 CONG. REC. 9173 (daily ed. June 11, 1979). *See generally Hazardous and Toxic Waste Disposal Report, supra* note 63.

71. Section 4 articulated both the standard of liability and the procedure for handling claims. S 1480, 96th Cong., 1st Sess., 125 CONG. REC. 9173 (daily ed. June 11, 1979).

promised the third-party personal injury provision in an attempt to receive the required approval of the House.[72] Paradoxically, the victims who served as the impetus for this legislation receive no coverage from the legislation.

Despite the failure to include compensatory mechanisms for victims, Superfund cursorily attempts to bridge the gaps between environmental regulatory legislation and environmental compensatory legislation; and between the unprotected victim and the manufacturer of hazardous substances. The Act does provide various mechanisms for holding the manufacturer accountable to the injured victim, but none afford him compensation.[73] Thus, although Superfund sounds in victim protection, this victim-based statute fails to recompense the victim.[74]

Nonetheless, the framers of Superfund remained confident that the judicial response would begin where legislative action ceased.[75] Federal courts may achieve the purpose of the statute by applying federal common-law precepts.[76]

B. Federal Common Law and the Implied Right of Action

The federal common law[77] and the implied right of action[78] have pervaded the judicial system for over a century.[79] Extrapolating the historical antecedents of these concepts provides a basis for applying them to effectuate Superfund's remedial purposes. The Supreme Court, however, has recently scrutinized both concepts strictly, particularly in cases involving environmental statutes.[80] Nonetheless, the current usage intimated by the Court suggests that both the federal common-law and the implied right of action concepts will remain a viable avenue for private litigants seeking recov-

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72. *See* 126 CONG. REC. 14948-62 (daily ed. November 24, 1980) (text of proposed compromise, amended No. 2631); 126 CONG. REC. 11773-87 (daily ed. December 3, 1980) (text of compromise offered by the Senate). *See* 126 CONG. REC. 14962 (daily ed. November 24, 1980) (statement of Senator Stafford), which asserts the following: "We are not here to discuss a compromise of the reported bill in order to find solutions to these urgent problems. We seek compromise because we are realistis." *Id. See also* 11 ENV'T REP. (BNA) 141 (1980); 38 CONG. Q. 1290 (weekly report, November 29, 1980); 38 CONG. Q. 3509 (weekly report, December 6, 1980).

73. *See infra* notes 148-58 and accompanying text.

74. *See infra* notes 148-55 and accompanying text.

75. *E.g.,* 126 CONG. REC. 11787 (daily ed. December 3, 1980) (statement of Representative Fiorio). *See infra* notes 161-68 and accompanying text.

76. *See infra* notes 85-169 and accompanying text.

77. *See infra* notes 84-120 and accompanying text.

78. *See infra* notes 121-68 and accompanying text.

79. *See, e.g.,* Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 138 (1824) (federal character of a right), Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (for every right there is a remedy).

80. *E.g.,* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); California v. Sierra Club, 451 U.S. 287 (1981); City of Milwaukee v. Illinois, 451 U.S. 304 (1981). *See infra* notes 87-146 and accompanying text.

ery from manufacturers of hazardous substances.[81]

Initially, the courts considered the federal common law and the implied right of action immiscible concepts. While the implied right of action existed as a substantive right emanating from a statute,[82] federal common law derived from federal concerns independent of any statute.[83] Either a federal common law of strict liability or an implied right of action would bring Superfund to the stage envisioned by its drafters.

1. Federal Common Law.—Federal common law constitutes the body of law that fills the interstices of a pervasive federal framework in order to avoid subjecting relevant federal interests to the inconsistencies of state law.[84] The federal common-law concept of nuisance, a variant of the traditional common-law concept of nuisance,[85] originally served as a jurisdictional mechanism for one state to seek redress from another state in the Supreme Court.[86]

In *Illinois v. City of Milwaukee,*[87] the seminal case regarding the federal common law of nuisance, Illinois instituted an action against four cities in Wisconsin for the disposal of inadequately treated sewage into Lake Michigan.[88] Because air and water in their ambient or interstate natures qualify as federal concerns, the Supreme Court sought to fashion a cause of action to promote a uniform standard of dealing with a state's environmental rights beyond its borders.[89]

The Supreme Court delivered the original *Illinois* decision during the early years of affirmative environmental legislation.[90] Relying on a long line of precedent, the Court considered the federal common law of nuisance a necessary supplement to existing legisla-

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81. *E.g.,* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981).

82. Texas & Pacific Ry. v. Rigsby, 241 U.S. 33 (1916).

83. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 91 (1938); Kansas v. Colorado, 206 U.S. 46 (1906).

84. Textile Workers Union of Am. v. Lincoln Mills, 353 U.S. 448 (1957).

85. *E.g.,* Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907).

86. *E.g.,* New Jersey v. New York, 283 U.S. 336 (1931); New York v. New Jersey, 256 U.S. 296 (1921); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907); Missouri v. Illinois, 180 U.S. 208 (1901). *See also* Committee for Consideration of Jones Fall Sewage v. Train, 375 F. Supp. 1148 (D.C. Md. 1974) (court indicated that the presence of governmental units as plaintiffs weighed heavily in finding that a federal cause of action existed). *But see* United States *ex rel.* Scott v. United States Steel Corp., 356 F. Supp. 556 (N.D. Ill. 1973) (no requirement of controversy between sovereigns).

87. 406 U.S. 91 (1972).

88. *Id.* at 93.

89. The court stated, "It is not uncommon for federal courts to fashion federal law where federal rights are concerned." 406 U.S. at 103 (quoting Textile Workers v. Lincoln Mills, 353 U.S. 448, 457 (1957)). *See also* Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971).

90. The Court utilized the 1971 version of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-376 (1976 & Supp. III 1979); and the National Environmental Policy Act, 42 U.S.C. § 4321 (1976 & Supp. III 1979).

tion.[91] On remand to the district court,[92] however, the case was decided during an environmental legislation upsurge.[93] Accordingly, the court held that the existing legislation, specifically the Federal Water Pollution Control Act, provided the courts with the necessary policy guidelines to implement this legislation.[94]

In the first *Illinois* decision, the Supreme Court established a federal common law of nuisance but did not substantively define that concept.[95] Nonetheless, the decision laid the foundation for the development of a federal common law of nuisance by identifying the federal interest.[96] Moreover, the decision established the availability of the federal common law of nuisance to parties other than states.[97] The concept's lack of substantive clarity, however, caused the courts to vacillate in determining the parameters of the concept and to whom it should apply. Courts tended to expand the scope of the federal common-law nuisance concept and increasingly allowed state entities and private litigants to utilize it.[98]

Most recently, the Supreme Court stultified the development of the federal common law of nuisance in *City of Milwaukee v. Illi-*

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91. Textile Workers Union of Am. v. Lincoln Mills, 353 U.S. 448 (1957); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); D'Oenck Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447 (1942); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907); Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971).

92. Illinois v. City of Milwaukee, 599 F.2d 151 (7th Cir. 1979).

93. *See* Water Pollution Control Act, § , 33 U.S.C.S. §§ 1251-376 (Supp. III 1979). *See also* The Toxic Substances Control Act, 15 U.S.C. §§ 2601-29 (1976 & Supp. III 1979 and Supp. IV 1980); The Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-87 (1976 & Supp. III 1979).

94. 599 F.2d 151 (7th Cir. 1979). *See also* 406 U.S. at 103 n.5, in which the Court stated: "While the various federal environmental protection statutes will not necessarily mark the outer bounds of the federal common law they may provide useful guidelines in fashioning such rules of decision." *Id.*

95. 406 U.S. 91 (1972). The Court rendered its decision in a procedural context, and classified the issue of federal common law as a federal question.

96. 406 U.S. at 103-05.

97. 406 U.S. at 98-99, 105-06. "Thus it is not only the character of the parties that require us to apply federal law . . . [w]here there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law." *Id.* at 105 n.8.

98. *See, e.g.,* Pymatuning Water Shed Citizens for a Hygenic Env't v. Eaton, 644 F.2d 995 (3d Cir. 1981); Romero-Barcelo v. Brown, 643 F.2d 835 (1st Cir. 1981); Glus v. G.C. Murphy Co., 629 F.2d 248 (3d Cir. 1980), *cert. denied,* 101 S. Ct. 351 (1980) (court relied on federal common law of nuisance principles in labor relations case); National Sea Clammers Ass'n v. City of New York, 616 F.2d 1222 (3d Cir. 1980), *rev'd,* 449 U.S. 917 (1981); City of Evansville v. Kentucky Liquid Recycling Co., 604 F.2d 1009 (7th Cir. 1979), *cert. denied,* 444 U.S. 1025 (1979); Indiana Stream Pollution Control Bd. v. United States Steel Corp., 515 F.2d 1036 (7th Cir. 1975); East End Yacht Club v. Shell Oil, 11 Env't Rep. Cas. (BNA) 1047 (2d Cir. 1977), *cert. denied,* 434 U.S. 969 (1977); United States v. Solvents Recovery Serv., 496 F. Supp. 1127 (D. Conn. 1980) (federal common law of nuisance implicit in Resource Conservation Recovery Act); Chesapeake Bay Village Inc. v. Costle, 502 F. Supp. 213 (D.C. Md. 1980); Chesapeake Bay Found. v. Virginia State Water, 495 F. Supp. 1229 (E.D. Va. 1980); Parsell v. Shell Oil Co., 421 F. Supp. 1275 (D. Conn. 1976).

nois.[99] The Court held that the 1972 amendments to the Federal Water Pollution Control Act[100] entirely preempted the federal common law of nuisance. The Court felt that the purported comprehensiveness of the legislative scheme obviated the need for federal common-law principles. The majority feared that lower courts would impose stricter efficiency limitations than those imposed by the legislation.[101] Accordingly, the majority held that a federal common law applies only until preempted by comprehensive legislation. The dissent, citing historical precedent and the legislative history of the Federal Water Pollution Control Act, found this result incongruous. The dissent noted that the legislative history explicitly stated that the 1972 amendments to the Federal Water Pollution Control Act should not hinder or affect existing common-law remedies, specifically the federal common law of nuisance.[102]

The Supreme Court's *Illinois* decision effectively presumes comprehensive legislative efforts by Congress. However, it remains doubtful whether Congress intended the 1972 amendments to the Federal Water Pollution Control Act to foreclose preexisting common-law approaches.[103]

Courts patterned the federal interest, originally conceived in environmental harm cases as the federal common law of nuisance, after the common-law concept of nuisance.[104] At the time the interest originated, courts utilized the nuisance theory more than any other in environmental cases.[105] Significantly, the federal cause of action posited by the Senate and the common-law approach advocated by the House demonstrate the need to replace the federal common law of nuisance with a federal common law of strict liability.

The circumambient nature of the hazardous substances regulated under Superfund, as well as the further regulation of hazardous substances in navigable waters and ground water supplies, depicts the federal interest implicit in Superfund.[106] Furthermore, the mi-

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99. 451 U.S. 304 (1981). Justice Rehnquist delivered the opinion of the Court in which Chief Justice Burger, Justices Brennen, Stewart, White, and Powell joined.

100. Pub. L. No. 92-500, 86 Stat. 816 (1972).

101. The Court concluded: "Federal courts lack authority to impose more stringent efficient limitations under federal common law than those imposed by the agency charged by Congress with administering this comprehensive scheme." 451 U.S. at 320.

102. Justices Blackmun, Marshall and Stevens dissented in *Illinois,* relying to a great extent on the legislative history. *Id.* at 342-44.

103. The legislative history of the Federal Water Pollution Control Act evinces the congressional intent to leave the federal common law of nuisance intact. Reserve Mining Co. v. EPA, 814 F.2d 492 (8th Cir. 1975), which addressed the issue of the federal common law of nuisance, pended during enactment of the amendments. According to Senate understanding, the amendments would not affect the federal common law. *See* City of Milwaukee v. Illinois, 451 U.S. 304, 318 n.10 (1981).

104. Illinois v. City of Milwaukee, 406 U.S. 91 (1972); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907); Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971).

105. *See supra* notes 17-19 and accompanying text.

106. Superfund addresses the release of hazardous substances into navigable waters and

gratory propensities of many of the substances regulated under Superfund often cause difficulty in ascertaining the source of the pollution.[107] Thus, hazardous substances easily satisfy the criteria for identifying a federal interest.[108] Fashioning the federal cause of action will require the use of strict liability because Superfund both explicitly and implicitly recognizes that standard.[109]

The concept of strict liability represents the most liberal approach to environmental harm cases.[110] The release of hazardous substances into the environment does not qualify as an inevitable by-product of industrialization or as a societal problem.[111] Manufacturers, however, cannot expect innocent victims to shoulder the costs of actions not within the victims' control or knowledge. In certain situations, including Superfund, legislation has justified strict liability concepts on the rationale that the manufacturer must bear the cost of introducing the chemical into the market.[112] Therefore, chemical industries must begin to internalize the full costs of producing chemical substances; Superfund implements this rationale.[113]

Superfund articulates a standard of strict liability and delineates rights and duties, but does not make those rights and duties explicitly applicable to private individuals.[114] Nonetheless, Congress envi-

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ground water supplies. 42 U.S.C. § 9601(8) (Supp. IV 1980). *See* Hinderlider v. La Plata, 304 U.S. 92 (1938).

107. See, e.g., EPA, TENTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY (1979), in which the agency reported: "When the United States biological survey tested a 39 year old 17 acre landfill at Islip, New York, it found the leachate plume extended one mile from the site and was 1200 feet wide and 170 feet deep. The leachate had fouled about 1 billion gallons of water." *Id.*

108. *See supra* note 96 and accompanying text.

109. *See infra* note 119 and accompanying text.

110. *See, e.g.,* Cities Service Co. v. State, 312 So. 2d 700 (Fla. Dist. Ct. App. 1975) (imposition of strict liability for environmental calamities); City of Bridgeton v. R.P. Oil Inc., 146 N.J. Super. 169, 369 A.2d 49 (1976). See also *supra* notes 22-23 for cases construing strict liability in connection with federal environmental statutes.

111. The chemical manufacturers urged governmental funding alleging that the lack of control over hazardous substances is a societal problem. 10 ENV'T REP. (BNA) 1343, 1602 (1979). The drafters of Superfund did not accept that position. *See also* 10 ENV'T REP. (BNA) 2068 (1979); 11 ENV'T REP. (BNA) 229 (1980).

112. Products liability actions base strict liability on the rationale that the manufacturer must bear the cost of introducing the product into the market. Significantly, the cost-benefit analysis implicit in the abnormally dangerous concept limits and modifies the products liability rationale. *See generally* RESTATEMENT (SECOND) OF TORTS § 402(a) (1965); W. PROSSER, LAW OF TORTS (4th ed. 1971). See also Kiemmer, *The Enterprise Liability of Torts,* 47 U. COLO. L. REV. 153 (1976), in which the author commented: "The enterprise rationale is premised on the notion that losses historically recognized as compensable when caused by an enterprise or activity . . . ought to be borne by those persons who have some logical relationship with that enterprise or activity." *Id.* at 158. This rationale most closely parallels the ultrahazardous concept of strict liability in the RESTATEMENT OF TORTS § 519 (1938).

113. *See* 10 ENV'T REP. (BNA) 1347 (1979) (Superfund adopts the ultrahazardous rationale). *See also* Note, *Strict Liability for Generators, Transporters and Disposers of Hazardous Wastes,* 64 MINN. L. REV. 949 (1980) (discussion of applicability of § 402A to case involving hazardous substances); W. Pfenningstory, *Environment, Damages, and Compensation,* 1979 A.B.A. RES. J. 349 (1979).

114. 42 U.S.C. § 9607 (Supp. IV 1980).

sioned implied remedies for private individuals.[115] Superfund preserves existing causes of action, and the Act's legislative history demonstrates that achieving the desired flexibility for the Act mandated preserving the common law.[116] Utilizing federal common-law concepts provides the opportunity to promote that flexibility.

By incorporating certain provisions of the Federal Water Pollution Control Act, Superfund bases liability on the concept of liability without fault. Strict liability under the Federal Water Pollution Control Act gained acceptance in cases decided pursuant to that Act.[117] While the legislative history of the Federal Water Pollution Control Act ostensibly maintained the federal common law of nuisance,[118] the legislative history of Superfund focuses on strict liability.[119] The legislative history of Superfund evidences the congressional purpose to replace the federal common law of nuisance with the federal common law of strict liability.[120]

Courts have held that federal common law exists independently of statutory law. Whether private litigants will have available a federal common law of strict liability depends on whether a private right of action exists implicitly in Superfund. The corollary of the statutory right and the federal common law is the implied right of action tailored to the federal statute.

2. The Implied Right of Private Action.—Like the federal common law, over one hundred years of legal precedent support the concept of an implied right of private action.[121] Until 1975, courts followed the common-law presumption that disregard of the law resulting in damages to one of the class for whose special benefit the statute was enacted mandated the right to recover damages.[122]

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115. Initially, Superfund articulated the standards of joint, several, and strict liability. Instead of a statutory definition, however, the drafters of the Act deferred to the judiciary. 126 CONG. REC. H11787 (daily ed. December 3, 1980) (statement of Representative Florio).

116. 42 U.S.C. § 9614 (Supp. IV 1980); *see generally* 126 CONG. REC. H11794-96 (daily ed. December 3, 1980); S. REP. NO. 848, 96th Cong., 2d Sess. (1980).

117. Stuart Transportation Co. v. United States, 596 F.2d 609 (4th Cir. 1978) (citing 1970 U.S. CODE & CONG. AD. NEWS 2691, 2712; Burgers v. M/V Tamaro, 564 F.2d 964 (1st Cir. 1977)).

118. *See generally* 1970 U.S. CODE & CONG. AD. NEWS 2691-750.

119. 126 CONG. REC. H11793 (daily ed. December 3, 1980) (text of final debate); 126 CONG. REC. S14929 (daily ed. November 24, 1980) (text of final debate and compromise); H.R. 7020, 96th Cong., 1st Sess.; 125 CONG. REC. H1213 (daily ed. January 18, 1979); S1460, 96th Cong., 1st Sess. (1978); 125 CONG. REC. S9173 (daily ed. June 11, 1979).

120. *Id. See infra* note 192 and accompanying text.

121. Gorris v. Scott, 9 L.R. 125 (Exch. 1874) (The interest protected by the statute and violated by the wrong gives rise to the implied right.).

122. Two seminal cases, J.I. Case v. Borak, 377 U.S. 426 (1974), and Texas and Pacific Ry. v. Rigsby, 241 U.S. 33 (1916), preserved this presumption. In *Rigsby*, the Supreme Court held that disregard of a statute resulting in damage to one of the class for whose especial benefit the statute was enacted provided the injured party with an implied right to recover damages. Similarly, the court in *Borak* held that an implied right of action will accrue when necessary to effectuate the broad remedial purposes of the statute.

A private right of action currently exists under array of federal statutes that do not expressly provide a right of action.[123] This right of action results from a test, adopted by the Supreme Court to meet the threat of litigious citizens threatening judicial economy, used to determine when an implied right of action exists:

> First is the plaintiff one of the class for whose especial benefit the statute was enacted. Second is there any indication of legislative intent, explicit or implicit either to create a remedy or to deny one? Third, is it consistent with the underlying purpose of the legislative scheme to imply such a remedy or deny one. Fourth, is the cause of action one traditionally relegated to state law in an area basically the concern of the state so that it would be inappropriate to infer a cause of action based solely on federal law.[124]

Congressional intent has become the touchstone for determining when an implied right of action exists.[125] The first, third, and fourth factors are the criteria by which courts determine congressional intent for an implied right of action under a statute.[126]

The Supreme Court has received the concept of a private right of action under environmental statutes unpropritiously.[127] In much the same fashion that the Supreme Court discounted the federal common law of nuisance, the Court has also failed to acknowledge the implied right of action under environmental statutes. In two recent Supreme Court decisions, the Court relied on two different tenets to deny the implied right of action.[128]

In *California v. Sierra Club,*[129] the private-party respondents sought an injunction pursuant to the Rivers and Harbors Appropriation Act of 1899.[130] The legislative history of the Rivers and Harbors Act provided no indication of congressional intent to either imply or deny a remedy for the private litigant. Silence in the legis-

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123. Recent decisions have discussed implied rights of action particularly in securities cases. *See, e.g.,* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Ernst & Ernst v. Hochfelder, 428 U.S. 185 (1975); Superintendent of Ins. & Bankers Life & Casualty Co., 404 U.S. 6 (1971); J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Kardon v. National Gypsum Co., 69 F. Supp. 812 (E.D. Pa. 1946). *See also* Canon v. University of Chicago, 441 U.S. 677 (1979) (civil rights case); Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) (private cause of action implied under the fourteenth amendment as a result of an unconstitutional search of the plaintiff's apartment).

124. Cort v. Ash, 422 U.S. 66, 78 (1975) (citations omitted).

125. Texas Industries, Inc. v. Radcliff Materials, Inc., 101 S. Ct. 2061 (1981); California v. Sierra Club, 101 S. Ct. 1775 (1981); Universities Research Ass'n v. Contu, 101 S. Ct. 1451 (1981); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979).

126. Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979); Davis v. Passman, 442 U.S. 228 (1979).

127. *See, e.g.,* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); California v. Sierra Club, 453 U.S. 287 (1981).

128. Middlesex County Sewarage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); California v. Sierra Club, 453 U.S. 287 (1981).

129. 453 U.S. 287 (1981).

130. 33 U.S.C. § 407 (1976).

lative history may demonstrate congressional intent not to create the right,[131] or it may demonstrate congressional acquiescence in the continuance of a private right of action that existed prior to the statute's enactment.[132] When Congress originally enacted the Rivers and Harbors Act of 1899, a private person had available a remedy for any injury suffered by reason of a violation of the statute.[133] Hence, congressional silence at the time of the statute's enactment may well have reflected a congressional assumption that private parties would continue to have available the remedy granted by the statute.[134] Nonetheless, the Court failed to find that Congress intended to confer statutory rights on an especial class of people.[135] The Court therefore denied the private right of action.

Most recently, in *Middlesex County Sewerage Authority v. National Sea Clammers Association,*[136] the Supreme Court again refused to recognize the implied right of action under an environmental statute. The National Sea Clammers Association brought an action for damages pursuant to the Federal Water Pollution Control Act[137] and the Marine Protection and Sanctuaries Act.[138] The Association sought recovery for the discharge of sewage that caused a massive growth of algae. The algae subsequently died and destroyed an enormous amount of marine life. The Third Circuit analyzed the case under both the implied right of action concept and the federal common law of nuisance. The court found a private

131. *E.g.,* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979). The defense often raised to implied rights of action is application of the rule *expressio unius est exclusion alterius,* or, expression of one thing excludes another. Botany Mills v. United States, 278 U.S. 282 (1929). The Supreme Court has construed this rule to mean that silence in the legislative history indicates that Congress meant only to provide those remedies specifically articulated. *E.g.,* National Railioad Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974).

132. *E.g.,* Canon v. University of Chicago, 441 U.S. 677 (1979).

133. Congress enacted the Rivers & Harbors Appropriation Act partially in response to a case in which private parties sought relief for the construction of a bridge over navigable water. Williamete Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888). The Act's legislative history did not state that the statute would continue to afford private litigants the same rights, but recognized the existing common-law remedy for breach of a statute. *E.g.,* Hayes v. Michigan Central R. Co., 111 U.S. 228 (1884).

134. *See* California v. Sierra Club, 451 U.S. 287, 298 (concurring opinion of Justice Stevens). Justice Stevens pointed out that the controlling common-law precept at that time would have permitted the private right:

> The then current edition of Cooley's Treatise on the Law of Torts 788-790 (1888) described the common-law remedy for breach of a statutory duty in this way:
>
> > When the duty imposed by statute is manifestly intended for the protection and benefit of individuals, the common law, when an individual is injured by the breach of the duty, will supply a remedy, if the statute gives none.

Id. at 299 n.2.

Accordingly, Justice Stevens felt that Congress probably assumed that private parties would enjoy a remedy by virtue of the statute. Nonetheless, Justice Stevens felt constrained by the *Cort v. Ash* analysis and denied the implied right of action on that basis.

135. *Id.* at 297-98.

136. 453 U.S. 1 (1981).

137. 33 U.S.C. §§ 1251-376 (1976).

138. 33 U.S.C. §§ 1401-44 (1972).

right of action implicit in both.[139]

The Supreme Court dismissed the case with only a perfunctory application of its own test.[140] Relying primarily on the availability of statutorily authorized enforcement suits for private citizens, the Court felt that Congress did not intend to authorize additional judicial remedies.[141] Although both statutes preserved all existing remedies, the Court construed the word "other" to mean any other statute except the one in which it was contained.[142]

In spite of these Supreme Court decisions, the legislative history of Superfund compels the creation of an implied right of action for private individuals. Although the remedy does not explicitly appear in the statute, the congressional intent that private litigants should receive the same protection that the statute grants the government implies the remedy.[143]

The Supreme Court has postulated a semantic distinction to determine whether Congress enacted a statute for the benefit of an especial class of people.[144] A statute that articulates a right and a duty for a class provides strong evidence of intent to create an implied private right of action.[145] A statute creating only a duty will evidence a statute created for the public at large, and not for the especial benefit of a certain class.[146] The operative language of Superfund makes abundantly clear the Act's purpose to create rights and duties on behalf of a certain class of people.

Superfund addresses victims exposed to hazardous substances as a class and, in broad terms, makes various provisions acknowledg-

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139. National Sea Clammers Ass'n v. City of New York, 616 F.2d 1222 (3d Cir. 1980). In conjunction with identifying the federal interest, the Third Circuit conducted the refined *Cort* analysis: "In order to give full effect to the federal common law of nuisance recognized in Illinois [v. City of Milwaukee, 406 U.S. 91 (1972)], private parties should be permitted and indeed encouraged to participate in the abatement of such nuisances." *Id.* at 1234. *See also* RESTATEMENT (SECOND) OF TORTS § 821(c) (1979) (pecuniary recovery for loss attributed to a public nuisance).

140. 453 U.S. 1, 13-18 (1981). See also the concurring opinion of Justice Stevens, *id.* at 22-33.

141. *Id.* at 18.

142. *Id.* at 16 n.26.

143. *See supra* notes 68-69 and accompanying text.

144. *See generally* Canon v. University of Chicago, 441 U.S. 677 (1979). *See also infra* notes 146-47.

145. Canon v. University of Chicago, 441 U.S. 677 (1979); Allen v. State Board of Electors, 393 U.S. 544 (1969); Sullivan v. Little Hunting Park, 396 U.S. 229 (1961); Turnstall v. Locomotive Firemen & Engineer, 323 U.S. 210 (1944); Virginia R. Co. v. System Federation No. 40, 300 U.S. 575 (1936); Texas & Pacific Ry. v. Rigsby, 241 U.S. 33 (1915). This distinction inextricably intertwines with the rights and remedies analysis implicit in the federal question aspect of the federal common law of nuisance. *See* City of Evansville v. Kentucky Liquid Recycling, 604 F.2d 1008 (10th Cir. 1979), *cert. denied,* 444 U.S. 1025 (1979); Illinois v. City of Milwaukee, 406 U.S. 91 (1971), *remanded*, 599 F.2d 157 (7th Cir. 1979), *vacated and remanded,* 451 U.S. 304 (1981).

146. *E.g.,* Piper v. Chris-Craft Industries, 430 U.S. 1 (1977); Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1974); Wheeldin v. Wheeler, 373 U.S. 647 (1962); T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959).

ing that class.[147] In the event of a release of hazardous substances in violation of federally permitted release requirements, the responsible party may bear the expenses of persons affected by the release.[148] The Act requires the undertaking of research to assess both the short- and long-term effects of exposure to hazardous substances.[149] Superfund establishes the Agency for Toxic Substances and Disease Registry, which, in cooperation with state agencies, obtains information about toxic related injuries and reports all information directly to the surgeon general.[150] In an emergency, the agency must conduct medical testing on exposed individuals as well as research to determine the relationship between exposure to hazardous substances and toxic illnesses.[151] A private individual's sole benefit from this legislation is the research and testing mandated after the individual's exposure to hazardous substances; this situation hardly compensates the victim of a hazardous waste spill.

Superfund in many respects resembles other environmental statutes.[152] The Act provides for elaborate enforcement mechanisms, currently available only to the government.[153] Unlike other statutes, however, Superfund does not provide any explicit remedies for the private citizen. Superfund has no civil suit mechanism to enable the private individual to trigger action by the Environmental Protection Agency.[154] This situation results in the anomaly that natural resources belonging to the government receive greater protection than human beings.[155]

The drafters of Superfund realized that only a legislative solution of broader dimensions could deal with toxic time bombs.[156] The Act's failure to provide an explicit remedy in addition to the strong legislative intent supporting a private cause of action should signal the courts that the Act implies the private action.[157] Both the House

147. The Senate, in formulating the proposed personal injury provisions, explicitly stated that the remedial provisions applied only to victims who suffered harm as a result of exposure to hazardous substances. S. REP. No. 848, 56th Cong., 2d Sess. 36 (1980). *See generally* 126 CONG. REC. 14929-15009 (daily ed. November 24, 1980) (Senate debate); 126 CONG. REC. H11773-802 (daily ed. December 3, 1980) (House debate); *Hazardous and Toxic Waste Disposal Report, supra* note 63.

148. 42 U.S.C. § 9604(a)(1) (Supp. IV 1980).

149. *Id.* § 9611(c).

150. *Id.* § 9604(i).

151. *Id.* § 9604.

152. The list of definitions incorporating provisions of other legislation clearly illustrates the similarity. *Id.* § 9601. *See also supra* notes 50-52 and accompanying text.

153. *See id.* §§ 9602-04, 9607, 9612, 9614.

154. Generally, statutes incorporate the civil suit provision into the section that requires retention of other common-law remedies. Superfund, however, does not include that provision. *Id.* § 9614 (1981).

155. *See* 42 U.S.C. § 9607 (Supp. IV 1980).

156. *See supra* notes 61-75 and accompanying text.

157. While Superfund attempts to surpass existing environmental legislation it yet resembles other legislative mechanisms because it incorporates other legislation. Nonetheless, no Superfund provision patterns the civil suit provisions of other legislation. *See supra* note 36

and the Senate recognized the need for legislation designed to provide some means of protection to victims exposed to hazardous substances. Only the inability to agree on the specific mechanism to remedy toxic torts prevented the inclusion of a specific provision in Superfund.

Congress devoted countless hearings and committee reports to ascertain the precise boundaries of victims' rights and the means available for compensation.[158] Hearings and reports that evaluated the latest environmental disasters confirmed the need for compensation mechanisms to ensure victims' recovery of the losses attributable to the illnesses caused by hazardous substances. Traditional common-law remedies simply do not provide the necessary compensatory mechanisms.[159] The existence of a private right of action was viewed as a supplement to the broad remedial purposes of this legislation. Moreover, the legislative history explicitly authorizes a private right of action.[160]

The Senate even articulated the parameters of a private cause of action.[161] Personal injury recovery funds would flow from the compensation fund for out-of-pocket medical expenses and lost earnings; other damages would flow from lawsuits.[162] Medical causation would parallel the legal theory of proof for diseases. The victim would not be required to establish only one cause of action because, frequently, the harm results from a combination of causes. Once the victim established by a reasonable likelihood that the exposure caused or contributed to the injury, the burden of going forward

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and accompanying text. This absence strongly supports implying a private right of action because it brings Superfund within the parameters of Canon v. University of Chicago, 441 U.S. 667 (1979). In *Canon,* the Court compared other similar civil rights legislation to the statute at issue.

158. *E.g., Hearings on the Kepone Contamination in Hopewell Virginia Before the Subcommittee on Agricultural Research and General Legislation of the Senate Committee on Agricultural Research and Legislation of the Senate Committee on Agriculture and Forestry,* 94th Cong., 2d Sess. (1976); LOVE CANAL—PUBLIC HEALTH TIME BOMB: A SPECIAL REPORT TO THE GOVERNOR AND THE LEGISLATURE (1978). Both of the above-reported incidents merited incorporation into the hearings. *See Hazardous and Toxic Waste Disposal Committee Report,* Part I-Part II, *supra* note 63; SIX CASE STUDIES, *supra* note 13. S. REP. NO. 848, 96th Cong., 2d Sess. (1979); *Environmental Policy Division of the Congressional Research Service of The Library of Congress, Senate Comm. on Env. and Public Works,* 96th Cong., 1st Sess. (1979) (report documenting the cost of pollution).

159. *Id.* Moreover, the legislation itself recognized the need to evaluate the inconsistent and inadequate approach of state common-law theories. *See* 42 U.S.C.S. § 9611(c)(2) (1980).

160. S. REP. NO. 848, 96th Cong., 2d Sess. (1979). *See infra* note 187 and accompanying text.

161. S. REP. NO. 848, 96th Cong., 2d Sess. (1979).

162. The issue caused the greatest amount of discontent in the Senate because the Senate minority feared that the doctrine of *res judicata* would obfuscate the amount of compensation paid to the claimant. S. REP. NO. 848, 96th Cong., 2d Sess. (1980) (minority additional and supplemental views). *See also* 125 LEGISLATIVE NOTICE: SENATE REPUBLICAN POLICY COMMITTEE (daily ed. August 25, 1980) (statements of Senators Simpson, Domenci, Dentsen and Baker).

with the evidence would shift to the defendant.[163] Central to the private litigant's right of action, the victim would avoid the difficulty of ascertaining the responsible party because all information incorporated into the Act would be equally binding for the private victim.[164]

The statutory deletion of a victim's administrative right of action does not necessarily evidence an intent to foreclose a private right of action. Indeed, the number of proposed bills providing for compensation to the toxic victim support an argument that Congress intended a private right of action.[165] The deletion of the administrative remedy only indicates that Congress could not formulate the proper scope of personal injury damages.[166] Deletion of the entire personal injury compensation scheme from the liability section of the Act possibly illustrates the drafters' realization of the legislative difficulty in specifying statutory provisions for all harms resulting from hazardous substance exposure.[167] Superfund leaves an obvious gap in the liability section, but leaves intact all other provisions pertaining to that right.[168] An implied right of private action would fill that gap.

C. The Sea Clammers Alternative

Originally, the courts relied on their judicially defined power to fill the gaps left unaddressed by Congress.[169] Subsequently, the

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163. S. REP. NO. 848, 96th Cong., 2d Sess. (1980). The congressional position on joint and several liability also illustrates this concept of causation. *See* 126 CONG. REC. H11788 (daily ed. December 3, 1980) (letter of Alan A. Parker, Assistant Attorney General Office of Legislative Affairs). *See also* Sam Finley, Inc. v. Waddell, 207 Va. 602, 151 S.E.2d 347 (1969) (polluters whose independent acts cause similar or cumulative injury jointly liable) (dicta). The latent effects of many injuries make this theory of causation very pertinent to hazardous substance cases. *See generally* S. BIRNBAUM, P. RHEINGOLD, TOXIC SUBSTANCES LITIGATION (1980); ASSOCIATION OF TRIAL LAWYERS OF AMERICA, TOXIC TORTS (1978).

164. This provision addresses a real concern. While over 220 federal data systems currently exist that contain data regarding toxic substances assessment, the material remains very highly speciaized or difficult to obtain for all but agency purposes. NINTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 205 (1978). Moreover, the statute eases the plaintiff's burden of proof by identifying declared hazardous substances.

165. *See supra* notes 68-71 and accompanying text.

166. Administrative compensation has failed to provide awards that reflect inflation and cost of living increases. Worker's Compensation legislation and social security benefits that provide specified amounts illustrate the shortcomings. Hutchins, *Most Exclusive Remedy Is No Remedy At All: Worker's Compensation for Coverage for Occupational Diseases,* 32 LAB. L.J. 212 (1981). The latent nature of injuries in environmental harm cases exacerbates the inadequacies of administrative compensation.

167. The liability provisions of Superfund do not contain compensatory provisions for pain and suffering. S.1480, 96th Cong., 1st Sess. Part 4(c), 125 CONG. REC. S9173 (daily ed. June 11, 1979).

168. 42 U.S.C.S. §§ 9607, 9614 (Law. Coop. 1980) (the liability provision, as well as the claims procedure, identifies other parties not explicitly provided for in the strict liability section).

169. *E.g.,* Wheeldin v. Wheeler, 373 U.S. 647 (1963); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938); Texas & N.O.R. Co. v. Brotherhood of Clerks, 281 U.S. 548 (1929).

courts began to rely on and implement the congressional intent.[170] The common thread between the implied right of private action and the federal common law has become the operative language of the statute itself.[171]

Currently, the Supreme Court has followed a course of strict separation of powers.[172] Judicial reluctance to fashion remedies on the sole basis that Congress has articulated all the rights in the operative language of the statute, however, is a regression to a situation that presumes congressional omniscience.[173] Former Senator Edmund Muskie, an adamant supporter of Superfund, quite aptly pointed out that Congress simply cannot fill all the gaps when legislating in a specific area of law.[174] Referring specifically to environmental harm cases, Senator Muskie stressed the need to emerge from the entire system of fundamental tort concepts, a task that Congress cannot solely accomplish.[175]

If congressional intent, the keystone of the inquiry, evidences a need for a private cause of action in an area uniquely of federal concern but not yet comprehensively addressed by Congress, the question becomes whether the judiciary should act in the absence of congressional action. This question recognizes the nature of the tension existing between the judiciary and the legislature.[176] Unquestionably, Congress possesses the paramount authority regarding lawmaking.[177] Therefore, a cause of action founded under the fed-

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170. *E.g.,* City of Milwaukee v. Illinois, 451 U.S. 304 (1981); Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978); D'Oench, Duhme & Co., Inc. v. FDIC, 315 U.S. 447 (1941).

171. *Compare* City of Milwaukee v. Illinois, 451 U.S. 304, 101 S. Ct. 1784 (1981) *with* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979). *See also* Textile Workers Union of Am. v. Lincoln Mills, 353 U.S. 448 (1957); Glus v. G.C. Murphy Co., 629 F.2d 248 (3d Cir. 1980).

172. Justice Powell, currently representing the majority view of the Supreme Court, perceives an implied right of action as an unreasonable interference with the separation of powers dogma. According to Justice Powell, once Congress has legislated in a given area, "[o]ur individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and is constitutionally determined, the judicial process comes to an end." Canon v. University of Chicago, 441 U.S. 677, 744-45 (1979).

173. *See, e.g.,* Durnin v. Allentown Fed. Sav. & Loan Ass'n, 213 F. Supp. 716 (E.D. Pa. 1963).

174. Muskie, *Torts, Transportation and Pollution: Do Old Shoes Still Fit?,* 7 HARV. J. LEG. 477 (1970). Former Senator Muskie noted that the development of a comprehensive scheme of recovery in wrongful death actions required fifty years. He stated that we cannot afford the luxury of waiting another fifty years before solving the problems posed by pollution. The Supreme Court has relied on Senator Muskie's opinion in the past. *See* EPA v. National Crushed Stone, 101 S. Ct. 295 (1980); E.I. duPont deNemours & Co. v. Train, 430 U.S. 112 (1977).

175. Muskie, *supra* note 174.

176. The dissent in City of Milwaukee v. Illinois, 451 U.S. 304 (1981) acknowledged the tension existing between the judiciary and the legislature. *See also* Ibrondtsen v. Johnson, 343 U.S. 779 (1952).

177. In recognizing a federal common law, the Supreme Court has always exercised sensitivity in acknowledging the legislative branch. *E.g.,* New Jersey v. New York, 283 U.S. 330 (1931).

eral law must reflect the federal interest in delineating rights and duties, but not to the extent that federal lawmaking power becomes vested in the judiciary.[178]

In *Middlesex County Sewerage Authority v. National Sea Clammers Association,*[179] the Court did not address the issue of whether a private person may have a cause of action under the federal common law. Rather, the Court alluded to the possibility that both the federal common law and the implied right of private action may combine to form a cause of action for private plaintiffs.[180] Incorporating the implied right of private action would prevent a court from exceeding the law implicit in the statute.[181] In refusing to implement the full force and effect of the congressional intent, however, the judiciary will fail to fulfill its function as a coequal branch.

The Supreme Court denounced the federal common law of nuisance in *Illinois v. City of Milwaukee*[182] when the concept was beginning to gain substance. Also, the Court desired its holding to ensure that the lower courts would not utilize the concept to extend the reach of the statutory language. Moreover, as the federal common-law concept developed, it became apparent that the private litigant would have a cause of action under the federal common law.[183] The Court evaded precisely that issue to avoid the fear that courts would impose strict standards under environmental statutes that do not explicitly authorize standards for private individuals.

The drafters of Superfund envisioned the type of private cause of action founded in federal common law.[184] This basis of liability requires balancing two concepts implicit in the federal common law: the federal interest and the need to avoid the inconsistencies of state law.[185]

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178. Arizona v. California, 375 U.S. 546 (1963).

179. 453 U.S. 1 (1981).

180. City of Milwaukee v. Illinois, 451 U.S. 304 (1981). Moreover, a private cause of action decided under the federal common law of strict liability represents the most logical extension of both the *National Sea Clammers* case and the *City of Milwaukee* case. In circuit court opinions, the courts would analyze both concepts in determining that a cause of action did or did not exist. *See supra* note 98. J.I. Case Co. v. Borak, 377 U.S. 426 (1964), recognized that both concepts inextricably intertwine. Labor relations cases have also recently recognized this possibility. *E.g.,* Gleis v. G.C. Murphy Co., 629 F.2d 248 (3d Cir. 1980).

181. Incorporating the implied right of action into the federal common law would create a further advantage because Superfund would set forth the technical requirements. The majority in City of Milwaukee v. Illinois, 451 U.S. 304 (1981), felt that the federal common law could not adequately address the technical difficulty inherent in environmental problems. The dissenting opinion pointed out, however, that the complexity of the subject did not justify denying that a federal common law exists. *Id.* at 349 n.25. Nonetheless, all technical information and requirements would appear within Superfund, thereby obviating the fear pervading the majority opinion in *City of Milwaukee.*

182. 406 U.S. 91 (1972).

183. *See supra* note 98.

184. *See infra* note 191.

185. Originally, the Supreme Court analysis examined the interstate concern before any other interest. *E.g.,* State of Kansas v. Colorado, 206 U.S. 406 (1906). In situations involving

Undoubtedly, toxic substances constitute a federal concern even though state law has traditionally handled this subject matter. Traditional common-law theories, however, have failed to provide both an adequate legal mechanism and a uniform standard. Federal common law avoids subjecting the problem to inconsistent state laws. Congress recognized that the creation of a federal cause of action might duplicate causes of action founded in state law, but acknowledged that it could confer a federal cause of action when a clear need presented itself.[186] Victims of toxic time bombs have presented that clear need.

Implying a private right of action under the Superfund legislation should be based on strict liability because the Act articulates that standard.[187] The implied right of action finds support in the principle that the Act specifies rights and duties.[188] The federal common law, however, is premised on the rationale that the court must define the rights and duties of the federal concern unaddressed statutorily.[189] The judiciary must implement the remedial provisions of the statute, but not extend those duties in excess of the Act's stated goals.

Superfund establishes a standard of strict liability and delineates rights and duties, but does not make those rights and duties explicitly applicable to private victims. Utilizing both the federal common-law and implied right of action concepts would directly improve this legislation. Use of the federal common-law concept alone does not afford the benefit of the statute and might allow courts to impose stricter standards than those delineated by the statute.[190] Similarly, the implied right of action theory may pattern too closely both the statute and the congressional proposal of out-of-pocket medical expenses and lost earnings. Hence, there would be a need for another lawsuit or a pendent state action that would bring the solution full cycle to the problem.

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a strong state interest, however, the Supreme Court usually deferred to the state policy, in the absence of a clear federal interest. United States v. Yazell, 382 U.S. 341 (1966); Wheldin v. Wheeler, 373 U.S. 647 (1963). The federal common law differs from the general common law, a distinction that the Supreme Court has recognized. *E.g.,* City of Milwaukee v. Illinois, 451 U.S. 304 (1981). *See also* Hart, *The Relations Between State and Federal Law,* 54 COLUM. L. REV. 489 (1954).

186. *See* S. REP. NO. 848, 96th Cong., 2d Sess. 36 (1980), which states the following:

> Out of respect for the Federal system created by the Constitution the Congress is generally reluctant to create a cause of action founded on federal law which might duplicate causes founded on state law. Indeed, it is primarily for this reason that the cause of action established by this action is restrained in the types of incidents covered, the type of damages which are compensable, the classes of victims protected and the like. Nevertheless, the Congress has not hesitated to enact remedial legislation conferring a Federal cause of action where there was a clear need.

187. 42 U.S.C. § 9607 (Supp. IV 1980).

188. *See supra* note 114 and accompanying text.

189. *See supra* notes 77-121 and accompanying text.

190. This result would contradict City of Milwaukee v. Illinois, 451 U.S. 304 (1981).

An implied right of action under the federal common law of strict liability would provide the basis for a cause of action to fill the interstices of a federal framework not yet entirely pervasive.[191] Private litigants would receive the opportunity to recover both personal injury and economic loss damages. This result would comport with the remedial provisions of Superfund, but would not exceed the liability provisions permitted by the Act. Moreover, the legislative history directly provides the foundation for a cause of action.

Most importantly, a private cause of action under the federal common-law of strict liability would be consistent with the optimal result sought by Superfund: control of hazardous substances by virtue of the federally permitted release requirements.[192] Superfund revolves around the federally permitted release requirements because only a violation of those requirements will trigger enforcement mechanisms. Persons injured by a release in compliance with federal requirements must secure their damage recovery through some other legal mechanisms.[193]

Thus, a private individual could sue only if the injury resulted from a release of a named hazardous substance that exceeded the federally permitted release requirements.[194] When a release occurred in violation of the statute, a court would rely, independently of the statute, on a federal common-law concept of strict liability when delineating the rights and duties of the private litigant. Simultaneously, the court would rely on implied right of action concepts in determining just how far the statute creates such rights and duties. This method would punish those industries that blatantly disregarded the statutory requirements and provide protection to those industries that complied with the federally permitted release requirements.[195] In addition, the method would prevent the anamolous result that natural resources owned by the government receive more protection than the injured victim.[196] The legislative history of Superfund supports this form of cause of action that provides a remedy restricted to the type of incident covered by the Act's liability

191. Well-documented final debates in both the House and the Senate fully illustrate Superfund's failure to pervade the field. *See generally* 126 CONG. REC. H11773 (daily ed. December 3, 1980) (text of final House debate), 126 CONG. REC. S14948 (daily ed. November 24, 1980) (text of final Senate debate).

192. *See* 42 U.S.C. § 9607 (Supp. IV 1980).

193. *Id.* § 9607(j).

194. *Id.*

195. The problem of achieving compliance by industries with environmental statutes results because many of the statutes and accompanying regulations speak in terms of aspirational commands. Henderson & Pearson, *Implementing Federal Environmental Policies: The Limits of Aspirational Commands,* 78 COLUM. L. REV. 1429 (1978). Aspirational commands seek cooperation, but their lack of power to enforce the commands actually serves as a disincentive for those who do cooperate.

196. 42 U.S.C. § 9607 (Supp. IV 1980). *See also* 126 CONG. REC. S14973 (daily ed. November 24, 1980) (statement of Senator Mitchell).

provision.[197]

Combining both the federal common-law concept and the private right of action concept at least provides the private litigant with the opportunity to confront the responsible party and provides victims with some viable means of recovery. It also promises compensation for all damages. Moreover, it puts the developed perspectives of two well-established principles in their proper current context, without offending the stringent separation of powers dogma that has permeated recent Supreme Court decisions. Most importantly, an implied right of action under the federal common law of strict liability would facilitate the understanding that industries must recognize environmental problems.[198]

IV. Conclusion

The ramifications implicit in the drafting of Superfund warrant heightened protection to injured victims. Reconciling the latest Supreme Court decisions with the clear mandate of Superfund should not result in a judicial reluctance to apply federal common-law concepts. Congress should not have only partially completed the task of compensating victims. Nonetheless, amending the Superfund legislation to compensate victims is unlikely because administrative compensation does not, and cannot, reflect the amount of damages incurred by the victims of toxic time bombs. Creating a private right of action under a federal common law of strict liability effectuates the remedial provisions of Superfund while a contrary holding perpetuates the obvious gap in protection afforded the victims. It is time to bridge that gap.

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197. *See supra* notes 124-173.

198. *See, e.g.*, EPA v. National Crushed Stone Ass'n, 101 S. Ct. 295 (1980). The Supreme Court held that economic incapability of achieving an efficient standard pursuant to the Federal Water Pollution Control Act was not an acceptable defense. Rather, the statute forced industries to use the best available technology.