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Edwin Meese

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Panel I: Liberty, Property, and Environmental Ethics

Edwin Meese, Moderator*

Let me welcome you to this panel focusing on Liberty, Property, and Environmental Ethics.

The subject of the environment, particularly its components—land, air, water, and property rights—has always been a major issue of public policy. In my home state of California, water rights have been, for the last 100 years or more, a major subject of dispute and controversies.

At the founding of our country, property was included with life and liberty as one of the three critical components that the new political order was to protect against tyranny. One of my favorite parts of the Declaration of Independence, which is rarely discussed, is in that list of complaints that the early colonists had against King George, III. The colonists complained that the king "has erected a multitude of new offices, and sent hither swarms of officers to harass our people, and eat out their substance."¹

I often wonder what Thomas Jefferson would have thought about the EPA or some of the other organizations that are vexing people today. I think the tension between liberty and environmental protection is a very important aspect of the contemporary public policy debate.

Generally, in the history of jurisprudence, damage to the environment has been remedied primarily through civil actions using tort law. Individual victims can use trespass or nuisance, or other common law causes of action, to enjoin and seek compensation from those who are allegedly damaging the environment.

During the past two decades, we have seen a virtual explosion of environmental laws and tremendous change in the way that the environment is regarded by the public and by political bodies—from the Federal Government to local governments, town governments, and special districts. For example, we now require environmental impact statements and permits of various sorts. Environmental quality councils and special governmental bodies, such as coastal commissions or

¹ The Declaration of Independence para. 12 (U.S. 1776).

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* Former United States Attorney General.
riparian rights commissions, have been created to protect and preserve certain parts of the environment. This is clearly an area in which policy and law are intertwined.

But perhaps the most novel part of the evolution of environmental law is that, instead of handling these things as administrative or civil matters, a new body of law encompassing both allegations of damage to the environment as well as failure to abide by an extensive panoply of administrative requirements has emerged under the category of so-called environmental crimes. The application of criminal law to ecological matters is more widespread than ever before in history.

This phenomenon represents one of the most compelling issues under the heading, "Liberty, Property, and Environmental Ethics." Today we have the opportunity to hear a variety of viewpoints on this and other issues in the evolution of environmental law. I happened to notice that all four of our panelists are currently professors, but I assure you that they all bring to this discussion a great deal of trial and government experience.

You have probably seen reference to the criminalizing of environmental law in the editorial pages of the Wall Street Journal. The Pozsgai case, for example, depicted a gentleman who, in trying to improve his own property, ended up doing more time in prison than many armed robbers and most burglars do on their first offense.\(^2\) The William Ellen case was a similar type of situation.\(^3\)

In another case, a man named Shuler was fined $4000 for defending himself against a bear that was about to attack him. The court found that, because he provoked the bear by shooting it, as it invaded his property and threatened his sheep, he had lost the right of self-defense.\(^4\)

Various similar cases have raised ethical questions about how society, and the government that represents it, should react to this new interest in the environment. Some call for a whole new ethic to deal with critical environmental problems based on the perspective that environmental values are distinct from the conventional values in our society such as property, entrepreneurism and free enterprise, or from the utilitarian aims of conservation, such as future human prosperity. The other side would argue that, far from needing new ethics, we ought to go back to our basic values. Environmentalism from this per-

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spective has become a form of new socialism characterized by increased government intervention in the economy and in the rights and activities of individuals and businesses. Further, this side sees environmentalists ignoring scientific fact and promoting with almost fervent religious zeal an anticapitalistic, radically egalitarian society. This side holds that respect for property and liberty must be restored as a bulwark against these environmental excesses.

Our first speaker today is Professor Stanley Rothman. Currently, he is Director of the Center for the Study of Social and Political Change and the Mary Huggins Gamble Professor Emeritus of Government at Smith College. He has a forthcoming work entitled, *American Public Opinion and the Environment*, which gives him a very good vantage point from which to open our discussion.

Our next speaker is Professor Robert Ellickson, currently the Walter Meyer Professor of Property and Urban Law at Yale Law School, where he specializes in topics relevant to our subject today: property, torts, land use controls, and real estate transactions. His scholarly publications include, *Order Without Law: How Neighbors Settle Disputes*.5

Our third speaker is Professor Jonathan Turley. He currently serves as a professor of law and Director of the Environmental Crimes Project at the George Washington University Law School. He was also recently appointed and currently serves as a member and reporter on the Environmental Crimes Advisory Group of the United States Sentencing Commission. So his current duties are right at the convergence of environmentalism and criminal law.

Our final speaker, before a general dialogue among the panelists, is the Honorable Richard Stewart, who is presently a professor at the New York University School of Law and is also involved in private practice as counsel to Sidley and Austin. But perhaps he is best known to most of us as having just finished a tour of duty as Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice.

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