ATTACKING BANANAS AND DEFENDING ENVIRONMENTAL COMMON LAW

Denise Antolini[†]

In the Monty Python skit "Self-Defense Against Fresh Fruit," Sergeant Major John Cleese instructs his feckless recruits on how to react to the risk of attack by someone armed with fresh fruit.[1] He starts by demonstrating how to defend against an attacker rushing at him with a banana. Cleese intones: "First of all, you force him to drop the banana; then, second, you eat the banana, thus disarming him. You have now rendered him 'elpless." Then, after egging on a recruit to attack him with a banana, Cleese pulls out a gun, shoots the attacker, then eats the banana. When a dismayed fellow recruit queries, "Suppose I'm attacked by a man with a banana and I haven't got a gun?," Cleese deadpans: "Run for it."

Stuart Buck's article "The Common Law & The Environment in the Courts" reminds me of the flawed logic so hilariously portrayed in this Monty Python skit. By suggesting the straw man argument that common law remedies are offered as a *complete* substitute for statutory approaches to solving modern environmental problems, Buck is wildly shooting at imaginary bananas. No modern commentator that I know of has suggested that the common law should replace our well-developed network of statutory laws that address environmental problems.[2] Supplement, yes, but not replace. Yet, Buck insists, "if some common law advocates got their wish,

---

† Associate Professor of Law, William S. Richardson School of Law, University of Hawaii at Manoa.

1 *Monty Python's Flying Circus, Self-Defense Against Fresh Fruit* (BBC1 television broadcast October 26, 1969).

2 Buck seems to set up Professor Bill Rodgers as this would-be extremist by quoting his treatise's praise for the virtues of nuisance law, but Rodgers himself goes on to describe nuisance as the "backbone" not a substitute for modern statutory environmental law. Stuart Buck, *The Common Law & The Environment in the Courts*, 58 CASE W. RES. L. REV. 621 (2008).

regulatory agencies would apparently be replaced (entirely?) by common law action."[3] Entirely? Really?

By setting up the extreme, Buck makes sensible common law advocates looks ridiculous. Yet, the fallacious premise makes for an unsatisfying analysis of the serious questions regarding the pros and cons of the common law in today's complex environmental litigation landscape. Buck fails to recognize the well-accepted value of common law in the modern statutory era as an *interstitial remedy*. And, he ignores (deliberately?) the less-well-accepted but equally obvious current use of common law litigation as a *catalyst for policy change*. These two fundamental values of "environmental common law" litigation—interstitial and catalytic—are, unfortunately, wholly ignored in his essay but of significant value in the real world of environmental advocacy.

The weakness in Buck's premise becomes most evident in his conclusion where he admits he has to "equivocate" and acknowledges that courts "are good" at addressing certain kinds of disputes and that, "[a]s to such disputes, the common law can be a useful regulatory tool."[4] He still challenges the utility of the common law, however, because "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."[5] Without offering what might ever be, in his view, that "right sort of case," he points to what he considers a bad case—a "diffuse, low-probability, multi-lateral, and temporally remote harms" that the courts "aren't the best" at addressing.[6] This example is clearly bothering him, indeed, perhaps it is the very reason he wrote the essay: it is "global warming."[7]

Thus, it seems that Buck's essay is really not about the weaknesses of the common law in general (and there are indeed many) but rather a specific attack on the merits of the most recent innovative (catalytic) uses of the common law in context of the U.S. policy debate over a federal response to global climate change. Whether Buck's objections are truly jurisprudential or simply climate-skeptical, his provocative

---

[3] *Id.* at 644. Buck sets up a caricature of common law advocates: "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?" *Id.* (emphasis in original). What is missing from his provocative point here and elsewhere in the essay is a citation to a source who may have stated the utility of the common law in such a radical and unrealistic way.

[4] *Id.* at 646.

[5] *Id.* (emphasis added).

[6] *Id.*

[7] Buck, *supra* note 2, at 646.

essay provides a good reason to review how modern-day environmental practitioners are using the common law and the courts to work around the infirmities of unresponsive statutory schemes in the face of continuing and growing environmental problems.

As a co-editor of a recent book suggesting that the common law *does* have a useful role to play even in the highly developed statutory context of environmental law,[8] I obviously have a divergent view from Buck. In *Creative Common Law Strategies for Protecting the Environment*, my co-editor Cliff Rechtshaffen and I deliberately set about collecting the stories from current practitioners who are actively using the common law to address a wide variety of environmental problems that have been ignored by the political process. From contamination of groundwater by MTBE in California, and polluting factory farms in the Midwest, to large agricultural landowners freely diverting water from taro famers in Hawaii, the major cases today invoking common law remedies have a shared theme: the community's frustration with the lack of legislative solutions to persistent environmental crises. As Professor Joseph Sax explains in the Preface of our book, the collection of stories written by these practitioners about their cases is "cause for celebration and emulation, but it is also distressing evidence of the extent to which our statutory scheme has failed to fulfill the promise that was so bright a few decades ago."[9] He concludes, "the common law method will always be an essential tool for addressing the problems we face."[10] Can Sax—widely considered as a central figure in the creation of the modern statutory era of environmental law (a system which Buck seems to admire)—be a valid straw man for Buck's polemic attacking the common law? Hardly.

Neither my co-editor nor I suggest that our modern statutory scheme be ditched for a common-law based system. In fact, we very carefully stated the opposite:

We wish to be clear, however, that this book is not a call for dismantling statutory protections and returning to a legal regime that places primarily reliance on the common law for remedying environmental harms. . . . . As experience before the 1970s starkly illuminates, the common law *by itself* is incapable of addressing the multitude of threats to human health, air, water, land, and wildlife posed by the complex, modern industrial society in which we live.

---

[8] CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT (Clifford Rechtschaffen & Denise Antolini, Eds., Environmental Law Institute 2007) [hereinafter CREATIVE COMMON LAW].

[9] Joseph L. Sax, *Preface*, *in* CREATIVE COMMON LAW, *supra* note 8.

[10] *Id.*

Environmental regulation has produced impressed and important gains in the quality of our environment over the past 35 years. But . . . there are still significant gaps in the web of protection woven by environmental statutes—gaps that can be effectively filled by a vibrant common law. In short, common law remedies are critically needed to *supplement*, not supplant, statutory approaches to protecting the environment.[11]

So, there should be a lot of room for Buck and me to agree. If only we could agree on the right questions. Unfortunately, it is how Buck provocatively phrases the questions in his essay, and his frequent resort to a straw man technique, that makes it almost impossible to find a common ground for a hearty discussion.

For example, on the issue of advocates' allegations of the "superiority" of the common law compared to agency regulation,[12] Buck says he is "agnostic"[13] but his tone, and in fact his entire essay, is wholly dismissive of the idea that the common law might have *some* advantages. A serious error in Buck's critique is to treat statutory law and common law as potential legal equivalents. They simply are not, even if they may have similar goals. As Buck acknowledges, "[t]o be sure, the fact that the common law can be tailored to local circumstances can be an advantage."[14] That is, in fact, a key strength of the common law.

To assess if the common law "works," Buck rattles off a series of rhetorical questions and then seems just to give up, concluding "we can't agree on what the end is," therefore "we can't agree on how well the common law achieves a particular end."[15] I'm stumped about why he is stumped. The "end" must surely be protection of the environment and human health. Even if this is not his personal goal, and even if we differ greatly on the means to achieve it, we (along with the host of scholars who have examined the relative value of common versus statutory law) should be able to agree on this "end." Moreover, the damning questions Buck poses—such as "Is it simply to gain the maximal amount of environmental protection, at whatever cost?"—are not unique to the common law, they are equally applicable to the statutory world. The macro-level legislative process is fraught with compromise, balancing, and the influence of "non-

---

[11] *A Roadmap of the Book*, *in* CREATIVE COMMON LAW, *supra* note 8 (emphasis in original).

[12] Buck, *supra* note 2.

[13] *Id.* at 630.

[14] *Id.* at 641.

[15] *Id.* at 630. His confusion, confusingly, crops up again later: "assuming we could all agree on what 'up to the task' even means." *Id.* at 633.

environmental" values. At the micro-level of common law lawsuits, the same is true: context is everything. As Buck writes, "It all depends on the court, the agency, the issue at hand."[16] But it also depends on the parties, the motives, the costs, the timing, and the evidence. And, particularly as common law accretes, on precedent. Neither approach is pure or simple. Both involve complicated mixes of law, fact, and politics. The indictment of the common law for these supposed failings is not warranted.

Buck also complains that "little solid empirical evidence" exists to support the value of the common law.[17] So, he concludes, its value cannot be compared to major statutes like the Clean Water Act. By oversimplifying the meaning of "empirical" as solely quantitative, he ignores the value of qualitative (*e.g.*, case-based) "data" that can inform this discussion. He says "anecdotal evidence only gets you so far,"[18] and then sets up his own imaginary three-point test for the validity of any useful information, stating that it must be "measurable" data over a twenty-year period with a baseline of pollution levels.[19] He adds that, for the data to be good, "[o]f 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*,"[20] adding more hurdles to the challenge and setting up a schema that the best empiricist could never meet. Even very good empirical studies of statutory law cannot achieve this statistical purity. He says so himself: "To my knowledge, no one has ever done a study that is remotely like what I have discussed. And I doubt that anyone can."[21] Indeed. Then, why set up a surrealistic test? Perhaps his purpose is to make his next four-part test, adopted from Steven Shavell, seem more appropriate. This more interesting approach, however, also does not prove his unprovable point.

With respect to the first part of his modified Shavell test—knowledge about risky activities—Buck states that the common law may be *better* than statutory law because "private parties will probably have better information than regulators" about risk.[22] Here I agree with Buck, but this is true *if* one differentiates between a site-specific problem (which is the typical target of common law) and a regional or national problem (which is the typical target of statutory

---

[16] *Id.* at 636.
[17] Buck, *supra* note 2, at 630.
[18] *Id.* at 631.
[19] *Id.* at 631-632.
[20] *Id.* at 632 (emphasis added).
[21] *Id.* at 633.
[22] Buck, *supra* note 2, at 633.

law). In other words, the analysis again requires recognition of the fundamentally diverse nature of common law cases (largely based on state common law and filed in state courts) compared to statutes (primarily federal in the modern environmental scheme used as a comparison by Buck). (He might argue, and I might agree, that this distinction does not hold true in the climate change cases. However, those cases are clearly designed to be catalytic not interstitial, that is, to prompt policy change as well as seeking to achieve an ultimate injunctive or damages remedy, which is proving quite elusive.)

When he asks whether common law plaintiffs have superior information about "general issues of environmental consequences," such as "endangered species two states away"[23] the straw man reappears. Common law cases, even if filed in federal court, are *state law* cases involving localized environmental risks. Although some commentators, including me, hold out hope for a resurgence in *federal* common law,[24] I cannot think of a common law case involving cross-boundary endangered species issues but perhaps I am mistaken; maybe there are creative litigators pushing this case theory (and, if so, I would love to know). On the other hand, of course, cross-boundary species issues are the essence of the federal ESA and much litigation. So, the very nature of Buck's question provides him an answer.

His next criticism of common law litigation, that juries are less capable than regulators in understanding environmental problems, is quite puzzling. He states, "It seems unlikely that the average jury has better information than do PhD chemical engineers working for the EPA. . . "[25] Perhaps Buck's experience as an appellate clerk for two years has unduly limited his view of how trials really work. He ignores completely the role of expert witnesses, and the frequent battle of experts, in cases involving environmental pollution. The parties are highly motivated to present the best possible quality information to the jury, and the judge must screen the qualifications of the experts. Juries are not flying solo, but they do filter the facts based on their own community experience. Indeed, that is their civic responsibility. Buck later gets this right: "[b]oth 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

---

[23] *Id.* at 634.

[24] *See* CREATIVE COMMON LAW, *supra* note 8, at 47–159 (discussing the *Milwaukee I and II* cases).

[25] Buck, *supra* note 2, at 634.

to an impartial outsider."[26] This is right. But then why the baseless attack on juries earlier?

What is unclear is whether Buck is arguing that trial, or appellate, judges are any better at reviewing conflicting expert testimony in the cold statutory context. Or, if he thinks that agency experts are necessarily superior to the parties' experts. Quixotically, he criticizes the very agency experts that he put on a pedestal a few paragraphs before. He finds that they may be too narrow-minded having put "their lives and souls into studying a particular type of emissions," which "tempt[s them] to regulate it into the ground, while ignoring the question of whether such regulation is the best use of society's resources."[27] But Buck admits that even "educated judges" need environmental cases to be "boiled down into terms" that they can understand, otherwise "then perhaps the rationale isn't such a good one."[28] Buck's clerkship experience serves him well on point. Law clerks know particularly well that judges are human too. It may be that Buck thinks neither juries (in common law cases) nor judges (in statutory review cases) are competent. But his alternative solution to providing redress other than these two currently used legal avenues is not at all evident. Free market? Eliminate legal remedies?

In addressing "ability to pay," Buck argues—without citation, example, or support—that some polluters may not be able to pay for the harm they create.[29] He says, "this factor weighs against the common law."[30] It does? To the contrary, it seems a stronger indictment of the market model, which often fails to force internalization of harmful externalities. He also assumes that polluters will utterly ignore judgments if they cannot pay (a strange argument given long-standing judicial mechanisms for enforcing judgments) but he also dismisses the option of injunctive relief (a primary goal, for example, in public nuisance cases). This weak criticism may reflect his unfamiliarity with the world of common law environmental litigation. In contrast, he seems to think that regulatory approaches work like a magic wand, "require[ing] the polluter to meet certain standards from Day One."[31] Even the biggest fans of statutory law should see the issue in a more complex way. Buck ignores the myriad real-world problems of permit challenges, non-compliance, non-enforcement, and the frequent "ability to pay" issues presented in the

---

[26] *Id.* at 635.
[27] *Id.*
[28] *Id.* at 636.
[29] *Id.*
[30] *Id.*
[31] Buck, *supra* note 2, at 636.

statutory context. Neither system has a monopoly on efficiency of enforcement.

On the issue of "access bias" and "process bias," Buck does a much better job of laying out the difficulties that plaintiffs face in both the common law and statutory contexts. As he indicates, lack of initial awareness of the pollution in the first place is a big problem. In fact, it is an enormous problem. Then, of course, there are the problems of causation or traceability. These barriers all come back to haunt statutory plaintiffs particularly in the context of statutory standing. In the common law context, these plaintiffs may need to clear the harsh "different in kind" test for public nuisance,[32] but under other theories (such as private nuisance or general negligence), actual or threatened injury will suffice. Here, Buck shows a finer appreciation for the general weaknesses of the legal system in addressing environmental harm.

At bottom, Buck's true concern about the value of the common law seems to come down to the global warming cases, which he calls "the prime example of environmental harm that is not likely to be addressed by common law courts, at least not very well."[33] His dislike for the global warming cases comes out more colorfully when he suggests that courts cannot do much about climate change because, "we all emit carbon in some form, even if only by exhaling."[34] He then mockingly suggests that the "entire Pacific Rim, as a class, should sue the entire industrialized world."[35] His facetious suggestion unfortunately does not add much to our struggle to understand the role, good or bad, of catalytic environmental common law litigation. But it may reveal something about the true bogeyman feared by critics of the common law. The bigger the banana, the bigger the counter-attack.

As explained by Matt Pawa, one of the key strategists behind the *American Electric Power* lawsuits, now pending in the Second Circuit Court of Appeals,[36] the cases were brought in response to the lack of response from the George W. Bush Administration to the climate change crisis. Specifically, the public nuisance lawsuit, seeking only injunctive relief, was filed after the Administration announced it would not support amendment of the Clean Air Act to impose new

---

[32] *See* Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 ECOLOGY L. Q. 755 (2001).

[33] Id. at 18.

[34] Id. at 18.

[35] Id. at 18.

[36] Matthew Pawa, *Global Warming: The Ultimate Public Nuisance*, *in* CREATIVE COMMON LAW, *supra* note 8, at 107–63.

emissions limits on CO2, and after the White House disavowed the Kyoto Protocol.[37] Ultimately, the district court dismissed the case *sua sponte* on the basis of the political question doctrine.[38] At its core, even those who disagree with the basis of the district court's dismissal can agree that this case is fundamentally about whether the courts will seize the common law opportunity to press forward on solutions, even partial, to climate change. As Pawa stated, "we have brought to bear an important additional tool for addressing an environmental problem of exceptional importance."[39]

Similarly, in the similar California common law case addressing climate change[40]—but this time seeking damages under a public nuisance theory—the lead attorney, Ken Alex, viewed the case as a catalyst for legislative action.[41] He explained, "[b]oth lawsuits were carefully crafted by the states' attorneys to respond to failures of the federal government to address the growing threat of global warming."[42] California and the other states involved in the cases "[s]tepp[ed] into that void," and "beg[an] aggressively to seek basic tort remedies against major sources of [greenhouse gas emissions], in addition to undertaking their own legislative and regulatory initiatives."[43] Alex acknowledges that the cases are challenging to the legal system, but concludes that "[t]he genius of the common law is its ability to address new pollution problems using long-established principles validated by decades of judicial precedent to effect sometimes profound changes."[44]

Both of these cases, as well as others more recently filed—such as the *Kivalina* case brought by an Alaska Native village of Inupiat Eskimo under public nuisance theory against two dozen oil, power, and coal companies, filed in February 2008[45]—show that the common law will continue to be used by environmental advocates, even if not always producing an immediate or direct "win," until there is a sufficient national statutory response to climate change. The very nature of the common law is to evolve with the times, to adapt to social needs. Unfortunately, the pace of change arising from these

---

[37] *Id.* at 124.

[38] *Id.* at 141.

[39] *Id.* at 163.

[40] California v. General Motors, et al., 2007 U.S. Dist. LEXIS 68547 (Sept. 17, 2007)

[41] Ken Alex, *California's Global Warming Lawsuit: The Case for Damages*, *in* CREATIVE COMMON LAW, *supra* note 8, at 165–71.

[42] *Id.* at 166.

[43] *Id.* at 166.

[44] Id. at 171.

[45] *See Climate Change Threatens Existence, Eskimo Lawsuit Says*, http://www.cnn.com/2008/WORLD/americas/02/26/us.warming.ap/ (last visited Feb. 27, 2008). Matt Pawa is also on the team of attorneys who brought this lawsuit. *Id.*

innovative climate change cases, which not enjoyed a warm welcome in the courts so far, is glacial. And, for those who seek action on reducing global greenhouse gas emissions, the window of time for altering the course of real-world events is simply too short for ponderous judicial action to succeed on its own. Yet, the climate change cases are a modern example of the classic role of the common law.

In conclusion, Buck's essay raises many questions about the resurgence of "environmental common law"[46] but the wrong ones. Worse, he answers even many of those questions unsatisfactorily. In the "Self-Defense Against Fresh Fruit" skit, Cleese progressively kills each of his recruits while calmly demonstrating how to repel attacks from bananas and raspberries. Although Buck's essay is not nearly at lethal, it unfortunately has the same effect of substantially dampening the reader's interest in even inquiring further about the subtleties of the weakness and strengths of the common law. Cleese's ultimate response to the fruit attacks is to unleash a live tiger on his last remaining recruits. Buck's essay similarly unleashes an untamed rhetorical critique. Despite the flurry, creative well-grounded common law strategies will survive for years to come. They will continue to be an effective *supplemental* tool to address dangerous gaps in our modern environmental statutes and to catalyze long overdue action on governmental policy.

[46] CREATIVE COMMON LAW, *supra* note 8, at 10.