QUO WARRANTO TO ENFORCE A CORPORATE DUTY NOT TO POLLUTE THE ENVIRONMENT

Capitalist economics rely upon corporations as a means of allocating resources. Factories, products, and developments that pollute our environment are the result of this process. Restrictions upon corporate conduct can control a major portion of society's environmental ills. Furthermore, these restrictions can be imposed expeditiously by concerned courts without the necessity of cumbersome legislative processes. Courts can utilize their common law powers over corporate fiduciary duties to create duties of social responsibility, and such duties can be enforced through the writ of quo warranto.

"Unless we arrest the depredations that have been inflicted so carelessly on our natural systems—which exist in an intricate set of balances—we face the prospect of ecological disaster." The National Environmental Policy Act of 1969 reflects the deep concern of the nation with the growing problem of pollution. Policy, however, is more easily obtained than results. Of the numerous alternative means of achieving the intended goal of saving the environment, most, including regulation and taxation, require new legislation. When results must wait for enabling legislation, it is difficult to proceed beyond policy which does not, by itself, prevent environmental degradation. Therefore, to the extent that current legal doctrines and remedies can be used or adapted, we can expedite necessary alleviation of environmental degradation.

One such possibility is the remedy of quo warranto. Nearly every state has some legislation which controls the grant of the privilege to incorporate. Some of these laws may provide vehicles for controlling corporate pollution without the necessity of new legislation. Other states

   A proceeding in quo warranto may be brought in case:
   
   (e) Any corporation does or omits to do any act which amounts to a surrender of forfeiture of its rights and privileges as a corporation, or exercises powers not conferred by law.

The key statutory language should provide for abuse of state laws or duties as grounds for forfeiture. The duty element could be implied in general statutes which provide for forfeiture for abuse of corporate powers without restriction to violation of state law. See note 5 infra.
may require only minor changes,\textsuperscript{5} while only a few are unadaptable without major revisions.\textsuperscript{6} The theory under which these laws could be used to control environmental harm begins with the assumption that corporations\textsuperscript{7} owe a duty to the public not to pollute.\textsuperscript{8} When a corporation violates that duty, it abuses the privilege of the corporate charter, and this abuse triggers the remedy.\textsuperscript{9}

The corporation has become the dominant form of business enterprise in the United States.\textsuperscript{10} Corporations are a source of environmental concern because they represent a vast centralized economic and social organization.\textsuperscript{11} Since American business, which relies heavily on the corporate form, organizes and channels a high proportion of society's resources,\textsuperscript{12} it is deeply implicated in the destruction of the environment.\textsuperscript{13}

\begin{itemize}
\item \textsuperscript{5} See Model Bus. Corp. Act Ann. 2d §94, ¶3.03 (1971). For example, the words "or duty" might be added to the Ala. Code tit. §1133 (1958) for quo warranto actions against a corporation that "violates the provisions of any law [or duty] by such corporation forfeits its charter, by abuse of its powers." Cal. Code Civ. Proc. § 803 (West 1970) provides that it is a ground for quo warranto if a corporation "unlawfully holds or exercises any franchise." Although abuse of a public duty does not appear to be within the scope of the statute, People v. Milk Producers' Ass'n of Central California, 60 Cal. App. 439, 212 P. 957 (3d Dist. 1922) held that where a corporation usurps powers which its articles of incorporation and the law do not permit it to exercise, quo warranto proceedings will lie. For this case to be applicable, two intermediary assumptions are necessary: a corporation does not have the power to abuse its duty to the public and such abuse is unlawful. With this reasoning, California rules would be amenable to the proposed remedy without further legislation.
\item \textsuperscript{6} See Model Bus. Corp. Act Ann. 2d § 94, ¶ 3.03 (1971).
\item \textsuperscript{7} This paper will be restricted to a discussion of corporations because of the nature of the proposed remedy. The environmental duty need not be so restricted. If the state can control one type of business organization, it should also be able to control the unincorporated forms of business associations, because they too take advantage of the laws of the state to operate their businesses under its protection.
\item \textsuperscript{8} A clear and concise definition of pollution is probably impossible. Courts would probably use a standard of reasonableness in determining the level of pollution that is to be deemed acceptable. Zero pollution would be unreasonably restrictive. The burden of proof would probably be on the plaintiff to show that the amount of pollution is unreasonable either because alternative production means are available or because the corporation does not make a significant enough contribution to the economy to warrant the amount of pollution it produces. But cf. Comment, Standing on the Side of the Environment: A Statutory Prescription for Citizen Participation, 1 Ecology L.Q. 561, 629-32 (1971). See also note 19 infra.
\item \textsuperscript{9} See text accompanying notes 56-65 infra.
\item \textsuperscript{10} See R. Gordon, Business Leadership in the Large Corporation 3 (1945).
\item \textsuperscript{11} Manning, Corporate Power and Individual Freedom: Some General Analysis and Particular Reservations, 55 Nw. U.L. Rev. 38, 39-40 (1960). See also 9 W. Holdsworth, A History of English Law 46 (1926) [hereinafter cited as Holdsworth]: The same reasons which make it necessary for the law to recognize the crime of conspiracy, make it necessary to regulate these groups of men [corporations], who, when they act in combination, have far more power for good or evil than a single man.
\item \textsuperscript{12} "The corporation is only a convenient legal arrangement for allocating interests and functions in a large concentration of assets." Schwartz, Corporate Responsibility in the Age of Aquarius, 26 Bus. Law 513 (1970) (adapted from an address before the
Industry, while only part of the pollution problem, is also the repository of research and technology which has the potential to bring pollution under control. For these reasons, it is particularly appropriate to focus on the corporation in an attempt to develop means of motivating these organizations to alleviate pollution.

The objective of this Comment is to illustrate that it is possible to recognize corporate duties beyond those the corporation owes to its shareholders. A duty not to pollute the environment is not inconsistent with historical precedents and there are logical justifications for holding corporations to that duty. When the duty not to pollute is contrasted with other forms of corporate social responsibility, it is apparent that the recognition of that duty is enforceable within the operation of the market economy. For a duty to be effective, there must be a workable means of enforcement. One means of enforcing this duty would be to use the writ of *quo warranto*, a remedy which relies heavily on the equity powers of courts.

I

THE ENVIRONMENTAL DUTY

A. Source of the Duty

Most corporations exist by virtue of a charter, certificate or articles of incorporation, authorized by a state's general enabling statute. The corporate form allows investors to limit their risk to the extent of their investment. It is, therefore, a desirable form for attracting large amounts of capital. Since its inception, however, the corporate form has been

Committee on Federal Regulation of Securities, Section of Corporation, Banking and Business Law, American Bar Association, Aug. 11, 1970).

15. See part I A of text.
16. See part I B of text.
17. See part II of text.
18. Courts are arguably best suited to handle the complex value choices involved in the elimination of pollution. See note 97 infra, and part III of this text. Courts could balance the need for a clean environment against the defenses of necessity and practicality. Relevant factors in the decision-making process would be the importance of the particular industry to the economy, how much pollution is involved, and how expensive it would be to eliminate or reduce the level of pollution. Difficult choices will be part of this process. Courts have greater flexibility to take human considerations into account on a case-by-case basis than does legislation which must establish general standards. In some situations, employment for a large sector of a community might outweigh the harm caused to the environment. Under those circumstances, it would be unreasonable to forfeit the charter of the corporation. See note 8 supra.
more than an organization for limiting the liability of investors. Its structure is a method of implementing the commercial needs of society. The first English book wholly on the subject of corporations specified that the general intent and end of all incorporations is for more efficient business government. The business corporation also has the public objective of managing and ordering the trade in which it is engaged, as well as the private objective of profit for its members.

According to conventional legal theory, a corporation owes a duty to its shareholders. The officers and directors of a corporation are fiduciaries who operate the corporation for the common economic benefit of the shareholders. The management of a business requires numerous day-to-day choices which necessitate the assessment of various economic and social values. The officers are charged with placing the interest of shareholders above personal and societal objectives in making these choices: an attempt to recognize other duties might be a breach of their

Business—which is the economic organization of society—is private property only in a qualified sense, and society may properly demand that it be carried on in such a way as to safeguard the interests of those who deal with it either as employees or consumers even if the proprietary rights of its owners are thereby curtailed.

Id.


23. Id.
24. Id.

We think that there is a clear and compelling distinction between management’s legitimate need for freedom to apply its expertise in matters of day-to-day business judgment, and management’s patently illegitimate claim of power to treat modern corporations with their vast resources as personal satrapies implementing personal political or moral predilections.


By contrast, Milton Friedman has gone so far as to say that recognition of any corporate social responsibility would be fundamentally subversive. The only social responsibility of business, as he sees it, is to use its resources and engage in activities designed to increase its profits. Friedman, A Friedman Doctrine—The Social Responsibility of Business is to Increase Its Profits, N.Y. Times, Sept. 13, 1970, § 6 (magazine), at 126. His conclusion seems to be a result of an unwillingness to distinguish between types of social responsibility and a failure to conceive of a means to make the responsibility work within the market system. See text accompanying notes 45-48 infra.
fiduciary duty to the shareholders. This conclusion, however, is neither necessary nor desirable.

Nearly forty years ago, Professor E. Merrick Dodd, Jr. concluded that growing judicial and legislative support existed for the view that the fiduciary obligations of corporations ran beyond the shareholders to include other constituencies, including the general public. He predicted that future developments in the law would recognize social responsibility as an appropriate standard for the conduct of the business enterprise and would reject sole reliance on profit maximization for shareholders.

The recognition that corporations have a social responsibility extending beyond their membership and employees has been a long time in the making but it is gradually emerging through liberal common law holdings and statutory provisions.

The current trend in legislation and social awareness of the importance of the environment has reinforced this view. Judicial decisions have also tended to expand the nature and scope of corporate duties in response to the needs of equity and fairness which they have perceived. The current need to protect environmental values presents another area in which the courts may feel justified to proceed against abuses.

The theory that corporations owed a duty only to their shareholders was developed during a laissez-faire period of American economic de-

28. A director is a fiduciary. So is a dominant or controlling stockholder or group of stockholders. Their powers are powers in trust. Their dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein. The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain. Pepper v. Litton, 308 U.S. 295, 306-07 (1939) [citations omitted], accord, Jones v. H.F. Ahmanson & Co., 1 Cal. 3d 93, 108, 460 P.2d 464, 81 Cal. Rptr. 592 (1969).


30. Dodd, supra note 21, at 1160-61.


33. Witness the popularity, if not success, of Ralph Nader's Campaign GM which sought to place representatives of the public interest on the board of directors of General Motors Corporation.

34. In Jones v. H.F. Ahmanson & Co., 1 Cal. 3d 93, 460 P.2d 464, 81 Cal Rptr. 592 (1969), majority shareholders were held to an obligation to be fair to the minority in their exercise of corporate control, although strict corporate democracy was held to be inappropriate. The majority could not maximize their personal profits at the expense of the minority. A logical extension of this argument would be that the majority cannot increase their profits by breaching their duty to society.
 Corporations were relatively small and society viewed their threat to the environment as minimal, if in fact society recognized any threat at all. Lower production costs at the expense of an environment that the public viewed as unlimited and self-regenerating were an impetus to economic growth in the land of plenty. Air and water were considered free resources which were not included in the cost of doing business. Therefore, a corporation which would invest substantial time and money to minimize the cost of labor and capital would ignore the costs of using and degrading rivers, lakes, and the atmosphere. The social costs of the resource misallocations in this pricing system have now become intolerable. Therefore we must charge manufacturers, in one way or another, for using environmental resources.

Because corporations owe their existence to the state of their incorporation, it is incongruous for anyone to assert that the corporation owes no duty to that state or to any other state that allows it the privilege of doing business within its jurisdiction. State governments have assumed, as part of their sovereign powers, the right to grant corporate privileges and duties. Imposition of an environmental duty, with the loss of corporate privileges as a sanction, would therefore be a valid exercise of state power.

In the early history of the American corporation, it was not unusual for a state to obtain forfeiture of a corporation's charter on the grounds that it had seriously violated its charter. A writ in the nature of a quo warranto was used by the state to demand to know why a corporation undertook a particular action. The writ of quo warranto is thus

35. "During the 19th Century when corporations were relatively few and small and did not dominate the country's wealth, the common-law rule [corporate duty owed only to shareholders] did not significantly interfere with the public interest. But the 20th Century has presented a different climate." A.P. Smith Mfg. Co. v. Barlow, 13 N.J. 145, 148, 98 A.2d 581 (1953).
36. See Dodd, supra note 21, at 1146-47.
37. Senator Edmund Muskie told a meeting of the Water Pollution Control Federation, "A product whose price is reasonable only because the consumer does not have to pay for the serious problems that product causes has no business being sold at all." San Francisco Chronicle, Oct. 6, 1970, at 53, col. 3.
38. See also 9 HOLDSWORTH, supra note 11.
40. 9 HOLDSWORTH, supra note 11, at 47. "In fact, creation by and subordination to the state are the only terms upon which the existence of large associations of men can be safely allowed to lead an active life." Id.
41. See part II infra.
42. C. WALTON, supra note 27, at 45.
43. Mandamus was also used to compel a business corporation—such as a canal or toll-bridge company—to perform some public duty imposed upon it by its charter. Id.
a time-tested and efficient means of enforcing the corporate duty to the public. It could now be used to enforce the duty not to pollute and could also help force corporations to include pollution abatement costs in their costs of doing business.  

B. Feasibility of the Duty

Legal scholars have expressed the conviction that corporations have social obligations, but they have been unable to propose a workable means of defining and enforcing those obligations. The result has been to dismiss the idea of social responsibility as wishful thinking. This view is a consequence of the failure to distinguish conceptually between different social issues. Pollution is one social issue that can be made into an economic obligation without significant disruption of the legal and economic framework of the market system.

Pollution is different from other social problems in that much of it can be traced directly to specific business enterprises. While it is difficult to locate, quantify, and allocate corporate responsibility to end poverty and promote racial harmony, corporations can be identified with specific environmental problems. Furthermore, since industry is directly responsible for its own emissions, it is logical that it should pay for any resulting harm as a part of its cost of production. When pollution is a cost of doing business which is not paid by the polluters, the burden is placed upon the public as a whole and the consumer of the offending product receives a subsidy. Consumers should pay the real cost of the production of the items they buy. When a corporation is allowed to save production costs by polluting, it can offer its product at a lower price to the consumer. Consumption levels will increase due this lower price which will, in turn, stimulate an expansion of the capacity of polluting manufacturers. Since this situation stifles incentive to minimize pollution, the goal should be to internalize this cost factor and

44. See part II infra.
45. See generally the debate between Dodd and Berle in the Harvard Law Review in the early nineteen-thirties: Dodd, supra note 21; Berle, For Whom Corporate Managers Are Trustees, 45 Harv. L. Rev. 1365 (1932). See also Berle, Corporate Powers as Powers in Trust, 44 Harv. L. Rev. 1049 (1931).
46. See Berle, For Whom Corporate Managers Are Trustees, supra note 45, at 1367. "Now I submit that you can not abandon emphasis on 'the view that business corporations exist for the sole purpose of making profits for their stockholders' until such time as you are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else." Id.
47. Other critical social issues include urban blight, race relations, poverty, and crime. Business may be incapable of making policy decisions concerning allocations for alleviation of these varied problems.
48. Cost may be measured either in terms of harm caused or in terms of the amount necessary to alleviate the harm. Measuring the harm is likely to present difficult problems of valuing aesthetic resources.
feed it into the operation of the market. Hence, the operation of an enterprise which causes significant amounts of pollution can be considered an abuse of the corporate franchise because the corporation is using its state-granted powers to export production costs to the general public instead of allowing the market mechanism to create demand for its products based on the true value of the product to society.

The use of *quo warranto* as a means of enforcement of an environmental duty forces the introduction of a reasonable portion of the cost of pollution into the market. This assures that pollution will be eliminated with the least cost to society. For example, when it is more efficient to restructure production processes to prevent pollution rather than devise a method of control, businesses will take advantage of that economy. The remedy places the initiative on those in the best position to do something about the problem. Allocation of resources into research to prevent pollution would be stimulated through this competitive device. The companies which are most efficient in controlling emissions will be favored. Under an unregulated system, on the other hand, the worst polluters are able to undercut the conscientious non-polluting firms. Hence the market operates to discourage those who wish to control pollution, prejudicing their ability to compete by increasing their costs. 49

Corporate social responsibility is generally vulnerable to three basic objections. First, recognition of a duty to protect the environment could create problems of shareholder control. Second, it could increase the difficulty of evaluating managerial performance. Finally, management would arguably be placed in the position of making *ad hoc* social value judgments. These traditional arguments against the recognition of corporate social responsibility are less persuasive when applied to the environmental duty.

Professor Hetherington argues that if management can claim social duties, it can potentially insulate itself from shareholder control. 50 Here the distinction between pollution control and other social needs is crucial. This is not an area where management can freely choose to pursue values other than profits for the shareholders because, the corporation's environmental responsibilities oblige the management to pay a reasonable part of the cost of pollution just as it must pay for other raw materials. If management does a poor job, shareholders may still bring a derivative

49. Cf. Samuelson, *supra* note 38. "It is nonsense to look to General Motors, or even the Big Three, for voluntary solution to the problem of air pollution." See also note 107 *infra.*

suit to challenge a breach of the duty to most efficiently promote shareholder interest. Just as management may not seek to maximize profits by violating antitrust laws, it should not be able to maximize profits at the expense of the environment. The recognition of this duty to the public should not jeopardize shareholder control of management.51

Recognizing protection of the environment as another corporate duty arguably might increase the difficulty of evaluating managerial performance.52 This argument, however, assumes a duty outside the structure of the operation of business for profit. If measurement of this duty could only be based on aesthetics or non-quantifiable values, this would be true. But since the duty is measurable in terms of the cost of doing business, this objection does not hold. There should be no significant departure from the existing structure which motivates management to seek increased productivity and efficiency. Management and outsiders will, in fact, be able to measure and compare records of one management with that of another more realistically, since more of the factors of production will be included. Society can make more realistic decisions when it can recognize the true cost of utilizing its resources in particular channels, because these costs will be reflected in the price consumers must pay.53 Introducing the cost of pollution abatement into the calculation of production costs puts that factor into a form with which business is capable of dealing. The market induces the corporation to minimize the cost and make pollution abatement more efficient, thus treating it like any other production factor. There is greater incentive for research: minimizing pollution becomes more than a public-spirited idea, it is good business. By acknowledging a duty to the public not to pollute and by providing for forfeiture of the right to do business for its breach, corporations would be put to a choice of cleaning up or losing the right to continue as a corporation.

Enforcement of an environmental duty would not mean that business executives would be faced with the problem of choosing among competing social values. It may be true that business executives cannot or should not try to choose between such factors as societal need for low-cost housing and the value to the corporation of extra charitable contributions, because neither of these is readily convertible into a production fac-

51. See generally Eisenberg, The Legal Roles of Shareholders and Management in Modern Corporate Decisionmaking, 57 CALIF. L. REV. 1, 15-27 (1969), discussing three theoretical approaches to increasing corporate responsibilities to the public—increased shareholder power, creation of clients' rights in the corporate power structure, and a less fettered managerialism.

52. Hetherington, supra note 50, at 279, "[T]he addition of various social responsibilities to the managerial function would greatly increase the difficulty of evaluating managerial performance."

53. See text accompanying note 37 supra.
tor. But since the environmental duty does not create an obligation to take affirmative action to eliminate pollution beyond that attributable to the corporation itself, the executives are only asked to make decisions pertaining directly to the activities of the corporation. Management would deal only with its own production costs and would not be making policy decisions that would be more appropriately made by the legislature.

Another potential problem presents a real, but manageable threat to the workability of the duty. A corporation may be confronted with uncertainty as to what constitutes unreasonable pollution, but this type of uncertainty is inherent in most business decisions.\textsuperscript{54} In the area of the antitrust laws, for example, corporations are continually being asked to decide what constitutes an unreasonable restraint of trade.\textsuperscript{55} Uncertainty does not render the standard unmanageable. The problem of the continuing degradation of the environment is so serious that the degree of uncertainty with which management must deal is not an unreasonable price to pay.

II

QUO WARRANTO

Suspending or dissolving a corporation, on proceedings taken against it by the crown for misuse or abuse of its privileges, was a very old principle of the common law.\textsuperscript{56} As early as 1274, Edward I was summoning state franchises for forfeiture, due to misuse, by means of a writ of \textit{quo warranto}.\textsuperscript{57} The most famous instance of this remedy occurred in 1681-1683 when the charter of the City of London was called into question.\textsuperscript{58} Sir Robert Sawyer, the Attorney General, argued that corporations that abused their power could be seized into the hands of the king.\textsuperscript{59} This case was vital to Charles II's design to remodel corporations to render them subservient to the state.\textsuperscript{60}

Today, the writ of \textit{quo warranto} is used mostly to challenge the validity of a corporate\textsuperscript{61} or government body's\textsuperscript{62} charter, or the right of

\begin{itemize}
  \item \textsuperscript{54} The standard for which directors and officers are held accountable is one of due care, also called the business judgment rule. \textit{N. Lattin, supra} note 31, at 272-74.
  \item \textsuperscript{55} \textit{E. KINTNER, AN ANTITRUST PRIMER} 18-19 (1964). \textit{See also} Standard Oil Co. v. United States, 221 U.S. 1 (1910).
  \item \textsuperscript{56} \textit{9 Holdsworth, supra} note 11, at 65.
  \item \textsuperscript{57} \textit{1 id.} at 230.
  \item \textsuperscript{58} 34 Charles II 1682, 8 S.T. 1039.
  \item \textsuperscript{59} \textit{9 Holdsworth, supra} note 11, at 46.
  \item \textsuperscript{60} \textit{6 id.} at 503.
  \item \textsuperscript{54} \textit{E.g., State ex rel. Crow v. Atchison, T. & S.F. Ry., 176 Mo. 687, 75 S.W. 776, 780, 63 L.R.A. 761 (1903); Black v. Contract Purchase Corp., 327 Mich. 636, 42 N.W.2d 768, 771 (1950). Quo warranto} is not widely used at the present time and many leading cases are comparatively old.
  \item \textsuperscript{62} \textit{E.g., Burns v. District Ct., 144 Colo. 259, 356 P.2d 245 (1960) (recreation district).}
an individual to hold office. Many states include "abuse and misuse of the corporate charter" within the scope of their _quo warranto_ statutes as grounds for the forfeiture of a charter. Legislative authorization for forfeiture of corporate charters for various sorts of misconduct by corporations has been sustained as a legitimate exercise of the states' reserved power to amend or repeal charters.

When a corporation excessively abuses the interest of the public, it should be ousted from its right to do business. The term ouster includes both forfeiture, available in the state of incorporation, and expulsion, used in other states. In terms of effectiveness, it should make no difference whether the corporation is incorporated within the state or merely licensed to do business there.

Generally, the action for forfeiture through _quo warranto_ is brought by the Attorney General of the state. By placing the power of enforcement principally in his hands, there is less likelihood of abuse and spurious suits. Some states actually limit the use of _quo warranto_ to the exclusive discretion of the Attorney General. However, this is an undesirable concentration of authority because limited budgets, manpower restrictions or political pressures brought to bear by large corporations may be excessively determinative of decisions to prosecute. A pref-

---


64. See generally notes 4-6 and accompanying text _supra_. _E.g._, _Ohio Rev. Code Ann._ § 2733.02(D) (1954); _Ind. Stats._ 3-2001(6) (1968). Many states allow _quo warranto_ for more comprehensive grounds than "abuse and misuse of the corporate charter." _E.g._, the Illinois code provides five other sets of grounds for proceedings in _quo warranto_. _Ill. Ann. Stat._ ch. 112, § 9 (Smith-Hurd 1966). The following discussion will be limited to _quo warranto_ as it relates to abuse and misuse of the corporate franchise. See part I_A for a discussion of why pollution constitutes an abuse of the charter. See also note 5 _supra_ for a discussion of the operation of the environmental duty within the context of these statutes.


66. _N. Lattin, supra note 31, at 628.

67. The term forfeiture refers to loss of the corporate charter. This is only available in the state where the corporation is incorporated.

68. The term expulsion refers to loss of the right to do business in a state in which the corporation is merely licensed and not incorporated.

69. See _State ex rel._ Dalton _v._ Riss & Co., 335 S.W.2d 118 (Mo. 1960).

70. _G. Hornstein, supra note 3, at § 813.

71. Herman _v._ Morlidge, 298 Ky. 632, 183 S.W.2d 807, 809 (1944).

erable procedure\textsuperscript{73} allows a responsible private party to bring the suit where there has been an abuse of the Attorney General's discretion\textsuperscript{74} to refuse to sue or where the Attorney General lacks the resources to prosecute.\textsuperscript{75} The requirement of a preliminary court showing by a prospective plaintiff of sufficient grounds to warrant the suit could prevent harassment.\textsuperscript{76}

The prospects of enforcement of the duty not to pollute would be made sufficiently credible to promote compliance with the duty if private plaintiffs were routinely granted standing as potential enforcers. A private citizen, acting as a private attorney general, possesses the energy and initiative which government may lack in protecting environmental resources in the public trust. This fact has been recognized in one state\textsuperscript{77} and the view is spreading with legislation introduced in other states and in Congress.\textsuperscript{78}

Absent statutory expansion of its scope, \textit{quo warranto} can be resorted to only where there is injury to the public.\textsuperscript{79} It is not available when the damages claimed are confined to private interests,\textsuperscript{80} unlike claims for damages in tort cases; thus a harm distinct from that to the general public need not be shown.\textsuperscript{81} Since most pollution is widely dispersed and the harm to each individual from a single source is relatively small, a remedy which can be asserted by the public is a necessary correlative to existing tort law.

It seems unlikely that private enforcement would open the door to

\textsuperscript{73} E.g., ILL. ANN. STAT. ch. 112, § 10 (Smith-Hurd 1967): The preceding shall be brought in the name of the People of the State of Illinois by the Attorney General or State's Attorney of the proper county, either of his own accord or at the instance of any individual relator; or any citizen having an interest in the question on his own relation, when he has requested the Attorney General and State's Attorney to bring the same, and the Attorney General and State's Attorney have refused or failed so to do, and when, after notice to the Attorney General and State's Attorney, and to the adverse party, of the intended application, leave has been granted by any court of competent jurisdiction, or any judge thereof.


\textsuperscript{75} Norton v. People ex rel. Rudbeck, 102 Colo. 489, 81 P.2d 393 (1938).


\textsuperscript{80} Some seemingly private suits are actually based on statutory expansion of the scope of \textit{quo warranto}, such as wrongful occupation of corporate office.

\textsuperscript{81} Pollution is generally held to be a public nuisance. A private individual has
frivolous suits. Since plaintiffs would have nothing to gain in a monetary sense, they would probably be restricted to public interest groups. A further check is the practice in *quo warranto* cases of putting the burden of proof on the private plaintiff when he prosecute on his own relation, whereas actions by the state put the burden on the defendant. At least one state requires a plaintiff who brings an action on his own relation to post a security for costs. This is a procedure that should be left to the discretion of the courts. If the court has the power to dismiss frivolous suits, the security deposit hurdle is unnecessary, especially since the cost of suing a large corporation is already likely to be a significant deterrent. The court should be able either to require or to waive a security deposit as best serves the ends of justice.

Forfeiture of the charter and expulsion are severe remedies and their imposition should not be taken lightly. Some courts have approved fines in *quo warranto* cases in lieu of ouster. In some cases the fines have been substantial and related to the seriousness of the abuse. This alternative has given courts the flexibility they need to handle cases where forfeiture would be unreasonable.

A recent Missouri case illustrates how this procedure might work. The defendant trucking firms had been operating in Missouri without complying with vehicle registration laws. The Attorney General brought a proceeding in the nature of a *quo warranto* alleging such conduct to be an abuse of the franchises granted the trucking firms by the state, so as to justify defendants' ouster from the franchises. The trial court

---


83. *See generally* Note, *Quo Warranto*, 15 HAST. L.J. 222, 227 (1963). A relator is one upon whose complaint, or at whose instance, writs are issued. He is the *quasi* plaintiff, since all proceedings in the nature of a *quo warranto* must be in the name of the state.


88. Note 18 *supra* discusses some of the considerations a court may take into account in concluding that forfeiture is too harsh.

89. *State ex rel. Dalton v. Riss & Co.*, 335 S.W.2d 118 (Mo. 1960).

90. *Id.* at 133.
fined the defendants $50,000 and the government refused to accept a lower settlement, although defendants had commenced compliance.\textsuperscript{91} The appellate court concluded that the extent to which the defendants were enriched by their continued and constant violation of the registration laws should be determinative of the extent to which they should be penalized. Their ultimate enrichment should not be "such as to make their wilful misconduct a pleasingly profitable venture."\textsuperscript{92}

An important alternative available in the quo warranto remedy is the court's ability to withhold judgment pending defendant's compliance with his duty. If, within a reasonable time, the corporate defendant has not complied, the court can then resort to fine or forfeiture. This procedure emphasizes the importance of compliance rather than punishment. The object is not to fine or eliminate corporations, but to have them operate in a manner which is not an abuse of the public interest. This emphasis could be the most important reason that quo warranto can be an effective environmental tool in both the immediate and distant future.

III

ALTERNATIVE REMEDIES

The environment has become one of the most fertile topics of social and political discussion. Many different approaches to the problem have been advocated and debated. A brief comparison to the more prominent alternatives will highlight the advantages of the environmental duty.

A. The Administrative Alternative

Where the legislative branch has made no significant effort to control the pollution caused by corporations, the quo warranto remedy presents a potentially quick judicial remedy which will ease the problem and perhaps induce legislative action. Where the legislature has acted by creating an administrative agency to regulate the pollution field it is possible to deal more comprehensively with specific problems on the administrative level. However, the equity power of the courts allows greater flexibility to promote ultimate policy goals than do regulations. To the extent that regulations provide for certainty they also tend to promote efforts toward circumvention. Tax regulations, for example, are voluminous, yet their comprehensiveness does not avoid a considerable amount of litigation.\textsuperscript{93} Antitrust legislation, on the other hand, is broadly

\textsuperscript{91} Id. at 134.
\textsuperscript{92} Id.
\textsuperscript{93} J. CHOMMIE, THE LAW OF FEDERAL INCOME TAXATION 6-7 (1968) indicates the high degree of complexity in the Internal Revenue Code. The resulting attempts to
written and allows courts to focus more on policy considerations. The ambiguity in antitrust law tends to make corporations avoid questionable situations and the policy is promoted without a considerable amount of litigation.94 Specific legislative solutions to the pollution problem would require a myriad of code sections and administrative requirements. Considering the diversity of manufacturing processes involved, drafting comprehensive legislation would be a difficult and unwieldy task. Too much of our current legislation relies on "elaborate—even elephantine regulatory and administrative procedure."95 Enforcement authority is weak and ill-defined.96 If the court were required to promote the policy of a corporate environmental duty, its task would be more difficult, but it would be more likely to see that the purpose of the law was achieved.

Legislation which is counter to the financial interests of large corporations is difficult to achieve. Since polluters are generally well represented by lobbyists, regulations contrary to their interests meet significant resistance and strong appeals for special dispensation.97 To the extent, however, that effective regulation could be implemented, it would be a complementary remedy to the judicially imposed duty. In jurisdictions where the administrative remedy has proved ineffective, either because the agency is the pawn of the industry or because the legislature has not given it sufficient power, the existence of the equity remedy provides a simple and efficient solution. This approach would also pressure legislatures to create more meaningful administrative remedies rather than dummy agencies in order to pay lip service to the public's desire for environmental quality.

B. The Taxation Alternative

Another alternative to the use of quo warranto is the proposal that tax credits or deductions be given to increase the incentive of corpora-

circumvent the language are dealt with in J. Hellerstein, Taxes, Loopholes and Morals (1963).


96. Id.


The courts provide an arena in which industry lobbyists and indifferent bureaucrats are least able to exercise their powers of dead-center inertia, and consequently the judicial approach may be a viable route to relatively immediate and surprisingly large-scale pollution abatement.
tions to invest voluntarily in pollution-abatement technology.\textsuperscript{98} Industry favors a tax-cut proposal so that it can finance its anti-pollution drive.\textsuperscript{99}

Tax cuts are inefficient in that they shift the cost of abatement from the polluter and the consumers of his goods to the government and the public as a whole.\textsuperscript{100} In other words, the unjustified subsidy to the offending product remains.\textsuperscript{101} A system based on reduction of taxes would only help profitable firms, since it would only reduce taxes already owed. Furthermore, if the system used tax deductions, as contrasted to tax credits,\textsuperscript{102} the biggest break would go to high-bracket companies, those best able to absorb the cost of abatement, without rendering appreciable help to the small firm which may be polluting even more per unit of output because it cannot take advantage of economies of scale in pollution abatement. Finally, tax credits would be a large cost to government without any assurance that the most efficient use, in terms of pollution abatement, would be made of the money.\textsuperscript{103} The environmental duty with its enforcement by the use of \textit{quorum warranto} forces cost internalization of pollution expenses. It is thus more likely to obtain pollution abatement than the incentive scheme which continues the subsidy to a different form.\textsuperscript{104}

An effluent-tax approach which taxes corporations based on amount of discharge of pollutants is also inefficient. The complexity of the approach and the difficulties of measurement make this a difficult alternative to implement. It also entails the element of inefficiency inherent in the use of a bureaucratic network. The result of this approach, to the extent it is workable, however, is similar to the \textit{quorum warranto} remedy in that both are result-demanding. To the extent that the tax is not based on income, it may have a regressive element since firms with small income would likely have to pay a larger percentage of their income than would firms with large incomes.

\textsuperscript{98} See generally, Harrington, \textit{Politics of Pollution; Why are the Corporations Cooperating?}, \textbf{COMMOWEAL}, Apr. 17, 1970, at 112.
\textsuperscript{99} \textit{Id.} Harrington argues that this would mean that the biggest polluters, with the biggest problems, would get the largest subsidies, which would, in effect, be a reward to those who had befouled the environment.
\textsuperscript{101} See text accompanying notes 47 & 48 \textit{supra}.
\textsuperscript{102} A deduction reduces adjusted gross income, whereas a credit reduces the amount of tax owed.
\textsuperscript{103} Roberts, \textit{supra} note 100, at 1537.
\textsuperscript{104} See generally Reitze & Reitze, \textit{Tax Incentives Don't Stop Pollution}, 57 \textbf{A.B.A.J.} 127 (1971): Federal and state tax incentives designed to help in the fight against pollution are fiscal carrots that don't work. They are expensive, and they are soft on pollution. Tax incentives fail because they do not give industry an incentive
As social goals such as pollution control enter the taxation process, there is an erosion of the revenue-raising function based on the ability to pay. As these compromises pyramid over the years, the tax system becomes more inequitable and confidence in the equity of the system is dissipated. The tax system, even if effective, is therefore an inappropriate vehicle for social reform.

C. The Federal Alternative

A remedy based on the equity power of fifty different state courts presents a potentially troublesome problem of non-uniformity. This however, is true of any environmental remedy based on state regulation. Even allowing for the difficulty of non-uniformity, there would be counterforces operative which would tend to mitigate its potentially detrimental effect.

Should only one state decide to impose this duty, it could place its corporations at a competitive disadvantage relative to those in non-regulated states. This added cost of doing business might drive a corporate manufacturer either out of business or out of the state. Either result deprives state and local governments of a valuable source of tax revenues. A state would have to decide whether the costs of a polluted environment exceeded the potential loss of tax revenue and economic activity. In such a balancing process, the environmental duty would be imposed where pollution is the greater cost. The appropriate forum for this balancing process is arguably a court of equity. This equity aspect of the remedy would permit courts to grant a reasonable interval for installation of control devices and for research into means of pollu-

---


105. McDaniel, supra note 104, at 897.

106. For many years, in the field of air pollution, a debate has raged over the question of national emission standards as opposed to local control over emissions. So far, local control has dominated and the problem of the competitive disadvantage remains. See Comment, California Legislation on Air Contaminant Emissions from Stationary Sources, 1 ECOLOGY L.Q. 203, 205-07 (1971).


But when [a businessman] commits money to bettering the environment, he shoulders, on the near term at least, a dead cost; unless other companies follow suit he will find himself at a competitive disadvantage.

Id.

108. Federal legislation is not likely to preempt this remedy. Since incorporation is done on a state-to-state basis and the quo warranto remedy is based on a state granted privilege, the federal government would probably have to preempt the whole field of incorporation to end the use of this remedy.
tion control and non-polluting processes. Some industries will be unable to eliminate harmful discharges completely, and the court must have time to evaluate their efforts and weigh the cost of minimal pollution control against the social cost of losing the industrial activity. With the environmental duty applied to such a great number of manufacturing processes, the remedy must be flexible enough to allow a full evaluation of all factors.109

In most cases the decision to relocate a corporation would not be based exclusively on a state's pollution laws. Other factors involved would include the availability of labor, the costs of moving, proximity to the market for the goods to be produced, and the availability of land and raw materials. Thus a state can impose a certain level of restriction before a corporation will be forced to depart, and these factors must also be considered in the balancing process.

A lack of uniformity can also be a potential advantage to a state, especially in the western states that are fairly independent of the actions of their neighbors. If State A imposes an environmental duty, it might drive the corporation into State B where it would continue polluting without internalizing the pollution cost. State A would still be able to buy the corporation's products, probably more cheaply than if the corporation had remained in State A, obeying A's pollution laws. Thus, State A, by imposing an environmental duty, would get both the advantages of lower prices and a clean environment. State B, with no environmental duty, would be bearing the cost of pollution for both states. The advantages of B's higher tax base would, at least in part, be flowing back into State A through lower consumer costs in addition to a cleaner environment. State A would also be able to promote its non-polluted environment to attract people and personal services into the state. It would be a desirable location for non-polluters and management offices of polluters. Firms continuing to operate in State A could use their good conduct to promote the firm's good will and enhance their image in areas such as recruitment.

A federal solution would not have the same problem of uniformity as would a state-imposed remedy. However, to the extent the federal legislation depended on regulations and administrative agencies, the federal alternative would have the same limitations as any regulatory approach to problems of pollution.110

CONCLUSION

The operation of the capitalist system is based on a preference for

109. See also notes 18 & 97 supra.
110. See Part III A supra.
the operation of the market rather than comprehensive government regu-
lation and control over the manner of the operation of industry. Thus,
the *quo warranto* writ, and other result-demanding sanctions, maintain
an advantage over many of the proposed and existing legislative and ad-
ministrative solutions. To the extent that regulations are politically feasi-
ble, sufficiently comprehensive, and allocate resources efficiently, they are
a valuable supplement to the corporate remedy outlined above. But
since it is possible to put an environmental duty into operation with mini-
mal modification of existing legislation, this corporate remedy appears
most likely to achieve immediate results.

No remedy for environmental ills will prove to have no drawbacks
and costs, some real and some illusory. If production costs increase
due to the imposition of an environmental duty, the difference will be
passed on to consumers in the form of higher prices which will reduce
demand. A given consumer income will be able to purchase fewer prod-
ucts in a non-polluting economy. The betterment of the environment will
mean a diminished ability to purchase items associated with the current
style of living. Many individuals tend to favor an end to pollution as
long as someone else pays, but not when their standard of living is threat-
ened. On the other hand, luxuries and leisure time will not mean much
if the environment becomes incapable of supporting life.

*Richard J. Maddigan*