The Common Law Approach to Pollution Prevention

A Roundtable Discussion

Hope Babcock
Elizabeth Brubaker
David Schoenbrod
Bruce Yandle
Michael Krauss, Moderator

The Cuyahoga River may not catch fire anymore, but pollution problems persist. For centuries, these problems were addressed by the common law, inherited from Britain by both Canada and the United States. Over the last few decades, however, there has been a shift away from common law remedies. Today the most common response to pollution is the imposition of statutory restrictions on behavior.

The effectiveness of the common law, and its potential applicability to contemporary environmental concerns is the subject of academic dispute. Some scholars have pointed out that the common law often set standards far stricter than statutes. Others claim it is too ad hoc to address contemporary pollution concerns in a systematic way.

To further the debate on this issue, the Center for Private Conservation hosted a roundtable discussion on December 17, 1997. What the assembled panel of experts – Professor Hope Babcock, author Elizabeth Brubaker, Professor David Schoenbrod and Professor Bruce Yandle – said about this issue constitutes the text that follows. The discussion was moderated by Michael Krauss, a professor at the George Mason University School of Law, and includes comments and questions from invited observers.

Among other things, the discussion considered the two extremes of the common law approach – that industry could be virtually shut down by nuisance injunctions or that, conversely, the costs of litigation could be so high that pollution would be virtually unchecked. The participants also touched upon the wealth effects of the distribution of rights and summed up by considering how common law logic might be made a part of the evolving regulatory regime.

MR. MICHAEL KRAUSS: Welcome to the Center for Private Conservation roundtable discussion on common law approaches to pollution prevention. More specifically, we are here to discuss how private ordering might address some pollution issues, and how it might replace or complement public ordering. It is a subject dear to my heart and I'm very happy to be here with such a distinguished panel.

Bruce Yandle is Director of the Center for Policy and Legal Studies at Clemson University, and a Senior Associate at the Political Economy Research Center in Montana. He is also author of the just published *Common Sense and Common Law for the Environment.*[*]

David Schoenbrod is a Professor at New York Law School and was an attorney at the Natural Resources Defense Council from 1972 to 1979.

Hope Babcock is a Professor at Georgetown Law School and was General Counsel for the Audubon Society from 1987 to 1991.

Elizabeth Brubaker is from Environment Probe Canada and is the author of *Property Rights in the Defence of Nature.*[**]

Bruce?

And, so, I look at the common law ordering mechanism as something that human beings choose, and build, and attempt to improve on as they manage and deal with scarce resources.

DR. BRUCE YANDLE: Thanks very much, Michael. I appreciate your mentioning the choice of ordering mechanisms because that's certainly how I approach today's topic.

Last Saturday, I had the pleasure of taking my granddaughter shopping, something we do together at this time of year. And, while we were in one of the malls, she spotted Santa Claus and said "Let's go over and talk with Santa Claus," which we did. She finished, and when I got to talk with Santa Claus, he asked me what I would like to have, I told him I would like to see a new order for the management of environmental and natural resources. And when asked, "What characteristics would you hope to have in this new ordering mechanism?" I said "Well, let me tell you four."

"First, I think the ordering mechanism ought to focus on outcomes. Second, the proposed mechanism for solving the problem should fit the dimensions of the problem. Third, the ordering mechanism should be fraught with accountability, so that those individuals who impose costs on other rightholders will be held accountable for their actions. And lastly, this mechanism ought to have a lot of flexibility, with incentives in it so that we would bring new information to bear on these precious assets that we human beings must conserve and manage. And those would be the four characteristics that I would look for."

Now, as I have touched on these characteristics, I have discovered in my legal and economic research, that these are characteristics that are found in the old common law.

[*] Lanham, MD: Rowman and Littlefield Publishers, Inc., 1997.
[**] Toronto: Earthscan Publications, 1995.

That is not to suggest that we would find these things held up in every case at trial or in every judge's opinion, but that those principles were there. That's how I got fascinated with it as a system for ordering society or as a basis for generating order.

And so, I look at the common law ordering mechanism as something that human beings choose, and build, and attempt to improve on as they manage and deal with scarce resources or, as I mentioned in my book, when we begin in what I call "a hummingbird economy," where human beings begin in a world of commons, where there are no rules for rationing our behavior.

Now, I would not argue that a common law approach can be quickly pointed to as a way for dealing with every imaginable environmental problem. But I'm happy to talk about the characteristics of the common law logic for dealing with that problem.

The thing that is puzzling to me is that when we look at the federal saga, what I call "the environmental saga," that began in the late 1960s here in the U.S., when we look at that saga it was prompted partly to deal with conventional pollutants, the discharge of raw sewage into rivers or particulates coming out of smokestacks. And yet, when you examine the record, we have had grave difficulty dealing with even those rather simple problems, where cause and effect is easily understood, where the pipe is here and the river is there. Indeed, there is the counterpart of protest going on in Atlanta now by the Upper Chattahoochee Riverkeepers Association, trying to get the river cleaned up, which is what people were talking about back in the sixties.

It seems to me that in many, many situations the logic of common law is rather compelling. In others, I think there would be some difficulties worth talking about, but some principles yet to consider.

As I've worked on this and thought about these principles, the other thing that I have discovered is – and perhaps this is part of the aging process that we all encounter – that there are a lot of people who have never heard of the common law for dealing with environmental problems. Indeed, some people in positions of great responsibility in the environmental establishment said "Oh! I didn't think we had any legal approach to these problems until we had statute law."

There is a lot wrong with the current statuatory approach, but I have questions about whether there are important problems that the common law can't deal with.

So, one of my motivations in trying to write down what I consider to be some of the lessons from the common law was, basically, to get it on paper and hope that some others who have not heard these stories will at least begin to think about the approach that was taken for so many decades before we had statute law at the federal level.

MR. KRAUSS: Thank you, Bruce. Professor Schoenbrod?

MR. DAVID SCHOENBROD: Thank you. When it comes to the idea of trying to solve environmental problems with the common law rather than statutes, I think there are believers, non-believers and "wanna believers."

I'm a "wanna believer" because there is a lot wrong with the current statutory approach, but I have questions about whether there are categories of important problems that the common law can't deal with. I raise these questions not as definitive critiques of the common law approach but because I would like to have answers and am looking forward to talking about these questions.

I group my questions in three categories. One concerns liability. In Professor Yandle's book he talks about a maxim defining liability under the common law: "One should use his property in such a manner as not to injure that of another." This is from an old English case. The case had to do with a pig sty near somebody's parlor. Now, under that maxim, whether there's a nuisance or not really depends upon the customary use of the neighborhood.

The maxim, "One should use his property in such a manner as not to injure that of another," really begs the question.

Or, to put it another way, the essential insight of Professor Coase is that the maxim, "One should use his property in such a manner as not to injure that of another," really begs the question. It depends on the context. And I think the way the common law settled the question was through custom.

Now, more recently, in the United States, there have been cases that have jettisoned custom and had the judge do kind of a balancing. I gather people who think that the common law is the right way to go don't like that, and I think there are reasons to object to that. If judges are really doing that kind of "social balancing," or policy balancing, as they go along, then you really have a kind of personal, ad hoc, decision making without any accountability. That seems bothersome.

So, if the system is going to work, I gather it would have to work on the basis of nuisance, where the standard of liability really is parasitic on the idea of custom. But custom presents certain problems. What if, for example, 300 pigs is all right but 8,000 is too many? Custom doesn't tell you where to draw the line. It doesn't tell you how to apportion the right to grow pigs among people, to make sure there aren't too many in the locale.

Second, what about new technology? For example, I read that in Vermont, dairy farmers are objecting to battery chicken growers coming in because they think that is a worse stink. Well, in a neighborhood where there is a lot of cow manure, is chicken manure worse? How does custom deal with that? Custom doesn't provide an answer, because if battery chicken growing is not a custom in that area, how do you draw the line? Or right here in this conference room, there is noise coming from the ceiling. Is that a nuisance or isn't it?

Beyond that, custom may not be a guide where we have changing public tastes about the amount of pollution to tolerate. How do you deal with situations where there is a change in public taste or new information about pollutants that before we didn't think were harmful but now think they are harmful? Therefore, we may want to change what was previously customary. So, there are a slew of problems related to liability and I hope there are answers to them, but I have these questions.

The second category of questions concern remedy: The remedy issue is not that difficult, I think, where it's clear that a pollutant is causing harm. But where a pollutant may well cause a certain harm – where you can't say it's more probable than not that a pollutant will cause harm – and yet it isn't a trivial risk, then you are going to have trouble getting damages because of the problem of certainty. There's a certainty threshold and you have to show that the harm was, with a reasonable degree of certainty, caused by the pollutant.

Similarly, you're going to have problems getting an injunction because, at least in common law, to get an injunction you have to show that there is an imminent, substantial harm. That requires showing a

fairly high degree of probability the harm will take place. If there is a carcinogen with a one in a hundred chance of causing a lot of cases of cancer, you might well want to stop it. But, one in a hundred is not going to get you an injunction.

Beyond that, there is the question of balancing. We all know the case of *Boomer v. Atlantic Cement,*[*] in which a judge balanced the costs and benefits of abating emission in deciding whether to grant an injunction. Is that the kind of decision we want to have judges making? I'm not sure.

Beyond that remember, most nuisances, when it comes to pollution, are intentional torts. But what about punitive damages? Back in 16th century England, you didn't have many punitive damages. Are these cases now going to give rise to punitive damages?

The third set of questions has to do with who does the enforcing. There is the free rider problem. You could, I guess, graft attorney fees onto common law actions. But I wonder how those who have thought more about this than I have would deal with those enforcement problems.

It is extremely difficult to transpose a system for remediating individual, private, harms into a system to effectively and equitably remediate broader harms, to the public, to natural resources.

MR. KRAUSS: Thank you. Professor Babcock?

MS. HOPE BABCOCK: I think a lot of the concerns that David raised are the concerns that I have, having been a litigant, trying to actually make not only statutes work but, occasionally, common law work, because of the inadequacies in the statutory framework. And I think my experience trying to prosecute causes of action under the common law has moved me from a "wanna be" – I would like to have the common law be a more viable mechanism for injured parties – to a "Gee whiz, I don't think this can be," or perhaps a "no be."

I am persuaded that it is extremely difficult to transpose what is a system for remediating individual, private harms into a system that is going to effectively and equitably remediate broader harms, harms to the public, harms to natural resources. I say that because of the nature of the action that you bring under common law, as well as the many barriers that exist for litigants trying to successfully prosecute a common law cause of action. David mentioned a few of them. What is a nuisance? My nuisance may not be your nuisance. Convincing a court of what constitutes a nuisance can be quite a whimsical process.

Finding a representational plaintiff who can actually come forward and prove the elements of a nuisance, or even the elements of negligence if a duty of care was owed to her, may be an insurmountable obstacle. I think the inadequacy of the remedies – the *Boomer* problem that you mentioned – the difficulty of getting injunctive relief, getting restoration or remediation of environmental harms, is much more problematic under the common law.

I listened to the four criteria that Bruce put forward. I thought they were very useful. And as I thought about my problems with the common law, I was answering each one of them, saying "Well, this is another reason why I don't think the common law fits."

[*] 257 N.E. 2d. 870 (N.Y. 1970).

One problem for me is whether you can devise a system under the common law that gives accountability. My answer to that is no, because again, you are remediating an individual harm as opposed to a broader, public harm. In the common law, although we do have the device of "public nuisance," the pleading burdens under "public nuisance" make it extremely difficult to get broader accountability.

The fact that you may be outcome focused gets into the relief problems that David raised, whether or not the outcome actually is going to fit the harm that you have pleaded in your case.

I think our system is broken. My interest in the common law is to see how it can be used to fix – to repair – what is broken in the system and to fill the interstices. I would note that I think the common law has an amazing vibrancy in the natural resource area, which we're not gathered here today to talk about, but doctrines such as custom and public trust are being employed successfully.

So, I think there is a lot to talk about today and I'm delighted to be here.

MR. KRAUSS: Thank you. Ms. Brubaker?

MS. ELIZABETH BRUBAKER: My approach is going to be a bit different in this presentation. I think that if we want to assess the common law's potential, we have to look at its past and current performance. We have to look at how people have used the common law, what has worked and what hasn't, and why. I will focus, right now, on what has worked, particularly in Canada.

Common law has, for centuries, empowered Canadians to prevent and to clean up pollution.

Both Canada and the United States inherited their common law systems from England, but Canada's system has evolved somewhat differently from that in the United States. In several key respects Canadian common law has remained more powerful. In certain key respects it remained in place for longer. I think we can look at Canada's experience and learn something about what the common law can do for a citizenry.

Common law has, for centuries, empowered Canadians to prevent and to clean up pollution. Pollution usually violates people's common law property rights in one of three ways. It may be a trespass, a nuisance, or a violation of someone's riparian rights. I think that it's useful, given the number of people who haven't even heard of the common law – those that Bruce mentioned – to briefly describe each of these.

Under the common law, it is a trespass to place anything upon anybody else's property. It doesn't matter, in Canadian law, if the substance is toxic or if it's perfectly harmless. It doesn't matter if there is a lot of it or just a little. As a judge in Manitoba explained, "Every invasion of private property, be it ever so minute, is a trespass."

Both landowners and tenants have used trespass law to keep pollutants off their property. Trespass cases have involved sawdust from a lumber mill and pesticide spray. A current trespass case before an Ontario court argues that toxic gases constitute a trespass.

Trespass law prevents direct invasions. For indirect invasions nuisance law often applies. A nuisance interferes with the use or enjoyment of property. Canadians have used nuisance law to protect

themselves from smoke, steam, fumes, foul smells, noises, vibrations, and even road salt. Back in the 1920s, a judge on Canada's Supreme Court went so far as to say, "Pollution is always unlawful and, in itself, constitutes a nuisance."

Another branch of the common law is riparian law. Riparians – people living beside lakes and rivers – have the right to receive water in its natural state. Without their permission, the water cannot be dammed, or diverted, or corrupted. Under the traditional riparian system, the water can't be polluted, or warmed, or discolored, or even hardened without the riparian's permission.

Canadian judges are reluctant to grant damages instead of injunctions. They understand that they can't put a dollar value on many injuries. Injunctions allow the victims to negotiate their own prices.

Nowadays, riparian law is less strict. Regardless, Canadians have used riparian law to fight pulp and paper mill wastes, other industrial effluents, storm water runoff, and sewage pollution. One riparian even used it to get an injunction against a speed boat race that she feared would pollute the lake she lived beside.

Injunctions remain the most common remedies in Canadian property rights cases. Judges are still very reluctant to grant damages instead of injunctions. They understand that they can't put a dollar value on many injuries. They understand that injunctions allow the victims to negotiate their own prices, and I think that's one of the great advantages of the common law system. It allows for a whole variety of solutions to environmental problems. If clean water is priceless to the people living along a river, they can insist that the polluters clean up the river.

Alternatively, if they can tolerate some pollution, they may bargain away all or some of their rights. The important thing is that any resulting bargains are arrived at freely and fairly. These bargains reflect the values and the circumstances of the people involved. This is an issue that Bruce addresses in his book. I think it's one that is very important and I hope we can return to it later in the discussion.

I've spent the last few minutes giving a quick sketch of how the common law has worked in Canada. Of course, there is one obvious question: If the common law is so effective, why do we have so much air and water pollution?

What barriers have prevented people from using the common law? And do these barriers still exist? The most formidable barriers to the common law have been created by our governments. They have passed scores of laws and introduced volumes of regulations overriding the common law. Many of these laws confer what is called 'statutory authority' upon polluters that makes it impossible for victims to sue polluters.

This is not accidental. In fact, many of these laws were introduced specifically in response to the threats to industry posed by people exercising their common law property rights. Common law property rights were simply too effective for many governments.

Let's assume that we could get governments to stop overriding the common law. Let's assume that laws governing polluting industries specified that they conferred no authority to violate others'

property rights. Would people rush to court to defend the environment, or would other barriers still remain?

If we look to the past, we see that a number of factors have prevented people from using the courts to stop pollution. Many of these barriers are now considerably lower than they used to be. For example, one problem, historically, was ignorance. People simply didn't know that pollution had many adverse effects, especially health effects. A hundred and fifty years ago, when Torontonians were dying of cholera, people blamed everything from humid air to drunkenness. No one knew that contaminated water was the problem.

Technological limitations also kept people from making their cases against polluters. A century ago, it was very difficult to trace pollutants to their sources. In England, people used to actually hire runners to stand outside of a factory, wait for the plume of smoke to appear, and then follow the path of the smoke. That's how they had to collect evidence for court. Clearly, our technology is far more sophisticated today.

Socioeconomic factors also limited the use of the common law. Many people accepted polluting industries because they provided jobs, and jobs were more important than comfort in many cases. I recently came across an ad that ran in a Toronto newspaper in 1912. It promoted a new residential development. The family pictured in the ad was placing its home in the middle of a circle formed by nine factories. The decorative border around the ad was a ring of black soot, which was pouring from the smokestacks of these factories. Apparently, in 1912, belching factories could be considered assets in working class neighborhoods. They sold homes.

The most formidable barriers to the common law have been created by our governments.

The cost of lawsuits was another barrier. And cost certainly remains a problem today. In my mind, it is really the only problem. Certain legal reforms, such as contingency fees or class action suits, may make the courts more accessible for people. And environmental groups may join with victims to take on some of the worst polluters. In Toronto, in fact, there are already four environmental groups dedicated to fighting statutory violations. If the pollution victims had stronger common law rights, I'm sure that environmental groups would spring up to defend them also. Even so, I think that more generous legal aid is necessary.

Mind you, if lawsuits become more affordable, I don't think that we will all end up in court. Strong property rights will have a preventative effect. The credible threat of a lawsuit will serve as a real deterrent to polluters. But that threat will not be credible unless everyone, rich and poor, has access to the courts. So, I do think that cost is a problem that has to be solved.

Once we get over the cost hurdle, I'm certain that the common law will look more feasible than ever. Today, we are better informed about the health risks of pollution, we have access to far more sophisticated monitoring technology, we are richer, and we place a greater value than ever on a clean environment. I think, therefore, we are more likely than our ancestors to use our common law property rights to protect the environment.

We can predict some of the results. Companies will have to purchase rights to pollute. If resources are more valuable to them than they are to others, they'll acquire the rights to them. Otherwise, they will have to clean up. Obviously, their costs will rise. But it's very important to remember that the

total costs of their activities will not rise. The costs of pollution are already out there. They already exist. Now, these costs are borne by pollution's victims. Property rights will simply internalize these costs.

Unsustainable industries, industries that exist only because they are able to expropriate other people's rights, will, indeed, suffer. They will not be able to abate their pollution and they won't be able to acquire rights to resources that are of marginal value to them. Without such rights, these industries may well disappear. And they should, if their costs exceed their value.

Under common law companies will have to purchase rights to pollute. Industries that exist only because they are able to expropriate other people's rights,will indeed, suffer.

MR. KRAUSS: Before we open things up, in the same way that Ms. Brubaker described remedies under Canadian common law, I think we should explain the circumstances surrounding the *Boomer* case since it was used to illustrate the common law's difficulty in creating an adequate remedy.

MR. SCHOENBROD: In *Boomer v. Atlantic Cement*, there was a company, Atlantic Cement, who came along to – I was about to say a rural area, but actually Boomer ran a junkyard, which is not well known by law students. In any event, the investment in the factory was a fairly large sum, about $45 million. It employed 300 people or so. It was a major contributor to the local tax base. It was up and running and then declared a nuisance. The New York Court of Appeals said that although the prior law in New York was that all nuisances that caused significant harm must be enjoined, New York was adopting a new doctrine, under which the nuisance wouldn't be enjoined, if enjoining the nuisance would create an undue hardship.

On the facts before the court, it seemed like it was implausible that the cement company could develop a way, in the time that was feasibly available, to abate the pollution. So the court denied an injunction to pollute and required the company to pay for a permanent easement on the property of the plaintiffs.

Part of the court's reasoning, which is apt for our discussion, was that the court said, to paraphrase, "What really motivates us is the great disparity between the harm to the plaintiff –" which was found to be $185,000 – "versus the $45 million invested in the factory." The plaintiff's lawyer replied, to paraphrase again, "But think of all the other people that are hurt by the pollution!" But the court rejoined "Listen! The New York State legislature just passed a statute addressing those types of problems, so harm to the public generally is not our concern; that's for the political process."

MR. KRAUSS: Well, we have several issues on the table. We have heard about a pristine and unequivocal notion of property rights and we have heard about an intrinsically vague definition of property rights that prevents the common law from doing what needs to be done. Any reaction?

DR. YANDLE: Well, I've certainly had a lot of thoughts as I've listened to the comments, which have certainly been helpful. First off, we should make the point that common law hasn't disappeared. Obviously, you are talking about matters at trial under common law.

The remedies for common law did disappear with respect to interstate pollution matters in the U.S. That's where we had federal common law evolving. That got nipped in the bud by federal statutes. But, for controversies that are within the boundaries of a particular state, there is still a body of common law chugging away.

It faces a formidable competitor, however, in statute law and regulation. In our informal polling of attorneys across the country – and this was not a scientific sample at all, but merely calling a large number – the response tended to be, given a set of facts, that "I would contact the state regulatory agency." Mentioning the possibilities of bringing a suit at common law was almost an afterthought, as if this was something that was viewed as not very effective or not a first preference.

Something that you mentioned, Elizabeth, about the earlier period – quite often these discussions, and indeed, a number of environmental policy and law books that I have read over the years, begin with "The Cuyahoga River was burning in Cleveland" and that shows what happens when you leave things to property rights and common law.

That's one of the beauties of the common law. Rulings do not become a hard and fast rule, for the entire country, until the next time Congress rewrites the statute.

For the last two years, I and some of my researchers have been attempting to get to the bottom of that. And, as a matter of fact, that was the second time that river had burned. The event that is usually referred to is 1962. I think the other burning was in 1939. And there were attempts to bring suit at common law, but there was a state statute that had classified rivers, and the judge basically said "That is a matter for the legislature to deal with."

We did see something evolving across the country with classification systems at the state level pushing out some common law remedies. If I look at it through an evolutionary lens, I get the notion that when we got to 1972 we attempted to embody into statute what might have been working fairly well in New York or in Massachusetts or in Illinois with respect to classification systems and regulations and we got the one suit that fits everyone across the entire country and, of course, it "gets concrete poured about it" and we lose the flexibility.

When we talk about these various concerns, criticisms, weaknesses, and strengths, I think we should also ask, "relative to what?" If we get one bad court decision or a curious one, and maybe *Boomer* falls into that category, that applies only to the parties to the controversy. It's one court, a New York court. Other courts at the time were making different decisions. That's the beauty – one of the beauties – of the common law. Common law rulings do not become a hard and fast rule for every cement company in an entire industry, for the entire country, until the next time Congress rewrites the statute or a new regulation shows up in the Federal Register.

Common law has tolerance for error. It is more forgiving of error, or stupidity, as the case might be, for all of us human beings, than a bad statute. When you mentioned the swine problem, I immediately thought about North Carolina, which has 10 million swine now; I think three times more pigs and hogs than people. At one time, North Carolina took pride in the growth of that industry. They also have, by statute, a shield that protects the industry from common law suits.

Why would you put a shield, why would you take away what I would consider to be property rights, common law rights, from the farmers who aren't in the hog raising business or the people downstream? I would think the only reason you would take away rights is because you think the common law is so effective in stopping these kinds of harms that these industries might not be here, because costs will go up and they may go elsewhere. In effect you get a permit to pollute by statute.

When you were speaking of "How would common law deal with some of these problems?" there is no such thing in common law, that I know of, as a permit to pollute. Certainly every statute that we have gives the right to discharge noxious wastes, and if you are operating with the limits of your permit – which does not mean that someone wouldn't be able to bring suit for harms that they could prove as a result of your emissions – but it makes it awfully hard for them to hit a home run when they come up to bat. So the "relative to what?" question is something that we ought to continue to raise as we think about remedies or rules of liability and enforcement mechanisms.

The fact that common law has a state characteristic to it, that there can be peculiarities between states and among states with respect to common law practice and rules, gives it a kind of competitive viability that is useful. Courts reflecting on customs and traditions, perhaps in one jurisdiction, may rule very differently with respect to the same set of facts as a court in another jurisdiction, also reflecting on customs and traditions of the people in that area. Out of this we get a kind of competition of norms, which makes room for people who might think differently to coexist with each other and not end up with hard and fast rules where one suit fits everyone.

There is no such thing in common law as a permit to pollute. Every statute that we have gives the right to discharge noxious wastes, within the limits of your permit.

In terms of my criteria or principles, when I mentioned outcome, what do we have now? We now have regulations that are based on inputs. They are technology-based, command-and-control regulations with little attention paid to outcomes. The basic statutory blueprint is based on inputs, not outcomes. I suggest that is the reason why, even today, we do not have a decent pollution monitoring system in this country that provides the average person with the data that tells whether we've made any progress or not. It is an input-oriented system.

I would argue that there is no such thing as a national environmental problem. Now, to the extent that acid rain exists, it could well be a regional environmental problem. To the extent that there's an ozone layer problem, maybe that is a global environmental problem. But I cannot identify any environmental problem that cuts across the entire boundaries of the nation and contaminates every river in the nation and so forth. They are local, they are regional, and so I would look for solutions that fit the scale of the problem, even if it's a statutory solution.

MR. KRAUSS: Hope is next on the queue, but first I would like to draw out some relatively clear areas of disagreement to enrich our discussion. Bruce and David, I believe, alluded to the Coase article,* David explicitly, Bruce implicitly. What this implies is that if a statute allows me to pollute at will, it does not necessarily mean that I will. You may purchase from me some kind of servitude or easement, some limitation of my rights, and therefore the common law allocation, if it is inefficient, might not be the final allocation.

David points out, however, that if numbers are very high this might not happen. Who is going to sue? There may be a free rider problem. I might be hurt but I might hope that you are going to sue in my stead and therefore I will save these costs. And Elizabeth admitted that these costs were positive and a problem.

Bruce talked about the Cuyahoga River. Is common property something that is just not amenable to common law? Or can we look to the folks who live on the shore of the common property, the riparian landowners, the private property next to the common property, as a way out, as Elizabeth claims? Is there some inherent vagueness in common law rules that prevents corporations from planning? That seemed to be a point that David was alluding to, as opposed to a brighter line drawn by a statutory rule.

There is certainly more, but I think that is enough fodder for the mill right now. Hope?

MS. BABCOCK: Yes, I'm going to pick up on some of that fodder.

One reason that we have statutory standards is because there is a need for a national norm. Why did we think there was a need for a national norm? To avoid pollution havens. I am troubled by the ad hockery of the common law, which I think could lead to pollution havens.

I am also interested in Bruce's comment about our statutes basically permitting pollution, creating a right to pollute, and I wonder, from Elizabeth's standpoint, how the private bargaining that might go on in a riparian situation might not lead to a private bargain which, indeed, authorizes a degree of pollution, because an agreeable price has been set. An obvious concern that I have with private contracting is who are the contracting parties? And I worry about the poor, I worry about the disenfranchised, and their ability to set a sufficiently protective standard bargain for their interests.

I am troubled by the ad hockery of the common law, which I think could lead to pollution havens.

It always gives me great pleasure to defend the Clean Water Act on these grounds. It was cited by Bruce as kind of the paragon of – and I'm exaggerating here to have a bright line – inflexible, national, technology-based standards. A close reading of that statute shows it to be incredibly porous. There are variances for permits that allow for individual adjustments to fit the particular circumstances into which polluters are discharging. The whole concept of state water quality standards is to ground the requirements on a more local basis, with the state being able to identify the resources in the water body of concern to it, and to set standards higher than what the national law requires. So, I look at that law and I see a law that, yes, has a national floor to it, but that allows for a lot of site-specific adjustment.

And I come back to David's earlier point on enforcement. I am intrigued by the concept that environmental groups might be able to join an individual who feels they have been trespassed against or who has suffered a nuisance, and I come back to the concept of property ownership, or at least having property that has been trespassed against or interfered with under nuisance doctrine, and wondering how, except for those few groups that actually own property, organizations like NRDC might be able to join and allege that they have, indeed, suffered a nuisance.

*R.H. Coase, "The Problem of Social Cost", *Journal of Law and Economics 3* (1960).

So, I worry. I think you're absolutely right on the costs of enforcement. These are not easy cases to bring. We are dealing with, now, generations of pollutants that we – the government – barely understands how they behave in an environment of multiple sources and multiple pollutants, which then transmogrify themselves in the environment in some kind of soup, and we're going to ask an individual, urban plaintiff to stand up and file a lawsuit saying that she has been injured in some way.

I am intrigued by the concept that environmental groups might be able to join an individual who feels they have been trespassed against or who has suffered a nuisance.

The Supreme Court just came down with a decision, I think, on the battle of experts, and the ability of expert testimony to be heard by a court, which indicates that it is going to continue to be a battle of experts at the court level.* The result is that you are going to get a lot of different decisions coming out of the common law, and that's troubling, I think, from everybody's perspective.

MR. KRAUSS: Elizabeth?

MS. BRUBAKER: Let me start at the end and work backwards. You asked about the role of environmental groups in helping victims defend themselves. We see an example of what might happen in England, where both riparians and fisheries owners hold very strong common law rights. They often rely on these rights to fight water pollution that adversely affects them and their fisheries.

There is an organization called the Anglers' Cooperative Association (ACA) whose sole reason for being is to help people defend their fisheries against pollution. It launches common law actions on behalf of riparians and fishermen. It has brought something like 2,000 cases since it was founded 50 years ago. It has lost only two. I think that the ACA could provide a very good model for us. If people have rights, they will create organizations to help them defend them. The problem right now is, of course, people don't have strong enough rights.

Moving backwards, I don't think that all pollution havens are illegitimate. I think that private contracts that lead to pollution are legitimate as long as they are negotiated in good faith, as long as the people signing the contracts know what they are getting into. In many cases, people might be facing a choice between a clean river and jobs, more tax dollars for their school system and a better standard of living. We have to let people make those decisions for themselves. If they are in a position where they can bargain and they can say no to pollution, then if they say yes it will be because they believe that they are benefiting.

We see communities making surprising decisions regarding the siting of controversial facilities. For example, most communities don't want nuclear waste dumps. But there are some poor communities that have decided that they do want to host nuclear waste facilities. I think that's their prerogative. I think that it's incredibly condescending of us to say that a community should not be able to make that kind of a decision.

As long as individuals and communities have powerful rights to protect their own interests, they will do so. They will make sure that effective mitigation is in place. They will make sure that they are well

* *General Electric Company v. Joiner*, 118 S. Ct. 512 (1997).

compensated. But I don't think that we should be in the position of saying that there is one set of rules that makes sense for everybody. That said, I would stress that nobody is more likely to protect an environment than the people that live in it. It's the rare exception where people will, willfully, destroy their own environment.

When we look at the cases that I mentioned earlier – the common law cases that inspired the government to pass laws allowing pollution – inevitably, it was the local people who said "We're going to take this sewage polluter to court; we're going to take a pulp mill to court; we're going to take a sawmill to court." In each of those cases, the government was terrified that the exercise of common law property rights would shut down the targeted industries and passed laws protecting the industries.

In the case of sewage pollution, the Ontario government passed a law in the 1950s saying all sewage treatment plants operated by statutory authority. In the case of sawmills and pulp mills, it passed two laws preventing injunctions against these industries. Normally, the people that live downstream from polluting industries fight them, and normally it's the government that intervenes to permit some pollution.

As long as individuals and communities have powerful rights to protect their own interests, they will do so. Nobody is more likely to protect an environment that the people that live in it.

MR. KRAUSS: Your comment reminds me that before coming to George Mason I was a law professor in French Canada, which doesn't have the historic common law system but uses a Napoleonic type code. And the very first pollution case I remember teaching in property law there was from 1890 and it was about a pulp and paper mill and a property owner suing over some very foul odors.

My students were very sensitive to this case because the town is a one-industry town. Even when I taught the case, many years after it arose, it was still a pulp and paper town. An interesting aspect of the case was that the population of the town wasn't suing at all – it was a very wealthy Montrealer who had his cottage in the area and whose weekend entertainment was impeded by the odors that sued. The townsfolk were desperate to keep this factory going. It was their livelihood.

Of course, my students observed that even though the injunction was issued – because the odors were noxious – the factory was still there many years later because, of course, the factory bought out the cottage owner and continued on its way. One wonders if there had been a regulation putting an end to this factory, would it have been as easy to buy one's way out of the regulation, as it is to buy one's way out of the judgment, since it was just one plaintiff.

MR. SCHOENBROD: Now that we have all the toys out of the toy box, I would like to focus in on toy number one, which is the question of liability. If we don't really have a good answer to the question of "What creates liability?" then the rest doesn't matter. The answer I have heard so far is that "Air pollution is a trespass or could be deemed a trespass and so, therefore, there is a clear test of liability." Or, put another way, "Pollution is always unlawful, therefore there is liability." But, if that's the rule we are going to adopt, that means that any emissions create liability. So, given that we can't cook our beans or heat our house without emission, we're in trouble.

An answer to that concern – and it is one that Elizabeth raised – is to say that the polluter, the emitter – I prefer the word emitter because polluter suggests a conclusion – could buy out the victim. But

what do you do if the emitter is the local utility in Washington, D.C.? Who are they going to buy out? Obviously, in many settings, the type of one-to-one transaction that can take place between the owner of the parlor and the owner of the pig is not possible.

If "pollution is always unlawful, therefore there is liability," is the rule we are going to adopt, that means that any emissions create liability given that we can't cook our beans or heat our house without emission.

So, I agree, I think we all agree, that the present system is broken. I don't think we need to look for a system that is 100 percent perfect, but we do need something that gets us in the ballpark. And, for the issue of liability, I have not heard anything yet that gets us into the ballpark.

DR. YANDLE: Let's talk about the liability question a little bit more. When I speak about accountability for parties involved in transactions with each other, I have in mind that liability would have to do with costs imposed on a rightholder. That is, I might be discharging some emissions that fall on you or on your property, but if you cannot demonstrate that there is a cost, to the satisfaction of some judge or a court –

MR. SCHOENBROD: Any cost, or a large cost?

DR. YANDLE: – based on scientific evidence of harm. It might be a health cost, it might be a financial cost, but what I'm suggesting is that you wouldn't just say, "I have a cause of action against you because you cranked up your car and I saw stuff coming out of your tailpipe and it was coming across the yard into my house." I would suggest that kind of standard, one that implies that you have to demonstrate cost imposed on a rightholder against his or her will.

MS. BABCOCK: What is the window of time that you think would be appropriate for the cost to occur? Obviously, one of the problems in the environmental area is the latency problem. You don't know you have suffered a cost and it may be generations until you know you've suffered, but do you keep that window open the entire time until the injury occurs?

DR. YANDLE: I expect that if we were thinking generally, saying "Let's find a rule that would apply to each and every case, in every possible set of circumstances," we would come up with a statute of limitations just to make it workable. I don't have a precise answer, but I want to suggest this: Let's take the easy cases first. You are raising a difficulty, and it a very real difficulty when you have a long gestation period and so forth. But let's not disregard other possibilities for using common law because I can't give you a good answer on that one. Let's not disregard the use of the common law when there is raw sewage coming out of the pipe from the City of Atlanta's treatment works, going into the Chattahoochee River today, and everybody knows that it's there.

MS. BABCOCK: But that's a violation of the Clean Water Act. I can go to court.

DR. YANDLE: But that doesn't matter. Atlanta simply pays the fine and keeps polluting. The people along the river are saying "We are being hurt" and Atlanta says "Fine, we'll just keeping paying this fine. It is such a trivial amount that the United States government imposes on us that it's cheaper for us to pay the penalty than to clean up."

MS. BABCOCK: Is the system, then, broken because we can't go back to Congress and say "Excuse us, fines need to go up?" Every time the Clean Water Act is reauthorized, we up the fines, butbecause of the comment that was made earlier, because of how polarized the interest groups are around these issues, it's very difficult to amend the law.

DR. YANDLE: It is.

MS. BABCOCK: So we're kind of stuck.

DR. YANDLE: I think that's part of it. The attractiveness of the law, with respect to favor seekers or those who may have cartelized an industry by virtue of some regulation that comes out of it, makes it extraordinarily hard, yes.

MS. BRUBAKER: The problem is that the people who are writing and enforcing the laws are not the people who have the strongest incentives to achieve clean water. You used the example of sewage pollution. In Ontario, the government owns or finances many polluting sewage plants. The same government has to enforce clean water laws.

In Ontario, the government owns or finances many polluting sewage plants. The same government has to enforce clean water laws. There's a real conflict of interest there.

There's a real conflict of interest there. The government doesn't have any desire to take itself to court or to require itself to invest more in its own sewage treatment plants. The people living downstream from the plants have a very strong incentive to clean up these plants. If you give power to the people who are immediately affected, they are more likely to act. Some central government is not.

MR. KRAUSS: Let me ask a question of Hope, because her initial comment was deflected by Bruce, who said "This is a very difficult question," and he was dealing with simpler questions, which he thought the common law could address.

But even for the more difficult question of long-term damage, essentially long-term increased risks, common law does deal with all the time in torts. That is to say, if I negligently collide with you while driving my car, you may well claim that not only did you miss last week's work, but you also have some expert who says that you now have a much higher chance of having some other disability because of what I did to you.

And I may produce an expert that says that's balderdash. The common law way of dealing with this has been to let the jury figure out who has made her case more persuasively by the preponderance of the evidence. And so, I take it that there is something about that process that you found objectionable.

MS. BABCOCK: Troubling. I think it is the indeterminacy of the harm that you are trying to prove and the attenuated nexus between the harm that has occurred, the action, and the injury you've suffered, the chain of causation from the discharge of the pollutant upstream to my leukemia, or whatever. You have this very attenuated line of causation that is, first of all, difficult to demonstrate. And then it may not be your leukemia; it may be your grandchild's leukemia.

And there is fact that we know so little. It is not simply the car crash where you can say "All right, you have whiplash." Chances are, if we have enough experience, we know what the timetable might be, what the reasonable expectation of harm might be. We don't know that for a lot of pollutants.

DR. YANDLE: I don't see how a statute helps, though. How does a statute help here?

MS. BABCOCK: The statute helps in a totally different way, by preventing the harm from occurring. The statute acts proactively to prevent harm because it subjects the discharge, the emission of a pollutant, to a set of standards that says we are going to keep this out of the environment or keep it to a low level.

MR. KRAUSS: Is your claim that the regulator – the state – has cheaper access to information about causation than the litigants?

MS. BABCOCK: No, I think nobody knows.

There is so much that is unknown. Now, we can lay that blame on the failure of the Toxic Substances Control Act or our pesticide laws. We just simply have not been able to generate information about how a lot of these chemicals behave in the environment. We just don't have that information.

MR. KRAUSS: So there is basic uncertainty about how the world works that has always plagued humanity. We don't have perfect certainty about what causes what. But your point is that this uncertainty argues for regulation, for command and control, not because the state has access to this perfect knowledge, but because –

MS. BABCOCK: Well, let me back up. It argues against common law because the damages you are going to get from a common law action are going to be inadequate, so you are not going to get the accountability, which I agree with Bruce is an extremely important part of the exercise.

MR. SCHOENBROD: But under Bruce's approach, you wouldn't need to be relegated to damages. I would gather, under his approach, once there was a cost then there could be an injunction.

MS. BABCOCK: But that gets to David's problem, that you may achieve too much when you shut down the plant as opposed to modifying the operation in some way.

MR. SCHOENBROD: Exactly, but let me try to sharpen the question a little bit. Let's say I can prove that the factory down the road is imposing a dollar's cost on me. But it turns out that it is the mainstay of the economy of the town. And now you have 800 people living in the town, each of whom were damaged to the tune of one dollar, and any one of them can enjoin the plant. That is a very bad situation.

For a car crash, we know what the reasonable expectation of harm might be. We don't know that for a lot of pollutants.

DR. YANDLE: Well, if we looked at how common law judges handled those kinds of situations, I guess you could put it in two categories. Some balanced. And I would suggest that they engaged in political behavior.

MR. SCHOENBROD: I agree.

DR. YANDLE: So they were balancing.

The others drew a bright line and said "You either have rights or you don't have rights. Even if it is a dollar's worth of harm, you have to stop or you have to make this person happy." Now, that might

mean I'm going to give you two years, or I'm going to get the professor of engineering at Vanderbilt, as they did in the Tennessee Copper case, to come over and work with you, and you will have to pay that guy to solve your problem.

I think in some of the cases we see, it appears that the judge is thinking "I don't want to bankrupt this community, and we don't have any evidence of a technical solution but we're going to find one, or else."

MR. SCHOENBROD: This is where Santa Claus comes in.

DR. YANDLE: I guess EPA calls it "technology forcing."

But I want to look closely at what happens under regulation from what might appear to be a statute that allows a lot of flexibility. It appears to me that the arteries harden along the way. That is, the statute may appear to have flexibility, and as we read it in plain English it does, but the Federal Register notice that goes out, or the effluent guidelines or whatever, doesn't have nearly that flexibility. Sometimes it seems as though they forgot to read part of the statute.

If we take the toxics release inventory requirement, for example, every emitter within a certain category has to report, by pounds, from a listing of something like 530 chemicals. The chemicals are not identified by toxicity, so you can be one of the top 10 polluters in your state and you'll get a nice news story in your paper if you are, but it doesn't mean that you're imposing toxic chemicals on people in your region.

You might be number 500 but be the worst of all. Still, environmentalists will say "They're clean." Industry, together, emits 17 percent of those chemicals in this country. That is, the people who are reporting are 17 percent of the problem, yet they are portrayed as 100 percent of the solution. Now, that's pretty crude. If we are worried about these toxics actually leading to some kind of health effect over the long-term, then I think the public is being misled.

What happens under regulation from what might appear to be a statute that allows a lot of flexibility? It appears to me that the arteries harden along the way.

MS. BRUBAKER: Hope, you were concerned about the difficulty of proving harm. One of the interesting things about both trespass and riparian law in Canada, and I don't know whether it's true here in the United States, is that one need not prove harm; one need prove only the existence of the trespass or of the pollutant. It's not necessary to say "This is going to give me leukemia 20 years from now." I think it's important to keep that in mind.

Now, that doesn't mean, though, that everybody who suffers one dollar of damages is going to go to the courts, because the courts won't listen to frivolous cases. There are a number of rules governing the courts. "Live and let live" is one of them. There is another rule preventing the law from dealing with trifles. The courts will simply dismiss cases if they think that they are frivolous.

In terms of one person holding up a community, you have to remember that that person's costs are real. And his opportunity costs are also real. If he is offered a deal and he refuses it, then he is turning down a real offer of money, or whatever, which means he really does value his environment to that extent.

So, I think the combination of those factors steers us away from a meaningless protection of common law rights and steers us toward some sort of –

MR. SCHOENBROD: If we have hundreds of receptors, then the free rider and other problems mean that even though people acting rationally would accept a deal that allows the local plant to continue, there may be no deal.

MS. BRUBAKER: It may be a problem. It is more of a problem if there are no alternatives. The existence of alternatives limits the costs of satisfying the demands of those holding out for a better deal. Technological alternatives or geographical alternatives put a cap on those costs. And it is very rare that there aren't alternatives.

Under both trespass and riparian law, one need prove only the existence of the trespass or of the pollutant. It's not necessary to say "This is going to give me leukemia 20 years from now."

MR. KRAUSS: Didn't you mention earlier, though, the possibility of reducing these transaction costs through an arbitrageur? You named an English association of individuals that can actually group the individual claims together at a cheaper –

DR. YANDLE: The angling society.

MS. BRUBAKER: Well, that's right. Bruce makes that point beautifully in his book. He says large numbers can become small numbers, and it is a very good point. Large numbers cases, as large numbers cases, don't work as well. But there are all sorts of ways to bring those large numbers down to small numbers, and the English Angler's Cooperative Association is a good example of that.

I think it's Terry Anderson who says that "perfection is the enemy of the good." We don't need to find a single solution to all of our environmental problems. There is no question that common law will not work when we are talking about, say, an unowned resource such as the atmosphere. It is not going to help us solve global warming. But it works in so many important cases! Let's let it work in those cases!

MR. KRAUSS: I'd like to focus on a point that Hope made earlier and that nobody addressed, and I'll address the point to those who are generally coming down on the side of private ordering. Hope said something like this: There are folks that either have no property or have such a small amount of property that they are, an economist would say, unwilling to pay. They are not the highest valued users of the clean environment and they are unwilling to pay for the cessation. Therefore, from what economists would call a Caldor-Hicks standpoint, they are not the highest valued user. Wealth would not be maximized by granting them the entitlement to be free from pollution.

Implicit in Hope's comment is that they should have the entitlement, even if they are not the highest valued user. So, the question is how to deal with those who have no property or too little property to feel an invasion.

DR. YANDLE: A few thoughts. First off, let's brighten it up a little bit by saying poor communities or poor neighborhoods, because I think that is the picture we have, as opposed to one poor individual who may be suffering as a result of some environmental catastrophe. It does get down to

neighborhoods. I would ask "How does that neighborhood fare under the regulatory system?" That is, "Relative to what?" But that doesn't speak to the question directly.

I think that the poor community is going to get the short end of the stick under any system. I would question whether they are any better off under statute than under common law. But, if those individuals have rights, property rights, or environmental rights as I prefer to call them, which was the common law system, at least it is possible for others to come to their defense in the courts. Most of the incinerators get located in poor communities, by eminent domain. The poor don't get the chance to get rich through the market by saying "You have to buy our property."

I don't think either system addresses the problem very well that you are talking about. Take Superfund sites. Most of them are in poor neighborhoods, and I would also suggest that those will be the last ones cleaned up. That's tough for the poor community, but at least, I think, the chances are better for volunteer associations and those who see this as something important, to try to do something about it within the context of common law courts, as opposed to lobbying Congress to change the statute.

MS. BABCOCK: Let me just note one particular problem for the urban poor neighborhood from relying on the common law. It is not a single source of pollution affecting these neighborhoods. They live in a polluted environment. They live in an environment which is already a nuisance, an aggregation of nuisances.

I think that the poor community is going to get the short end of the stick under any system. I would question whether they are any better off under statute than under common law.

DR. YANDLE: Yes. That's right.

MS. BABCOCK: So, how does that poor community argue in court that the last one on the block, the new entrant, has created a discernible, disaggregated nuisance that they can then complain about? That is a real problem.

I agree with you, and this has been a frustration. I was listening to you, Elizabeth, thinking, "Boy, the answer, to me, is if we can figure out how to get a harmonious system that is a composite of statutes and common law, I think we could do a lot more for our environment." I hope at some point we are going to talk about the points where the two systems are clashing, where we could agree that common law might provide an effective remedy and that statutes are creating a problem, and other areas where we think the statutes might be effective. We don't want to then erroneously substitute common law for a statutory framework that is either working well enough, not holding up the perfection standard, or maybe someday we will be able to tinker with it and get it to a better point.

But, for the urban poor, for the person who is already living in a pollution haven, whether it's in Louisiana or Anacostia or wherever, I don't think that the common law gives them, at least not under nuisance, a handle that they can use against the most recent entrant.

MR. KRAUSS: I will ask for questions from the observers in a moment, but first let me pose a question to the panelists. Hope has been raised the point that we might be able to do more for the environment through a mix of statute and common law. The implication is that we should do more for the environment, that we are not doing enough for the environment. Is it possible to do too much for the environment?

MR. SCHOENBROD: You know, when I hear Hope talking, I think of a horror movie called "EPA meets the American Trial Lawyers Association."

MR. KRAUSS: Is it possible to have too little pollution or is the optimum amount of pollution zero? That is to say, as long as there is pollution out there, does that mean that we're not doing enough for the environment?

MS. BABCOCK: Anthrax, zero. I mean, it depends what the pollutant is. No, I don't think anybody would say that zero –

If we can figure out how to get a harmonious system that is a composite of statutes and common law, I think we could do a lot more for our environment.

MR. KRAUSS: Since to live we have to pollute.

MS. BABCOCK: Well, and you need to discharge –

DR. YANDLE: I think we are doing far too much at some margins, far too much.

MR. KRAUSS: I just wasn't sure there was a consensus. I thought the comment that we could do more for the environment, implied that we are not doing enough. But is there a consensus that we're not doing enough for the environment, that under the present laws there is too much pollution everywhere?

Elizabeth wondered what if West Virginians want more pollution? They currently, willingly, take the trash from my county to their landfills.

MS. BRUBAKER: I asked that, but I also said I don't think there's anybody more likely to protect West Virginia than West Virginians.

MS. BABCOCK: That gets to a much larger political question. How did West Virginia get into a situation where trash is appealing? Was it the result of years and years and years of unregulated strip mining, of chemical emissions, so that as a society, as a population, they have not been able to gain a level of material wealth, and that the managers, the executives, were not necessarily living in West Virginia? It was the workers who were kept down at a fairly low wage level, what do they do when the mines close down because of the Clean Air Act or whatever?

I happen to represent a lot of people who are living in pollution havens, and there is just simply not a good pollution haven. Their ability to bargain their way out into a better situation is pretty poor. The choice is not between a nuclear waste disposal site and a shoe factory. The other option is nothing. Unfortunately, the choices are horrible choices, so I have a problem with applauding freedom of choice here, because I don't think the choice is that free.

MR. KRAUSS: Let me ask, now, for questions from around the room.

DR. PETER VAN DOREN: Peter Van Doren from the Cato Institute.

When I teach my law and economics and policy classes, I always try to get students to distinguish between wealth effects and efficiency effects, which we are dancing around, but no one has said those two words.

One possibility: These comments are all about why initial wealth effects are the way they are, and the fact that we wish they weren't that way. But, of course, that's no reason not to adopt some efficiency-enhancing system. One possibility that combines statute and common law is to have the political system worry about wealth effects. But, once they are created, let people trade them, buy them, and sell them through common law, et cetera.

My guess is that some people would like very poor people to have all of the amenity rights, then others would have to buy them. Okay. The Coase theorem says we can do that. We can give all the nice property rights to poor people in West Virginia and northern New York State, where I grew up, and then let everyone else try to buy away those rights to create a more polluted environment. That's one solution.

One possibility that combines staute and common law is to have the political system worry about wealth effects. But, once rights are created, let people trade them, buy them, and sell them through common law.

Another solution would be to have all the initial wealth given to already rich people, and then have poor people try to buy their way to a better environment. Critics, of course, might say "Well, I'm not sure the equilibrium amount of pollution would be identical under those two scenarios." So, I think that's the conflict that's lurking beneath this discussion that hasn't been explicitly stated.

MR. SCHOENBROD: The way I translate what Dr. Van Doren is saying is that the legislature could create liability standards, but then one could trade these rights away, and a lot of West Virginians could do as they please, for example.

DR. VAN DOREN: Right. The real questions is "What are the initial property rights and who owns them?" So, the concern is about "What is the right level of nuisance to accept?" Or, to say it in wealth terms, "Who has the initial property rights to what level of pollution, and would that initial property right be different in another state?" It very well might be.

It's clear to me that somebody, probably the legislature, can play a role in deciding what that is initially. Professor Yandle may say we want local courts to actually decide what initial property rights are, through something called custom.

MR. KRAUSS: Let me emphasize an aspect of Dr. Van Doren's point, brought out in a very classic Law Review article over 20 years ago.* This article emphasized that there are different ways to protect entitlements. You can make an entitlement inalienable. You can say you have the right to be free from pollution. You have the right to have your land free from pollution and darnit, you can't sell that right. It is such an important right, we think, that you would be crazy to sell it, and so we are not going to let you sell it.

And I take it that part of Bruce's point is that regulations tend to establish a lot of inalienable rights. Whereas I take it that Dr. Van Doren is saying that it would be certainly conceivable to imagine property rights, as opposed to an inalienability rule, what the authors of this article called a property rule. That is to say, you may have the right to be free from pollution, but you can trade off this right for something you value even more than clean land, for example a job or the possibility that your kids won't have to leave West Virginia to find a job.

So, Dr. Van Doren's question refocuses part of our discussion in an interesting way. Is it the case that the common law is more amenable to property rules and that regulation is more amenable to inalienability rules? If that were so, then from an efficiency perspective that would be a clear argument in favor of the common law as opposed to of regulation.

MS. BABCOCK: One problem I have with that – and we haven't addressed this – is that pollution is not static; it moves. The fact that you have an air emission or emission to water, or are negotiating a hazardous waste site may ignore the fact that you have taken land out of, perhaps, a migratory pathway for birds. So you have, again, through private ordering, negotiated a public good away.

And so I have a problem fitting this private bargaining construct into what we are concerned about in the environmental area, beyond my individual property interest or my interest in clean air. So I worry. When I think about bargaining in West Virginia over a water emission, I immediately start thinking of the Potomac River, and I think of the entire Potomac River watershed, which of course gets me to the Chesapeake Bay. Who comes to the table to bargain? Who is the representational entity that speaks for all of those interests? So, again, at a very practical level, I wonder how this bargaining actually would work. Although it is a useful construct.

DR. YANDLE: A couple of thoughts here.

To explain political behavior, we must say that politicians are in the business of redistributing wealth. That is the model I would use for explaining their behavior. I would not use the model that says politicians are in the business of making the world more efficient, of finding low cost ways to produce well-being.

Then, I would ask, "What are common law courts about?" I would not use a model saying that common law judges, through the centuries, have been in the business of redistributing wealth and favoring one group versus another. I would say that they have been making decisions that had to do with the redistribution of wealth, but since they were competitive and their rules only applied to two parties, or the parties to the controversy, they were not very good at redistributing the wealth of a country.

On that basis, a long way to get to your question – I would say that property rules have a better chance of survival in that common law/private ordering system than in the political/legislative system, because legislators are in that business – their reward system stems from this game of juggling wealth.

But your question is about a larger problem. Things were evolving here before 1972 that got nipped in the bud by, specifically, the Federal Water Pollution Control Act (i.e. the Clean Water Act). We had multi-state compacts working. The Ohio River and Sanitation Commission (ORANSCO) was a wonderful example of it, going back to 1948. Ten states were involved, there was continuous monitoring of the Ohio River from Cincinnati all the way back up to New York, and that's not private ordering. Cincinnati got tired of getting Pittsburgh's untreated sewage, and once typhoid and gastroenteritis attacks, which do not abide by the law of gravity, started going back upstream, the folks in Pittsburgh began to pay a price for their own behavior. So they coalesced and formed a not-for-profit corporation called ORANSCO.

* G. Calabresi & D.Melamed, "Property Rules, Liability Rules and Inalienability : One View of the Cathedral," 85 *Harvard L. Rev.* 1089 (1972).

There were about eight of those that had formed in the United States and were forming prior to 1972. Incomes were rising and, as you were pointing out, this caused people to begin to reassess their situation. Life expectancies were increasing so that the chances of dying from cancer became very real as well. But, the Federal Water Pollution Control Act cut the legs out from under those competing governments and, at the same time, cut the legs out of common law remedies across those state lines and replaced them with statute.

What I'm suggesting is that there are a lot of cooperative ways, including angling societies, multi-state compacts, non-profit corporations, river basin associations, river clubs – we have about 500 river clubs in the United States now – for people to get involved in trying to protect their property rights. I'd like to see all of that. I'd like to see the cauldron bubbling with the inventiveness and the creativity of people addressing this problem, instead of a monopoly cauldron that bubbles every 10 years.

MR. KRAUSS: Would you include things like the development of class actions as another way to approach this?

DR. YANDLE: To deal with the public good problem? Sure.

MS. BABCOCK: They're cumbersome. It's difficult to form a class, it's difficult to hold a class, and the courts are getting more resistant to class actions. Granted, there have been extreme examples of it that tested the courts' tolerance. But, a class action has a lot of problems.

I'd like to see the cauldron bubbling with the inventiveness and the creativity of angling societies, multi-state compacts, non-profit corporations, river basin associations, and river clubs,instead of a monopoly cauldron that bubbles every 10 years.

MR. KRAUSS: Other questions?

MR. JERRY TAYLOR: Jerry Taylor, Cato Institute. I believe it was Morton Horwitz, a historian from Harvard, who wrote a book called *The Transformation of American Law*[*], and in the course of this rather famous book he made some mention of this issue. What he argued was that common law in the environmental arena in this country was slowly abandoned through a transformation of the ideological culture of the legal system; that it moved toward a system in which the rights of the trespassers were paramount in the balancing test in the course of weighing societal interests.

Horwitz's thesis was that it was not so much statutes that undercut common law environmental protection, but a legal culture which became dominated progressively by concerns of the public good and the public interest which, ironically, were subsequently cut.

So, what I'd like to ask Professor Yandle is, one, does he accept this hypothesis, since this book contains some controversial interpretation of legal history, and two, if he does find some merit to Horwitz's thesis, what confidence does he have that a return to the common law would provide any sort of a different culture since today, if anything, we seem more utilitarian than ever before? What

reason do we have to believe that judges will adamantly support the rights of property owners and not engage in some sort of balancing test to determine these things?

What confidence is there that a return to the common law would provide any sort of a different culture since today, if anything, we seem more utilitarian than ever before?

DR. YANDLE: Yes, I'm sympathetic with his story, and he cites plenty of evidence. If you review common law court cases in Pennsylvania, for example, over time, sometimes with the same judge and with similar sets of facts, you encounter balancing. Part of this relates to the Great Depression. Did judges change the way they thought, so that simultaneously, over a large, industrialized, region, judges started balancing? The same judges! Or was it a depression?

And had there not been the Great Depression, would the rule of property have survived better, as opposed to shutting down the coal mine and saying "Miss Jones, you have to accept the waste?" So, I think there's a little bit of Great Depression in that story as well. Would judges not balance in the future? I have no basis for concluding that they would not.

MR. TAYLOR: We know legislators would not. Of course that's a side point.

DR. YANDLE: And, you know, I keep coming back to this – common law judges are not monopolists. But the legislative body is a monopoly lawmaker.

I think there tends to be a race to the top, not the bottom, in the environmental arena now, and there would be a tendency to enforce environmental rights rather strongly now, but I don't know what would happen if we have another Great Depression.

MR. KRAUSS: Other comments?

MR. JONATHAN ADLER: Jonathan Adler, CEI. It seems that the progressive fear of the holdout and free-rider problems mentioned by Professors Schoenbrod and Babcock are not limited to environmental issues, and I think that looking at these "problems" in other areas can help us think about the extent to which private ordering can deal with these concerns.

In areas like utility rights-of-way, for a long period of time it had been the conventional wisdom that unless you give the power of eminent domain to the utility, then it will be unable to build a pipeline, string up wires, or whatever. But there's all kinds of historical evidence that they developed all sorts of gaming systems to deal with the one landowner who might hold out and hurt the whole community.

The example I'm personally familiar will is that of casinos in Atlantic City where, at least initially, casinos couldn't use eminent domain and, as a result, there are casinos that are literally built over and around the properties of landowners that refused to sell. So we see that these sorts of situations are reconcilable and that the holdout problem isn't a very big one.

I wonder if someone would like to address the implication of these experiences for potential holdout problems in a common law context.

* New York: Oxford University Press, 1992.

MR. SCHOENBROD: I think the holdout problem, the worst one, is the pollution injunction because you could always build around the sandwich shop. But if you have 800 people who are potential plaintiffs and you pay off 799, the remaining one person could stop you cold.

MR. ADLER: The issue is, ex post, a problem where you're dealing with a facility that's already in place. But if you have, for example, a company that's deciding where to put a new factory –

MR. SCHOENBROD: Ah, that's different.

MR. ADLER: Because part of what, I think, we're asking is whether or not we sold ourselves short by not having private ordering in these realms over the past 20 or 30 years. Did we sell environmental protection short? And would we not have had a situation where the company would have come in and said "If I don't get all 800 – in this town – I'm going to go to a town where I can get all 800." And that, all of a sudden, creates all kinds of pressures for the one holdout to not be the holdout, whether it's informal pressure from neighbors, whether it's the recognition of opportunity costs, and so on.

It has been conventional wisdom that without the power of eminent domain there will be holdout and free-rider problems. But there's all kinds of historical evidence of systems to deal with them.

MR. SCHOENBROD: Although I've raised a lot of issues with the common law approach, our present statutory approach is bad enough that it really is worth investigating these alternatives.

I think – and I want to say this specifically to Professor Yandle and Ms. Brubaker – I think that your case would be more powerful if you described its limits in your presentations - in other words, in your future writings. This is what I'd like to see you do: Okay, there's a series of potential objections. I think some of them can be overcome by the common law. Some of them could be overcome the way Dr. Van Doren suggests – through a legislative fix. If you described all that, and came up with a program, you'd have a much more powerful case, politically and intellectually. I'd really urge you to do that. I think it would be a great public service.

MR. KRAUSS: An interesting point was raised that I'm not sure has really been addressed, so allow me to rephrase it: The cat is already in the henhouse. We don't have a system of adjudication as they do in Europe, for example, where some judges judge only private law disputes and other judges judge only public law disputes. Our courts are diverse; one judge will take a criminal case one day, a regulatory case, a torts or contracts case on another day.

Our judges have become regulators. They see themselves as regulators in the public interest. There's no going back. The common law is "pie in the sky" because – I'm overstating the case as a caricature here – because we have folks who are unaccountable regulators in the judicial branch and accountable regulators in the executive branch; we might as well take the accountable ones in the executive branch rather than the unaccountable ones in the judicial branch.

DR. YANDLE: Boy, you make a tough case!

This is not a very good answer to the proposition you described – but we do not know what would have evolved had we not had such a heavy-handed approach to statutes and regulation, with respect to these questions.

I think it's quite likely we would have had not just special masters but specialized courts, as has been the experience elsewhere and the case across history. For example, land courts and forest courts were mentioned in the Magna Carta. There is an old body of law that we could go back to, if we wanted to talk about it.

It may not be relevant to what we're talking about today, but it does suggest that human beings are very creative in coming up with institutions. I do think there's an efficiency theme that goes through what we do, an evolutionary force, that causes us to survive and go forward.

I don't object to it because I can't think of a better way to say it – but when you said "Go back to", in a way, that's what we are talking about when we say that common law worked "back when," let's do it again. But I don't think there is a lot of hope for ideas going forward if we couch them in terms of "going back to the good old days" when common law did so and so. Let's talk about a new model, a rich model. In the last chapter in my book I say "Look, the world is put together with statutes." And in my view, it always will be. What I'm speculating about is how to make room for common law thinking and, in some cases, common law as common law, within the presence of statutes that may be evolving?

Okay, I haven't really addressed your question head-on, but I've tried to hit it a glancing blow every now and then.

MS. BABCOCK: If I could give you an assignment, it would be to research the doctrine of ouster. Why do our courts so quickly say that they are not going to hear a common law suit because there is a specter of a statute out there? Is it the discomfort of dealing with a political problem? The courts are saying "This really belongs in the legislative branch. The legislative branch, the representational branch, has greater competence."

Our judges have become regulators. They see themselves as regulators in the public interest. There's no going back.

I think the villain is the doctrine of ouster. I think if you want to go back to *Milwaukee* and its progeny, that's really where, thanks to the Supreme Court, we took a wrong turn, the idea that common law doctrine could not co-exist in a statutory framework. *

If we could convince courts that they can do it, that they need to hear common law cases, that common law cases do give a vibrancy to the law here, that they do allow for the particular situation – I think Elizabeth is talking about down to the particular problem, allowing local communities to speak, – we could bring flexibility into the law and allow private bargaining when private bargaining is appropriate.

So, if I have a villain, it is ouster and preemption.

MR. KRAUSS: This is not my principal field – I'm a torts professor – but I do notice a slight movement away from preemption. The Supreme Court is a little bit more hesitant to preempt state statutes with federal statutes these days. Now, of course, common law is state law, so if preemption is narrowing, then there might be some prospect for a common law toehold. In other words, it might be that the desire to overrun state common law was, in fact, just part of a desire to replace it with federal law, and if now there is a movement to reestablish state sovereignty, then common law might be a part of that sovereignty.

MR. SCHOENBROD: But it is also a problem at the state level as well. One of the first suits I brought at NRDC was a nuisance case in the state courts, and I lost. I basically went all the way to the top court of the state and they said "We don't want to have anything to do with it. This is a hot topic. We don't want to touch it." The real problem is that so many of these issues are policy issues and some courts do not want to decide policy issues without a judicially manageable standard. Because zero pollution is not a feasible standard, we are in search of a feasible standard that is judicially manageable.

MR. KRAUSS: Any other comments?

MR. TAYLOR: I'm not sure that it is possible for a synthesis to exist between statute and common law in the same arena of environmental problems. I suspect that this is the case because under a statute, you essentially have a public body making claims about the rules upon which property will be used, can be protected, or can be violated in some senses. There is, implicitly, a presumption of public good over that piece of property.

Why do our courts so quickly say that they are not going to hear a common law suit because there is a specter of a statute out there? Is it the discomfort of dealing with a political problem?

When you have a private suit you have, in the arena of common law and the environment, the argument that someone's private property, whether it is their own body or the lake they're living next to, has been trespassed against. Now, how can you sort out how much you own, how much the public owns, and what is the public interest? Once the statute comes into play it becomes very difficult to argue that you were transgressed upon, as opposed to the community that was violated, and I think that's where you get into some serious problems.

I definitely think that you have identified the root of the problem. But I'm not sure that those two regimes can be melded together in a certain arena, where it is very difficult to determine who is supposed to own this property, who can claim they were harmed, and who has standing to move forward. In some places you might have to abandon common law because it's very hard for me to put together the pieces that provide for property right protections over Chesapeake Bay non-point source pollution.

MS. BABCOCK: That was my point.

MR. TAYLOR: Maybe there's a great answer out there and Murray Rothbard's son can go along and solve it for us.

But, until that day, this is an arena where I would say the regulatory system probably has to stand.

MS. BABCOCK: I think that is a very telling comment. It brings to mind a case that I hope we are going to bring very soon, against a facility that is clearly causing a nuisance in a community, and I'm looking over my shoulder at the District of Columbia government, which seems to be on the precipice of actually doing something in a regulatory sense. So, I'm very worried about doctrines like ouster and primary jurisdiction. I think I have a classic nuisance case. I have property owners, and their enjoyment of their property has been substantially interfered with, and I think I can show the necessary intent, foreseeability, whatever.

**Illinois v. Milwaukee*, 406 U.S. 91(1972).

But I'm very worried about this idea that there is an incipient regulatory regime that might already be viable enough for a court to say "I'm sorry, we're simply not going to touch a highly contentious political issue like whether this facility should be able to operate." It is doing public good, although it is also obviously doing public harm. So, when I think about co-existence, I think, "Is there a way that one can continue to use common law to fill in interstices where the law may be inadequate?" Because I don't believe the District government is ever going to come out with those regulations.

MR. KRAUSS: Bruce, then one final question and final comments.

DR. YANDLE: Jerry, your comments cause me to want to revise or at least speak more precisely about something I said just a moment ago. When I referred to my discussion in the last chapter of this book I wanted to make it clear that I am not recommending a mix of statutes and common law. This last chapter is a forecast of how I think the world is going to be, and when I say the world is going to be put together with statutes, I'm not saying that I think it ought to be put together with statutes; I think it *will* be put together with statutes.

I think the lessons of history tell us that politics and property rights just don't co-exist very well. They never have, across history. And maybe that is part of your point. That is, to rely on the political mechanism to bring definition and protection of tradable property rights and the flourishing of markets is, as I think Fred Smith says, "Looking for love in all the wrong places."

But, we can get a force that deals with the non-point source pollution problem. We got it on the Tar River in North Carolina, where the EPA said "Look, the approach we are taking is not going to solve your problem. Eighty percent of the problem in this river and in this sound is from non-point sources, and we can't solve it. But if you don't do it, we will lay some regulatory concrete on you like none you have ever seen." And so those people formed a not-for-profit corporation, called the Tar-Pamlico River Basin Association. They defined property rights and they have markets and they have trading and they are relying on common law contracts. But there was a gun put to their heads!

So maybe you can have a force that elicits a response. I'm not suggesting that we have arrived with this. But it does show, in a way, how markets can emerge from under the regulatory concrete.

I think the lessons of history tell us that politics and property rights just don't co-exist very well.

MR. JONATHAN TOLMAN: Jonathan Tolman, CEI. Mr. Schoenbrod mentioned earlier that if common law had a zero pollution tolerance, he didn't actually see how it would work. Yet, in listening to the Canadian case, it sounds like trespass, not necessarily nuisance but simply trespass sounds to me like zero tolerance. Detecting one molecule coming onto your river or your stream.

My question is: "Is there some other check in the process in Canada or are there other forces are at play that still allow the system to work?" Because it seems to me that they have a zero pollution tolerance, at least theoretically, but yet the system seems to work, at least more effectively than the statutory system does.

MS. BRUBAKER: Zero tolerance made a lot more sense when science was in its infancy and we were talking about what were called "sensible pollutants" things that could be sensed, things that could be seen or smelled. There were cases in the 1950s that determined that invisible pollutants could, indeed,

constitute trespasses, and these made trespass law a lot more complicated. I mentioned a suit in frontof an Ontario court right now, in which invisible gases are said to be trespasses. We'll see how that works its way through the courts.

I think trespass law will become unworkable if all microscopic matter is deemed to be a trespass. Courts may begin to require proof of harm in such cases. And they certainly will step up their arguments against frivolity. This process is a perfect example of the evolution that Bruce refers to.

MR. KRAUSS: Did you have another comment that you wanted to make?

MS. BRUBAKER: Yes, on this question of whether common law and statutes can co-exist. I'd like to see whether they have been able to co-exist in the past. I'd like to look at what's happened, instead of just fretting over what might theoretically happen. In 19th century England we find a good example of statutes and common law co-existing. The state had begun to introduce a lot of legislation governing utilities – for example granting gas companies rights to service particular areas – and it would, as a rule, write into these statutes that they did not confer any authority to violate individuals' common law property rights. They did not confer authority to commit nuisances. I think that this practice worked very well. I have never heard of a problem with co-existence, so it's not something that concerns me greatly.

In 19th century England we find statutes and common law co-existing. When state began granting gas companies rights to service particular areas, it would, as a rule, not confer authority to commit nuisances.

I think a more interesting question that we might want to spend a few minutes on is whether we can introduce certain elements of the common law into statutes. One of the great things about the common law is the decentralization that it permits. Can we, somehow, decentralize statutory law, so that we can have more community input into the formation of statutes and standards?

There are a lot of environmentally beneficial incentives built into the common law. Can we introduce those incentives, somehow, into statutory law? Can we set up our statutes in such ways that they mirror the best in the common law? I think that's a great challenge for us. If we do have some mix of statutes and common law, as we're inevitably going to have, how can we bring out the best in both systems?

MR. KRAUSS: I'm not sure that we're going to have time to address this explicitly but we have, I think, addressed it implicitly. At one level, an individual owns property. At another level, it is somehow the country that owns it. That's very different.

But, of course, as you federalize and as you decentralize, you get closer to individual property. You get to a collectivity of individuals. Bruce has given some examples of regions getting together and, if municipalities had the right to legislate, as opposed to the province or the state involved, then there would be, presumably, competition among municipalities that might have the wealth. Those who are more concerned about disparate wealth effects may have severe problems with that, obviously.

MR. ROBERT J. SMITH: Robert J. Smith, CEI. This is sort of a discretionary footnote. But, regarding the earlier comment about environmental groups working with property-owning organizations or individuals to protect the environment, there is an interesting tradition, with the National

Audubon Society perhaps the best example, of using private property rights and trespass law to protect wildlife and vanishing wildlife, going back to the turn of the century when so many birds like egrets, the plumed birds, were vanishing because there were no laws to protect them. Audubon set up its own system of private sanctuaries and wardens and went around and found the last places where these species bred. They bought them and owned them in fee simple and put a warden out there to protect them. And, in fact, the first three wildlife wardens in American history to be murdered were private Audubon wardens, protecting plumed birds. One was Guy Bradley.

Going back to the turn of the century, there has been a tradition of environmental groups working with property-owning organizations or individuals to protect the environment.

And since they couldn't own everything, they even went into areas, for example all these little coastal islands off the Atlantic Coast, and would ask the landowners of these islands to post their land against trespass, so that Audubon could then arrest people for trespassing if they came on to gather the eider ducks, eggs, or whatever. So there *was* a tradition environmental groups using property rights against trespass to protect wildlife and environmental amenities.

Before what some may consider to be changes in its essential nature, all sorts of organizations like the Nature Conservancy did similar things.

MR. KRAUSS: Finally, let me ask for some final, very brief thoughts from each of the panelists.

MS. BABCOCK: Well, I'd like to ask you to reconvene a similar group to further explore how we can fit the two systems together. I think Elizabeth's comment about trying to import into statutes what is good, and vibrant, and helpful from the common law is a wonderful comment. I would like to explore ways that the barriers to using common law more effectively could come down, which we've merely mentioned here.

I think it is too easy to throw stones at the common law and to dismiss it, even though we are looking over our shoulder and realizing that our statutory framework is imperfect at best. And I'd like to move on, soon, and try to figure out how we can make both systems work.

MR. SCHOENBROD: I essentially agree. I'd just like to state it a little differently. I think the advocates for the common law approach have made an effective case that the common law has a lot to offer. What we really need now is a concrete program that consists, number one, of what the common law do can as is, on its own. And, number two, what it could do if some defects or shortcomings were fixed by statute or in some other way.

DR. YANDLE: I think this discussion has helped me tremendously, to get questions and ideas about the implementation of these concepts, and to think about what the limits are. We are talking about, I think, the expansion of the domain of common law, not necessarily a takeover by the common law. That is a forecast, not the expression of a desire, by the way.

But, I think the work that's being done here at CEI, and at the Center for Private Conservation, focuses on many alternatives for dealing with conservation questions. So, my last comment is to thank CEI for bringing this together.

MR. KRAUSS: Elizabeth, you have the last word.

MS. BRUBAKER: I would simply leave everybody with a plea for respecting the common sense of individuals affected by pollution, and for empowering people to make decisions that can protect themselves and their families. Our common law history shows that we can trust men and women to protect the environment. Our statutory history shows that we *cannot* trust governments to do so. The common law has earned our confidence and should be strengthened.

MR. KRAUSS: Thank you all for coming, and I reiterate my thanks to CEI and to the CPC.

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