Readings

of particular interest

Dispensing Justice at DOE

"When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy through an Exceptions Process" by Peter H. Schuck, in *Duke Law Journal*, vol. 1984, no. 2 (April), pp. 163-300.

Inherent in any regulatory process, according to Peter Schuck of Yale Law School, is a conflict between the need to make general rules and the need to treat individual cases equitably. Rules by their nature must be broad enough to control a wide range of subjects and situations, but this breadth inevitably places an unfair burden on some parties in circumstances the agency could not have foreseen. Thus the rulemaking process by which agencies carry on much of their business is often modified by an adjudicatory "exceptions process" for use in special circumstances. The operation of the exceptions process, in turn, can modify or even overturn the original rule over time. In this article, Schuck looks at how the Department of Energy used its exceptions process during the 1970s in its regulation of the oil industry.

Agencies often face a choice between adopting a new policy through rulemaking and letting it emerge through the systematic granting of exceptions. Schuck says the incremental and ad hoc nature of the exceptions process can make it more appealing than rulemaking as a mode of policy making, and notes several other possible advantages that he says were very much at work in the energy field during the 1970s.

- Adjudication is often preferred when "the regulatory jurisdiction extends to a broad subject matter or to numerous and diverse regulated firms" so that regulators are likely to run into frequent special cases in enforcing sweeping rules. The oil industry is a complex collection of overlapping production, refining, and distributing companies.
- Adjudication can provide quick, seemingly pragmatic decisions for emergency situations, while the rulemaking process is a slow one due to procedural constraints. There was a crisis mood at DOE after the 1973–74 Arab oil embargo and the 1979 Iranian cutoff.
- Adjudication can be attractive when a rulemaking bureaucracy is weak or ineffective and cannot or will not make hard choices. The Department of Energy and its rulemaking apparatus, the Economic Regulatory Administration, approached a state of paralysis at times during the 1970s.
- Case-by-case adjudication can lower the visibility of policy makers, freeing them from potential controversy that might lead to outside interference. The special preferences and subsidies given to "small refiners" during the 1970s escaped the political limelight in part, Schuck says, because they were not imposed through formal rulemaking.

The author presents four case studies of how the Office of Hearings and Appeals (OHA) administered the Department of Energy's exceptions process. The first case concerns the small-refiner exception to the department's entitlements program, which transferred money from refiners with access to price-controlled oil to refiners that purchased oil on the open market. Some small refiners sought relief from having to contribute to this subsidy scheme, and the OHA, on a case-by-case basis, developed a not-quite-formal system of exceptions, the "Delta-Beacon" standards. In the author's view, these rules led to inconsistent treatment of different companies and inconsistent treatment of the same companies over time. By easing the lot of many small refiners, however, the rules may have acted as a perverse safety valve relieving the pressure in Congress for a more systematic policy with respect to small refiners.

The second case study concerns OHA's grant of relief to two fairly large oil refiners, Union Oil and Ashland Oil, which had relied heavily on the spot market for crude oil purchases and were thus hit hard by the 1979 Iranian embargo. Competitors charged that the two companies had simply made a bad business decision to expand their refining capacity aggressively in search of higher market share, while failing to line up assured supplies of crude. The competitors also argued that the informality of the exceptions procedure violated their rights of due process by not allowing them enough of a chance to challenge the claims of Union and Ashland.

The third case study also shows some of the competitive problems with granting special relief to particular companies. The department artificially held down the price of Alaskan oil while giving producers a subsidy through the entitlements program to compensate them for lost revenue. One big distributor of Alaskan oil, Sohio, took advantage of its lower costs to increase its gasoline sales in the "lower forty-eight" by 25 percent. Its competitors, organized as Ohio Independents for Survival, petitioned the Office of Hearings and Appeals to abolish the Alaska subsidy program.

The OHA had no authority to do that; instead it ordered Sohio to contribute $14 million to a special escrow account with the U.S. Treasury. OHA intended this unorthodox decree, the author maintains, less as a final solution to the problem than as a way to goad its parent department into dealing with the problem by rulemaking—which it finally did two months later. In this and other cases, Schuck says, the "exception" itself generated the rule, while the official regulatory machinery lagged behind.

The official regulators' abdication of responsibility was most apparent in the final case study, the gasoline shortage of 1979. When the crisis arrived, DOE was still using essentially the same gasoline allocation system it had devised five years earlier to deal with the OPEC oil embargo. Gas stations' monthly allocations were based on how much they had bought during the corresponding month in 1972. The enormous changes in market conditions in the mean time were supposed to be reflected, not by significant adjustments in base allocations, but by OHA's "exceptions process." This adjustment procedure worked effectively until the Iranian cutoff in 1979, but in that year there was a torrent of applications for allocation increases. OHA's case backlog climbed from 926 in January 1979 to nearly 10,000 by September. The exceptions process was being used to fill an administrative and policy function for which it was ill equipped.

The author argues that DOE's exceptions process, because it was being used as a substitute policy-making mechanism, should have been more sensitive to due process concerns, and should have provided for earlier notice to and opportunities for discovery by competitors of the specific companies granted relief. He also says OHA should have put more restrictions on ex parte contacts between its officials and petitioners, and should have solicited more participation by outside groups in formulating criteria for relief.

The author concludes that because an adjudicatory exceptions process requires officials to deal with isolated cases as they come up, the "rules" it generates will tend to skew social reality. If circumstances force regulators to use an exceptions process to develop policy as well as achieve equity, he says, they should also establish safeguards to ensure the sort of broader perspective that can make social policy fair and effective in macro- as well as microcosm.

Regulation vs. Liability

"Liability for Harm versus Regulation of Safety" by Steven Shavell, in *Journal of Legal Studies*, vol. 13, no. 2 (June 1984), pp. 357-374.

The regulation of safety and the imposition of tort liability for harm done are two very different methods of controlling accident risks. The regulatory approach tackles the risk problem head-on by explicitly requiring private parties to obey safety standards, while the liability system works indirectly by creating financial incentives that induce safe behavior. In this article, Steven Shavell of Harvard Law School suggests that the relative merit of the two methods of risk control is in part determined by four factors, and discusses the actual use of liability and safety regulation in light of those factors.

The first factor is how much the private parties know about the risks of their activities. Where the private parties know more about the likelihood and nature of risks than the regulators, the use of liability would be advantageous other things being equal, since the private parties can act more knowledgeably than regulators in balancing the costs and benefits of precautions. Usually, Shavell believes, private parties come into possession of superior knowledge about risk as a kind of by-product of engaging in the risky activities. Yet there may be instances where information about risk will not be naturally associated with engaging in risky activities, and in such instances a regulator might be able to commit social resources to develop the needed information when individual private parties would not have sufficient incentives to do so.

The second of the factors affecting the relative desirability of the two methods is the possibility that the private parties cannot pay full compensation for the harms they inflict. Where this is the case, the liability system will not furnish adequate incentives to control risk, since private parties will not take into account potential obligations above the level that would exhaust their potential ability to repay. Under regulation, inability to pay for harm done is largely irrelevant since rich and poor parties alike ordinarily have to comply with risk standards as a precondition for engaging in their activities. The relevance of this factor, in any case, will depend not on just the size of the parties' assets and the probable magnitude of the harm they might do, but on complications relating to whether they can buy adequate liability insurance.

The third of the four factors is the chance that parties will not face the threat of being sued for the harms they inflict. Such a possibility, like incapacity to pay for harm done, dilutes the incentive to reduce risk in a liability system. Again, it is a drawback that does not apply in a system of fully enforced regulation.

The last of the factors is the magnitude of the administrative costs incurred by private parties and by the public. The liability system has an underlying cost advantage in that it generates administrative costs only in cases where harm occurs despite precautions, whereas regulation generates administrative costs whether or not a particular case would really have resulted in harm. Nevertheless, this initial advantage may be reduced or offset where the cost of the liability system is high per instance of use, or where regulation is easily enforced either because noncompliance with standards is simple to detect or where authorities can successfully adopt probabilistic methods of enforcement, such as random checks.

In sum, two of the factors—differential knowledge and, more tentatively, administrative costs—seem to favor the liability system, while the other two factors—incapacity to pay for harm done and possibility of escaping suit —favor safety regulation. This indicates, the author believes, that neither liability nor regulation is likely to be most appealing in all situations; the answer will depend on the relative importance of the different factors.

Shavell examines both traditional areas of tort liability and major areas of regulation and concludes that current allocations are broadly rational: the regulated areas are in general better suited to regulation than are the areas left to liability. But the observed correspondence is only general and approximate, and he notes examples where, in light of the four factors, it seems that regulation may be overemployed and others where it may underemployed. This is hardly a surprise, since "the choices actually made about regulation and liability are obviously influenced by factors lying outside the framework of this analysis, and in any event often will not reflect a conscious, careful use of a cost-benefit calculus."

Toward Artists' Rights?

"The New York Authorship Rights Act: A Comparative Critique" by Edward J. Damich, in *Columbia Law Review*, vol. 84, no. 7 (November 1984), pp. 1733-1756.

"In 1980 the Bank of Tokyo decided to remove from the lobby of its Wall Street branch a massive sculpture by the renowned Japanese artist, Noguchi. To do so, the bank had to cut the sculpture into pieces, thus effectively destroying it." The bank's action provoked heated reaction from not only Noguchi, who called it "vandalism," but also many in the New York and national arts community.

In this country, citizens have up until recently had a right to do as they please with the art works they own. That is now changing, as more American courts and legislatures embrace the concept of *droit moral* or moral or personal rights, a fairly common concept in non-Anglo-American jurisprudence that (among other things) gives an artist a litigable interest in the integrity of his works even after he has sold them. California (1979) and New York (1983) were the first states to enact statutes establishing artists' rights in their works after sale. [*Editors' note—They were joined by Massachusetts in 1985.*] In this article, Professor Edward J. Damich of George Mason University School of Law reviews the New York statute, the Artists' Authorship Rights Act, and compares it to the California Art Preservation Act and to the French law of March 11, 1957. The French law is very comprehensive in its elaboration of artists' rights, while the California statute is a scaled-down and Americanized version but springs from a similar theory. The New York statute does not go nearly as far.

The doctrine that artists retain permanent personal rights in their works was first proclaimed in France, and that country remains its foremost exponent. The theory is that because a work of art is an extension of the author's personality, the author is personally injured when someone else does anything violent or injurious to the work—even if that other person is the paying buyer of the work and its copyright. French law establishes a number of creators' "rights" that broadly prohibit (1) alteration or destruction of the work (the right of integrity); (2) failure to attribute authorship or, conversely, failure to preserve anonymity and pseudonymity (the right of attribution); (3) unauthorized disclosure to the public (the right of disclosure); and (4) continued public display of works no longer representative of the author's thought (the right of withdrawal).

The U.S. statutes, by contrast, recognize only what the French call the "right of integrity" and the "right of attribution." Furthermore, the U.S. statutes limit the latter by requiring that an artist have a "just and valid reason" to disclaim authorship. The U.S. statutes differ from each other on the scope of these two rights. While the California statute bars any alteration or destruction, the New York statute bars such acts only when they are reasonably likely to damage the artist's reputation. Consequently, the New York statute seems to apply only to works that are publicly displayed or published, and might not prohibit an owner from destroying even publicly displayed works so long as the author's reputation is not at issue. The New York statute goes further than California's in a different respect, however, in that it would seem to prohibit the publication of unfaithful reproductions of the original work.

Worth Noting–

PARIS—No one here can hang up a shingle that says *Haute Couture* without government permission. After World War II, so many people were calling themselves couturiers that a group was formed to set standards.

Today, there are only 21 full-fledged *grand couturiers*—members of the Chambre Syndicale de la Couture Parisienne, the government-aided body that policies and promotes haute couture. They are: Balmain, Pierre Cardin, Carven, Chanel, Christian Dior, Courrêges, Emanuel Ungaro, Givenchy, Grès, Guy Laroche, Hanae Mori, Jean Patou, Jean-Louis Scherrer, Lanvin, Louis Feraud, Nina Ricci, Per Spook, Philippe Venet, Ted Lapidus, Torrente and Yves Saint Laurent. Two others—Paco Rabanne and Serge Lepage—are certified as *petit couturiers;* and Lecoanet Hemant, a new house, has trial certification.

To use the appellation "haute couture," says the chamber's executive director, Jacques Mouclier, a designer must make made-to-measure clothes; have a workroom in Paris with at least 20 in-house workers; design and show 75 garments to the press twice a year (in January and July); and present clothes at least 45 times a year to private clients. That used to require having a staff of in-house models putting on daily or weekly shows, but today many houses (including Saint Laurent) videotape their press shows and use the video in conjunction with just a few live models for their shows to clients.

One benefit of being accredited is that only haute couturiers have the right to show their clothes or even be interviewed on French television.

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The U.S. statutes also depart from the French model in severely limiting the kinds of works entitled to protection. While in France all works entitled to copyright protection are also entitled to personal rights protection, the California and New York laws confine their coverage to works of "fine art." In California that term is defined to include only paintings, sculpture, drawings, and works of art in glass, which must also be "of recognized quality." The New York statute does not attempt to draw quality distinctions, and its definition of "fine art" is more broadly stated to take in more types of visual and graphic art. Photographic prints and sculpture are protected, but only if issued in limited editions. Significantly, neither of the U.S. statutes covers motion pictures, and both contain exceptions for commercial art.

Both American laws are more specific than the French law in giving artists recourse against negligent as well as intentional acts. The danger of liability for negligent acts is of great concern to museums and galleries, as well as private collectors, because improper maintenance or restoration can easily inflict inadvertent damage on an art work. Although the language of both statutes is confusing, Damich says, it appears that in California liability may result only from gross negligence in restoration, while in New York liability may result from ordinary negligence in restoration or from gross negligence in failing to maintain or protect a work of art. New York's rule that a work must be subject to public display or publication before liability ensues, however, would seem to minimize the effect of this provision on art owners.

France proclaims that the "personal rights" of artists are by their very nature inalienable. In contrast, the California statute expressly provides that artists can consent to a blanket waiver and the New York statute, though silent on the matter, lends itself to the same interpretation. Damich argues that this leaves a significant gap in coverage because struggling artists would probably not have the bargaining power to withstand buyers' demands for blanket waivers. Better-known artists might have the bargaining power to resist such contractual concessions, but their works are not as likely to be altered.

All three statutory schemes provide damages and injunctive relief. They differ, however, in the term of coverage. In France, personal rights are perpetual and may be enforced by the author's heirs. In California, statutory protection endures for fifty years after the artist's death. The New York statute is unclear but would appear to give protection only during the artist's life.

In Damich's view, the New York statute is distinctly weaker than the French law and the California statute because it has a narrow theoretical basis, applying only when the author can make a showing of injury to reputation. The French law, on the other hand, is motivated by a much broader personal rights theory, and the Californian adds the idea that to preserve works of art in their original state is itself in the public interest.

The Rise of Ethnic-Joke Liability

"Racial Remarks in the Workplace: Humor or Harassment?" by Terry L. Leap and Larry R. Smeltzer, in *Harvard Business Review*, vol. 62, no. 6 (November-December 1984), pp. 74-75, 78.

Racial harassment, "unlike sexual harassment in organizations, has received scant attention in the legal arena and academic literature," according to Terry Leap of Clemson University and Larry Smeltzer of Louisiana State University. "Next to jokes about sex," however, "jokes directed at racial and ethnic groups make up the most popular form of humor." And employers are increasingly facing legal liability for the tasteless ethnic jokes and racially derogatory remarks of their employees.

The Equal Employment Opportunity Commission has declared that an employer has an enforceable obligation to take "positive action where positive action is necessary" to provide a "working environment free of racial intimidation." To distinguish between harassment and ordinary "hazing," courts and the EEOC are evaluating "the work environment and context in which slurs, epithets and jokes were uttered," the authors say. In a case involving a group of workers on an oil rig, an appeals court found that the victimization of a black worker was not illegal because workers of all races were routinely exposed to personal abuse and harassment; violations were found in another harassment case, however, that took place in the presumably more polite atmosphere of a car dealership.

The authors say courts have "generally" not found liability in individual jokes or remarks. A federal appeals court found that a National Football League supervisor's derogatory remarks about Italian-Americans in a conversation did not violate Title VII of the Civil Rights Act of 1964. The New York state supreme court likewise held that an isolated anti-Semitic remark did not violate the state's human rights law. Liability most often sets in, according to the authors, when slurs are repeated often.

Where an employer is found liable, a number of court-ordered remedies may result. In a recent federal case in Minnesota, the court commanded the employer to take disciplinary action against its employees and also "ordered the company to educate and sensitize its supervisors and managers." The authors say preventive action by employers may succeed in warding off future liability. "[M]anagement should consider using periodic race relations awareness training programs and counseling sessions to alert offending employees to the legal ramifications of their actions. Such programs," along with the disciplining of errant workers, "may reflect positively on management's effort to maintain a cordial work environment when the administrative enforcement agencies and courts examine an organization for signs of racial hostility."

A Bid for More Competition and How It Backfired

The Ban on Intra-Major Joint Bids in Federal Petroleum Offshore Lease Sales: An Evaluation by Joseph P. Mulholland (Federal Trade Commission: Bureau of Economics Staff Report, October 1984), 84 pp.

In December 1975 the U.S. Interior Department instituted a rule prohibiting large oil companies (defined as those with annual petroleum production of more than 1.6 million barrels a day) from joining together to bid for federal petroleum leases on the outer continental shelf. There are eight "major" oil firms with production totals that bring them under the ban: Exxon, Texaco, Gulf, Mobil, Standard Oil of Indiana (Amoco), Standard Oil of California (Chevron), Shell, and British Petroleum.

The ban arose mostly because policy makers were afraid that joint bidding by major producers was reducing the revenues the government receives for offshore leases. It was argued that such combines allowed major producers to acquire superior information about the likely competition for tracts, which in turn allowed them to obtain tracts at lower cost than smaller companies. Also, intra-major combines allegedly reduced bidding competition by joining together producers with the capacity and intent to bid separately for the same tracts. Supporters of the Interior rule predicted that banning joint bids would generate greater competition in offshore lease sales, with a correspondingly greater financial return to the Treasury.

Unfortunately, the ban did not provide the expected benefits, according to this study by Joseph P. Mulholland of the Federal Trade Commission's Bureau of Economics. Furthermore, the study concludes, there appears to have been no solid rationale for the ban in the first place.

To evaluate the original rationale for the ban, Mulholland analyzed winning bid levels for a number of sales conducted during the years 1973 and 1974. He found that the majors did not, in contrast to the allegations made by supporters of the ban, tend to purchase tracts at prices lower than those paid by smaller producers (after adjusting for expected quality differences among tracts). This was true of both the winning bids made by majors acting singly (solo bids) and of the joint bids with other majors (those being the intra-major joint bids subsequently prohibited by the Interior ruling).

Likewise, empirical tests indicated that no important competitive benefits seem to have resulted from the ban. Mulholland found that the average level of bid activity did not change appreciably when the ban was instituted: the number of bids offered by large nonmajor firms did increase, but this was offset by a corresponding decline in the number of bids submitted by majors.

Similarly, no improvement was found in the level of winning bonus payments between the pre-ban and ban periods. Statistical analyses indicated that Interior did not succeed in capturing a greater share of the economic value of the tracts it leased. In fact, there was some evidence that Interior's revenues from lease sales may have declined somewhat, at least for the early sales conducted soon after the ban went into effect.