PUBLIC AND PRIVATE PROPERTY RIGHTS

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> This is my land. I own it. I rented it on shares first; then bought it on a purchase contract. It has a power line right-of-way across one side. It fronts on a state highway with a setback line along it. There is a limit to what I could collect on any new improvements in front of that line, should the state take more land for widening the highway. It's zoned industrial now which doesn't bother my farm uses, but I think my assessment is higher than if it had been zoned for agriculture. I thought I had a buyer for it, but I guess he was scared off by the court order against the processing plant next door—something to do with polluting the small stream behind our land and a big fishkill down river. I've heard that they may be after me because of the manure from my cattle. Some of my new neighbors used to complain about the smell until I stopped spreading near them. This is different. But hell, there hasn't been any fish in that stream for ten years. I'll be on social security and signed up for a free fishing license before they have fish in it.

That is not an actual quote from anyone but a way to summarize this paper. Tenure and terms of transfer, rights of way, and the like used to be a major focus when we talked about rights in real property. Eminent domain and the use of police power have long been considered means of permitting public rights to prevail over private rights. But the interface of public and private rights is shifting. It may be more instructive to look at the administration and politics of regulatory activities to understand what is happening to property rights. Also property rights have to be defined quite broadly. Rights to social security, preservation of fish, and response to the social pressure of neighbors hardly come to mind when reading law books about what you bought when you recorded the deed.

The breadth of the meaning of property can be seen best by considering the many values associated with property. These values include income, goods and services, consumption and saving. They also include well-being (consisting of health, safety, and security), enlightenment, and skill or proficiency. Other values associated with property are power (especially the ability to influence the decisions of others), status and prestige, goodness and stewardship, and love and friendship.

The point is that the value of property is made up of many parts. Conflict in values, conflict between these many parts, conflict over property—all lead to change in the property system.

Therefore, it is risky to explain property problems in terms of only a few of the parts, such as services or goods from alternative uses of property. Simplifications are necessary to get at the logic of property problems, but obviously they run the risk of leaving out much that is relevant to policy formation and public action.

PROPERTY AS A SYSTEM OF CLAIMS AND LIABILITIES

Property can be thought of as a system involving the individual, the state, and objects. In our private property system, individuals, and various groups acting as individuals, have a strong claim on the benefits from property. The limited interest of the state is expressed through a set of laws which define the role of the state not only as an arbiter in conflicts between individuals but also as a participant in the game. Examples include defending a man against the power of the state or transferring wealth from the "haves" to the "have nots." That is, we have to consider the state's role not only in protecting the individual but also in protecting the collective well-being against the economic behavior of the individual.

Property has two functions. First, it distributes claims for the benefits and liabilities for the burdens of society. Second, it allocates access to use. Property is the basis of power and control. If the individual exercises power and control over use of property, he has property rights. Conversely, if the state (and at more informal levels, the community) exercises power and control over use, public rights are expressed.

Institutions complete the property system. They define or classify property objects and interest holders. They express action rules. Not all of the action rules are contained in statutory law or court rulings and common law. On occasion, stewardship preached from the pulpit may have more impact on rules of behavior than if decreed from the bench.

POLLUTION AND LEGAL REMEDIES

Most people think of the courts as the primary regulators in the property system. Public action can also be expressed through the power of government to tax and spend. This is particularly true in society's newly found problem of pollution. However, we first need to examine the search for legal remedies to pollution, especially recent use of the courts as an institutional vehicle for expressing changes in the action rules concerning property.

The courts have appeal as a vehicle for change in part because of the large role which the injured individual can play, at least

potentially. Indeed, the courts are unable to act until asked to intercede on someone's behalf. If the person asking for relief can show that he has a personal stake in the issue, he is deemed to have "standing" before the court and he may then have considerable impact. A few jurisdictions and at least one state, Michigan, have declared by legislation that in environmental cases everyone is affected and thus anyone has standing.

In recent pollution cases the results are sometimes measurable in terms of reduced discharges, but more to the point may be the prevention of conflicts, which waste the time and energy of polluters and control agencies. The uncertainties may be reduced by more careful development of planning and enforcement procedures, and this greater care may in turn reduce pollution.

Nuisance law, a part of court-developed common law, has the longest history of use in pollution cases. The issue is usually whether your neighboring property owner is unreasonably interfering with your use of your property, or with the rights of the public in general. The complainant must show damage and may request payment for damages sustained in addition to an injunction to prohibit further damages. Commonly, damages are awarded but not the injunction, which suggests that the award may be viewed as compensation for not only past damages but also for permanent reduction in market value of property if the pollution continues. Substantial financial interests would be at stake if the pollution were completely prohibited. However, more and more cases are resulting in orders for feasible modification of processes and practices to reduce future injury.

Legal relief concerning other issues is less well tested and developed. In cases of trespassing, damage need not be shown, but the response of the courts has differed little from their response to the nuisance complaint. Water rights suggest another line of legal reasoning. The natural flow theory of riparian doctrine, where bank owners have rights to a reasonable use of the water, states that lower owners have a right to the flow undiminished in both quantity and quality. But this doctrine is not widely honored. In most states, reasonable use is interpreted as a fair share that leads to the highest overall development from the use of a body of water. In states that use prior appropriation, right to use may be interpreted as maintaining the quality for lower order and future users. California has taken the step of combining water rights and water quality administration in the same board.

Some statutory provisions have been proposed and a few enacted to facilitate the use of the courts for relief from pollution.

Class actions are a case in point. In a class action one individual acts in the name of a group or class of persons injured and asks the court to apply the relief requested to the whole group. Declaratory judgment acts offer the opportunity to ask the courts to spell out the validity of agency actions and the environmental issues that should be considered.

Under the National Environmental Policy Act of 1969, for example, environmental impact reports are required on all federally related projects. Many agencies have found themselves in court to defend the adequacy of their statements. But the impact of the courts is limited by their reluctance to second guess the officials responsible for making the decisions at hand. Courts limit themselves to protecting the due process rights of those affected. They will require more adequate procedures to comply with the statutes under review. But once satisfied that the proper steps have been taken, reasonable studies made, and reports circulated, they will not assume the decision-making prerogatives of the responsible officials. Thus, the act may add little that is new to the real decision-making process. "Bad faith" must be shown to reverse a decision if all the procedural requirements have been met.

Court actions are dramatic and can affect agency and polluter behavior. They have an impact on the system of property rights, helping to shift the balance between private and public rights. However, administrative actions that exercise the police power of the state, though perhaps less dramatic individually, may have a much greater total impact on behavior.

The nature of private rights and public rights can be described in terms of a continuum between private property rights and common property rights. An owner of an asset which enjoys the status of a "pure" private property has exclusive use of that asset and may transfer it freely. These are characteristics of the asset. The social results are best when the object or asset is easily divisible. Its use fully excludes value taken by others, and in using it the owner excludes rivals. Externalities from that use are then insignificant. The price and market system will operate effectively. Price effects transfer with little or no cost.

At the other end of the continuum are common property rights. Rights to view a sunset or to civil liberty are not exclusive to any one owner. They are not transferable. The use by one does not diminish that available for another user. The social benefits from such objects are greatest when the cost of supplying them is zero or close to it. When resources must be used to supply

them and the price makes access to them difficult, they may be underutilized. However, at low or zero price overcrowding or overexploitation results with the attendant loss of the ability to provide value. This is the "tragedy of the commons."

But most of life goes on between these extremes. Others take pleasure in your clothes, your car, and your home. Many factors, such as age, residence, training, income, and the like, limit transferability. Price is not enough to effect transfer. Rights depend upon status. Institutions and their behavior rules define status rights, making private goods more like common property and vice versa, as conflicts in value arise.

REGULATORY DECISION MAKING—WHERE THE ACTION IS

Regulation of pollution provides a good example of how institutional processes are changing the character and balance of private and public rights and interests in property. An examination of the politics of regulatory decision making helps us understand how such institutions change the rules of behavior of the interest holders and the object classes involved.

What are the elements of such decision making? There is often an element of prior clearance. The person injured does not have to act first; the potential polluter must ask for a permit. If not, at least some standard of behavior has been spelled out, which can later be judged to have been violated. Often there is an element of supervision over the initiation of the potentially damaging activity. And there is an element of later review for compliance. The expectation is that the regulator will not be passive but will seek out the wrongdoer. How these elements are expressed varies greatly, affecting the capacity of the regulating agency to fulfill its duty.

These elements of decision making have a number of characteristics. A public interest to be served, legal authority to do so, and the power to take the initiative are perhaps obvious. Less obvious is the need to be comprehensive with respect to the system being regulated, such as a watershed or a basin. Also technical competence to set standards and determine compliance are not always to be taken for granted.

If this is regulatory decision making, it is not hard to understand why most institutions established for the purpose fail to achieve the expectations of many of those who supported their creation. The political constraints are severe and not always appreciated by those same supporters. Success is conditioned by the degree of consent of the regulated to be regulated. This consent is achieved

in a process of bargaining, and the regulating agency usually has little choice but to bargain.

Why must the regulators bargain with the polluters? Pollution is a matter of definition. There are hundreds of polluting substances, many existing in nature. At each step in definition there is room for interpretation and disagreement. Conflict with the regulated usually occurs at every step. Standard setting is a kind of planning process. What uses should determine the classification for a stream? Once uses have been determined, requirements dictate the minimum levels of quality to be maintained. Should the quality of individual discharges be a part of the standard? Or should only a stream standard be used, making an individual discharge a violation when it proves to be responsible for degradation below stream standards? The regulator has many choices in seeking compliance—whom to ignore, how long to wait, what to accept as compliance. For many years regulators were forced to accept a statement of future intent to comply as compliance.

The timing of action by the regulator can be critical in gaining support. The big employer in the community with the obsolete plant, with other reasons to relocate elsewhere is in a strong bargaining position. The regulator must pick a time to obtain maximum support and incur minimum blame. It is often very attractive to wait. The relevant constituencies have a chance to show themselves and demonstrate their strength. The regulated and their allies may be forced out in response to demands by the environmentalists and their allies. Federal agencies have a chance to show their backstopping support, or lack of it, provide funds and publicity, or a lack of either.

There are a number of situational factors that force bargaining. The polluter, for example, has most of the relevant technical information. He knows more about his own processes and how they can be modified, what is in his wastes, and how to remove them. He can use this knowledge of feasible remedies to lend credibility to his arguments.

Many myths and values force the need for bargaining. The very words "filth" and "exploitation" suggest a polarized view of the problem. Others see "jobs" and "development" at stake. The regulator has little choice but to seem to compromise.

The regulator also faces different mixes of constituencies at different levels and points in the political structure. Different agencies serve different clienteles and have as a result different postures with respect to the regulator's task. One house of a legislature may be dominated by "hawks" or by "doves" on the envi-

ronment or on economic development. An elected executive may differ in his point of view from the legislature. Local, state, and federal levels can have different mixes. The regulator may have to deal with all of them. A bargained result is almost inevitable if for no other reason than that conflict may be taken as a symptom of the regulator's incompetence. A bargain resulting in tolerable working arrangements has high value in keeping the wheels of government turning. The regulating agency knows that it and those regulated will be there together long after a current flurry of public interest and debate.

ARBITRATION—AN ADMINISTRATIVE APPROACH FOR THE FUTURE?

Arbitration has been most fully developed in the area of labor-management disputes. But it may have a place in environmental problems, particularly land use conflicts that do not lend themselves to the usual regulatory processes, such as in water and air pollution. But what will serve as "collective bargaining agreements" for environmental problems?

A task force of the American Law Institute has considered some elements of this question in a review of zoning, which simply was not getting the job done. The task force considered a quasi-judicial process to allow arbitration of land use conflicts between agencies, between levels of government, between local people and utilities based on the merits of each use. Highway and park agencies disagree over routes. Park authorities often want land uses around park entrances to be consistent with the environment in the park. The location of power lines and plant sites often conflicts with the aims of local land use controls. The examples are endless, which is part of the problem.

Who can wield this kind of arbitration power? The power to decide often resides at a level no lower than the governor's mansion or the halls of the legislature. A view of property institutions as consisting of interest holders, object classes, and rules of behavior is helpful but perhaps too simple here. Our government is a system of active and latent interest groups (the public), agencies, and elected officials. New institutions, or old ones with broadened functions, will evolve in this context.