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THE COMMON LAW AND THE ENVIRONMENT IN THE COURTS

Stuart Buck[†]

INTRODUCTION

Numerous scholars over the past decade or two have argued for a renewed emphasis on common law solutions to environmental problems.¹ In this paper, I will begin by describing the basic common law institutions and principles that can be used to address environmental problems. I will examine both the successes and failures of common law actions in courts.² As I argue below, the overriding question whether the common law is superior to agency regulation is indeterminate, both because there is no agreed-on definition of what counts as “superior,” and because there is little solid empirical evidence as to the *comparative* efficacy of each type of legal institution.

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¹ See, e.g., Karol Boudreaux & Bruce Yandle, *Public Bads and Public Nuisance: Common Law Remedies for Environmental Decline*, 14 FORDHAM ENVTL. L.J. 55 (2002) “[P]ublic nuisance law can be robust in dealing with environmental harms”; MICHAEL S. GREVE, *THE DEMISE OF ENVIRONMENTALISM IN AMERICAN LAW* 115 (1996) (arguing for a return to the “logic and the basic premises of the common law”); Roger E. Meiners & Bruce Yandle, *Clean Water Legislation: Reauthorize or Repeal?*, TAKING THE ENVIRONMENT SERIOUSLY 73, 95 (Roger E. Meiners & Bruce Yandle, eds. 1993) (arguing that “the common law would provide more environmental protection than has the regulatory process.”).

² This article addresses only common law *civil* actions. For a discussion of common law crimes, see Steven L. Humphreys, *An Enemy of the People: Prosecuting the Corporate Polluter as a Common Law Criminal*, 39 AM. U. L. REV. 311 (1990).

I. BASIC COMMON LAW PRINCIPLES

A. Private and Public Nuisances

It has been said that “[t]here is no common law doctrine that approaches nuisance in comprehensiveness or detail as a regulator of land use and of technological abuse Nuisance theory and case law is the common law backbone of modern environmental and energy law.”³

There are two broad categories of nuisances: private and public.⁴ A private nuisance is typically defined as “a nontrespassory invasion of another’s interest in the private use and enjoyment of land.”⁵ The elements include a showing of “conduct [that] is a legal cause of an invasion of another’s interest in the private use and enjoyment of land, and the invasion is either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.”⁶ A prototypical definition of “nuisance” is given by the West Virginia Supreme Court:

When the prosecution of a business, of itself lawful, in a strictly residential district, impairs the enjoyment of homes in the neighborhood, and infringes upon the well-being, comfort, repose, and enjoyment of the ordinary normal individual residing therein, the carrying on of such business in such locality becomes a nuisance, and may be enjoined.⁷

In this modern statutory age, of course, traditional common law offenses are now sometimes defined by statute. In Nevada, for example, a statute defines a “nuisance” as anything that is “injurious to health . . . or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.”⁸ In

³ WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW* 112–13 (2nd ed. 1994); see also Tom Kuhle, *The Rebirth of Common Law Actions for Addressing Hazardous Waste Contamination*, 15 *STAN. ENVTL. L.J.* 187, 197 (1996). (“In recent years, the courts have expanded the remedies available in nuisance actions.”).

⁴ Sometimes common law claims are used in tandem with federal statutory claims, such as CERCLA, but do not seem to have any independent force. See, e.g., *NutraSweet Co. v. X-L Engineering Co.*, 227 F.3d 776, (7th Cir. 2000) (affirming district court judgment under CERCLA and common law for defendant’s disposal of hazardous compounds).

⁵ RESTATEMENT (SECOND) OF TORTS § 821D (1979).

⁶ See *id.* § 822.

⁷ *Martin v. Williams*, 93 S.E.2d 835, 844 (W. Va. 1956); see DAN B. DOBBS, *THE LAW OF TORTS* § 231 (2000) (landowners owe a duty not to create “a serious interference with [neighboring landowners’] use and enjoyment of land by pollution or the like.”).

⁸ NEV. REV. STAT. § 40.140 (2000); see *Culley v. County of Elko*, 711 P.2d 864, 866

perhaps the most far-reaching statutory promotion of the common law, the Michigan Environment Protection Act authorizes the state courts to develop a “common law of environmental quality,”⁹ and even allows state courts “to specify a *new* or *different* pollution control standard if the [state] agency’s standard falls short of the substantive requirements.”¹⁰

Whether defined by statute or by judicial decisions, private nuisance actions are often used to address environmental harms that interfere with someone else’s health or property, including air and water pollution. For example, in *Village of Wilsonville v. SCA Services, Inc.*,¹¹ the defendant’s attempt to open a chemical waste disposal site was preliminarily enjoined, where the plaintiff showed that the toxic chemical waste could explode, migrate, or contaminate the groundwater, even though these harms had not yet occurred. The court noted that a “prospective nuisance is a fit candidate for injunctive relief,”¹² and that a “court does not have to wait for [the harm] to happen before it can enjoin such a result.”¹³ The court clarified, however, that such a preliminary injunction was appropriate only where “it is highly probable that [the defendant’s plans] will lead to a nuisance, although if the possibility is merely uncertain or contingent [the plaintiff] may be left to his remedy after the nuisance has occurred.”¹⁴ Similarly, in *Bahrle v. Exxon Corp.*,¹⁵ property owners sued a gas station on nuisance grounds, claiming that spills from the station’s storage tanks had contaminated the local groundwater. The state appellate court held, among other things, that even if the property owners’ own wells had not yet been contaminated, “[n]egligently caused economic loss may be

(1985) (“An actionable nuisance is an intentional interference with the use and enjoyment of land that is both substantial and unreasonable.”); *see also, e.g.*, MINN. STAT. § 561.01 (1998) (“Anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance. An action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.”).

⁹ *Nemeth v. Abonmarche Dev., Inc.*, 576 N.W.2d 641, 648 (Mich. 1998).

¹⁰ *Her Majesty the Queen v. City of Detroit*, 874 F.2d 332, 337 (6th Cir. 1989).

¹¹ 426 N.E.2d 824, 836 (Ill. 1981).

¹² *Id.* (emphasis omitted).

¹³ *Id.* at 837.

¹⁴ *Id.* at 836. *See also* *Nickels v. Burnett*, 798 N.E.2d 817 (Ill. App. 2003) (affirming, on nuisance grounds, a preliminary injunction against defendants’ plans to construct a hog confinement facility, on theory that it would damage the neighbors’ health and land value); *cf.* *William Aldred’s Case*, (1611) 8 James 1, 77 Eng. Rep. 816 (K.B.) (considering claim that a pig sty created undue odor on neighboring land).

¹⁵ 652 A.2d 178 (N.J. Super. Ct. App. Div. 1995), *aff’d* 678 A.2d 178 (N.J. Sup. Ct. 1995).

recoverable absent physical harm by an identifiable class of plaintiffs whose damage is reasonable foreseeable [sic].”¹⁶ Here, future potential damage was reasonably foreseeable due to the New Jersey state government’s investigation of the contamination.¹⁷

Another, more recent example is *Ellis v. Gallatin Steel Co.*,¹⁸ in which a few rural Kentucky residents sued the Gallatin Steel Company and Harsco Corp., alleging that the defendants’ steel manufacturing operations caused dust to migrate onto their property.¹⁹ This dust, they claimed, caused respiratory problems, headaches, itchy throats, and infections.²⁰ The federal district court awarded injunctive relief (under the Clean Air Act and Kentucky nuisance law) and compensatory and punitive damages (under nuisance law).²¹ As for the nuisance claims, the Sixth Circuit agreed with the district court’s evidentiary finding that the dust “interfered with [plaintiff’s] use and enjoyment of the property,”²² as well as the court’s holding that punitive damages were appropriate under Kentucky law because the defendants’ repeated emissions were in “wanton or reckless disregard for the lives, safety or property of others.”²³ The Sixth Circuit also affirmed the district court’s prospective injunction as to the state-law nuisance claims, noting that there was “ample evidence” of the “threat of continuing violations.”²⁴

A “public” nuisance, by contrast, is an “unreasonable interference with a right common to the general public.”²⁵ Whether the interference counts as “unreasonable” is typically decided based on several factors, including whether the “conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience,” whether “the conduct

¹⁶ *Id.* at 194.

¹⁷ *Id.*

¹⁸ 390 F.3d 461 (6th Cir. 2004).

¹⁹ *Id.* at 466.

²⁰ *Id.* at 466–67.

²¹ *Id.* at 466.

²² *Id.* at 470.

²³ *Id.* at 471.

²⁴ *Id.* at 472. The Sixth Circuit also held that the injunctions were improper insofar as the district court issued them under the Clean Air Act, *id.* at 475–77, but this holding did not seem to have affected the state-law injunctions.

For a few more examples of the common law’s effectiveness in particular cases, see *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001) (affirming arbitrator’s award of damages and injunctive relief against Amoco for a leaky oil pipeline that damaged a creek running through plaintiff’s property); *Trident Investment Management, Inc. v. Amoco Oil Company*, 194 F.3d 772 (7th Cir. 1999) (affirming damages award based on the claim that the leakage of Amoco’s gasoline on plaintiff’s property lowered the value of the property); *Donaldson v. Cent. Ill. Pub. Serv. Co.*, 767 N.E.2d 314 (Ill. 2002) (affirming \$3.2 million judgment in case alleging that defendant’s contamination had contributed to plaintiff’s cancer).

²⁵ RESTATEMENT (SECOND) OF TORTS, § 821B (1979).

is proscribed by a statute, ordinance or administrative regulation,” or whether “the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.”²⁶ Public nuisance claims typically must be brought by someone who suffered an injury “different in kind and not merely in degree” from the one suffered by the general public.²⁷ Moreover, organizations often cannot sue under public nuisance doctrine, unless the organization itself has suffered a distinct injury (rather than a mere injury to one of its members).²⁸

Public nuisances often, or even typically, consist of environmental harms.²⁹ As one scholar notes, public nuisances are due to “the injury a private use inflicts on public rights, which may occasionally mean harm to real property owned by the public, but is more often an injury to common pool resources, like silence, clean air or water, or species diversity.”³⁰ For example, in *California ex rel. California Department of Toxic Substances Control v. Campbell*,³¹ plaintiffs sued under the public nuisance doctrine for alleged contamination of the water under the defendant’s property. The Ninth Circuit held that “California law imposes liability on any person who maintains a nuisance—regardless of whether that person has an interest in the land,” and that therefore the defendants, as executors of an estate of someone who had polluted the land in question, “maintained a nuisance by administering property where hazardous chemicals were polluting the water.”³²

²⁶ *Id.*

²⁷ See, e.g., *Hark v. Mountain Fork Lumber Co.*, 34 S.E.2d 348, 354 (W. Va. 1945) (“Ordinarily, a suit to abate a public nuisance cannot be maintained by an individual in his private capacity, as it is the duty of the proper public officials to vindicate the rights of the public.”); RESTATEMENT (SECOND) OF TORTS § 821C cmt. b (1979) (“The private individual can recover in tort for a public nuisance only if he has suffered harm of a different kind from that suffered by other persons exercising the same public right. It is not enough that he has suffered the same kind of harm or interference but to a greater extent or degree.”).

²⁸ See, e.g., *Med. Licensing Bd. of Ind. v. Ind. State Chiropractic Ass’n.*, 373 N.E.2d 1114, 1115–16 (Ind. Ct. App. 1978) (denying relief where injury would be to individual members of a state chiropractic association, with no distinct injury to the association itself).

²⁹ See, e.g., *New Jersey v. New York*, 283 U.S. 473, 477 (1931) (enjoining City of New York from “dumping garbage into the ocean or waters of the United States off the coast of New Jersey” and thereby creating a “public nuisance”); W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 651 (W. Page Keeton, ed., 5th ed. 1984) (describing environmental harms as a general type of public nuisance).

³⁰ Louise A. Halper, *Untangling the Nuisance Knot*, 26 B.C. ENVTL. AFF. L. REV. 89, 96 (1998).

³¹ 138 F.3d 772 (9th Cir. 1998).

³² *Id.* at 782; see also *Carter v. Chotiner*, 291 P. 577, 578 (Cal. 1930) (noting that polluted water is a public nuisance); *Selma Pressure Treating Co., Inc. v. Osmose Wood Preserving Co. of America*, 221 Cal. App. 3d 1601, 1619–20 (1990) (finding that anyone who contributes to a nuisance is liable for its abatement and damages).

B. Trespass

The trespass doctrine is often invoked in environmental claims. A “trespass” is occurs when someone “enters land in the possession of the other, or causes a thing . . . to do so, or remains on the land, or fails to remove from the land a thing which he is under a duty to remove.”³³ Unlike the nuisance doctrine, no wrongful intent is necessary; the mere fact of a trespass on one’s land is enough. As the Fourth Circuit has said, “It is, of course, among the most ancient of common law doctrines that damage is presumed from a trespass to land.”³⁴

What is the practical difference between the activity that causes an environmental trespass vs. that which causes an environmental nuisance? Probably not much, in most real-world cases. As some scholars note, the two doctrines “offer essentially the same substantive rights,”³⁵ and “[m]uch of the same conduct discussed in conjunction with a nuisance action also supports a trespass action.”³⁶ Courts have occasionally tried to draw a distinction, however, such as the Alabama court that said that “[i]f the intruding agent could be seen by the naked eye, the intrusion was considered a trespass. If the agent could not be seen, it was considered indirect and less substantial, hence, a nuisance.”³⁷ Even then, some courts note that if the intangible interference causes enough “substantial damage,” it can be deemed a trespass as well as a nuisance.³⁸

C. Strict Liability

Where strict liability applies, harm and causation are the only real prerequisites; if those are shown, the defendant is strictly liable for the harm. The traditional strict liability action sprang from the classic English case of *Rylands v. Fletcher*,³⁹ which held that “the neighbour who has brought something on his own property (which was not

³³ RESTATEMENT (SECOND) OF TORTS § 158 (1965).

³⁴ *Alpine Forrest Partners v. Crown Cent. Petroleum Corp.*, 46 Env’t Rep. Cas. (BNA) 1251, 1255 n.8 (4th Cir. 1998) (noting that if a trespass existed, the plaintiff “was entitled to an award of nominal damages notwithstanding its failure to prove actual damages”).

³⁵ J.B. Ruhl, *Toxic Tort Remedies: The Case Against the ‘Superduper Fund’ and Other Reform Proposals*, 38 BAYLOR L. REV. 597, 609 (1986).

³⁶ Joseph F. Falcone III & Daniel Utain, *You Can Teach an Old Dog New Tricks: The Application of Common Law in Present-Day Environmental Disputes*, 11 VILL. ENVTL. L.J. 59, 69 (2000).

³⁷ *Borland v. Sanders Lead Co.*, 369 So.2d 523, 527 (Ala. 1979).

³⁸ See, e.g., *Gill v. LDI*, 19 F. Supp.2d 1188, 1197–98 (W.D. Wash. 1998) (granting summary judgment for trespass action after establishing that the defendant’s activities caused silt and rocks to invade the plaintiff’s property).

³⁹ 3 L.R.E. & I. App. 330 (1868).

naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property."⁴⁰

These days, strict liability may arise under the Second Restatement of Torts, under which defendants can be held strictly liability for harm caused by "abnormally dangerous" activities. Whether an activity is "abnormally dangerous" is ascertained by six factors ("(a) existence of a high degree of risk of some harm to the person, land or chattel 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."⁴¹ Strict liability sometimes is embodied in state statutes as well.⁴²

Strict liability is often, though by no means universally, used in the environmental context. As Alexandra Klass noted in 2004, "twenty-one out of twenty-seven jurisdictions that have squarely considered the issue have extended the doctrine of strict liability to activities resulting in environmental contamination," including courts in Colorado, Iowa, New York, Minnesota, Ohio, and Florida.⁴³ Based on these numbers, she concluded that the current trend in environmental cases is contrary to the trend elsewhere to "disfavor strict liability in favor of negligence."⁴⁴ Klass emphasizes that even though

⁴⁰ *Id.* at 340. For further discussion of the spread of this tort in the United States, see Jed Handelsman Shugerman, *The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of Fletcher v. Rylands in the Gilded Age*, 110 YALE L. J. 333 (2000).

⁴¹ RESTATEMENT (SECOND) OF TORTS § 520 (1977). For a critique of current doctrine, see William K. Jones, *Strict Liability for Hazardous Enterprise*, 92 COLUM. L. REV. 1705 (1992).

⁴² See, e.g., *Aramark Uniform and Career Apparel, Inc. v. Easton*, 894 So.2d 20, 26 (Fla. 2004) (interpreting Florida statute to create strict liability in case involving contamination of plaintiff's property).

⁴³ Alexandra B. Klass, *From Reservoirs to Remediation: The Impact of CERCLA on Common Law Strict Liability Environmental Claims*, 39 WAKE FOREST L. REV. 903, 957-58 (2004). That said, she reached this proportion of jurisdictions by excluding some jurisdictions or cases altogether, such as cases involving "subsequent owners" or "rejecting strict liability completely." *Id.* at 958.

⁴⁴ *Id.* at 961-62. Klass contrasts the current trend with the observations of numerous scholars in previous decades. See *id.* at 934 n.133 (citing William R. Ginsberg & Lois Weiss, *Common Law Liability for Toxic Torts: A Phantom Remedy*, 9 HOFSTRA L. REV. 859, 920 (1981) (concluding that "notions of fault die hard"); Frank E. Maloney, *Judicial Protection of the Environment: A New Role for Common-Law Remedies*, 25 VAND. L. REV. 145, 151 (1972) (noting that the limitation of strict liability to ultrahazardous or abnormally dangerous activities "has severely limited its usefulness"); Gary Milhollin, *Long-Term Liability for Environmental Harm*, 41 U. PITT. L. REV. 1, 7 (1979) ("It will not be possible to convince the courts that all or even most, polluting activities are ultrahazardous under a common law definition."); Jim C. Chen & Kyle E. McSlarrow, *Application of the Abnormally Dangerous Activities Doctrine to*

contamination is often subject to private suits under CERCLA, plaintiffs "cannot recover any damages associated with diminution in property value, lost profits, lost rents, personal injury, punitive damages, or other damages that are often associated with environmental contamination," which in turn means that "claims for common law strict liability remain a crucial element of a plaintiff's case, even if a statutory cause of action exists under state law, federal law, or both."⁴⁵

Strict liability also comes into play in the oft-contested issue of whether one landowner can sue the previous owner for environmental damage caused to the land. As Joseph Falcone and Daniel Utain note, "There is a jurisdictional split . . . in determining whether a court will allow a common law tort action against a previous owner who polluted the land. Some jurisdictions will uphold a common law tort action against a previous owner under strict liability, but not under trespass or private nuisance."⁴⁶ The usual reason for denying such liability is that if land buyers properly and fully inspect their purchases, the marketplace will normally adjust the price of land to account for existing environmental damage, which in turn means that future liability for the seller could "negate the market's allocations of resources and risks."⁴⁷

Thus, for example, in *Kennedy Building Assoc. v. Viacom, Inc.*,⁴⁸ a federal district court in a diversity case had awarded \$225,000 in compensatory damages and \$5 million in punitive damages against

Environmental Cleanups, 47 BUS. LAW. 1031, 1032 (1992) ("[T]he recent decisions are relatively scant and the abnormally dangerous activities doctrine has acquired no more than a foothold in environmental cleanup litigation.")).

More broadly, Falcone and Utain observe that "modern allowance of such [common law] causes of action is a far cry from the judicial attitude prior to CERCLA, in the early 1970s, where 'such actions had never before been applied successfully to hazardous waste contamination, and judicial interpretation of the relevant common law doctrines in other environmental contexts had not favored plaintiffs.'" Falcone & Utain, *supra* note 36, at 63-64 n.19 (quoting Tom Kuhnle, *The Rebirth of Common Law Actions for Addressing Hazardous Waste Contamination*, 15 STAN. ENVTL. L.J. 187, 188 (1996)).

⁴⁵ *Id.* at 905.

⁴⁶ Falcone & Utain, *supra* note 36, at 78.

⁴⁷ *Philadelphia Electric Co. v. Hercules, Inc.*, 762 F.2d 303, 314 (3d Cir. 1984). New Jersey is one prominent exception. See, e.g., *T&E Indus. v. Safety Light Corp.*, 587 A.2d 1249, 1255-59 (N.J. 1991) (extending strict liability to a property owner's claim against the previous owner for contaminating the land); *New Jersey Turnpike Auth. v. PPG Indus., Inc.*, 16 F. Supp.2d 460, 478 (D.N.J. 1998) (noting that it is "more appropriate to employ newly developed absolute liability theories than 'to endeavor to torture old remedies to fit factual patterns not contemplated when those remedies were fashioned,'" and observing that New Jersey has "moved away from common law claims such as trespass and nuisance in environmental pollution cases") (quoting *Kenney v. Scientific, Inc.*, 497 A.2d 1310, 1325 (N.J. Super. Ct. Law Div. 1985)).

⁴⁸ 375 F.3d 731 (8th Cir. 2004).

Viacom, whose predecessor had owned a piece of property later purchased by the plaintiff and had contaminated that property with PCBs.⁴⁹ The Eighth Circuit overturned the district court on the grounds that Minnesota law would probably not grant strict liability in a situation involving a subsequent landowner. The court's reasoning was that the Minnesota courts had recognized the traditional rule that strict liability required an "escape" of the dangerous substance from one place to another.⁵⁰ Thus, when a subsequent landowner was suing the previous owner over the same piece of land, there had not been an "escape."⁵¹

D. Other Common Law Actions

Two additional common law actions are potential sources of environmental remedies, although only in limited situations. First, the traditional doctrine of "waste" allows shared users of property to seek a remedy (damages or injunctive relief) against another property user who damages the property. Thus, a landlord might sue a tenant for engaging in some activity that damages the property, including environmental harms.⁵² This doctrine is useful only in those situations involving shared property interests in real estate, not more broadly.

Second, breach of contract actions can occasionally be used to remedy environmental harms. In *Jaasma v. Shell Oil Co.*,⁵³ for example, Jaasma successfully sued Shell Oil Company, who had formerly operated a gas station on her property, for breach of contract.⁵⁴ It turned out that gas had leaked from underground storage tanks, leading to a 2.5 year investigation by the New Jersey Department of Environmental Protection.⁵⁵ Although the agency eventually cleared the property, Jaasma was able to invoke several different lease terms, such as a term requiring Shell to return the property to her in its "original state," and a term requiring Shell to obey all "environmental laws" and to indemnify Jaasma for any damage from such a violation.⁵⁶

⁴⁹ *Id.* at 735–36.

⁵⁰ *Id.* at 741–42.

⁵¹ *Id.* at 742.

⁵² See, e.g., Lynda L. Butler, *Defining a Water Ethic Through Comprehensive Reform: A Suggested Framework for Analysis*, 1986 U. ILL. L. REV. 439, 445 (1986); John A. Humbach, *Landlord Control of Tenant Behavior: An Instance of Private Environmental Legislation*, 45 FORDHAM L. REV. 223, 258 n.115 (1976).

⁵³ 412 F.3d 501 (3d Cir. 2005).

⁵⁴ *Id.* at 502–03.

⁵⁵ *Id.* at 503.

⁵⁶ *Id.* at 504, 508.

That said, contract actions are of little more use than the waste doctrine, most obviously because such an action arises only when the defendant actually is a party to a contract that creates liability. If gas or dangerous chemicals leaked onto a neighbor's property, for example, the neighbor could not invoke breach of contract against the landowner (unless he demonstrated that he was an intended third party beneficiary of some contract that the landowner had with someone else, which is rather unlikely). In addition, any contract recovery is likely to be limited to actual pieces of land—after all, upstream polluters are not likely to have entered into contracts with downstream consumers of water or air promising to avoid environmental harm.

II. STRENGTHS AND WEAKNESSES OF THE COMMON LAW

Does the common law “work” in environmental cases? I’m agnostic on this question, for two reasons.

First, what does it even mean for a legal institution to “work” in this context? What is the overall goal here? Is it simply to gain the maximal amount of environmental protection, at whatever cost? Or are we trying to decide which legal institution (or combination thereof) will lead to the highest point at which the marginal cost of additional protection exceeds the marginal benefit? Or are we looking for a legal institution that, in addition to protecting the environment (to some extent), also serves some other value or combination of values (*i.e.*, reducing private transaction costs in bargaining to an efficient solution, reducing rent-seeking, enhancing community participation, tailoring decisions to the particulars of each locality)? After all, we can’t agree on how well the common law achieves a particular end unless we first agree on what that end is.

Second, there’s little solid empirical evidence as to how much the common law can protect environmental values. As Roger Meiners and Bruce Yandle concede, “In 1972, there was no reliable water quality data base that focused on specific rivers, lakes, and coastal waters. That is, no one knew the magnitude of the gap between the existing quality of water and the goals to be accomplished.”⁵⁷ While Meiners and Yandle make this observation in the middle of a larger article arguing that the Clean Water Act was unnecessary in light of common law actions, the point leads to agnosticism about the common law’s effectiveness: If “no reliable” data existed prior to the

⁵⁷ Roger E. Meiners and Bruce Yandle, *Clean Water Legislation: Reauthorize or Repeal?*, in Roger E. Meiners and Bruce Yandle, eds., *TAKING THE ENVIRONMENT SERIOUSLY* 73, 76 (1993).

Clean Water Act, how can one have any empirical basis for comparing the common law to the Clean Water Act?⁵⁸

The best collection of empirical evidence as to air pollution prior to the era of federalization is Indur Goklany's *Clearing the Air*.⁵⁹ In charts compiled from numerous data sources, Goklany demonstrates that a few types of air pollution (including particulate matter and sulfur dioxide) saw "significant improvement" before the Clean Air Act of 1970 "became effective"⁶⁰—*i.e.*, during an era when the common law may have been the main source of environmental protection. That said, Goklany often seems to credit technological and economic advances for past improvements in pollution controls,⁶¹ and an endnote expressly noted that the rate of pollution improvement can be expected to slow down over time (for the usual reason that the "easiest and cheapest reductions are obtained [first]").⁶² This implies that even if the rate of pollution improvement was higher during the common law era than since the 1970s, this could merely be because the common law era came first. In any event, as best as I can tell, Goklany does not directly ascribe pre-1970 pollution improvements to the common law. In contrast to Goklany, Joel Franklin Brenner's study of the Industrial Revolution era in England took a definite opinion of the common law, suggesting that, at least at the time, it did not do a good job of controlling the "pollution of the air and water."⁶³

So we are left with the claim that courts have protected environmental interests *in some specific cases*.⁶⁴ That kind of anecdotal evidence only gets you so far. If you want to make any more weighty claim as to how often the common law protects the environment as compared to statutory or regulatory regimes, what you would need is something more like this:

- 1) Find good, solid, and consistently measured data showing the levels of a particular type of environmental harm (say, particulate matter in the air, or levels of chemicals in

⁵⁸ See also Roger E. Meiners and Bruce Yandle, *Common Law and the Conceit of Modern Environmental Policy*, 7 GEO. MASON L. REV. 923 (1999).

⁵⁹ INDUR GOKLANY, *CLEARING THE AIR: THE REAL STORY OF THE WAR ON AIR POLLUTION* (1999).

⁶⁰ *Id.* at 52–53, 57.

⁶¹ See, e.g., *id.* at 5, 83.

⁶² *Id.* at 2 n.11.

⁶³ Joel Franklin Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. LEGAL STUD. 403, 408, 424–25 (1974); see also N. William Hines, *Nor Any Drop to Drink: Public Regulation of Water Quality*, 52 IOWA L. REV. 186, 186 (1966) (arguing that the common law was incapable of adequately protecting environmental concerns).

⁶⁴ See, e.g., Karol Boudreaux and Bruce Yandle, *Public Bads and Public Nuisance: Common Law Remedies for Environmental Decline*, 14 FORDHAM ENVTL. L.J. 55, 67–86 (2002).

groundwater) in 20 (preferably more) jurisdictions over a period of at least 20 years under a common law system (a time period that would hopefully be long enough to detect and control for underlying long-term trends).

2) Let half or so of the jurisdictions adopt enact environmental regulation at some point.

3) Then, let the same data be collected over the next 10 or 20 years to determine what exactly happened in those jurisdictions—whether the levels of that specific type of pollution went up, down, or remained unchanged, in comparison to the jurisdictions that still retained a primary role for common law actions.

Of course, you'd also have to have reliable data for that entire time period for all of the other factors that might affect the levels of pollution—say, economic growth, population growth, exogenous introductions of new technologies (this could be a cross-correlated variable, in that the legal or regulatory response to pollution could create incentives for technological advancement), industrial development or declines thereof, and so forth.

All of this, of course, goes only to the level of *protection* that a legal institution would provide. But at what cost? If a legal institution provides X more dollars of protection at a cost of 5X, fans of the precautionary principle would be unfazed, but the rest of us might find it useful to know whether a move towards that institution was cost-justified.

Thus, to know whether the common law is superior to agency regulation, we'd also need to have empirical evidence as to the enforcement costs and the direct and indirect costs of compliance with each regime. For example, many risk-averse businesspeople might strongly prefer a uniform federal regulation over a common law system in which well-heeled plaintiffs' firms can cherry-pick jurisdictions (say, Beaumont, Texas) in which juries might (or might not) level huge damage awards for a pattern of nationwide conduct. Both because of risk-averseness, and because of the desire not to have a nationwide operation subjected to 50 potentially different standards, corporations usually argue strenuously on behalf of federal preemption of state common law.⁶⁵

⁶⁵ See, e.g., *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) (holding that federal transportation regulations preempted state tort law holding Honda liable for conduct that was allowed under the federal agency's phase-in of new regulatory requirements).

To my knowledge, no one has done a study that is remotely like what I have described. And I doubt that anyone can. Not only is there insufficient data for the common law era, where good data is available in more recent years, environmental law has already been federalized to such an extent that there are no state common law regimes to use as a comparison (none, that is, that exist apart from the overriding effect of federal law).

One can imagine a study comparing the 21 or so states with strict liability for environmental offenses to the rest that lack such a common law remedy. Such a study might be very useful, particularly if a researcher were able to obtain state-level panel data for a lengthy time period that covered both sides of various dates when individual states adopted strict liability for the first time. Still, even such a study would have to be conducted against a massive backdrop of dozens of federal and state statutes and agency regulations. Thus, such a study would not conclusively demonstrate that the common law, in and of itself, is up to the task of environmental protection (assuming that we could all agree on what “up to the task” even means).

So what have we then? In what ways do we have reason to suspect that the common law might do a good job? And where can we venture a hesitant guess that it faces significant limitations? That is what the next Part attempts to address.

III. ADVANTAGES AND LIMITATIONS OF THE COMMON LAW

In a 1984 article, Steven Shavell described four factors that aid us in comparing common law liability to regulation.⁶⁶ These factors are: (1) knowledge about risky activities, (2) the ability of private parties to pay for harm, (3) the chance that private parties would not face the threat of a lawsuit, and (4) the administrative costs incurred by private parties and the public.⁶⁷ As I discuss below, these factors lead in different directions and are potentially incommensurable.

A. Knowledge about Risky Activities

The first factor—knowledge about risky activities—may lean toward the common law. That is, private parties will probably have better information than regulators about such factors as “the benefits of activities, the costs of reducing risks, or the probability or severity

⁶⁶ See Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357 (1984). I’m not going to address the independent flaws—of which there are many—of administrative regulation (*i.e.*, regulatory capture, ossification, a myopic focus on a non-optimal set of risks, and so forth).

⁶⁷ *Id.* at 359–64.

of the risks.”⁶⁸ To the extent that private parties do have better information in this regard, *and* to the extent that courts can determine the right level of liability after the fact, then—Shavell concludes—a common law system of liability would lead the private parties to exercise the appropriate level of care.⁶⁹

Those are big “ifs,” however. First, do private parties really have superior information? They may have superior information about their own compliance costs, to be sure, but do they really have superior information about more general issues of environmental consequences? Does a farmer (for example) have superior knowledge, as compared to an expert agency, about all the possible environmental and health consequences of hundreds of different pesticides that could potentially be used? The suggestion seems doubtful. Does a polluting company have superior information about the way in which its emissions could seep into the watershed and ultimately affect the mating patterns of an endangered species two states away? Again, doubtful.

Second, do courts have superior information? Let me put forth the best case for both sides of this question. On the pro-agency side: It seems unlikely that the average jury has better information than do PhD chemical engineers working for the EPA about how to treat NOx emissions from diesel engines. As for judges, they are at least likely to be drawn from the educated sector of the population, but they still are generalists. In a single week, they might have to read briefs from eight different cases that turn on questions of ERISA, bankruptcy law, the United States Sentencing Guidelines, breach of contract, the Fourth Amendment, immigration law, the Foreign Corrupt Practices Act, and section 10(b)(5) of the SEC’s regulations.⁷⁰

Thus, when the average judge faces a lawsuit over pollution, it very well could be the first time in his life that he has heard the term “PM.”⁷¹ As the Supreme Court noted, “The invocation of federal

⁶⁸ *Id.* at 359.

⁶⁹ *Id.*

⁷⁰ My list reflects cases that may arise under federal law, but I have little doubt that state court judges face a similar diversity of cases.

⁷¹ *Cf.* Cass R. Sunstein, *Panel II: Public Versus Private Environmental Regulation*, 21 *ECOLOGY L.Q.* 455, 456 (1994) (pointing to the “lack of necessary expertise in the judiciary” in various environmental cases); Richard Lazarus, *Panel II: Public Versus Private Environmental Regulation*, 21 *ECOLOGY L.Q.* 438, 441 (1994) (contending that “courts simply do not have the technological . . . expertise to make these [environmental protection] decisions”); Andrew McFee Thompson, *Free Market Environmentalism and the Common Law: Confusion, Nostalgia, and Inconsistency*, 45 *EMORY L.J.* 1329, 1362 (1996) (“One of the most frequently noted shortcomings in a system of private environmental regulation is its complete reliance on generalist judges who lack the training and expertise to evaluate the complex and technical evidence that overwhelms many common law actions for environmental harm.”).

common law by the District Court and the Court of Appeals in the face of congressional legislation supplanting it is peculiarly inappropriate in areas as complex as water pollution control. . . . Not only are the technical problems difficult—doubtless the reason Congress vested authority to administer the Act in administrative agencies possessing the necessary expertise—but the general area is particularly unsuited to the approach inevitable under a regime of federal common law.”⁷² Or as the D.C. Circuit observed, “Judges, both trial and appellate, have no special competence to resolve the complex and refractory causal issues raised by the attempt to link low-level exposure to toxic chemicals with human disease. On questions such as these, which stand at the frontier of current medical and epidemiological inquiry, if experts are willing to testify that such a link exists, it is for the jury to decide whether to credit such testimony.”⁷³

On the pro-court side, however, the very fact that judges lack specialized expertise could be viewed as a plus, under the right circumstances. Perhaps the experts in administrative agencies tend to have distorted perspectives from having spent their entire careers studying a particular form of environmental harm. That is, they may be subject to self-serving bias: Few people want to feel that their lives have been wasted mastering a subject that is of trivial value, and so they exaggerate the importance of that subject to society at large. As a result, perhaps the agency experts who have put their lives and souls into studying a particular type of emissions are tempted to regulate it into the ground, while ignoring the question whether such regulation is the best use of society’s resources.

Correspondingly, perhaps it takes a well-educated, generalist outsider—*i.e.*, the ideal of a judge—to look more dispassionately at whether it has really been *proven* that the mighty hand of the government ought to smite those who failed to take due care to avoid a particular type of environmental harm. Both sides can produce studies and expert testimony, but at the end of the day, the outcome will depend on which side manages to explain and justify its position to an impartial outsider.

⁷² *City of Milwaukee vs. Illinois*, 451 U.S. 304, 325 (1981). The Supreme Court also quoted the district judge in the case as having observed, “[i]t is well known to all of us that the arcane subject matter of some of the expert testimony in this case was sometimes over the heads of all of us to one height or another. I would certainly be less than candid if I did not acknowledge that my grasp of some of the testimony was less complete than I would like it to be.”

⁷³ *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1534 (D.C. Cir. 1984).

Indeed, I sometimes wonder whether the complexity of environmental cases is overstated. Epidemiological studies may require background study and some close reading, but they are no more incomprehensible than the property law doctrines that each first-year law student is expected to learn. Think of the famous story of Nobel-winning physicist Richard Feynman, who "was once asked by a Caltech faculty member to explain why spin one-half particles obey Fermi Dirac statistics. Rising to the challenge, he said, 'I'll prepare a freshman lecture on it.' But a few days later he told the faculty member, 'You know, I couldn't do it. I couldn't reduce it to the freshman level. That means we really don't understand it.'"⁷⁴ If the rationale for an environmental lawsuit can't be boiled down into terms that an educated judge can understand, then perhaps the rationale isn't such a good one.

In sum, I'm not sure whether courts are *systematically* better or worse than regulatory agencies in how they come to grips with complex sources of information. It all depends on the court, the agency, and the issue at hand.

B. Ability to Pay

This factor is simple: Any given polluter might not be able to pay for any harm that it might have caused. This could be because the damage is greater than anything that the polluter can afford to pay, or because of insolvency that arose for any other reason. In either event, this factor weighs against the common law: If the main bar against pollution is that the potential polluter might someday face the threat of a lawsuit, then a potential polluter will tend to ignore risks for which liability would exceed the ability to pay. Lawsuits could still seek injunctive relief, of course, but plaintiffs' lawyers would have less of an incentive to bring such cases (and this is assuming that they could be compensated for their attorneys' fees in the event that they won an injunction).⁷⁵ Most forms of regulation, on the other hand, would require the polluter to meet certain standards from Day One, or possibly to buy pollution permits up front.

⁷⁴ See Richard M. Reis, *Making Science Understandable to a Broad Audience*, CHRONICLE OF HIGHER EDUCATION, July 23, 1999, <http://chronicle.com/jobs/v45/i47/4547ctlyst.htm>.

⁷⁵ See, e.g., *City of Burlington v. Dague*, 505 U.S. 557 (1992) (noting the availability of such relief under a federal statute).

C. The Chance That There Will Be No Finding of Liability

Notice that I have redefined Shavell's third category to include not just the chance that a lawsuit will be *filed*, but the chance that a lawsuit will *succeed*. Put a different way, Gillette and Krier divide this category into "process bias" and "access bias"—"process bias" refers to "factors that work systematically for or against the interests of plaintiffs once their public risk claims reach the courtroom," while "access bias" refers to "factors that work systematically for or against the interests of plaintiffs as they seek to get their public risk claims into court in the first place."⁷⁶

This category is far broader than the first two. Take access bias. First, before any lawsuit can be filed, the plaintiffs have to know *that* environmental damage has occurred, and *who* caused it.⁷⁷ In many cases this may not be a problem, but some cases, people will simply have no idea whether there are particular toxins in the air or water (let alone that a particular species is endangered). Even if they notice that the well water has a slightly different taste, or that they are wheezing a bit more than normal, they may have no way of knowing where the pollution ultimately came from. Thus, in the common law era in nineteenth-century Britain, says Noga Morag-Levine, the difficulty of establishing the source of pollution "led major landowners to abandon their quest for judicial relief," and "physically able individuals could even find employment as runners who would painstakingly, and often unsuccessfully, attempt to follow emissions to their source."⁷⁸

Today, we are a bit better off: the role of emissions monitoring is typically performed by administrative agencies rather than private runners.⁷⁹ Still, even in today's world, it seems plausible that there are some potential plaintiffs who never become aware that they have a potentially viable legal claim against a defendant that caused environmental harm.

⁷⁶ Clayton P. Gillette, & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1044–45 (1990) (emphasis omitted); see also J.B. Ruhl, *Toxic Tort Remedies: The Case Against the 'Superduper Fund' and Other Reform Proposals*, 38 BAYLOR L. REV. 597, 616–17 (1986) ("The private law system poses hurdles for each potential plaintiff, including (1) requiring a plaintiff . . . to identify and sue a defendant allegedly responsible for the plaintiff's injury; (2) the requirement . . . [of the] statutes of limitations; (3) the requirement that the plaintiff prove the defendant's wrongful conduct caused the injury . . . and (4) the inevitable complications of litigation.").

⁷⁷ See Shavell, *supra* note 66, at 359.

⁷⁸ NOGA MORAG LEVINE, CHASING THE WIND: REGULATING AIR POLLUTION IN THE COMMON LAW STATE 49 (2003).

⁷⁹ See, e.g., U.S. Environmental Protection Agency, Air Pollution Monitoring, <http://www.epa.gov/ebspages/airairpollutionmonitoring.html>.

Overall? Mark this factor down as of unknown effect. If we moved to a predominately common law system, would-be plaintiffs would be at an informational disadvantage. But one can imagine a continued informational role for expert administrative agencies in such a world, *i.e.*, monitoring emissions, collecting and analyzing information, publishing studies about various types of pollution, and perhaps even contacting potential plaintiffs to let them know that a legal claim might be available. Who knows what the ultimate result would be.

Second, the free rider problem is well-known: if one person brings suit, neighbors who might also benefit from the lawsuit have a lesser incentive to participate in the costs of litigation.⁸⁰ On the other hand, the class action mechanism is one way of mitigating that problem, *i.e.*, by increasing the possible award of damages, thereby increasing the incentive and ability for plaintiffs' lawyers to take the case in the first place.⁸¹

Let's move to process bias. What are the factors that would bias the way in which environmental plaintiffs win or lose lawsuits? At the initial stage, the plaintiff typically has to meet standing requirements. In federal courts, at least, standing requirements can be used to kick out cases in which the plaintiff has failed to allege an individualized injury, or has failed to show that the court could redress the alleged injury.⁸² This factor, by the way, casts doubt on whether the common law could ever protect endangered species with any appreciable effectiveness—the very people who are most likely to have standing (*i.e.*, because they have some connection to a species that lives on their land) are not likely to be potential *plaintiffs*.

Also at the initial stage, the plaintiff has to show that the conduct occurred within the relevant statute of limitations.⁸³ Some jurisdictions may recognize a “continuing tort” theory, which would treat an environmental harm as an ongoing phenomenon for which damages could be paid as to the most recent harm, even though the original harm may have begun long outside the statute of limitations period.⁸⁴ But others do not recognize such a theory. For example, in *Highland Industrial Park, Inc. v. BEI Defense Systems Co.*,⁸⁵ Highland Industrial Park sued a former tenant in July 1999, after

⁸⁰ See, e.g., Gillette & Krier, *supra* note 76, at 1046–50.

⁸¹ See Shavell, *supra* note 66, at 363.

⁸² See Allen v. Wright, 468 U.S. 737, 751 (1984) (“A plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.”); Florida Audubon Soc’y v. Bentsen, 94 F.3d 658, 666 (D.C. Cir. 1996).

⁸³ See Shavell, *supra* note 66, at 363.

⁸⁴ This used to be the case in New York, see, e.g., *Amax, Inc. v. Sohio Indus. Prods. Co.*, 469 N.Y.S.2d 282, 284–85 (N.Y. Sup. Ct. 1983).

⁸⁵ 357 F.3d 794 (8th Cir. 2004).

finding in 1996 and 1997 that the tenant's former practice of burning waste from rocket component production had contaminated the groundwater in that area.⁸⁶ The suit was brought under Arkansas common law tort theories of negligence and trespass.⁸⁷ The Eighth Circuit held that the claim was barred by Arkansas' three-year statute of limitations for tort claims, because Highland Park had been put on notice both in 1991 and in 1996 that there had been soil contamination.⁸⁸ Highland argued that the contamination constituted a "continuing trespass," but the Eighth Circuit noted that Arkansas law did not recognize a "continuing-tort theory."⁸⁹ Additionally, the district court had found that the statute of limitations did not begin to run until 1997, "because it was not until then that Highland knew the nature and extent of its injury."⁹⁰ The Eighth Circuit rejected this theory as well, noting that "we know of no state whatever in which an injured party must know the full extent of the damages that it may recover before the statute of limitations begins to run on its claim."⁹¹

Indeed, even where state law does recognize continuing violations, at least in theory, courts may still find that the claims are precluded. For example, in *Skokomish Indian Tribe v. United States*,⁹² an Indian tribe brought suit in federal district court against the United States and various state entities for environmental harms allegedly caused by a hydroelectric dam built in 1930.⁹³ As to the state law claims at issue (including trespass, negligence, conversion, and nuisance), the Ninth Circuit noted that the state statute of limitations was three years,⁹⁴ and that the Tribe was on notice of its claimed harm from aggradation of the river (*i.e.*, the deposit of sediment) no later than 1989, when its attorney had written a letter to the Washington Department of Ecology dealing with that very issue.⁹⁵ The Tribe claimed that the trespass at issue was a continuing violation, a claim that, if successful, would have at least allowed the Tribe to recover for the preceding three years of damage before the suit was filed.⁹⁶ But the court noted that the Tribe had failed to make a showing required by state law to invoke the continuing violation theory, *i.e.*, that the damage had been

⁸⁶ *Id.* at 795–96.

⁸⁷ *Id.* at 796.

⁸⁸ *Id.* at 797.

⁸⁹ *Id.*; *See also* *Syms v. Olin Corp.*, 408 F.3d 95, 110 (2d Cir. 2005) (barring tort claims as to property contamination because New York law no longer recognized continuing violations).

⁹⁰ *Highland*, 357 F.3d at 796.

⁹¹ *Id.* at 797.

⁹² 410 F.3d 506 (9th Cir. 2005).

⁹³ *Id.* at 509–10.

⁹⁴ *Id.* at 516.

⁹⁵ *Id.* at 517–18.

⁹⁶ *Id.* at 518.

“reasonably abatable.”⁹⁷ The theory is that if the damage is caused by a one-time event that can’t be reversed or abated, then the statute of limitations begins to run at the time of that event; while a truly “continuing” tort consists of something more like a repeated act that causes harm.⁹⁸

After a plaintiff has scaled the hurdles of standing and statutes of limitations, the merits of the case still have to be demonstrated. This is as it should be, of course. It’s a good thing if the legal system focuses its regulatory energies on those activities that are provably tied to individual harm. Still, plaintiffs can fail to prove their cases for many reasons other than the actual merits of the case—the capricious intuitions or biases of the judge and jury, the inability to pay for an expert who appears convincing and polished on the witness stand, or poor litigation skills by the plaintiffs’ lawyers (this could be anything from a rambling brief to the inadvertent waiver of important legal arguments). In addition, meeting the burden of proof both as to unreasonableness and as to causation may be especially difficult in cases involving diffuse and low-level environmental harms, even though such harms may turn out to be more serious than dangers that are more salient at the moment.

On other occasions, environmental common law claims can run into technical obstacles, *i.e.*, the particular plaintiffs fail to meet some doctrinal qualification. For example, in *Parker v. Scrap Metal Processors, Inc.*,⁹⁹ the district court had awarded Mrs. Parker and her two adult children a total of \$1.5 million in compensatory and punitive damages based on violations of the Clean Water Act, negligence, trespass, and nuisance, because the hazardous waste stored in drums and underground storage tanks had contaminated the Parkers’ property.¹⁰⁰ Although Mrs. Parker’s children had been made co-tenants as to the property in question, the Eighth Circuit reversed the district court’s damages award to the children, noting that the children did not have a “property right in their mother’s property at the time the complaint was filed.”¹⁰¹

⁹⁷ *Id.*

⁹⁸ *But see* State v. Kermit Lumber & Pressure Treating Co., 488 S.E.2d 901, 925 n.29 (W. Va. 1997) (holding that while generally a “continuing tort sufficient to toll a statute of limitations is occasioned by continual unlawful acts, not by continual ill effects from an original violation,” this “general proposition” is “unworkable in the context of a public nuisance action to remediate a business site containing hazardous waste which is endangering the ‘public health, safety and the environment.’”) (emphasis omitted).

⁹⁹ 386 F.3d 993 (11th Cir. 2004).

¹⁰⁰ *Id.* at 1000–02.

¹⁰¹ *Id.* at 1018–19 & n.32; *cf.* Alpine Forrest Partners v. Crown Central Petroleum Corp., No. 95-1871, 1998 U.S. App. LEXIS 1732, at *9 (4th Cir. 1998) (“[T]here was evidence from which the jury could find that the discharge had completely ended *before* Alpine Forrest bought

Even if the plaintiff has a good case on the merits, common law courts have sometimes let the defendant escape liability on the ground that the defendant's economic activity was too valuable to the community. Two of the cases cited by Todd Zywicki¹⁰² are useful examples. In *Pennsylvania Coal Co. v. Sanderson*,¹⁰³ the plaintiffs alleged that the Pennsylvania Coal Company had polluted a nearby river, but the court denied relief, on the theory that coal mining was of such importance that "mere private personal inconvenience . . . must yield to the necessities of a great public industry, which, although in the hands of a private corporation, subserves a great public interest. To encourage the development of the great natural resources of a country trifling inconveniences to particular persons must sometimes give way to the necessities of a great community."¹⁰⁴ Similarly, in a Great Depression case—*Versailles Borough v. McKeesport Coal & Coke Co.*¹⁰⁵—plaintiffs sued a mining company for the harm allegedly caused by burning the byproducts of mining. The court noted that "the annoyance which is theirs is trivial in comparison to the positive harm and damage that would be done to the community, were the injunction asked for granted."¹⁰⁶

To be sure, the fact that the common law can be tailored to local circumstances can be an advantage; as Todd Zywicki points out, judges can "consider the exigencies of the situation and location that are relevant to the specific community in question," as well as "other values and norms unique to the community in question."¹⁰⁷ Nonetheless, this factor is a bit of a one-way ratchet—it provides a reason for courts to deny liability even as to otherwise-meritorious claims, while there is no countervailing factor that would allow courts

the property. The right to sue on account of a completed tort is not conveyed *sub silentio* in a deed of realty. It is a chose in action, which is a personal right that must be specifically assigned.")

¹⁰² See Todd J. Zywicki, *A Unanimity-Reinforcing Model of Efficiency in the Common Law: An Institutional Comparison of Common Law and Legislative Solutions to Large-Number Externality Problems*, 46 CASE W. RES. L. REV. 961 (1996).

¹⁰³ 6 A. 453 (Pa. 1886), criticized by *Commonwealth v. Barnes & Tucker Co.*, 319 A.2d 871 (Pa. 1974).

¹⁰⁴ *Id.* at 458–59.

¹⁰⁵ 83 PITTSBURGH LEGAL J. 379 (Allegheny Cty. Ct. 1935).

¹⁰⁶ *Id.* at 383.

¹⁰⁷ Zywicki, *supra* note 102, at 1016. See also Frona M. Powell, *Trespass, Nuisance, and the Evolution of Common Law in Modern Pollution Cases*, 21 REAL ESTATE L.J. 182, 183–84 (1992) ("Common-law tort theory is sometimes criticized as too slow or too uncertain to resolve the technologically-induced problems of environmental pollution. To some extent, this uncertainty is a result of the inherent flexibility and adaptability of common-law theory in adjudication of individual disputes under the common law, characteristics of the common law that permit courts substantial discretion in reformulating legal theory to address the unique factual or policy considerations in individual cases." (citation omitted)).

to impose liability on deserving defendants absent an injured plaintiff who has filed suit within the statute of limitations.

Global warming may be the prime example of environmental harm that is not likely to be addressed by common law courts, at least not very well.¹⁰⁸ Assume for the moment that the direst predictions are true: global warming is occurring; the earth will rise in temperature by several degrees Celsius over the next 50 years; and this is all or mostly due to humanity's carbon emissions. What can courts do about such a situation? For one thing, we all emit carbon in some form, even if only by exhaling. Those of us who live in the industrialized world do quite a bit more: the vast majority of us drive automobiles; we use electricity to heat and cool our houses; we fly across country on business; and more. So if there is to be a lawsuit over global warming, the most basic question is: who should sue whom? Perhaps the entire Pacific Rim, as a class, should sue the entire industrialized world, as a defendant class, but it seems rather unlikely that any court would be able or willing to apportion liability, or even to keep track of the docket entries.

Not surprisingly, the global warming lawsuits to date have tended to get kicked out for lack of standing,¹⁰⁹ or even political question grounds. In *Connecticut v. Am. Elec. Power Co.*,¹¹⁰ several states sued power companies under "federal common law public nuisance actions

¹⁰⁸ See PERC Reports, *Global Warming: A Dialogue—Should Victims Receive Compensation?*, http://www.perc.org/publications/percreports/march2005/global_warming.php (last visited Feb. 8, 2008); Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495, 1535 (1999) ("Climate change represents the ultimate degree of complexity and difficulty in environmental protection. The harms—a buildup of greenhouse gases in the atmosphere potentially causing global warming, increased intensity of windstorms and other extreme weather events, changes in rainfall patterns, and sea level rise—can be traced to the activities of virtually every industrial facility, vehicle, and individual on the planet." (citation omitted)).

¹⁰⁹ See, e.g., *Korsinsky v. United States EPA*, No. 05 Ci. 859 (NRB), 2005 U.S. Dist. LEXIS 21778, at *7–*10 (S.D.N.Y. Sept. 29, 2005) (denying standing to sue defendants for contributing to global warming because the plaintiff's alleged grievance was "generalized"); *Ctr. for Biological Diversity v. Abraham*, 218 F. Supp. 2d 1143, 1155 (N.D. Cal. 2002) ("The concerns presented regarding global warming are too general, too unsubstantiated, too unlikely to be caused by defendants' conduct, and/or too unlikely to be redressed by the relief sought to confer standing."); *Found. on Econ. Trends v. Watkins*, 794 F. Supp. 395, 398 (D.D.C. 1992) (denying standing to plaintiffs who claimed that various agencies' "failure to consider the effects on global warming of specific federal actions and programs under their authority has harmed plaintiffs' programmatic activities in disseminating information about the greenhouse effect to the public"). But see *Friends of the Earth, Inc. v. Watson*, No. C 02-4106 JSW, 2005 U.S. Dist. LEXIS 42335, at *5 (N.D. Cal. Aug. 23, 2005) (allowing standing for plaintiffs who claimed that two federal agencies "have provided assistance to particular projects that contribute to climate change without complying with the requirements of the NEPA and the APA"). In a case where the judges split their opinions, Judge Douglas Ginsburg would have denied standing to "anyone with the wit to shout 'global warming' in a crowded courthouse." *City of Los Angeles v. NHTSA*, 912 F.2d 478, 483–84 (D.C. Cir. 1990).

¹¹⁰ 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

to abate what they allege to be Defendants' contributions to . . . global warming," *i.e.*, the defendants' collective emission of "650 million tons of carbon dioxide gas annually."¹¹¹ The court, however, dismissed their claims on the ground that the global warming question was a "non-justiciable political question,"¹¹² in that to resolve such a nuisance claim, the court would need to determinate a cap for carbon dioxide emissions, "create a schedule to implement those reductions," coordinate the relief with "the United States' ongoing negotiations with other nations concerning global climate change," and other questions of sheer policy.¹¹³

Even a suit that survives dismissal will likely be viewed with a skeptical eye, as can be seen in a federal district judge's recent opinion observing that there would be

daunting evidentiary problems for anyone who undertakes to prove, by a preponderance of the evidence, the degree to which global warming is caused by the emission of greenhouse gasses; the degree to which the actions of any individual oil company, any individual chemical company, or the collective action of these corporations contribute, through the emission of greenhouse gasses, to global warming; and the extent to which the emission of greenhouse gasses by these defendants, through the phenomenon of global warming, intensified or otherwise affected the weather system that produced Hurricane Katrina.¹¹⁴

D. Administrative Costs

As Shavell points out, the level of administrative costs may favor the common law, which incurs administrative costs "only if harm occurs."¹¹⁵ Indeed, if the system of liability leads "parties to take proper care and this happens to remove all possibility of harm, there would be no suits whatever."¹¹⁶ (An optimistic assumption, to be sure; even under a strict liability system, parties would presumably still undertake polluting activities that were cost-justified, and thus would still create harm that might lead to a lawsuit.) On the flip side,

¹¹¹ *Id.* at 268.

¹¹² *Id.* at 273.

¹¹³ *Id.* at 272–73.

¹¹⁴ *Comer v. Nationwide Mut. Ins. Co.*, No. 1:05CV436 LTS-RHW, 2006 U.S. Dist. LEXIS 33123, at *12 (S.D. Miss. Feb. 23, 2006).

¹¹⁵ Shavell, *supra* note 66, at 364.

¹¹⁶ *Id.*

“administrative costs are incurred whether or not harm occurs,” and even if the regulation eliminates the risk of harm, “administrative costs will have been borne in the process.”¹¹⁷

E. Courts as Policymakers

In addition to Shavell's four factors, one might also add a general note of skepticism about the notion that courts should decide weighty matters of environmental policy, all unto themselves. However much a court may wish to avoid such policy matters,¹¹⁸ it cannot do so. Technically, a case arises when a plaintiff sues a defendant over a particular harm, but the court cannot stop there. If the standard is strict liability, for example, the court will have to determine whether the defendant's activity was “abnormally dangerous,” an inquiry that may take into account the commonness of the activity and/or the value that it might produce. If the standard is negligence, the court may need to consider whether the defendant's actions were reasonable, an open-ended inquiry that will likely take into account the court's underlying intuitions about what sort of business conduct is reasonable in light of community needs. As the Supreme Court has recognized, to resolve typical air pollution cases, courts must strike a balance “between interests seeking strict schemes to reduce pollution rapidly to eliminate its social costs and interests advancing the economic concern that strict schemes [will] retard industrial development with attendant social costs.”¹¹⁹

Now if some common law advocates got their wish, regulatory agencies would apparently be replaced (entirely?) by common law actions. But do we have reason to believe that courts should be the *only* governmental vehicles for setting wide-ranging social policy as to environmental law? Administrative regulation has plenty of disadvantages—that's a subject unto itself—but it doesn't seem likely that common law courts are going to establish the right level of environmental liability (assuming that such a thing exists) by assessing liability in the *right* cases.

It's this latter bit that troubles me. Let's assume for the sake of argument that judges and juries are eminently wise, unbiased, able to comprehend all manner of complex environmental claims regardless of how well or poorly the parties litigate the cases, and able both to

¹¹⁷ *Id.*

¹¹⁸ *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 871 (N.Y. 1970) (“A court should not try to [regulate] on its own as a by-product of private litigation . . . [or] lay down and implement an effective policy for the elimination of air pollution. This is an area beyond the circumference of one private lawsuit.”).

¹¹⁹ *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 847 (1984).

discern and to craft just the remedy that perfectly leads even non-parties to take cost-justified measures of environmental protection (no more, no less).

Still, judges and juries can't take any action until someone files a lawsuit. And I mean no unique criticism of the plaintiffs' bar when I say that their case-selection patterns are calculated more in self-interest than in service of a coherent regulatory policy. The plaintiffs' bar is drawn to cases that are likely to lead to damages high enough to provide a contingency fee that, in turn, would be high enough to recompense the lawyers for their time and money spent investigating and litigating the case, plus a profit.¹²⁰ As Peter Huber points out, "the most attractive risks are those for which the evidence is the most unusual and lurid, the class to be represented the largest, and the problems of proof the lowest. According to these criteria, the risks that happen to land at the top of the list are not likely to be those that would be selected by risk experts engaged in a sober examination of the competing sources of risk in a market filled with a rich variety of hazardous substitutes."¹²¹

In other words, the plaintiffs' bar piles on when it perceives high liability and easy victories in high-profile accident cases—several hundred lawsuits, most including common law claims, were successfully brought against Exxon for its infamous oil spill¹²²—while slighting more difficult-to-prove cases involving slight increases in pollution and the mere prospect of long-term environmental damage.¹²³ The common law bankrupts Dow Corning for making silicon breast implants that turn out to be harmless, while relatively ignoring pollution that might pose a slight increase in mercury contamination of the fish population in other states. As mentioned above, no matter how serious a problem global warming is or might become one day, plaintiffs' lawyers are unlikely to invest millions of dollars in a quixotic effort to pin liability on a few companies for events that may take place 50 or 100 years from now. Thus, as Peter Huber has argued, "A massive delegation of consensus-forging responsibilities to the courts and private litigators

¹²⁰ Gillette & Krier, *supra* note 76, at 1051–52.

¹²¹ Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277, 318 (1985). In the interest of full disclosure, I currently work for the law firm that Peter Huber co-founded.

¹²² Andrew McFee Thompson, Comment, *Free Market Environmentalism and the Common Law: Confusion, Nostalgia, and Inconsistency*, 45 EMORY L.J. 1329, 1349–50 (1996).

¹²³ Notice also that the common law system, wielded as it is by the plaintiffs' bar, can exert the most deterrence on conduct that is least in need of it. Companies already have a compelling incentive to avoid massive disasters such as the Exxon Valdez oil spill, quite apart from any legal ramifications. To be sure, the common law is hardly unique in this respect.

is probably even worse than leaving the issues in the politicized hands of legislatures and regulatory agencies. Millions of small tort and contract decisions will not magically coalesce into coherent public policy. . . ."¹²⁴

CONCLUSION

I'm going to equivocate here: On one hand, courts are good at addressing "focused, high-probability, bilateral hazards that have ripened (or are about to ripen) into concrete injuries."¹²⁵ As to such disputes, the common law can be a useful regulatory tool, both to create *ex ante* incentives for potential defendants and to provide *ex post* compensation to injured plaintiffs. On the other hand, we don't really know very much about how much environmental protection the common law independently could provide, and we have reason to be skeptical that the right sorts of cases will percolate into the judicial system for resolution. For that reason, courts probably aren't the best regulatory tool to address "diffuse, low-probability, multi-lateral, and temporally-remote harms,"¹²⁶ such as global warming. Whether these potential deficiencies of the common law could be counterbalanced by administrative regulation (or whether they would be outweighed by the many deficiencies of regulation) is a subject for another essay.¹²⁷

¹²⁴ Peter Huber, *Panel II: Public Versus Private Environmental Regulation*, 21 *ECOLOGY L.Q.* 445, 454 (1994).

¹²⁵ Huber, *Safety and the Second Best*, *supra* note 121, at 331.

¹²⁶ *Id.*

¹²⁷ *Cf.* NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (paperback ed. 1996).