THE MISDEMEANOR APPROACH TO POLLUTION CONTROL

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The use of the criminal penalty to enforce air pollution regulations is not a recent development. It appears that the first smoke abatement law was adopted in 1273 in England, and that in 1307 one offender was executed for violating a Royal Proclamation on the subject.[1]

Air pollution did not seem to be a serious problem in the New World until the Nineteenth Century. Perhaps the earliest case involving a smoke control ordinance is *New Orleans v. Lambert*,[2] decided in 1859. Since the decision in *Northwestern Laundry v. Des Moines*,[3] there has been little doubt about the power of local government to adopt and enforce smoke abatement ordinances.[4]

Today we take it for granted that criminal penalties may be used to control all sorts of offensive acts, including, of course, contaminating the atmosphere.[5] As noted below, it is not unusual for laws to provide administrative procedures for the abatement of air pollution. It is possible to combine the administrative procedure with the criminal penalty, without making criminal prosecution conditional upon exhaustion of the administrative remedy.[6]

The criminal penalty, of course, is the most familiar and common technique for securing compliance with the law. Even the most recent enactments in the field of air pollution control, such as the federal Air Quality Act of 1967, ultimately rely upon the criminal penalty.[7]

The fact remains that many people harbor a belief that contaminating the environment is an inherent privilege, or at most a minor vice not warranting a penalty. In the early days, the plea was for "self-regulation."

LEGAL CONTROL METHODS IN CALIFORNIA

It is surprising to many people that air pollution was not invented in

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[1] *See* Chass & Feldman, *Tears for John Doe*, 27 S. CAL. L. REV. 349, 352 (1954). *See also* State v. Mundet Cork Corp., 8 N.J. 359, 86 A.2d 1 (1952).

[2] 14 La. Ann. 247.

[3] 239 U.S. 486 (1916).

[4] *See also* Lawton v. Steele, 152 U.S. 133 (1894).

[5] People v. Plywood Mfgs., 137 Cal. App. 2d 859, 291 P.2d 587 (1955); People v. International Steel Corp., 102 Cal. App. 2d 935, 226 P.2d 587 (1951).

[6] Consol. Edison Co. v. Murtagh, 280 App. Div. 221, 112 N.Y.S.2d 681 (1952).

[7] Air Quality Act of 1967, § 205, 42 U.S.C.A. § 1857f—4 (Supp. Feb. 1968).

Los Angeles, California. Today, it is well known that all large cities have air contamination problems. Los Angeles County has a population of about 7.0 million people and nearly 4.0 million automobiles. We use over 7.5 million gallons of gasoline each day, and 90 percent of our electric energy is produced by the burning of fossil fuels. The Los Angeles Basin covers an area of about 1,250 square miles.[8] The major sources of air contamination include motor vehicles, fuel combustion, organic solvent usage, petroleum refining and marketing, and chemical production. Since 1960, the power to set motor vehicle emission standards has been in the State rather than in local air pollution control districts.[9] Law enforcement has always been primarily the responsibility of the local district.[10]

In 1955, by special law, the California Legislature created the Bay Area Air Pollution Control District, made up of six counties in the San Francisco Bay Area.[11] This statute differs in some respects from the general law governing other districts.[12] One significant difference is the provision for administrative hearings leading to a petition for injunction, in place of the criminal penalty permitted by the general law, for a number of unlawful acts.[13] Another important difference is the lack of a permit or licensing system under the Bay Area statute.

The 1967 Mulford-Carrell Air Resources Act[14] combines the administrative hearing procedure with a criminal penalty, although the straight criminal penalty is retained for violations of the chapter on motor vehicle emissions.[15]

The Effect of the Misdemeanor Approach

Since 1947, local air pollution control districts in California have employed three primary methods of enforcement: the permit system, the injunction, and the criminal penalty.[16] The permit system includes the power to revoke permits, after an administrative hearing.[17] After ten years of rejecting the misdemeanor penalty, the Bay Area Air Pollution Control District, in 1965, secured this remedy against open burning.[18]

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[8] Air Pollution Control District, County of Los Angeles, Air Pollution Data for Los Angeles County (January 1967).
[9] Stats. 1967, ch. 1545; Cal. Health & Safety Code §§ 39000-39570 (West Supp. 1967).
[10] Cal. Health & Safety Code § 24246 (West 1967).
[11] *Id.* Div. 20, ch. 2.5.
[12] *Id.* Div. 20, ch. 2.
[13] *Id.* §§ 24277-24282.
[14] Stats. 1967, ch. 1545; Cal. Health & Safety Code §§ 39000-39570 (West Supp. 1967).
[15] Cal. Health & Safety Code § 39093 (West Supp. 1967).
[16] Cal. Health & Safety Code §§ 24252, 24253, 24263, 24278-24282 (West 1967).
[17] *Id.* § 24274.
[18] *Id.* § 24361.

The permit system, violation of which is a misdemeanor under the statutes governing the Los Angeles County Air Pollution Control District, has been very effective, and over the past twenty years has resulted in an expenditure of over $130,000,000 for air pollution control equipment.

Prosecutions are based on five offenses:

(1) violation of a statute governing blackness or opacity of an emission,[19]

(2) violation of a statute governing nuisance,[20]

(3) violation of a particular district rule,[21]

(4) violation of a permit regulation,[22] and

(5) violation of a statute governing the excessive emission of fumes from motor vehicles.[23]

Since the establishment of the District twenty years ago, approximately 40,000 misdemeanor cases have been filed in Los Angeles County. The conviction rate in some years has exceeded ninety-nine percent. In the typical year of 1965-66, cases involving stationary pollution sources numbered 204 while those involving vehicular sources numbered 2431. Fines assessed by the courts average about $44,000 per year.

The effectiveness of the Los Angeles approach is not reflected in statistics such as these. The ultimate test of any air pollution control effort is whether or not the level of air contamination is actually reduced. It is a well-recognized fact that the pollution abatement program of the Los Angeles County Air Pollution Control District is the most effective in existence. It is estimated that control of industrial emission sources has prevented 1220 tons of organic gases, 1945 tons of carbon monoxide, 1445 tons of sulfur dioxide, 465 tons of aerosols, and 105 tons of oxides of nitrogen from entering the atmosphere *each day*.

THE INJUNCTION APPROACH TO CONTROL

As noted above, air pollution control districts in California have had the power to enjoin violations since 1947. In Los Angeles County, we have found this remedy to be of very limited value. We assume, of course, that the mere existence of the power to seek an injunction has a salutary effect. An action filed in the federal district court,[24] but later

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[19] *Id.* § 24242.
[20] *Id.* § 24243.
[21] *Id.* § 24281.
[22] *Id.* §§ 24278, 24279, 24280.
[23] CAL. VEHICLE CODE § 27153 (West 1967). This section has been held to be constitutional, as not uncertain or vague. People v. Madearos, 230 Cal. App. 2d 642, 41 Cal. Rptr. 269 (1964).
[24] People v. Bethlehem Pac. Coast Steel Corp., Civ. No. 13087-PH (S.D. Cal. 1951).

dismissed, was effective in achieving control over air contamination from the steel industry. On the other hand, in one case of a frequent violator, judgment was for the defendant, on the ground that he already had remedied the particular difficulty.[25]

In essence, the Los Angeles experience shows that the remedy of injunction is valuable, but only as a supplemental remedy.

Some Problems in the Criminal Penalty Approach

It has been suggested that the criminal penalty can result in a refusal of an operator to furnish information, analyses, etc. to a control officer,[26] upon the basis of potential self-incrimination. This has not presented a problem to the Air Pollution Control District. In any event, our District is able to make its own tests, should the need arise. In addition, the air pollution control officer may suspend the permit if the requested information is not supplied.[27] It may be necessary in the future to provide immunity from criminal prosecution based upon the materials so supplied.[28] The argument that the criminal penalty results in a drying up of the sources of necessary information is not supported by the experience in Los Angeles County.

Illustrative Criminal Cases in Air Pollution

Some advantages to the misdemeanor approach to air pollution control are found in the nature of the crime itself. It has been held that vicarious criminal liability will attach to an employer, even though the act done is in violation of the employer's instructions.[29] It has also been held that state air pollution statutes apply to instrumentalities used in interstate commerce, on the authority of the state quarantine cases.[30] For example, in *People v. Metropolitan Stevedore Co.*,[31] the defendant was convicted of violating an opacity of emission statute although he was engaged in loading a ship in foreign commerce. There is now no doubt that a local regulation can control vessels in interstate commerce.[32]

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[25] People v. Consumers Transportation Corp., Civ. No. 634426 (Super. Ct., County of Los Angeles June 22, 1955).

[26] Cal. Health & Safety Code § 24269 requires that the permit holder or applicant must furnish detailed information on demand, including analyses, plans, and specifications. The Bay Area District Law has a similar provision. Cal. Health & Safety Code § 24362.4 (West 1967).

[27] Cal. Health & Safety Code § 24270 (West 1967).

[28] *See* Garrity v. New Jersey, 385 U.S. 493 (1967); Spevack v. Klein, 385 U.S. 511 (1967).

[29] People v. West, CR. A. 2800 (App. Dep't, Super. Ct., County of Los Angeles Feb. 15, 1952); *Ex parte* Marley, 29 Cal. 2d 525, 175 P.2d 832 (1946); *In Re* Casperson, 69 Cal. App. 2d 441, 159 P.2d 88 (1945); People v. Schwartz, 28 Cal. App. 2d 775, 70 P.2d 1017 (1937).

[30] Oregon-Washington R.R. & Navigation Co. v. Washington, 270 U.S. 87, 93 (1926).

[31] CR. A. 3562 (App. Dep't, Super. Ct., County of Los Angeles March 18, 1957).

[32] Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960).

In *People v. Community Linen Rental Service*,[33] the court held that lack of intent (or accident) was not a defense to the violation of an air pollution statute. The court thus put such statutes in the same category as the food adulteration and similar strict liability offenses.[34]

As was stated in *People v. Consolidated Edison Co.*:

> The criminal intent or *mens rea* essential to a conviction in the case of true crimes need neither be alleged or proven with respect to violations of municipal ordinances which forbid the commission of certain acts as contrary to the general welfare and make them *malum prohibitum*. Proof or admissions of the doing of the forbidden thing, regardless of intent, good faith or willfulness, must bring a conviction. (emphasis added).[35]

As early as 1951, in the case of *People v. Alexander*,[36] the Appellate Department of the Superior Court of Los Angeles County, California, stated:

> It is the actuality and not the guilty intent that determines guilt. Intent is not an element of the offense defined in Health and Safety Code Sec. 24242 [opacity of emission].

It has been held that an owner or occupier of land is criminally liable if he allows an open fire to exist on his property, in violation of an air pollution statute.[37]

It has also been held that a mere violation of the "Ringelmann standard of blackness of emission" is enough to sustain a conviction. For example, in *People v. International Steel Corp.*,[38] the defendant was convicted under a statute which forbade an emission of smoke exceeding No. 2 on the Ringelmann Chart.[39] The conviction was upheld. It is also of interest that the officers who observed the violation did not physically use the Ringelmann chart. The court held that their training in estimating the opacity and color of smoke provided a sufficient foundation for their testimony.[40]

The case of *People v. Plywood Mfrs.*,[41] involved the use of the

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[33] CR. A. 3979 (App. Dep't, Super. Ct., County of Los Angeles April 16, 1959).

[34] *See* Smith v. State, 223 Ala. 346, 136 So. 270 (1931); *Ex parte* Marley, 29 Cal. 2d 525, 175 P.2d 832 (1946); Commonwealth v. Sachs, 214 Mass. 72, 100 N.E. 1019 (1913).

[35] 116 N.Y.S.2d 555, 560 (1952).

[36] CR. A. 2708 (App. Dep't, Super. Ct., County of Los Angeles May 24, 1951).

[37] People v. Southern Pac. R.R., CR. A. 3585 (App. Dep't, Super. Ct., County of Los Angeles May 6, 1957).

[38] 102 Cal. App. 2d 935, 226 P.2d 587 (1951).

[39] U.S. Bureau of Mines Standard.

[40] For other cases approving the use of the Ringelmann Chart, see Board of Health v. New York Cent. R.R., 10 N.J. 294, 90 A.2d 729, 735 (1952); Board of Health v. New York Cent. R.R., 4 N.J. 293, 72 A.2d 511, 513 (1950); Penn-Dixie Cement Corp. v. City of Kingsport, 189 Tenn. 450, 225 S.W.2d 270, 273-4 (1949).

[41] 137 Cal. App. 2d 859, 291 P.2d 587 (1955), *appeal dismissed sub nom.* Union Oil Co. v. California, 351 U.S. 929 (1955).

Ringelmann chart in the measurement of opacity of the emission. As noted, the chart actually measures blackness. The court upheld the statute which prohibited an emission of an opacity equal to the blackness represented by shade No. 2 on the Ringelmann Chart (twenty percent black). The case also determined that:

(1) a statute is not invalid if scientific knowledge is necessary to determine whether a violation exists.

(2) a "detached plume" of smoke may result in a violation, even though the opacity at the stack mouth is below the statutory maximum, and the position of the observer relative to the "plume" is not material if, as observed from any quarter, the prohibited opacity appears.

These cases illustrate the point that the misdemeanor approach can be effective in cases where a hearing board or other judicial or quasi-judicial body applies traditional principles of equity. It may be argued that elements such as lack of intent or accident *should* be considered. One answer is that in many cities the air pollution problem is too dangerous to warrant anything but the most stringent methods of control. Just as strict rules have because of stark necessity attached to cases involving food,[42] so too the policy of using every effective enforcement tool available is justified by the very serious nature of the problem of air pollution and the difficulty of its solution.

Inspection Ordinances

Amost every municipality and regulatory agency will be affected by the recent cases of *Camara v. Municipal Court*,[43] and *See v. Seattle*.[44] It seems clear that the effect of these cases, discussed by another writer herein,[45] will be to make it more difficult for air pollution inspectors to perform their duties.

Statutes and ordinances making it a crime to refuse to allow an inspector to enter for a mere inspection are effectively nullified by these decisions. The important point for the present discussion, however, is that both cases would apply even though the inspector had no power to issue a citation or to seek a criminal complaint. It cannot be argued that the principles of these cases make the misdemeanor approach unwise or ineffective. Similar decisions have, over the years, made the policeman's job more and more difficult, but it is still being done. There is no reason to believe that *Camara* and *See* will stifle the enforcement of air pollution regulations.

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[42] State v. Weisberg, 74 Ohio App. 91, 55 N.E.2d 870 (1943).
[43] 387 U.S. 523 (1967).
[44] 387 U.S. 541 (1967).
[45] *See* Comment, *Camara and See: A Constitutional Problem With Effect on Air Pollution Control, infra* at 120.

CONCLUSION

In any area subject to a serious air pollution problem the choice of remedies will, of course, be determined by several factors: the nature and sources of contamination, meteorology, political boundaries, the legal foundation of the control agency, and the attitudes of industry, other polluters, and the public.

There appears to be no valid reason to deny an air pollution control agency the power to invoke the criminal penalty. It also appears that such action is effective in controlling air pollution. The courts have applied very strict rules in the interpretation and application of air pollution regulations.

It may be expected that industry will object to the criminal penalty. It may also be expected that if the air contaminator in an area is able to convince government that this weapon is unnecessary or undesirable, the people of that area will endure air pollution for a very long time.