

American Proponents of the Precautionary Principle Seek to Redefine Science and Trample Private Property Rights

The following excerpts demonstrate that, during the past decade, there has been a latent movement growing within the United States among ideological scientists, government officials, environmentalists, lawyers, labor representatives, and grassroots activists to incorporate the Precautionary Principle into U.S. law. This effort has largely focused on reinterpreting the provisions of the U.S. Constitution so that they promote the collective rights of society over the rights of individuals, contrary to the letter and spirit of the original document. If this movement were successful it would imperil the American free enterprise system and our cherished American individual freedoms and values.

One cherished individual right is the right to innovate, to exploit one's innovation, and to seek lawful protection of that innovation from the unauthorized exploitation by others (i.e., to seek exhaustion of legal remedies). Another is the right to own and exploit private property that is either inherited or acquired in a legally sanctioned transaction, and to be paid just compensation for it if it is 'taken' via legally approved procedures to serve strictly a sovereign purpose. A third such right is the right to due process of law. That entitles legal individuals, including corporations, to be judged under objective and balanced (subject to a weighing of costs and benefits) legal, ethical and scientific (empirical and probabilistic) benchmarks (statutes, regulations and standards) that do not reflect the preferences of only particular societal factions. It also entitles legal individuals to their day in court (to be judged fairly by a selected group of their peers who, after taking instructions from an objective non-ideological judge presiding over the case, ascertains whether those benchmarks have been satisfied) which includes the presumption that they are innocent until proven clearly, preponderantly, or beyond a reasonable doubt, by the evidence to be guilty under the law. In other words, the burden of proof, which includes both the burden of production and the burden of persuasion, is usually placed on the accuser, not the accused.

Increasing anecdotal evidence shows that this American precautionary principle movement has been much more active and vocal within the past three years. The evidence also shows that such movement is increasingly working behind closed doors with misguided American politicians assisting European social and environmental activists, the European Commission and the United Nations. Their collective goal it is to inject the precautionary principle into U.S. law for the purpose of changing U.S. legal standards. These advocates seek to alter U.S. law and business practices so that they comport with the mandates of the precautionary principle as enshrined within European Community Treaty law, UN environmental treaties (e.g., the Kyoto Protocol, etc.) that the U.S. has refused to ratify, as well as, many other non-legally binding UN declarations. They reason that, once the precautionary principle is adopted as U.S. law, it will be easier to demonstrate the required thresholds of 'state practice' and opinion juris' that like-minded ideological international lawyers and judges need to declare the precautionary principle as general norm of customary international law, and thus, as an absolute global legal standard. If this were to occur, all countries, including those that do not agree, particularly, the United States must abide.

“Dear Friends and Colleagues,

In January 1998, an international group of scientists, government officials, environmentalists, lawyers, labor representatives, and grassroots activists met in Racine, Washington (USA) and developed the Wingspread Statement on the Precautionary Principle. ***Over the past three years, groups all over the U.S. have taken steps to put the Statement into practice. The following Loka Alert discusses the need for public participation in implementing the Precautionary Principle, and provides an example of how this is occurring in the state of Massachusetts.*** Coordinated by the Lowell Center for Sustainable Production, the Clean Water Fund, and the Massachusetts Breast Cancer Coalition, the Massachusetts Precautionary Principle Project ***is a collaboration of various scientists, funders and grassroots activists working to implement the Precautionary Principle in the state of Massachusetts.*** If you have and comments or questions, contact Joel Tickner <joel_tickner@uml.edu> from the University of Massachusetts-Lowell's Center for Sustainable Production, or Lee Ketelsen <bostoncwa@cleanwater.org> from Clean Water Fund.

Cheers to all,

Jill Chopyak
Executive Director

This briefing paper explores the importance of democratic forms of decision-making that empower citizens as a critical element of implementing the Precautionary Principle. ***We argue that without such democratic decision-making structures in place, in most cases where there is an uncertain threat to public health or the environment, the status quo of waiting for near proof of harm before acting will be maintained.***

PROBLEMS WITH THE CURRENT SYSTEM

Most people believe we live in a democracy or should. Those of us who support the Precautionary Principle do so in part because we perceive our democratic rights to a clean environment and health have been violated.

In the U.S., we live in a representative democracy with guaranteed individual rights. We elect representatives that vote on laws designed to protect our health and environment. We vote for governors and presidents that appoint bureaucracies to implement and enforce these laws. We have a court system to punish violators of the laws, to defend the collective good, and to protect individual rights against the tyranny of the majority.

Many have argued that corporate wealth and power, and the fact that corporations have been given the rights of individuals, is a major undermining factor in our democracy. One area where democracy and protection of U.S. constitutional rights has functioned most poorly is for the protection of the health of individuals or ecosystems from environmental contamination. Corporate campaign contributions, and armies of lobbyists, consistently block the passage of health protective laws, weaken implementation of existing ones, and inhibit politicians and bureaucrats from protecting health, particularly when opposed by economic interests. ***Aggressive corporate lawsuits in response to government regulations have resulted in the creation of court imposed restrictions on government action particularly insisting on narrowly defined quantitative scientific cause and effect evidence of damage before health protective action can be taken (Applegate, 2000). Or worse yet, the courts ask that agencies demonstrate that the "benefits" of pollution do not outweigh the risks before being able to act. (1)*** Large scale advertising continues to convince much of the public that the current system is for their best interest, "better living through

chemistry", plastics saves lives, driving a big new SUV (sports utility vehicle) will make you powerful and closer to nature, etc.

Another problem area for democracy is when the majority can impose harm on a minority. This is the case with environmental injustice issues- obvious toxic harm can be imposed on a poor neighborhood of racial minorities because of the indifference of or because it benefits the majority. **The idea of "expected utility", the greatest good for the greatest number is at the heart of many of our environmental regulations, particularly those that balance the quantifiable costs of regulation with the less quantifiable impacts or benefits on a particular population.** Yet this type of analysis often begs the question of who benefits and who is harmed.

Despite corporate power, disempowered minorities, ingrained bureaucracies and other factors, in some forms and cases, democracy still functions. It is possible for individual rights or minority interests to be protected when individuals organize a large pressure and voting block so that their numbers outweigh corporate influence. (2) Or court cases can be waged to win minority protections against majority indifference. Obviously important environmental protections have been won and even big tobacco has begun to pay reparations for its impacts on the health of Americans.

However, **the case where activities can cause illness, death or irreversible ecosystem damage, but where current scientific methods cannot fully establish direct cause and effect connections, is a case where democracy and the protection of individual (and collective) rights is particularly doomed to fail.**

The reason is that the future victims of these actions are unknown and likely to remain unidentified. They cannot organize a voting block because most people do not know they are or will be victims, what activity they might be a victim of, or that they or their children will be victims in the future. The perpetrator, the polluter (or sometimes a government agency), can effectively use the uncertainties of the science to deny to the courts or to the 'court of public opinion' that there is any harm being done (for example as is the case with climate change and the health effects of endocrine disrupting chemicals). In addition, government officials tend to react more swiftly when the victims of damage are well identified this has to do with the "not on my watch" mentality. These usually tend to be victims of accidents or infectious diseases, for which governments are often very precautionary.

When the evidence of damage becomes clearer, such as the recent evidence of the dangers of second hand smoke, people can organize to gain protections. When the public can see the cause and effect link between a danger and an action, such as when a gunshot kills a child, people are also motivated to gain protections, such as gun control. Even if they don't know whether they will be victims, they see the danger. We have even gained protections for those who have no voice in the process, such as plant and animal species near extinction. The causes of the species decline are known, and the victim is understood, and therefore protections are fought for and won. But even in these cases, action takes place only long after the victimization had begun, damage had occurred, and many have suffered.

When the victims remain unproven or unidentified, full health protections for people or ecosystems are rarely achieved under our current system.

Various analysts have made this flaw in democratic process starkly clear. Merrell and Van Strum (1990, as cited in O'Brien, 2000, p. 80) posed the following question with regards to pesticide risks:

"What would happen if our pesticide risk assessments were so scientifically advanced that assessors knew not only exactly how many people would be harmed by a particular pesticide but also which individuals would be harmed. A permit to release a carcinogenic pesticide into the food system, for instance, would be preceded by a list of who would contract the cancer. This, however,

would constitute premeditated murder. The marked people would be entitled to an injunction on using that pesticide by their Constitutional right to life. However, bureaucrats and the private sector routinely 'get away' with this premeditated murder because the victims are individually anonymous."

The fact that our current system allows unidentified individuals to be harmed without their knowledge or consent results in the routine violation of the individual's right to life, liberty, and the pursuit of happiness and our collective right to health and safety.

The Precautionary Principle is necessary to guarantee this basic right. It says that if there is credible reason to believe that the actions of an entity will hurt another, action should be taken to protect the potential victims. Also, society should use democratic methods to ensure that the alternatives that cause the least harm are selected to meet our needs.

Thus, the Precautionary Principle is based on the recognition that we in a democracy should be guaranteed our individual and collective right to an environment that does not damage our life or liberty (including our health). This right should override private property rights and the rights of corporations to pursue a profit. We all are allowed to pursue our happiness, so long as we do not infringe on others. But if there is evidence to believe that an entity's actions towards the environment might harm others, that action should be curtailed.

...Proponents of the Precautionary Principle see a need for a new system of democratic methods that protect individual, collective, and minority rights. As Mary O'Brien (2000, p. 79) states:

"While permitting of hazardous activities is unavoidable to some degree in a representative democracy of 250 million citizens, we must look at the degree to which communities are requiring and allowing government and business to pronounce the adverse effects of unnecessary hazardous activities acceptable when in fact the victims may not find them acceptable at all."

A system of decision-making, called risk assessment and risk management has evolved that tries to establish an "acceptable risk" for some harmful activities, but the system has many major flaws, not the least of which is that tends to exclude those affected from the decision-making process. As O'Brien states:

'Nobody is able to define for someone else what damage is 'acceptable.'...What is acceptable to any person is a matter of personal judgement, but the word is used by risk assessment promoters as if it were something about which everyone must surely agree. This is not accurate. For instance, while a state Department of Environmental Quality may call some amount of toxic pollution of well water acceptable, a person who actually drinks this well water may not find any unnecessary pollution acceptable." (O'Brien, 2000, pp. 7- 8)

This technocratic process purports to put the decisions into an objective framework but the process gives greater power to corporate interests and tends to violate individual and collective rights to health. "Risk assessment obscures and removes the fundamental right to say 'no' to unnecessary poisoning of one's body and environment (O'Brien, 2000, p. 84)."

Fiorino (1990) gives three arguments against the technocratic process: **"A substantive argument is that lay judgments about risk are as sound or more so than those of experts...A normative argument is that a technocratic orientation is incompatible with democratic ideals. It is to 'ignore the value dimension of**

policy analysis and to disenfranchise the public who, in a democracy, ought to control that policy'...An instrumental argument is that effective lay participation in risk decisions makes them more legitimate and leads to better results."

...The current process of regulatory decision-making does contain some elements of public participation, such as public hearings on proposals and sometimes stakeholder committees. But as Arnstein (1969) correctly argues "there is a critical difference between going through an empty ritual of participation and having the real power needed to affect the outcome of the process...participation without redistribution of power is an empty and frustrating process for the powerless."

We need to make more democratic choices about what is necessary, what is least harmful, and what is fair.

Therefore we need to implement the Precautionary Principle: to take action to protect our right to an environment that does not threaten our health or life, and to implement democratic processes to choose the least harmful and most beneficial alternative technologies and methods of meeting our needs.

KEY METHODS: CITIZEN JURIES AND **"LAY PERSON"** PANELS

To protect individual rights to life and liberty, criminal cases in the U.S. guarantees the accused a fair trial with a jury of his or her peers. When someone's life or freedom is at stake we have long trusted the decisions of juries.

When one person or group believes they are being harmed by another, we have civil court trials, often with juries.

...However, when someone's life or **way of life** is being harmed by another's emission of a toxic chemical or destruction of an ecosystem, we turn to a state bureaucracy to make the decisions. But **this system has generally failed to protect the unknown victims.**

When someone has evidence to believe that their life or health or way of life may be harmed by others' potentially harmful impacts on the environment, and that the government action is not forthcoming or sufficiently protective, we should explore the idea that the decision of what to do should rest with an independent jury. Questions of when is there enough evidence to warrant precautionary action, and what that action should be, are value judgments, not scientific questions. Science provides vital evidence for informing the decision, but the ultimate decision is primarily a judgement of what is necessary and fair.

Jordan and O'Riordan (1999) note that "precaution is a culturally framed concept that has evolved along different pathways and at different rates in different countries...individuals will never agree upon what is or is not precautionary in a given situation. Cultural theory tells us that there is no one single context of risk perception."

We need to explore ways to better represent minority interests and potential victims, including future generations. One option might be some form of victims' advocate in the decision-making process. ***"People should be provided with the means to work out what precaution means for them in their own localities..."***It means exploring the worst-case scenario and searching out the ill-informed and possible 'losers' from a course of action, asking what they regard as legitimate." (Jordan and O'Riordan, 1999)

We believe that we need to invent new democratic methods for making environmental and health decisions in the face of uncertainty when precaution is a critical consideration. We should develop a set of guiding laws and policies that allow appropriate government agencies to make decisions, based on maximum democratic input, particularly by those who may be harmed by the activity in question, but that gives the public or potential victim the ability to appeal to an independent citizen jury or appeal panel.

The pieces of this system would be:

- * **Precautionary** laws, regulations and policies to guide decision- making
- * A democratic process to guide government decision-making on the safest ways to fulfill our needs, that maximizes input from potential victims
- * An appeal system to citizen juries or panels

See Joel Tickner and Lee Ketelson, “Precaution: Who Decides? Why Democratic Methods of Decision-Making are Critical to Implementing the Precautionary Principle”, the Loki Institute¹ (2000) at: (<http://www.gracelinks.org/corp/ecological/corp-precautionary.html>).

During July 2004, *The New York Times* reported about the growing collaborations taking place between the American and European environmental and social responsibility movements. It noted how American groups are devoting substantial financial and human resources to European-based fear campaigns that intimidate Brussels Commissioners and Parliamentarians, sway European public opinion, threaten the reputations of non-environmentally or socially conscious businesses and ensure the enactment of legislation based on the precautionary principle. Ironically, European governments and the EU Commission have funded many of the campaigns that have challenged their credibility.² According to the Times article, these non-governmental organizations (NGOs) are now using the stricter precaution-based European regulations as a lever/ platform to promote similar regulatory change in the U.S.³

See Lawrence A. Kogan, “Precautionary Preference: How Europe’s New Regulatory Protectionism Imperils American Free Enterprise ©” (July 2005), at: pp. 43-44), at: (<http://www.itssd.org/White%20Papers/PrecautionaryPreference-EURegProtectionism-FULLVERSION.pdf>).

¹ The Loki Institute happens to receive Washington DC office space free of charge from The International Center for Technology Assessment, the same group that participated in the attorneys general legal action brought against the EPA for failing to regulate automobile greenhouse gas emissions. See “About LOKI”, at: (<http://www.loka.org/pages/lokainfo.htm>). “The environmental groups which brought that legal action included Bluewater Network, Center for Biological Diversity, Center for Food Safety, **International Center for Technology Assessment**, Conservation Law Foundation, Environmental Advocates, Environmental Defense, Friends of the Earth, Greenpeace, National Environmental Trust, Natural Resources Defense Council, Sierra Club, the Union of Concerned Scientists and US Public Interest Research Group (PIRG).” See “States, Cities, Environmental Groups Sue Bush Administration on Global Warming, Challenge EPA’s Refusal to Reduce Greenhouse Gas Pollution”, Office of New York State Attorney General Eliot Spitzer, Press Release, Oct. 23, 2003, at: (http://www.oag.state.ny.us/press/2003/cot/oct23a_03.html).

² Nearly ten percent of the EU budget now goes to the funding of [advocacy]...groups...[the] network of national advocacy groups in Brussels receives about half its funding from direct EU grants.” See Dennis Dutton and Wolfgang Kasper, “Green Protectionism”, at 24, citing A. Voss, “Betteln und Spenden”, de Gruyter, (Berlin 1992); J. Rabkin, “Euroglobalism? How Environmental Accords Promote EU Priorities into ‘Global Governance’ – and Global Hazards”, Centre for the New Europe (Brussels 1999).

³ A recent *New York Times* article emphasizes how “[American] environmental groups...are...putting more resources into Europe than [they] otherwise would have done...[and] are working more closely with European lawmakers...[in order] to use [stricter] regulations *there* as a lever for regulations in the United

States” (emphasis added). The article, furthermore, identifies how the precautionary principle has been utilized by European legislators to limit or eliminate the use of potentially harmful brominated flame retardants in consumer goods like furniture and computer monitors, of metals in consumer electronics and of the many unregulated high volume chemicals used by various industries. In addition, the article notes how impending EU programs to curb European industry’s generation of greenhouse gases believed to cause global warming are being looked at by American environmentalists as a means “to promote change in the United States.” See Otto Pohl, “European Environmental Rules Propel Change in U.S.” *New York Times* (July 6, 2004), cited at: (<http://www.ewg.org/news/story.php?id=2767>); (<http://www.noharm.org/details.cfm?type=news&ID=67>).