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# UNSETTLED EXPECTATIONS: REFLECTIONS ON FOUR VIEWS OF THE COMMON LAW AND THE ENVIRONMENT

*David Schoenbrod*<sup>†</sup>

## INTRODUCTION

Why bother to consider common law solutions to environmental problems? Is it just a way of wishing there were no environmental law? If you think that, see *Mountain Patrol: Kekexili*, an award winning film distributed by National Geographic. National Geographic is not known as a champion of common law solutions,<sup>1</sup> yet the film suggests why some scholars do wish for them. Some wishes, of course, can't be realized. This symposium is about whether this wish in particular can be, but more on that later.

The film dramatizes the effort in the 1990s to save the Tibetan antelope, native to the 3-mile high Kekexili region of the Qinghai-Tibetan Plateau and now endangered. The threat to the antelope came from poachers who machine gunned whole herds, stripped the hides, and left the carcasses for the birds. The hides were in demand because the antelopes' wool was used, illegally, to make luxurious "shahtoosh" scarves. The poaching had reduced the antelope population from millions to only ten thousand or so and poachers were still killing hundreds in a burst.

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<sup>1</sup> National Geographic website, <http://www.nationalgeographic.com> (last visited Feb. 4, 2008) (A search of the website for "common law" yielded no results).

The right to stop the slaughter was with the People's Republic of China, which claimed to own the antelope as surely as it claimed to own Tibet. No individual or Tibetan tribe had a right to the animals. Nonetheless, a small, rag-tag group of Tibetans from the locale banded together to stop the poachers. The group, led by a middle-aged man, Ri Tai, received some support from the Chinese government but nothing like the rights of an owner. The patrol was empowered to confiscate antelope hides and levy fines, both to be turned over to the government, but not to arrest anyone. The government gave the patrol a subsidy, but it was not enough. At the point the film opens, a patrolman had just been killed by the poachers and the surviving patrolmen had received no salary for a year.

After mourning their colleague, Ri Tai and his colleagues set out to pursue the poachers. At a lakeside, the patrol came across the carcasses of several hundred freshly killed and skinned antelope. The patrol buried the carcasses with the same reverence that it had mourned its murdered colleague (it buried many thousand antelope a year) and followed the tracks of the poachers. They found some poachers, but they were small fry. The top culprit—the man who triggers the machine gun and pockets the big money—had gone on. Having sought him for years, Ri Tai gave chase. The remaining poachers, however, took cover, fired at the patrol as it passed, killing one of its members and wounding another, and took off again. To continue the chase, Ri Tai ordered one of his men to take the wounded patrolman to the doctor and return with needed supplies. There was, however, a problem—insufficient funds. So Ri Tai ordered some hides seized from the poachers to be sold on the black market. This was illegal, but it was break the law or let the killers get away.

As the chase continues, Ri Tai had to leave more colleagues and equipment behind because, lacking funds, gas was in short supply, vehicles were dicey, and members of the patrol were few. By the time he caught up with the villain, Ri Tai was down to one sidekick and only a dozen bullets. Ri Tai found himself confronted with the villain who was armed with his machine gun and backed up by his gang. This is, where, in a Western, John Wayne would do something astounding and heroic. But, this is, to recoin a phrase, an "Adult Eastern." Ri Tai, the hunter, was snared. The villain asked, "Why have you tried to stop me for all these years?" Ri Tai responded, "They are my antelope." Without hope, Ri Tai took a swing at the villain and was shot dead.

The film states that it is “inspired” by events and the National Geographic website suggests the same.<sup>2</sup> The extent to which the docu-drama is drama rather than “docu” I do not know. As is the way with docu-dramas, however, the film ends with text describing the aftermath.<sup>3</sup> Due to the publicity generated by the mountain patrol, the Chinese government has made Kekexili a preserve, the level of poaching has been reduced (there is no claim that it is eliminated), and the antelope population has increased to a hundred thousand.<sup>4</sup>

This summary fails to do justice to the film. It is worth watching for any of the following: the scenery, the elan of the patrol, and the acting, mostly done by locals without prior dramatic experience. Equally electric is the “production diary” at the National Geographic website.<sup>5</sup> Read that too.

Now, what the film suggests about the common law. To Ri Tai, they were “my antelope,” but to the law they were not. If they were his antelope or those of some small tribe, he would have had plenty of bullets, gas, and sidekicks. He could have sold enough antelope hides to fund a powerful anti-poaching patrol without putting a dent in the herd. He could have given jobs to the underling poachers, who work for the big villain because, as they said, that was the only livelihood open to them in the bleak uplands of Kekexili. A favorite topic in the common law of the environment literature is how giving individuals or tribes ownership interests has, by giving the locals a stake in the preservation of the animals, been a more effective shield against poaching than enforcement by remote national governments.<sup>6</sup>

The most evident moral to be taken from *Mountain Patrol: Kekexili* is that when individuals or small groups own resources, they have a strong incentive to spend to protect the resource while, in contrast, when government’s own resources, they may or may not do so. In the United States, the federal government’s slothful stewardship of federal grazing lands suggests that government property can, like property owned in common, be subject to a tragedy of the commons.<sup>7</sup> Property ownership by individuals or small groups can sometimes

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<sup>2</sup> National Geographic, Mountain Patrol, <http://www.nationalgeographic.com/mountainpatrol/> (last visited Feb. 4, 2008).

<sup>3</sup> Mountain Patrol (Kekelixi) (Sony Pictures 2004).

<sup>4</sup> *Id.*

<sup>5</sup> National Geographic, Mountain Patrol-Production Diary, [http://www.nationalgeographic.com/mountainpatrol/prod\\_diary.html](http://www.nationalgeographic.com/mountainpatrol/prod_diary.html) (last visited Feb. 4, 2008).

<sup>6</sup> See, e.g., Jonathan H. Adler, *Do Conservation Conventions Conserve?*, in SUSTAINABLE DEVELOPMENT: PROMOTING PROGRESS OR PERPETUATING POVERTY, (Julian Morris ed., Profile Books 2002), available at [http://www.sdnetwork.net/pdfs/jonathan\\_adler\\_chapter11.pdf](http://www.sdnetwork.net/pdfs/jonathan_adler_chapter11.pdf).

<sup>7</sup> Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1243–48 (1968).

protect the environment by hitching the wagon of environmental protection to the horse of self-interest.

There is another, slightly more subtle, moral lurking in the movie. If they really were Ri Tai's antelope, he would not have to depend upon the shifting whims of officials in power to protect them. Ri Tai would have the rule of law rather than the caprice of officials.

Modern environmentalists understand the rule of law point. That is why modern environmental statutes bottom, or at least give the appearance of bottoming, environmental protection upon nondiscretionary duties backed up by the right of citizens to bring suits to make officials carry out these duties, such as promulgating regulations, and to bring enforcement actions against polluters that violate regulations.

Yet, in purporting to place environmental protection under the rule of law rather than the caprice of officials, modern environmental statutes deviate from the spirit of the common law in other ways. The common law sought to prescribe conduct that society deems unjust. That is, as Oliver Wendell Holmes put it, "the first requirement of a sound body of law."<sup>8</sup>

The common law system was structured to serve this noble aspiration. Judges were to have no stake in the outcome of the cases. They were required to ground their decisions in precedent whose ultimate source was custom. They would announce the law in specific controversies. They would demand that the plaintiff explain why the court must act and hear the defendant on the difficulties posed. The law was thus rooted in society's vision of justice rather than that of the judge. It unfolded case by case rather than by sweeping generalizations that would apply to people not present and situations unimagined, thus causing unexpected difficulties.<sup>9</sup>

These characteristics that aimed to tune the common law to prohibit conduct that society deems unjust are lacking in the statutes with which Congress empowered EPA in the early 1970s. The statutes told the EPA to disregard society's customs, indeed to change them. The goals were protection from unhealthy air pollution by the end of 1970s and complete elimination of water pollution by 1985.<sup>10</sup>

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<sup>8</sup> OLIVER WENDELL HOLMES, *THE COMMON LAW* 41 (1923).

<sup>9</sup> See, e.g., Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 373 (1978). The common law judges, of course, sometimes fell short of these ideals. Yet, the common law's mistakes could be corrected by laws made in the legislature. That was acceptable in the rule of law tradition because a law made by elected legislators also reflects the values of society. FRIEDRICH A. HAYEK, *LAW, LEGISLATION, AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE* 88-89 (1978).

<sup>10</sup> See Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251(a)(1) (2000).

Thirty plus years later, we have yet to achieve these ideals. EPA is nothing like a common law court charged with enforcing society's binding customs, or a court charged with enforcing laws of a legislature accountable to society. It does not resemble the agencies that Congress created in the era before 1970, to make laws in "the public interest," or other formulas connoting society's values. EPA's mandate was to force society to change its values, not to enforce them.

Society did need to change how it dealt with the environment, but the great environmental champion and sage, Aldo Leopold, would have started by persuasion.<sup>11</sup> Society had already been changing and making laws to match. Pollution had been slowly coming under control from the beginning of the twentieth century.<sup>12</sup> The spirit of 1970, however, demanded faster change.

An ideal such as perfectly healthy air by a deadline becomes real only when enforceable laws require people to reduce pollution to the required extent. It turned out that no one in public office was willing to back EPA in taking the kinds of actions needed to achieve that ideal.<sup>13</sup>

Yet, Congress had made achieving such ideals a right held by every citizen. It is no good saying there is time enough for Congress to face the hard choices after the ideal is a legal right. Once government grants a right, such as to healthy air, those who hold it dear understandably feel entitled to it and so will fight even harder to keep it than they would have fought to get it in the first place. By turning ideals into rights, Congress evades the procedural checks in the Constitution on making rash laws, but those checks come fully into play if one wants to revise rash laws made by EPA. And, once Congress legislates a new ideal, a coterie of interest groups grows up to defend it.

The upshot is that EPA, as Congress has instituted it, necessarily perverts the rule of law. While the rule of law seeks to proscribe conduct that society deems unjust, EPA's laws are based on whatever is expedient to serve its statutorily mandated goals. While common law judges have no stake in how they define the law, EPA does have a stake because the stricter the environmental goals, the greater its power. While the common law judges are forced to consider practical

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<sup>11</sup> DAVID SCHOENBROD, *SAVING OUR ENVIRONMENT FROM WASHINGTON: HOW CONGRESS GRABS POWER, SHIRKS RESPONSIBILITY, AND SHORTCHANGES THE PEOPLE*, ch. 12, 19 (2005) [hereinafter *SAVING OUR ENVIRONMENT*] (describing the work of environmentalist Aldo Leopold to educate people to take care of the environment in the mid-20th century).

<sup>12</sup> *Id.* at ch. 5.

<sup>13</sup> *Id.*

consequences because they make the law case by case in the context of concrete facts presented by those directly affected, EPA makes laws applicable to society at large.<sup>14</sup> Should EPA hesitate, a citizen can haul it into court and get an order forcing it to proceed.

In areas other than environmental law, Congress and agencies also announce laws that apply generally rather than case-by-case, but with EPA there is a difference. Legislators must consider the public consequences of the laws they make or suffer personal consequences themselves because they are responsible. Agencies that came before it were told to consider practicalities. EPA was to give short shrift to practicalities.<sup>15</sup>

I have in earlier writings expressed doubts about whether the common law could be used as the first line of defense against most pollution problems,<sup>16</sup> but argued that Congress really could take a different tack in pollution control legislation that would give it more of the

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<sup>14</sup> See Andrew P. Morriss, *Lessons for Environmental Law from the American Codification Debate*, in THE COMMON LAW AND THE ENVIRONMENT: RETHINKING THE STATUTORY BASIS FOR MODERN ENVIRONMENTAL LAW, 130, 130–157, (Roger E. Meiners & Andrew P. Morriss eds., 2000).

<sup>15</sup> Under many statutory provisions, such as those for setting ambient air standards, EPA is barred from considering the practicalities. See, e.g., *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1149 (D.C. Cir. 1980). Under others, it may consider practicalities, but only in a limited fashion and up against the legislative judgment that society really ought to be attaining the statutory ideal. For example, the Safe Drinking Water Act's four-step process gave only a grudging nod to practicality. Safe Drinking Water Act, Pub. L. No. 99-339, 100 Stat. 642 §101(b)(D)(4) (1986) (codified as amended at 42 U.S.C. §§ 300f–300j(26)). After deciding how much of a dangerous substance in water is safe, EPA is to decide whether it is feasible—that is, possible—to achieve that safe level. Possible, however, does mean not practical. It may be possible to sanitize a city's sidewalks with an antiseptic every night, but it is not practical. EPA is also to calculate the costs and benefits of various limits on the dangerous substance. Here, Congress permitted EPA to consider practicalities, but did not lend its authority to actually taking them into account in making the law. If EPA sets the law anywhere short of the lowest feasible level, it would have to be on EPA's moral authority and it better have an overwhelming case for exposing the public to any risk that could feasibly be stopped.

That sounds pretty close to ideal, but consider the consequences in the case of arsenic. EPA got handed the arsenic question in 1974. Twelve years earlier the Public Health Service had suggested the standard probably should be set at 10 ppb. Yet, in pursuit of something pretty close to the ideal, EPA left the standard at 50 ppb until 2001. The EPA set the National Interim Primary Drinking Water Regulation at 50 ppb on December 24, 1975. National Interim Primary Drinking Water Regulation, 40 Fed. Reg. 59566, 59570 (1975). For the 2001 regulation, see, National Primary Drinking Water Regulations; Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring, 66 Fed. Reg. 6976 (2001). Meanwhile, in 1993, the World Health Organization had adopted a standard of 10 ppb. The EPA was also told, in 1999, by the National Academy of Sciences that it should revise the arsenic standard “as promptly as possible.” NATIONAL RESEARCH COUNCIL, SUBCOMMITTEE ON ARSENIC IN DRINKING WATER 16 (2001). If 10 ppb made so much sense to Congress and EPA in 2001, they should have lowered the limit sooner. See generally SAVING OUR ENVIRONMENT, *supra* note 11, ch. 17.

<sup>16</sup> David Schoenbrod, *Protecting the Environment in the Spirit of the Common Law*, in THE COMMON LAW AND THE ENVIRONMENT: RETHINKING THE STATUTORY BASIS FOR MODERN ENVIRONMENTAL LAW 3 (Roger E. Meiners & Andrew P. Morriss, eds., 1999); David Schoenbrod, *Putting the “Law” Back into Environmental Law*, 22 REGULATION 17 (1999).

virtues of the common law—chiefly by leaving more, but not all, power to states and localities and, when it wants to act federally, taking direct responsibility for the regulations rather than delegating it to the EPA.<sup>17</sup> I will not replay these contentions here, but rather turn to the main contributions to this symposium to see whether they allay my skepticism (not cynicism) about whether the common law can replace regulatory law in environmental protection.

The four principle contributors to this symposium have viewed the common law's potential to protect the environment from quite different perspectives. Steven J. Eagle, focusing on the idea that the common law protects liberty by defending settled expectations, concludes that the common law is superior to administrative law in reconciling environmental protection with other interests.<sup>18</sup> Keith N. Hylton, focusing on welfare economics, concludes that the common law, with a little help from administrative agencies, will produce more efficient environmental policy than agencies alone.<sup>19</sup> J. B. Ruhl, focusing on ecosystem services, concludes that the best way to increase protection for them is to combine common law nuisance with administrative law.<sup>20</sup> Stuart Buck, focusing on comparative institutional analysis, concludes that he can reach no conclusion on the relative merits of the common law and administrative law.<sup>21</sup>

The task assigned to me is to reflect on the work of these four contributors. Although my perspective differs from theirs, their essays are each thoughtful and clearly stated. That has made my work light.

#### PROFESSOR STEVEN EAGLE

Eagle begins his argument that the common law should supplant administrative law in environmental protection with Justice Lemuel Shaw's description of common law as "a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it."<sup>22</sup> The notion that the common law is based upon a few stable principles is critical to Eagle's essential claim that the common law can protect expectations

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<sup>17</sup> SAVING OUR ENVIRONMENT, *supra* note 8, at ch. 18.

<sup>18</sup> Steven J. Eagle, *The Common Law and the Environment*, 58 CASE W. RES. L. REV. 583 (2008).

<sup>19</sup> Keith N. Hylton, *The Economic Theory of Nuisance Law and Implications for Environmental Regulation*, 58 CASE W. RES. L. REV. 673 (2008).

<sup>20</sup> J.B. Ruhl, *Making Nuisance Ecological*, 58 CASE W. RES. L. REV. 753 (2008).

<sup>21</sup> Stuart Buck, *The Common Law and the Environment in the Courts*, 58 CASE W. RES. L. REV. 621 (2008).

<sup>22</sup> Eagle, *supra* note 18, at 583 (quoting *Norway Plains Co. v. Boston & Maine R.R.*, 67 Mass. 263, 267 (1854)).

even while adapting to new circumstances. As he writes, “[t]he utility of the common law lies in its basic adherence to settled expectations about rights.”<sup>23</sup> This means, he argues, that common law can protect liberty and produce a healthy environment and a healthy society, while the administrative state cannot because it has no clear idea of its objectives<sup>24</sup> and is liable to be hijacked for the purpose of wealth redistribution.<sup>25</sup>

Yet, even back in 1854, when Justice Shaw was writing, many losing litigants must surely have thought that the judges were making it up as they went along rather than protecting settled expectations. There have been many changes in the common law since then.

Eagle makes no systematic effort to show that the common law can deal with modern environmental problems in a way that protects settled expectations. He does point out that some cases are brought and disposed of,<sup>26</sup> but that does not add up to a showing that courts can and do dispose of such cases in line with settled expectations.

The common law could dispose of modern environmental claims on the basis of settled expectations if it upheld land uses that are customary and forbade others. But, the main engine of the common law in environmental protection is nuisance. The Restatement (Second) of Torts instructs that “an intentional invasion of another’s interest in the use and enjoyment of land is unreasonable if . . . the gravity of the harm [to the plaintiff] outweighs the utility of the [defendant’s] conduct.”<sup>27</sup> The Restatement goes on to define “the gravity of the harm” to the plaintiff and “the utility of the . . . conduct” [to the defendant] in terms that reflect not only what is customary. “The gravity of the harm” to the plaintiff includes not “the suitability of the particular use or enjoyment invaded to the character of the locality”, but also many other factors, including the extent and character of the harm to the plaintiff and society. Similarly, “the utility of the . . . conduct” [to the defendant] includes not only “the suitability of the conduct to the character of the locality” but also many other factors including the extent and character of the benefit of defendant’s conduct to the defendant and society.<sup>28</sup>

Thus, what is a nuisance hangs on an amorphous balancing and the balance struck on any particular varies with the land use pattern and the place. It also varies over time. Uses that once were not customary

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<sup>23</sup> *Id.* at 614.

<sup>24</sup> *Id.* at Part II.

<sup>25</sup> *Id.* at 606.

<sup>26</sup> *Id.* at 614.

<sup>27</sup> RESTATEMENT (SECOND) OF TORTS § 826 (1979).

<sup>28</sup> *Id.*

have become common as the economy develops and uses that were once customary become unacceptable as their scale grows to the point where they impose severe costs on neighbors.<sup>29</sup> How the balance is struck also varies from judge to judge and jury to jury because how the nuisance test comes out depends on factors that people will value differently. So nuisance law has been long thought to be notoriously uncertain, an “impenetrable jungle.”<sup>30</sup>

The flux and variation in nuisance is apt to be particularly great in modern environmental cases because neighborhood land uses now change more rapidly than they did in customary societies, the public’s attitudes about environmental issues has changed radically in recent decades, science keeps producing new information on environmental consequences,<sup>31</sup> and individuals differ sharply in the values they perceive and value those consequences.

The common law is even more uncertain than this thumbnail discussion of the Restatement’s treatment of private intentional nuisance suggests. As Ruhl points out, Restatement section 826A takes a defendant-centered approach to nuisance, but some jurisdictions take a plaintiff-centered approach under which severe cost to plaintiff constitutes a nuisance even if the nuisance produces a large benefit.<sup>32</sup> As Stuart Buck points out, courts sometimes deal with pollution under trespass doctrine. Trespass law is tougher on defendants because it bans all trespasses, regardless of the relative impact on plaintiffs, defendants, and society.<sup>33</sup> As he points out, trespass traditionally dealt with visible invasions, leaving the invisible ones to nuisance, yet the dividing line has in some cases yielded to the idea that the sufficiently severe harm is a trespass, even if invisible.<sup>34</sup> In addition, strict liability under section 520 of the Restatement rolls out another vacuous balancing test for “abnormally dangerous” activities.<sup>35</sup>

Eagle states in conclusion that “[t]he genius of the common law is the fact that it combines the protection of expectations with the possibility of incremental change.”<sup>36</sup> Here he does acknowledge the

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<sup>29</sup> *Spur Industries, Inc. v. Del E. Webb Development Co.*, 108 Ariz. 178 (1972) is a case where what was not a nuisance became one as residences were built nearby. Similarly, while a feedlot with one steer might not be a nuisance, it could well become one if the herd grows large enough.

<sup>30</sup> See WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 63 (4th ed. 1971) at 571.

<sup>31</sup> Ruhl, *supra* note 20, at Part II.

<sup>32</sup> *Id.* at 766 n.44, 45. As Ruhl points out, the Restatement gives some scope to this approach in § 826B.

<sup>33</sup> Buck, *supra* note 21, at 626.

<sup>34</sup> *Id.*

<sup>35</sup> RESTATEMENT (SECOND) OF TORTS § 520 (1977).

<sup>36</sup> Eagle, *supra* note 18, at 620.

flux in the law of nuisance, but he does not show the flux would be only “incremental.” Nor does he show that the flux, together with the variations from decision to decision, are consistent with settled expectations.

Of course, administrative law also has its share of tests that are vacuous or agencies change their regulations and how they interpret and enforce them with changes in the political winds blow. Whether a common law or administrative law approach would do more to unsettle expectations, I do not know. But, showing it would be so is essential to making the case that the common law protects settled expectations.

#### PROFESSOR KEITH HYLTON

Hylton begins by distinguishing “command and control rules” and “liability rule[s].”<sup>37</sup> The distinction is akin to, if not the same as, Guido Calabresi and Douglas Melamed’s distinction between property rules and liabilities rules in their article, “Property Rules, Liability Rules, and Inalienability: One View of the Cathedral.”<sup>38</sup> Property rules (akin to command and control rules) order the defendant while liability rules make the defendant liable in damages. Hylton also distinguishes between private and public enforcement. This, writes Hylton, produces “four regime types: public enforcement with command-and-control rules, public enforcement with liability rules, private enforcement with command-and-control rules, and private enforcement with liability rules.”<sup>39</sup>

Hylton analyzes these four approaches, but primarily the first, third, and fourth, with a view to finding which is most likely to produce a desirable level of environmental protection from the perspective of micro-economics. Noting that activities that produce external costs can also produce external benefits, he concludes that, where the defendant has not been negligent, the way for the law to achieve efficiency is to intervene only when “the external costs of the actor’s activity substantially exceed the external benefits associated with the actor’s activity.”<sup>40</sup>

Hylton argues that the common law deploys such a test under both the law of abnormally dangerous activities and the law of nuisance.

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<sup>37</sup> Hylton, *supra* note 19, 673. (emphasis omitted).

<sup>38</sup> Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106–10 (1972)

<sup>39</sup> Hylton, *supra* note 19, 674.

<sup>40</sup> *Id.* at 681. (emphasis omitted).

So Hylton sees in the common law tests that focus on costs and benefits while Eagle sees tests that focus on settled expectations.

Like Eagle, however, Hylton has only part of the picture. Take, for example, the law of abnormally dangerous activities, which he analyzes through the lens of the Restatement section 520's six factors:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on and;
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

The first three factors and the sixth nicely fit his cost and benefits interpretation. The fourth factor, "extent to which the activity is not a matter of common usage," he plausibly makes fit by arguing that it "helps us identify activities for which the risks are reciprocal to those of other common activities."<sup>41</sup> It makes sense to think that the reciprocal nature of risks is relevant to whether it is efficient to curb the activity of a particular defendant. The fifth factor is where the trouble comes. He writes "inappropriateness, is another way of determining whether the activity imposes a reciprocated risk."<sup>42</sup> Yet, inappropriateness also refers to whether the use interferes with settled expectations or, in other words, fairness as opposed to efficiency.<sup>43</sup>

Hylton's analysis of the private nuisance under Restatement section 826A is also troubling. Its definition of nuisance—to repeat, that "an intentional invasion of another's interest in the use and enjoyment of land is unreasonable if . . . the gravity of the harm outweighs the utility of the actor's conduct," is, according to Hylton,

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<sup>41</sup> *Id.* at 683.

<sup>42</sup> *Id.*

<sup>43</sup> *But cf.* Hylton, *supra* note 19, 683. According a draft of the Restatement, "The appeal of strict liability for an activity is stronger when its risks are imposed on third parties while its benefits are concentrated among a few." RESTATEMENT (THIRD) OF TORTS §20, cmt. J.

“questionable because it refers to the actor’s conduct rather than his activity.” In other words, he seems to believe the test is keyed to whether the defendant was sufficiently careful in undertaking the activity rather than whether the activity, if properly done, was suitable. The Restatement’s wording could have been better, but its intention was to evaluate the activity rather than whether it was negligently performed.<sup>44</sup>

Having found the Restatement wanting, Hylton concludes that “[t]he core question is whether the actor’s activity is one that imposes too many risks on others given its benefits.”<sup>45</sup> In other words, he makes the law of nuisance into a cost-benefit test. Yet, a pigsty in a neighborhood of parlors is still a nuisance even though the pigsty produces very valuable pork.

Hylton argues that cost-benefit is the lodestar not only at the liability stage, but also at the remedy stage. He concludes that a court will not enjoin a defendant liable for nuisance *if* the injunction would impose costs that are greater than its benefits.<sup>46</sup> He is referring to the undue hardship defense, but that defense differs from Buck’s description for many reasons. In ruling on that defense, courts consider not only costs and benefits, but also the equities of the case. For example, courts discount the hardship to the defendant if it is self-imposed and discount the benefit to the plaintiffs if they were slow to invoke their rights.<sup>47</sup> That is why the test is sometimes referred to as the “balance of equities and hardship” test.<sup>48</sup> Moreover, it is not enough that the hardship caused by the injunction is greater than the benefits to the plaintiff, as a pure cost-benefit approach would require, but the hardship must be, to use Douglas Laycock’s phrase “substantially disproportionate.”<sup>49</sup> In sum, the undue hardship defense, like the law nuisance, hangs not just on efficiency, but also on fairness.

Besides, making the undue hardship defense into a cost-benefit analysis can have adverse implications for economic welfare. This may seem counter-intuitive, but the Calabresi and Melamed article

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<sup>44</sup> See Hylton, *supra* note 19, at 684–686.

<sup>45</sup> Hylton, *supra* note 19, at 685.

<sup>46</sup> *Id.* at 686–689. The leading Property casebook, Dukeminier, Krier etc. makes the point that few courts explicitly follow the Restatement. DUKEMINIER, KRIER, ALEXANDER, SCHILL, PROPERTY 642 (6th ed.).

<sup>47</sup> LEVINE, JUNG, SCHOENBROD & MACBETH, REMEDIES: PUBLIC AND PRIVATE 100–07 (4th ed. 2006). See also Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 688, 749–50 (1990).

<sup>48</sup> See *Smith v. Staso Milling Co.*, 18 F.2d 736, 737–38 (2d Cir. 1927).

<sup>49</sup> LEVINE ET AL., *supra* note 47, at 97. See also David Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627 (1989).

explains why. When the law protects an entitlement with a liability rule, the judge sets the price at which its owner must sell it, but when the law protects an entitlement with a property rule, the owner of the entitlement gets to set the price or to refuse to sell altogether. The reason for property rules, argue Calabresi and Melamed, is that owners know better than judges what their entitlements are worth *to them* and so it is efficient, at least where the transaction costs are not too high, to have the owners of entitlements price them because they have much better information than do judges.<sup>50</sup> In other words, the justification for property rules is that it is more efficient in the long run to allocate resources through markets rather than through pricing by courts.<sup>51</sup>

The damage remedy in common law environmental cases is also a poor vessel for achieving efficiency in the cost-benefit sense. The certainty requirement bars damages unless the plaintiff can show with a fairly high level of certainty that the nuisance caused the purported elements of injury.<sup>52</sup> That means that a plaintiff exposed to a nuisance that will increase the chance of getting a certain kind of cancer by, say, somewhere between 0.1 and 30 percent, is unlikely to recover any damages for the increased risk, even if this sort of cancer develops, because it is more likely than not that the plaintiff would have gotten cancer anyway. In other cases, juries may award damages that are wildly high.

Even if the common law sought to decide questions of liability and remedy on the basis of cost benefit analysis, there is reason to doubt such a common law would maximize benefits. One reason, which Hylton addresses, is that there are free-rider problems in identifying environmental harms and their source.<sup>53</sup> He would have the government help by providing information to potential plaintiffs.<sup>54</sup> There are, however, other reasons why a common law geared to cost benefit analysis would fall well short of efficiency. One reason is Buck's point that plaintiffs' lawyers in deciding which cases to bring to maximize their income are apt to do a poor job of prioritizing risks to the public at large.<sup>55</sup> Another reason is that cost-benefit analyses in the environmental field are highly uncertain because of lack of information on costs and benefits and disagreements about how to value the costs and benefits. It is not unusual for plausible estimates

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<sup>50</sup> Calabresi & Malamed, *supra* note 38, at 1107.

<sup>51</sup> *Id.*

<sup>52</sup> See Ayers v. Jackson Twp., 525 A.2d 287, 311 (N.J. 1987).

<sup>53</sup> Hylton, *supra* note 19, at 694–695.

<sup>54</sup> *Id.* at 695–696.

<sup>55</sup> Buck, *supra* note 21, at 644–646.

of costs and benefits to vary over wide ranges, thus making it indeterminate whether the costs exceed the benefits vice versa.<sup>56</sup> The uncertainty in cost-benefit analysis would be compounded when they are constructed by judges and juries rather than policy analysts.

So, whether the common law is about cost-benefit or much more, it will often be difficult to predict outcomes. If the outcomes under the common law are more unpredictable than under the present regime, then that will be another source of inefficiency. The unpredictability will discourage investments and encourage in the environmental sphere the equivalent of wasteful, indeed often harmful, defensive medicine in response to unpredictable malpractice litigation. Studies do show that doctors make many more negligent errors than they are sued for,<sup>57</sup> but the unpredictability of its liability makes for wasteful defensive medicine.<sup>58</sup>

Of course, administrative law as we have it, itself is often inefficient in protecting the environment.<sup>59</sup> Whether a common law or administrative law approach would be more inefficient, I do not know. But, showing it would be so is essential to making the case that the common law produces efficiency.

#### PROFESSOR J. B. RUHL

Ruhl argues that the common law could be a useful adjunct to administrative law in protecting ecosystem services.<sup>60</sup> He presents a strong argument that courts could recognize damage to eco-system services as a nuisance, and on occasion have done so.<sup>61</sup> He is looking to common law nuisance to supplement rather than replace administrative law in protecting eco-system services. This, he argues, would be useful because nuisance law would help shield regulations from takings claims and lend political legitimacy to such regulation.<sup>62</sup>

Unlike Eagle, Ruhl does not argue that nuisance law would protect settled expectations. Indeed, he wants nuisance law to change in response to new information about the importance of eco-system services. Unlike Hylton, Ruhl does not argue that nuisance law produces efficiency. Ruhl's normative foundation is much more basic

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<sup>56</sup> CASS R. SUNSTEIN, *RISK AND REASON: SAFETY, LAW AND THE ENVIRONMENT* 165-66 (2004).

<sup>57</sup> See TOM BAKER, *THE MEDICAL MALPRACTICE MYTH* (2005).

<sup>58</sup> See PHILIP K. HOWARD, *THE COLLAPSE OF THE COMMON GOOD: HOW AMERICA'S LAWSUIT CULTURE UNDERMINES OUR FREEDOM* (2002).

<sup>59</sup> E.g., STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (2006).

<sup>60</sup> Ruhl, *supra* note 20, at 762-765.

<sup>61</sup> *Id.* at 765-770.

<sup>62</sup> *Id.*

and limited to the eco-system services. He wants more protection for them and sees nuisance law as one way to get it.

Ruhl's wanting more protection for eco-system services raises the question; how much more? Ruhl does not argue, "the more, the better." He knows lines must be drawn. He likes that courts can decide on a highly localized basis.<sup>63</sup> Thus, Ruhl does not have a cosmic theory, but rather a desire and acknowledges that whether the courts will satisfy it through nuisance depends on a balancing act.<sup>64</sup>

He is, in short, alert to the uncertainty in the application of nuisance doctrine. The uncertainty is, however, somewhat greater than even he acknowledges. He argues convincingly that one of the factors in assessing the gravity of the harm to the plaintiff test under the Restatement, "the character of the harm," is no bar to recognizing damage to eco-system services as a nuisance, but he does not grapple with the difficulty for courts of applying that factor.<sup>65</sup> For example, while a court might readily decide that flooding on plaintiffs' property caused by defendant's damage to a wetland constitutes a harm of a very bad character, what is the court going to make of bird-loving plaintiffs having fewer birds on their property because defendants changed the crops they were growing? Is this a "harm" or the loss of a benefit? Ruhl's version of nuisance law for ecosystem protection makes no distinction between requiring defendants to confer a benefit and preventing defendants from imposing a harm. Yet, according to Prosser, "the highly individualistic philosophy of the older common law had no great difficulty in working out restraints upon the commission of affirmative acts of harm, but shrank from converting the courts into an agency for forcing men to help one another."<sup>66</sup> He goes on to acknowledge that the law of torts does impose affirmative duties to do good in some circumstances, but where that would be when it comes to eco-systems services may be hard to say.<sup>67</sup>

Ruhl attempts to cabin the uncertainty by noting the concept of "critical natural capital."<sup>68</sup> Surely, this is a sensible concept for ecologists but its application in court would ride on questions of degree such as how important is an ecosystem and to what extent are substitutes available.

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<sup>63</sup> *Id.* at 768–69.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 777–779.

<sup>66</sup> See W. PAGE KEETON, PROSSER AND KEETON ON TORTS 373–4 (5th Ed. 1984)

<sup>67</sup> *Id.*

<sup>68</sup> Ruhl, *supra* note 20, at 774 (emphasis omitted).

Ruhl also attempts to ameliorate the uncertainty in nuisance law by emphasizing anticipatory remedies.<sup>69</sup> But, once the ecosystem services nuisance cat is let out of the bag, plaintiffs will seek to enjoin not only projects not yet begun, but the operation of projects already completed at some cost and to get damages for harm already suffered.

#### PROFESSOR STUART BUCK

Buck starts by arguing that we lack empirical data to compare the performance of common law and administrative law in protecting the environment, and probably always will.<sup>70</sup> He then compares the institutional capacity of the common law and administrative law to deal with environmental claims and finds shortcomings in both.<sup>71</sup> Thus, he is agnostic on which can do a better job.<sup>72</sup> That is, with the exception of “‘diffuse, low-probability, multi-lateral, and temporally-remote harms,’ such as global warming.”<sup>73</sup>

I have drawn on Buck’s work throughout this little essay. I like that he thinks about the potential of the common law in terms of particular aspects of environmental protection rather than trying to reach conclusions about the potential of common law for environmental protection in general. A more particularized approach may well conclude that some areas should be handled by administrative law alone, others by the common law alone, and still others by a combination, as Ruhl concludes as to ecosystem services.

#### CONCLUSION

A particularized approach is useful not only because the relative institutional competency of common law and administrative competency varies with the context—compare a rural pond bounded by three owners to global warming—but also because of political question concerns.

By political concerns, I mean not only whether there is judicially manageable test<sup>74</sup> (which I have been discussing under the heading of uncertainty), but also whether the case involves the sort of policy issue better left to the political process. The distinction is illustrated by the first case I filed as an environmental advocate back in 1972.

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<sup>69</sup> *Id.* at 777–779.

<sup>70</sup> Buck, *supra* note 21, at 630–633.

<sup>71</sup> *Id.* at 630–646.

<sup>72</sup> *Id.* at 646.

<sup>73</sup> *Id.*, quoting Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277, 331 (1985).

<sup>74</sup> See *Baker v. Carr*, 369 U.S. 186, 217 (1962).

The claim was that noise levels on the New York City subway were so loud as to constitute a nuisance. The New York Court of Appeals rejected the case on the basis that administrating the subways was a job for the political process rather than the courts.<sup>75</sup> At the time, I thought the decision was wrong because the political process through the Occupational Health and Safety Administration had given the courts a judicially manageable standard by establishing numerical limits on noise exposure and the subways exceeded those limits. There was no private cause of action under the occupational laws, but that is where the nuisance claim came in. In retrospect, however, I think the court's decision was correct. Yes, the subways did exceed the noise limits, but the subways had a myriad of other problems and not enough money. The politicians in New York had delegated how to allocate the scarce dollars to a public authority rather than the courts. The courts could not have tackled the subway noise issue without superseding the public authority's discretionary functions.

Meanwhile, my lead plaintiff in the subway noise case became the attorney general in New York State, where he certainly could have filed a subway noise suit in his official capacity, though he did not do so. Yet, the subways are much quieter today because of the political process. The subway noise litigation was the forerunner of a larger campaign to improve transit in New York City, including a citizen suit brought under the Clean Air Act.<sup>76</sup> Here then is another variable—whether the political process has authorized court involvement through an explicit citizen suit provision. In that case, the district court judge ruled that he could not issue an order because this was a political matter, but the federal court of appeal reversed because Congress had commanded the courts to act. Even there, change came not from any court order, but from the political process, as it responded to growing public pressure.<sup>77</sup>

The point of this little war story, indeed of this entire essay, is that the most productive way to think about the potential of the common law in the environmental sphere is in particular areas.

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<sup>75</sup> *Abrams v. N.Y. City Transit Auth.*, 355 N.E.2d 289 (N.Y. 1976). See also *Boomer v. Atlantic Cement Co.*, 257 N.E. 2d 870, 871 (N.Y. 1970), and *Connecticut v. American Electric Power Co.*, 406 F.Supp.2d 265, 267, 271–275 (S.D.N.Y. 2005), both declining to enjoin environmental harms on the basis that political branches should make the decision.

<sup>76</sup> *Friends of the Earth v. Carey*, 552 F.2d 25 (2d Cir. 1977) and *Beame v. Friends of the Earth*, 434 U.S. 1310 (1977).

<sup>77</sup> See ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* 35–43 (2003).

