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Marvin M. Moore  
*University of Akron*

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# The Case for the Regulation of Nonreturnable Beverage Containers

MARVIN M. MOORE\*

## I. INTRODUCTION: CONTRIBUTION TO ROADSIDE LITTER

The trend toward throwaway beverage containers has been dramatic in the United States. The market share of soft drink sales represented by nonreturnable bottles and cans has risen from 5 percent in 1960<sup>1</sup> to over 50 percent today,<sup>2</sup> and over 70 percent of all beer is now sold in nonreturnable containers.<sup>3</sup> In the 12 years between 1958 and 1970 beverage consumption rose 1.6 times,<sup>4</sup> but beverage container consumption increased 4.2 times, a phenomenon explainable mainly by the increasing use of throwaway containers.<sup>5</sup> Of the 10.8 million tons of glass used for packaging annually in the early 1970's, 3.8 million tons were used to manufacture throwaway bottles,<sup>6</sup> which are now being produced at the rate of over 60 billion bottles per year.<sup>7</sup> An avowed goal of the large container manufacturers is the production of 100 billion throwaways annually.<sup>8</sup>

To appreciate the significance of those statistics, one must consider the related figures concerning roadside litter. Several recent studies have unanimously demonstrated that throwaway bottles and cans constitute a significant percentage of roadside debris. A Braniff University Graduate School survey revealed that beverage containers represented 41 percent of the litter items found along the highways and side streets in Dallas, Texas.<sup>9</sup> A 1971 Oregon study sponsored by the People's Lobby

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\* Professor of Law, The University of Akron School of Law. B.A. 1955, Wayne State University; J.D. 1957, LL.M. 1960, J.S.D. 1968, Duke University.

<sup>1</sup> Lesow, *Litter and the Nonreturnable Beverage Container: A Comparative Analysis*, 2 ENVIRONMENTAL L.J. 197, 208 (1971)[hereinafter cited as Lesow].

<sup>2</sup> Greef and Martin, *Beverage Container Legislation: A Policy and Constitutional Evaluation*, 52 TEXAS L. REV. 351, 353 (1974)[hereinafter cited as Greef and Martin].

<sup>3</sup> Lesow, *supra* note 1, at 208.

<sup>4</sup> Hannon, *Bottles, Cans and Energy*, ENVIRONMENT, March 1972, at 13 [hereinafter cited as *Bottles, Cans and Energy*].

<sup>5</sup> *Id.*

<sup>6</sup> Greef and Martin, *supra* note 2, at 358.

<sup>7</sup> ENVIRONMENT ACTION BULLETIN, Jan. 5, 1974, at 4.

<sup>8</sup> *Id.*

<sup>9</sup> Makens, *Paper and Beer Cans Win*, THE AMERICAN CITY, Jan., 1973, at 53.

Against Nonreturnables showed that glass and cans together constituted 71 percent of the litter found along the streets in Oregon's three largest cities.<sup>10</sup> A Keep America Beautiful, Inc. (K.A.B.) survey conducted in September 1969, involving a study of debris found along one mile of primary highway in 21 states, revealed that bottles, jars, and cans collectively represented 22 percent of the litter.<sup>11</sup> Finally, a recent study sponsored by the Department of Health, Education, and Welfare's Bureau of Solid Waste Management disclosed that, including paper cups, beverage containers accounted for nearly two-thirds of the highway litter found in the study.<sup>12</sup>

## II. SOME OBJECTIONABLE FEATURES OF ONE-WAY BEVERAGE CONTAINERS

Without disputing the statistics, one may nevertheless legitimately ask whether there are attributes peculiar to throw-away beverage containers that may justify their regulation while other kinds of merchandise packaging remain unregulated. In support of an affirmative answer the following observations have been made.

First, the glass and metal containers are non-degradable, and thus remain on the land indefinitely unless picked up by hand, a costly undertaking. Moreover, once collected, the containers continue to present a disposal problem, as glass and metal do not decompose through incineration. This normally leaves landfill disposition as the only practical option, and

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<sup>10</sup> Eugene, Portland, and Salem. Lesow, *supra* note 1, at 201 and 203. The percentage of the glass and cans represented by beverage containers was apparently not tabulated.

<sup>11</sup> It is reasonable to assume that beverage containers would have constituted a substantially higher percentage of the litter found in the K.A.B. study had the researchers determined the percentage of litter by volume, as did those conducting the other two surveys. Instead, Keep America Beautiful, an organization formed by bottlers, brewers, and container manufacturers in 1953, used a piece-count method of analysis. Every scrap of paper, no matter how small (even a gum or cigarette wrapper), was included in the tally, to be given the same statistical weight and significance as a bottle or can. Lesow, *supra* note 1, at 199-205. The validity of this kind of analysis seems questionable, since a beer or soft drink bottle obviously constitutes a more permanent blight on the land than does a gum wrapper.

<sup>12</sup> U.S. BUREAU OF SOLID WASTE MANAGEMENT, DEP'T OF HEALTH, EDUCATION AND WELFARE, *THE ROLE OF PACKAGING IN SOLID WASTE MANAGEMENT, 1966 TO 1976* (1969).

landfill sites near metropolitan areas are becoming difficult to obtain.<sup>13</sup>

Secondly, the glass used in nonreturnables does not lend itself to reclamation,<sup>14</sup> whereas returnable bottles, which require virtually no reprocessing other than cleansing, are probably more reclaimable than any other form of food packaging.<sup>15</sup>

Finally, the reasons causing the dramatic increase in the use of throwaways do not tend to elicit enthusiastic approval. Although the glass, steel, and beverage industries attempt to explain the phenomenon as being merely a response to a consumer preference for the convenience of nonreturnables,<sup>16</sup> the evidence indicates that three additional factors have played an important role in the conversion to the one-way container: a desire by the metal and bottle manufacturers to increase the market for their products,<sup>17</sup> an eagerness on the part of the large soft drink companies and breweries to extend their markets over a much wider geographical area,<sup>18</sup> and a desire by beverage

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<sup>13</sup> "Locating sites for disposal is becoming increasingly difficult, particularly in urban areas, where the quantity of waste is greatest and open land is scarce." Note, *State and Local Regulation of Nonreturnable Beverage Containers*, 1972 Wis. L. REV. 536, 537 [hereinafter cited as *State and Local Regulation*].

<sup>14</sup> Blonston, *Throw-Away Culture Can Choke Us*, Akron Beacon Journal, Dec. 8, 1974, § D, at 1, col. 1 [hereinafter cited as Blonston].

<sup>15</sup> "Each returnable bottle travels the natural closed loop from container manufacturer to bottler, to retailer, to consumer, and back again for reuse an average of 15 times." ENVIRONMENT ACTION BULLETIN, Dec. 22, 1973, at 5.

<sup>16</sup> Hannon, *Letters*, ENVIRONMENT, July, 1972, at 47 [hereinafter cited as *Letters*].

<sup>17</sup> The movement to the throwaway container was begun in the late 1940's by the steel industry, which viewed the beer and soft drink market as the last major area for expansion of the use of steel cans. With returnable bottles then averaging about 40 trips from the consumer back to the bottler, it was apparent that 40 cans would be needed to replace each returnable bottle. Shortly thereafter bottle manufacturers, realizing the impact that the use of cans would have on their market, began making one-way bottles. Aluminum companies introduced the all-aluminum beer can in the mid-1950's. *Bottles, Cans and Energy*, *supra* note 4, at 12.

<sup>18</sup> "[T]he big bottlers favor throwaways because they are even more of a convenience for the bottler than the consumer. They enable giant bottlers like Coke, 7-Up, Dr. Pepper, Budweiser, Miller, and the rest to move their product just as widely as possible." Peter Chokola, a small, independent Pennsylvania bottler, quoted in ENVIRONMENT ACTION BULLETIN, Jan. 5, 1974, at 4. "[T]he returnable deposit bottle system imposes a natural limitation on the market area served from any bottling plant—the limitation being how far delivery trucks can carry the filled bottles and return with the empties . . . . The national brand franchise companies recognized the advantages accruing to themselves from a system whereby they could ship out their products and forget about the empties. A one-way system . . . provided the medium

retailers to reduce the floor space and labor costs required for storing and handling returnable bottles.<sup>19</sup>

Concluding that the problems associated with throwaways outweigh their advantages, 3 states<sup>20</sup> and more than 20 local governments<sup>21</sup> have enacted laws regulating their use. The approach taken by most of these legislative bodies—including those of Oregon and Vermont—has been to place a mandatory deposit on all soft drink and beer containers. The throwaway container is not banned outright, but the bottler is discouraged from continuing its use. Since he must accept back and pay for all containers used to package his product, he is better advised to use only refillable bottles. The deposit also serves to induce the consumer to keep and return all soft drink and beer containers, of whatever form, inasmuch as they all have monetary value. As noted in one commentary, "In essence the deposit makes the container into a bearer bond redeemable by anyone selling the product."<sup>22</sup>

A statutory definition of "soft drink" typical of that found in such legislation is the one provided by a bottle ordinance enacted in July 1970 by Bowie, Maryland: "any mineral waters, soda waters, or any other carbonated or uncarbonated beverage not containing alcohol that is commonly known as a soft drink."<sup>23</sup> The catchall phrase covering anything "commonly known as a soft drink" gives the ordinance a degree of flexibility, enabling it to embrace certain uncarbonated fruit-flavored drinks that fail to classify as fruit juices.

There are significant differences among the beverage container statutes of Oregon, South Dakota, and Vermont, the

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through which monopolization of the soft drink industry could be achieved." ENVIRONMENT ACTION BULLETIN, Dec. 22, 1973, at 4.

<sup>19</sup> "There was . . . stiff retailer resistance to accepting returned bottles because of diminishing retail storage space. In 1960 . . . 40 percent of the roofed supermarket space was devoted to nonselling storage; and in 1970 only 10 percent of such space was used for storage. *Bottles, Cans and Energy*, *supra* note 4, at 12.

<sup>20</sup> ORE. REV. STAT. §§ 459.810-.995 (1972); S.D. COMPILED LAWS ANN. §§ 34-16C-9 (Supp. 1976); VT. STAT. ANN. tit. 10, §§ 1521-25 (Cum. Supp. 1975).

<sup>21</sup> NATURAL RESOURCES DEFENSE COUNCIL, INC. NEWSLETTER, Fall 1971, at 1. Among municipalities having such laws are Ann Arbor, Mich.; Bowie, Md.; and Lake County, Mich. *Id.* See Hollister, *To Reduce Litter*, 8 HOUS. L. REV. 687, 698 (1971) [hereinafter cited as Hollister] and ENVIRONMENT ACTION BULLETIN, Dec. 22, 1973, at 3.

<sup>22</sup> *State and Local Regulation*, *supra* note 13, at 538.

<sup>23</sup> Bowie, Md., Ordinance Prohibiting the Sale of Certain Non-Returnable or Disposable Containers Within the City of Bowie, § 307 A, July 21, 1970.

only three states currently having such laws. The Oregon statute,<sup>24</sup> which became effective on October 1, 1972, requires all beer and carbonated soft drinks to be sold in containers returnable for a refund of at least 5 cents each. An exception is made for standardized returnable containers that different bottlers can use interchangeably to encourage their use. For these the mandatory deposit is only 2 cents each. The sale of beer or soft drinks in flip-top cans is prohibited entirely.<sup>25</sup> The Vermont law,<sup>26</sup> which took effect on September 1, 1973, is similar to the Oregon act except in two respects. Beverage distributors are permitted to impose a 3 cent handling charge on each beverage container to recoup the expenses of storing and handling the returnables, and flip-top cans are not prohibited.<sup>27</sup> Differing substantially from the enactments of Oregon and Vermont, the South Dakota law,<sup>28</sup> which became effective on July 1, 1976, simply bans all soft drink and beer containers that are not reusable or biodegradable.<sup>29</sup>

Besides adding significantly to roadside litter, throwaways have created or exacerbated other problems. They have increased appreciably the amount of solid waste to be disposed of, they have produced an unnecessary drain on our nation's energy resources, and they have inflated the purchase price of the beverages marketed in them.

Since 1950 the nation's population has increased 30 percent, but the solid waste generated by our citizenry has increased 60 percent.<sup>30</sup> According to government estimates, American individuals and corporations now discard more than 350 million tons of refuse annually, exceeding the weight of all the people on earth.<sup>31</sup> Of this yearly total, discarded packaging

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<sup>24</sup> ORE. REV. STAT. §§ 459.810-995 (1972).

<sup>25</sup> Thirty-seven states are presently considering some form of the Oregon container law. *Can Ban*, NEWSWEEK, April 2, 1973, at 79.

<sup>26</sup> VT. STAT. ANN. tit. 10, §§ 1521-25 (Cum. Supp. 1975).

<sup>27</sup> Greef and Martin, *supra* note 2, at 353.

<sup>28</sup> S.D. COMPILED LAWS ANN. § 34-16C-9 (Supp. 1976).

<sup>29</sup> U.S. NEWS AND WORLD REPORT, May 13, 1974, at 66. Lake County, Mich. has a similar ordinance. Doster, *Solid Waste Pollution: Control of Container Packaging Through Taxation*, 1973 URBAN L. ANNUAL 387 (1973) [hereinafter cited as Doster]. Legislation comparable to that of Oregon and Vermont has been proposed in 250 municipalities. Hollister, *supra* note 21, at 1.

<sup>30</sup> Hollister, *supra* note 21, at 687.

<sup>31</sup> Blonston, *supra* note 14, § D, at 1, col. 2.

accounts for about 60 million tons,<sup>32</sup> and approximately one-half of all beverage and food containers are used for soft drinks and beer.<sup>33</sup> The bottles and cans enclosing soft drinks and beer constitute most of the 30 billion bottles and many of the 60 billion cans discarded annually in the United States.<sup>34</sup> In New York City alone the Department of Sanitation carts away more than 14,000 tons of solid refuse every day, much of it in the form of beverage containers,<sup>35</sup> and it costs New York about 30 cents for each bottle picked up, seven times the cost of the bottle.<sup>36</sup> Not only is solid waste expensive to process, but burial in a municipal landfill, the principal means of disposal, is becoming increasingly difficult to accomplish. As noted earlier,<sup>37</sup> open land suitable for landfill use is becoming scarce near metropolitan areas,<sup>38</sup> and even when such land can be found, political problems remain since few people want to live near a landfill.<sup>39</sup>

There is persuasive evidence that the trend toward nonreturnables threatens to worsen the nation's energy problem. According to one authority,<sup>40</sup> the United States is already wasting nearly 1 percent of its energy in the production of throwaways.<sup>41</sup> It has been estimated that a complete return to the use of two-way bottles would reduce the energy used for container production by approximately 40 percent.<sup>42</sup> Energy requirements to manufacture glass are considerable. Between 6 and 7 million British thermal units (B.T.U.s.) are needed to make a

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<sup>32</sup> Greef and Martin, *supra* note 2, at 351.

<sup>33</sup> *Bottles, Cans and Energy*, *supra* note 4, at 11.

<sup>34</sup> Comment, *Ohio House Bill 869 and Similar Statutes*, 7 AKRON L. REV. 310, 311 (1974) [hereinafter cited as *Ohio House Bill 869*].

<sup>35</sup> Noble, *Ban The Can*, *The Sun* (Springfield, Ohio), Nov. 30, 1970, at 2.

<sup>36</sup> Hollister, *supra* note 21, at 688.

<sup>37</sup> *Supra* note 13 and accompanying text.

<sup>38</sup> San Francisco sanitation men are hauling trainloads of refuse to dumping grounds in the desert 375 miles away. Blonston, *supra* note 14, § D, at 1, col. 2.

<sup>39</sup> *Id.*

<sup>40</sup> Dr. Priscella Laws, faculty member of Dickinson College, Carlisle, Pa., ENVIRONMENT ACTION BULLETIN, Dec. 22, 1973, at 3.

<sup>41</sup> *Id.* This figure was obtained by calculating that of the 17 million barrels of crude oil consumed in the United States on an average day, about 0.15 million barrels would be saved if all the beverages packaged in throwaways were marketed in returnable bottles. *Id.* This assumes that the returnables would make 15 trips, the national average, from the consumer back to the bottler. *Supra* note 15.

<sup>42</sup> Greef and Martin, *supra* note 2, at 358.

ton of glass from raw materials.<sup>43</sup> That the totals add up quickly is shown by the fact that in 1972 alone the manufacture of throwaway bottles caused the unnecessary expenditure of 211 trillion B.T.U.s.<sup>44</sup> This represents the energy consumed *over* the amount required to produce only returnables. It would supply nearly 10 million Americans with electrical power for one year.<sup>45</sup> Finally, motorists should be interested in the following calculation. The energy used in the manufacture of the 60 billion one-way containers currently being produced annually in the United States is equal to the energy provided by the use of 5.5 million gallons of gasoline daily for a year.<sup>46</sup> It is, thus, difficult to disagree with the following statement: "It is true, beverage containers are only a tiny fraction of the materials we waste daily in our society, but it is also true that their needless manufacture is a deplorable waste of energy."<sup>47</sup>

As one might suppose, soft drinks and beer purchased in throwaway containers are more expensive than those bought in returnables. A throwaway adds at least 7 cents to the cost of a beverage, and a one-way bottle adds 5 cents.<sup>48</sup> It has been determined that a complete conversion to returnables would save consumers of soft drinks and beer a total of \$1.4 billion per year.<sup>49</sup>

### III. ARGUMENTS AGAINST THE REGULATION OF THROWAWAY BEVERAGE CONTAINERS

Five principal arguments have been advanced against any legislation banning or restricting the use of one-way containers. Such legislation would, it is contended: (1) Create unemployment among workers at bottle and can manufacturing plants,<sup>50</sup> (2) disregard the "greater public convenience" of throwaways,<sup>51</sup>

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<sup>43</sup> Lesow, *supra* note 1, at 208.

<sup>44</sup> ENVIRONMENT ACTION BULLETIN, Dec. 22, 1973, at 5.

<sup>45</sup> ENVIRONMENT ACTION BULLETIN, Dec. 8, 1973, at 1.

<sup>46</sup> ENVIRONMENT ACTION BULLETIN, Dec. 22, 1973, at 5.

<sup>47</sup> Rutland Daily Herald, Oct. 5, 1973, at 6 (editorial).

<sup>48</sup> National Enquirer, Oct. 21, 1975, at 10.

<sup>49</sup> *Bottles, Cans and Energy*, *supra* note 4, at 14.

<sup>50</sup> Gibbons, *Hardhats, Hyacinths, and Returnable Bottles*, COMMONWEAL, June 25, 1971, at 324.

<sup>51</sup> *The Battle over Bottle and Cans*, 25 CHANGING TIMES, Dec. 1971, at 46 [hereinafter cited as CHANGING TIMES].

(3) constitute an approach inferior to the "ultimate solution" of recycling,<sup>52</sup> (4) be unconstitutional, and (5) constitute an unwarranted curtailment of individual freedom.<sup>53</sup>

### A. *Employment*

That a mandatory deposit law or outright ban on throwaways would create some unemployment among workers at bottle and can manufacturing corporations, waste disposal firms and facilities, and national brand bottlers and breweries is almost certainly true. According to one authority, such a law, if operational nationally, would bring about a loss of more than 164,000 jobs.<sup>54</sup> Some job losses have, in fact, been caused by the Oregon law. The Emerald Canning Co., an Oregon corporation, canned 135,000 cases of soft drinks in October of 1971. After the new law went into effect, business fell to 3,300 cases per month, and in January of 1973 the company went out of business.<sup>55</sup> But there is a good deal of evidence that those job losses would be offset by the creation of new jobs in the retail, local beverage, and distributing trades.<sup>56</sup> A 1972 University of Illinois study found that job losses in the glass and can manufacturing and the waste disposal fields would not only be offset by the creation of new jobs in the retail, beverage, and distributing businesses, but would result in a net gain of nearly 1,600 jobs.<sup>57</sup> Another recent study calculated that the national economic effect of a mandatory deposit law would be a gain of 60,800 jobs in the local beverage, retail, and distributing trades, and a loss of 60,500 jobs in the container-manufacturing and national brand bottling and brewing industries, producing a net gain of about 300 jobs.<sup>58</sup> Initially, average annual income would be lower in the newly created jobs, but only by \$345.<sup>59</sup> Further-

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<sup>52</sup> *State and Local Regulation*, *supra* note 13, at 571-572.

<sup>53</sup> Kilpatrick, *Point of No Return*, Akron Beacon Journal, Sept. 23, 1975, § A, at 9, col. 3.

<sup>54</sup> Maillie, *The National Impact of a Ban on Non-refillable Containers*, ENVIRONMENT ACTION BULLETIN, Feb. 16, 1974, at 2 [hereinafter cited as Maillie].

<sup>55</sup> *Can Ban*, NEWSWEEK, April 2, 1973, at 79.

<sup>56</sup> *Ohio House Bill 869*, *supra* note 34, at 314.

<sup>57</sup> Maillie, *supra* note 54, at 2. The study was conducted by a professor of economics and labor relations at the University.

<sup>58</sup> The study was conducted by T. Bingham and P. Mulligan of Research Triangle Institute. Maillie, *supra* note 54, at 2.

<sup>59</sup> *Id.*

more, a high percentage of the new jobs created in retail trade would meet the job needs of young people, the segment of society that normally suffers the highest rate of unemployment.<sup>60</sup>

### B. Convenience

It is undeniable that throwaways are more convenient than returnables. What is debatable, however, is whether this extra convenience is worth the costs, economic and aesthetic. Not only do one-way containers cost the consumer more money at the local retail outlet, but they also cost him money as a taxpayer, inasmuch as the employees of municipal litter-control and waste disposal departments obviously must be paid for their services. Admittedly, most municipalities would need to continue operation of such departments even with enactment of a mandatory deposit law, but fewer employees usually would be required.<sup>61</sup> The aesthetic cost of throwaways is represented by the roadside and parkland litter that are inevitably associated with them. Litter-patrol crews and anti-litter campaigns can realistically be expected merely to alleviate, not eliminate the landscape besmirchment caused by the use of nonreturnables.<sup>62</sup> Considering the actual financial and environmental costs involved in the use of one-way containers, the conclusion is inevitable that the convenience which they provide is purchased at too dear a price.

### C. Recycling

It may be true that recycling will be the ultimate solution to the problems posed by the beverage container. But, to advance this contention in opposition to a proposed mandatory deposit law is to overlook three significant facts. First, the reuse of returnable bottles, which a mandatory deposit law encourages, itself constitutes a form of recycling—and a relatively cheap and efficient form of it. Secondly, “recycling” in

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<sup>60</sup> *Letters, supra* note 16, at 47.

<sup>61</sup> See *Detroit News*, Jan. 11, 1976, § A, at 5, col. 2.

<sup>62</sup> Commenting on anti-litter campaigns, Dr. N. E. Norton, president of Royal Crown-Dr. Pepper Bottling Company, has observed: “[T]he idea that we eliminate litter by educating the public ‘not to litter’ is a pipe dream. Those who do the littering are unconcerned about their environment and will not be moved by appeals.” ENVIRONMENT ACTION BULLETIN, April 20, 1974, at 2.

the conventional sense of reprocessing and reusing the glass and metal of which the containers are made is not yet economically feasible and apparently will not become so in the near future.<sup>63</sup> Thirdly, it is not inconsistent to support a mandatory deposit law while simultaneously supporting efforts to develop the technology and processing efficiencies that will eventually render recycling economical and acceptable to private enterprise.

The limited amount of recycling now undertaken by the beverage container industry appears to be attributable in most instances mainly to a desire to project a favorable public image.<sup>64</sup> Beginning about 1970 the Glass Container Manufacturers Institute started an advertising campaign to encourage the public to return soft drink and beer bottles to local collection centers. A number of centers were established, and in 1972, 960 million bottles were collected and recycled.<sup>65</sup> Although the number seems impressive, it represents less than one of every 33 bottles manufactured in 1972. Three years of such recycling (1971 to 1973 inclusive) have achieved a return rate of only 3 percent.<sup>66</sup> The return rate for steel cans was 2.3 percent.<sup>67</sup> In short, as observed by one authority: "Present so-called recycling centers operated by volunteers and industry are at best stopgap measures. They don't receive enough scrap either to reduce waste measurably or to make economic sense . . . ."<sup>68</sup>

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<sup>63</sup> Doster, *supra* note 29, at 395.

<sup>64</sup> ENVIRONMENT ACTION BULLETIN, Jan. 5, 1974, at 4.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Letters, supra* note 16, at 47.

<sup>68</sup> CHANGING TIMES, *supra* note 51, at 46. Aluminum cans are an exception. More than 1.4 billion used aluminum beverage cans were received and remelted at Alcoa's recycling plants in 1975, representing an 86 percent increase over the number of aluminum cans in 1974. Akron Beacon Journal, Jan. 29, 1976, § C, at 9.

Although it is not now economically practicable, it is possible to recycle bottles by separating the glass from the other trash in the municipal waste system and then decontaminating and sorting the glass. At this time only one company is making the equipment needed to perform these functions. The unit, called the Hydrosposal, can reclaim not only glass, but paper, metal, and plastics as well. A pilot plant, which processes about 150 tons per day, has begun operation in Franklin, Ohio. But, half the glass is lost in the separation from the other trash, and only 60 percent of the balance is recovered from the decontamination and sorting processes. *Bottles, Cans and Energy, supra* note 4, at 19. Consequently, most of the glass remains to be disposed of in

#### D. *Constitutionality*

The contention that a mandatory deposit law may be unconstitutional is grounded on the belief that such legislation violates the equal protection or due process clause of the fourteenth amendment,<sup>69</sup> or that it transgresses the commerce clause.<sup>70</sup> Two arguments can be based on the equal protection clause: First, that it is arbitrary and discriminatory to single out soft drink and beer containers for regulation when other kinds of containers (such as fruit juice cans and whisky bottles) also contribute to the evils sought to be remedied (roadside litter, energy waste, etc.); and secondly, that when the beverage container law is enacted by a municipality or county and operates only within the city or county limits, it is unreasonable, discriminatory, and oppressive to local retailers to restrict the sale of one-way containers within the locality when nearby merchants outside the political boundaries can operate free of such a restriction. Rejecting the first argument, courts in Oregon<sup>71</sup> and Vermont<sup>72</sup> have responded substantially as follows. When confronted by a large problem such as landscape litter, the legislature is not required by the equal protection clause to attack the entire problem at once; rather, it may select for early attention a major contributor, such as nonreturnables which are readily susceptible to legislative remedy. Moreover, discrimination is impermissible only when invidious, and if the challenged regulation does not relate to civil rights, the legislature is given considerable discretion to make judgments on this matter.<sup>73</sup> Responding to the second argument, a Mary-

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a landfill, and the cost of processing *all* the glass must be absorbed by the relatively small percent that is salvaged. Assuming that the technology and processing efficiencies are improved over time, the need for a mandatory deposit law may eventually lessen.

<sup>69</sup> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONSR. amend. XIV, § 1.

<sup>70</sup> "The Congress shall have power . . . . To regulate Commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. CONST. art. I, § 8.

<sup>71</sup> *American Can Co. v. Oregon Liquor Control Comm'n*, 517 P.2d 691 (Ore. 1973).

<sup>72</sup> *Anchor Hocking Glass Corp. v. Barber*, 105 A.2d 271 (Vt. 1954).

<sup>73</sup> See Hollister, *supra* note 21, at 698.

land court<sup>74</sup> has declared that the inability of a municipality or county to legislate beyond its borders cannot be invoked to bar it from imposing reasonable restrictions within its political boundaries.

The contention that a mandatory deposit law may offend the due process clause rests on the theory that the principal purpose of such a law—the reduction of roadside debris—is to promote aesthetics and that the furtherance of aesthetic goals does not fall within the police powers of the state or its political subdivisions. There are three responses to this contention. First, as noted in *Anchor Hocking Glass Corp. v. Barber*,<sup>75</sup> the effort to reduce the glass and metallic components of roadside litter can be justified on public safety as well as aesthetic grounds. Secondly, in recent years a number of courts have sustained laws enacted exclusively or primarily to further aesthetic purposes.<sup>76</sup> An illustrative case is *State v. Diamond Motors*,<sup>77</sup> in which the Hawaii Supreme Court upheld a Honolulu ordinance comprehensively regulating billboards, saying:

We accept beauty as a proper community objective, attainable through the use of the police power . . . .  
 . . . . They [billboards] are just as much subject to reasonable controls, including prohibition, as enterprises which emit offensive noises, odors, or debris. The eye is entitled to as much recognition as the other senses . . . .<sup>78</sup>

Thirdly, in the National Environmental Policy Act of 1969 Congress expressly took cognizance of “the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man. . . .”<sup>79</sup> It seems improbable that many courts would conclude that the ugliness engen-

<sup>74</sup> *Bowie Inn, Inc. v. Bowie*, 335 A.2d 679 (Md. 1975).

<sup>75</sup> 105 A.2d 271 (Vt. 1954).

<sup>76</sup> See *State v. Buckley*, 243 N.E.2d 66 (Ohio 1968) (sustaining an ordinance requiring the erection of an opaque fence at least 6 feet high around junk yards); *People v. Stover*, 191 N.E.2d 272, 240 N.Y.S.2d 734 (1963) (upholding an ordinance disallowing the maintenance of clotheslines in front or side yards in residential zones); and *Missouri ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305 (Mo. 1970) (approving an ordinance in effect requiring that all new houses constructed in the municipality be of an architectural style harmonious with homes already built there).

<sup>77</sup> 429 P.2d 825 (Hawaii 1967).

<sup>78</sup> *Id.* at 827, 828.

<sup>79</sup> 42 U.S.C. § 4331(a)(1970).

dered by roadside litter and overburdened landfills does not have a significant impact on environmental quality.

In regard to the final constitutional question, courts have used a balancing test in appraising the constitutionality of state and municipal regulations which have an effect on interstate commerce. Thus in *Pike v. Bruce Church, Inc.*<sup>80</sup> the United States Supreme Court declared:

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.<sup>81</sup>

Undeniably, a mandatory deposit law, whether enacted by a state or municipality, would have some impact on interstate commerce. Hardest hit would be the large national brand bottlers and brewers, which would incur additional shipping costs in reprocessing the returnable bottles.<sup>82</sup> Applying a balancing-of-interests test, however, most courts would probably conclude that the burden imposed on interstate commerce is merely "incidental" to "legitimate" local objectives—the reduction of roadside debris and the alleviation of solid waste disposal and energy-consumption problems—and that no feasible alternative approach exists that would have a lesser impact on interstate commerce.<sup>83</sup>

### E. *Restriction of Freedom*

Whether passage of a mandatory deposit law would constitute an unwarranted restriction on individual freedom is, fundamentally, a philosophical question. Indisputably it is consistent with the tenets of a free society that consumers should

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<sup>80</sup> 397 U.S. 137 (1970).

<sup>81</sup> *Id.* at 142.

<sup>82</sup> The passage of Oregon's beverage container law has caused out-of-state brewers to incur a 38 percent increase in shipping costs. *Ohio House Bill 869, supra* note 34, at 317.

<sup>83</sup> See Hollister, *supra* note 21, at 704.

have the greatest possible freedom of choice. Arguably, they should be able to purchase any beverage they choose in any kind of a container they desire. But even the most ardent libertarian must concede that individual rights are not absolute and that the community also has legitimate rights that are entitled to protection. On any given issue—whether it be imposition of a ban on handguns, permitting unrestricted wiretapping by the police, or mandating a deposit on soft drink and beer containers—persons will disagree about whether individual freedom or the public welfare should prevail. The writer submits that the problems created by nonreturnables are so burdensome to society that in this instance individual liberty should defer to the well-being of society.

#### IV. PROBABLE FUTURE OF PROPOSALS TO REGULATE ONE-WAY BEVERAGE CONTAINERS

In assessing the likelihood that additional states and municipalities will enact mandatory deposit laws, it seems reasonable to give weight mainly to two factors: the success of such laws in those jurisdictions that already have such legislation, and the vigor and effectiveness of obstructive lobbying efforts by the container manufacturing and national brand soft drink and beer companies. As to the first factor, substantial data is available only in respect to Oregon's law regulating throwaways. But the results there have been extremely gratifying, and Governor Tom McCall has declared his state's legislation "a rip-roaring success."<sup>84</sup> The president of the Oregon Environmental Council (O.E.C.) agrees: "measured by the yardstick of litter reduction, Oregon's 'bottle bill' must be considered an unqualified, dramatic, resounding success. Oregon has solved its beer and soft drink can and bottle litter problem."<sup>85</sup>

Studies conducted by the Oregon State Highway Department one year after enactment of the law showed that beverage container litter had decreased 90 percent.<sup>86</sup> Similar findings were obtained by a 1974 study, which also revealed that annual

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<sup>84</sup> NATIONAL ENQUIRER, Oct. 21, 1975, at 10.

<sup>85</sup> Donald Waggoner, president O.E.C., quoted in ENVIRONMENT ACTION BULLETIN, Oct. 20, 1973, at 3.

<sup>86</sup> *Id.*

energy savings attributable to the new container law were sufficient to heat 2 percent of Oregon's homes for a winter.<sup>87</sup> Prior to passage of the law, 49 percent of the soft drinks and 35 percent of the beer marketed in the state were sold in nonreturnables. Six months after the law's enactment no soft drinks or beer were being sold in one-way bottles, and less than 1 percent was being marketed in cans.<sup>88</sup> Significantly, soft drink and beer sales have not dropped, contrary to the predictions of the law's opponents.<sup>89</sup> Although there is not yet much data available on the Vermont law, Governor Thomas Salmon recently stated: "The law works. Vermonters see the results with their naked eyes and feel it in their pockets."<sup>90</sup> Moreover, it seems noteworthy that the Vermont League of Cities and Towns, which was originally a vocal opponent of the state's bottle law, has subsequently changed its position and formally endorsed a strengthening of the law.<sup>91</sup>

A consideration of the other factor likely to bear heavily upon the fate of proposals to regulate nonreturnables in additional jurisdictions—lobbying efforts by affected industries and interested segments of the labor force—does not leave an environmentalist with a feeling of optimism. The container manufacturers, constituting a multi-million dollar industry strongly opposed to any legislation that will have the effect of reducing the demand for cans and/or bottles, have made it clear that they will vigorously resist any new mandatory deposit bills.<sup>92</sup> Active resistance can also be expected from elements of organized labor,<sup>93</sup> from the large soft drink bottlers and brewers,<sup>94</sup>

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<sup>87</sup> ENVIRONMENT ACTION BULLETIN, Jan. 19, 1974, at 1.

<sup>88</sup> *Ohio House Bill 869*, *supra* note 34, at 317.

<sup>89</sup> ENVIRONMENT ACTION BULLETIN, Jan. 19, 1974, at 1.

<sup>90</sup> NATIONAL ENQUIRER, Oct. 21, 1975, at 10.

<sup>91</sup> ENVIRONMENT ACTION BULLETIN, Nov. 3, 1973, at 2.

<sup>92</sup> *Bottles, Cans and Energy*, *supra* note 4, at 11.

<sup>93</sup> The fact that a conversion to returnables would create new jobs in some sectors does not serve to placate those members of the labor force whose jobs would be jeopardized by such a change. At a union-sponsored rally successfully called to demonstrate labor opposition to a proposed state-wide compulsory deposit law in Maryland, one employee of The National Can Corp. told a reporter: "Hell, those broads with the two-hundred-dollar suits on their backs can raise any issue they want for a crusade, but when they start messing with my job they better watch out." Gibbons, *Hardhats, Hyacinths, and Returnable Bottles*, COMMONWEAL, June 25, 1971, at 324.

<sup>94</sup> In *Bowie Inn, Inc. v. Bowie*, 335 A.2d 679 (Md. 1975) a suit instituted to challenge the constitutionality of the city's mandatory deposit law, the principal plaintiffs

and from some retail grocery and party-store chains that market substantial quantities of beer and soft drinks.<sup>95</sup> The influence of such forces, when united, can be great, as demonstrated by: the failure of a beverage container bill in Pennsylvania to even get out of the House Conservation Committee, notwithstanding enthusiastic support by state environmentalists and the State Department of Environmental Resources;<sup>96</sup> the defeat in Washington state of an initiative providing for a mandatory 5 cent deposit on beverage bottles and cans, following a \$1 million newspaper and television campaign opposing the measure;<sup>97</sup> the repeal of a beverage container law in Barberton, Ohio, after the ordinance had been in effect for only a few months and appeared to be achieving a reduction in litter;<sup>98</sup> and the defeat of a bottle bill introduced in the 1976 session of the Kentucky General Assembly.<sup>99</sup> But, conservationists can derive some comfort from the fact that despite all of the newspaper and television advertising stressing the convenience of throwaways, public opinion polls consistently disclose that a majority of those contacted favor some kind of regulation of nonreturnables.<sup>100</sup>

## V. CONCLUSION

It is hoped that more states and municipalities will have the wisdom and courage to enact laws curbing the use of one-way beverage containers. The passage of such legislation repre-

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were joined by divisions of Seven-Up, Coca Cola, and Pepsi-Cola. NATIONAL RESOURCES DEFENSE COUNCIL, INC. NEWSLETTER, Fall, 1971, at 1.

<sup>95</sup> Illustrative of the hostility of some retail beverage outlets toward such legislation is the following: "Reports of harrassment and intimidation of customers who try to return bottles are coming into Montpelier [Vermont]. Customers trying to return containers find they can't get waited on, and . . . sometimes the containers are taken in a rude manner and thrown into a corner." ENVIRONMENT ACTION BULLETIN, Sept. 29, 1973, at 4.

<sup>96</sup> ENVIRONMENT ACTION BULLETIN, Oct. 20, 1973, at 3.

<sup>97</sup> Lesow, *supra* note 1, at 207-208.

<sup>98</sup> Akron Beacon Journal, Feb. 9, 1975, § D, at 3, col. 2.

<sup>99</sup> The Kentucky proposal, Senate Bill No. 59, died in the Senate Committee on Judiciary and Statutes. It would have imposed a mandatory refund value on all containers of 5 cents, except those reusable by more than one manufacturer, which would have had a refund value of 2 cents, and prohibited entirely the use of flip-top cans. It also provided for the approval of redemption centers to deposit beverage containers and collect refunds.

<sup>100</sup> Greef and Martin, *supra* note 2, at 354.

sents a formal recognition that our nation's beauty and resources are, respectively, perishable and finite, and that to trade them for such insubstantial benefits as "convenience" is an act of improvidence.

