DISCUSSION

HONORABLE Mr. MESE: I am going to cut short the dialogue so we can move directly to the questions. But first we will have a brief period for anyone on the panel who wishes to make any comment or statement in response to any of the original speeches. Is there anybody who wants to make a comment?

PROFESSOR ROTHMAN: Since I have been commented upon, let me state that I do not think Professor Turley is either an elitist or a scum. (Laughter.) I want him to know that I was not making policy recommendations and, incidentally, I do not find myself in sharp disagreement with many of the points he made. I was trying to explain the emergence of a new paradigm—the environmentalist paradigm. I continue to believe that the passion of at least some environmental leaders is a surrogate for other powerful dislikes.

Environmentalists today may not be explicitly antimarket. Even mainstream leaders, however, tend to shy away from market solutions in favor of statist solutions. They are also very liberal in other areas. PROFESSOR ELLICKSON: As I mentioned, I detect scant support around law schools for socialism as such, even among students who regard themselves as being on the left. But, as Professor Rothman says, environmentalists certainly do tend to embrace the usual package of "progressive" views.

Professor Rothman rightly observes that activists may opportunistically seize an issue for ulterior purposes. I have done some research on homelessness, and teach a course called "The Homeless and the Law." During the 1980's many of the advocates who latched on to the homelessness issue had agendas far removed from improving the lot of the destitute. Those on the far left saw homelessness as an issue with potential for discrediting a market economy. Mainstream Democrats saw it as a tool for embarrassing the Reagan and Bush administrations. So I agree that issues may be used partly as foils.

I do not sense, however, that many environmentalists currently use their cause in this way. Nor would I place them on the political fringe. They seem to be comfortably within the mainstream of the Democratic Party.

PROFESSOR ROTHMAN: You are certainly partly correct about the environmental mainstream. Socialism is temporarily out of fashion. I still believe that many are, for good or evil, "antibourgeois," and

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1. See, e.g., Editor's Introduction, in CRITICAL PERSPECTIVES ON HOUSING xi, xix (Rachel G. Bratt et al. eds., 1986).

rather sympathetic to elements of the ideology of various fringe groups.

**Professor Stewart:** I think there are many people who do not advocate socialism generally, but do favor socialism for environmental protection. They believe in environmental central planning, thinking that people in Washington can know and tell hundreds of thousands of industrial facilities and millions of people what to do to produce clean air and water.

There is still faith in top-down socialism in the environmental area. On the other hand, some environmental groups have come to recognize the limits of central planning and the advantages of market-based incentives. I was Chairman of the Board of the Environmental Defense Fund, which has pushed market-oriented approaches more than any other leading environmental group, and worked with the Bush administration on sulfur trading. So the environmental movement is beginning to reexamine the socialist orthodoxy.

**Professor Turley:** Before opening the floor for questions, I wanted to respond to former Attorney General Meese's earlier statement. I did not mean to suggest that the Federalist Society takes a particular position. I stand corrected on that. I also did not mean to indicate that you all run the political gamut from A to B when it comes to environmentalism. I believe there are some of you that go as high as a D or an E. (Laughter.) Seriously, I did not mean to stereotype and my comments went to the general tenor of the debate and not to a formal organizational position.

**Honorable Mr. Meese:** Professor Rothman, if you ever need to validate your theories, I suggest you attend a congressional hearing some time. I am sure that some of the folks that appear there will verify what you have said. Now, we turn these proceedings over to the audience for questions and comments.

**Audience:** I would like to ask Professor Ellickson to comment on some of these so-called market-oriented solutions to pollution problems. My own view is that they are a property right Trojan horse. The government is still called upon to set some kind of overall pollution level and I am highly critical that government can come up with a number that bears any resemblance to what a market would set for a pollution level. What is your reaction to these proposals?

**Professor Ellickson:** Although I am not an expert on pollution policy, I am more hopeful than you seem to be about the potential of emission fees, transferrable pollution rights, and the like. Markets cannot do everything. Many environmental conflicts involve huge numbers of people who cannot possibly coordinate by contract. In some environmental contexts the scientific evidence is complex and
ambiguous. Jim Krier has talked about the difficulties that arise with risk assessment.³

Given this complexity, there is unlikely ever to be a consensus that any particular approach is obviously correct. The market-oriented systems you mention strike me as less bad than other systems we are likely to employ.

I should add that I regard environmental quality as an important goal. Two years ago I visited Moscow to work on housing reform. I was struck by how often the people I met, who had a host of things to complain about, made remarks like, "The communists have ruined our environment," and "The air in Moscow stinks." Environmental issues were high on their list of gripes.

Any environmental policy more promising than a command-and-control regime is worth an experiment. If it does not work, we can stop using it and try something else that promises to be less bad.

AUDIENCE: How do you think the government can come up with a number like fifteen million tons and say that this is the total amount of pollution allowed annually? How does the government, as opposed to a private actor, come up with that number?

PROFESSOR ELLICKSON: If a regulatory body does not set the number, it will be set by private norms or by judges applying the common law of nuisance. In a context this complex, norm-makers and courts are likely to be even farther off base than regulators. There are no easy solutions. We should strive to identify the least bad institutions.

AUDIENCE: I have a question for Professor Turley. Certainly, professor, you have attempted to de-demonize the environmentalists at least in the eyes of those who may not agree with their conclusions. I would not suggest that environmentalists are demons, nor would I suggest that they are evil, or even necessarily insincere. Nevertheless, there are radical elements of the environmentalist movement who will drive spikes into trees so that when the logger cuts it there is a grave risk of life and limb when the chainsaw breaks. I have no doubt that you would not defend these people, particularly as you study criminality.

However, what concerns me most is not this most radical element. Rather, it is the creeping process that I witnessed, for instance, in New York when some regulator on the radio suggested that people not flush the toilet so often to conserve our water. What concerns me the most is the tendency to lead people to live a different type of life whereby civilization is destroyed. Please address these concerns.

Professor Turley: Well, it is a pretty full plate. It is actually sort of a combination plate. (Laughter.)

Let me address a couple parts of your question. First of all, I think you are absolutely right, people who drive stakes into trees to harm other individuals should be put in jail, period. Second, in terms of the impact of conservation programs on changing lifestyles, I think that in some cases those policies are misguided. There have been mistakes. We can sometimes act from a politically intestinal standpoint. For example, we have some communities recycling without any place to process the recyclables. The problem is not the goal, but the failure to create a proper infrastructure to realize that goal.

However, in areas like California, we are going to have to come to grips with the fact that we are running out of water. We continue to have high levels of development in areas that simply cannot support it. The “Big Green” Initiative that was defeated in California was perhaps an overly ambitious effort to regulate development, but eventually we are going to have to regulate development. If there is a change in your lifestyle, it will occur because of limited resources, not because of regulation.

Professor Ellickson: I disagree with Professor Turley’s analysis of the water situation in California. This is a classic context in which markets can work and we do not use them enough. California water is underpriced, particularly for agricultural use. Raising water prices would solve many problems in a snap. I also do not understand Professor Turley’s statement that we are going to have to regulate land development in California. It is already regulated to the hilt.

Professor Stewart: Lifestyles will change together with markets, but they will change because people will decide what they prefer at what price and adjust their behavior, not because of some blueprint imposed by the government.

Audience: I have a question for Professor Turley. By way of disclosure, I am with the Washington Legal Foundation. Our group represented one of the poster children that Professor Turley referred to, John Pozsgai. Before I go to my question I want to say that I would be happy to meet with Professor Turley afterwards to tell you about the real facts of the Pozsgai case, because you may have some erroneous information. Mr. Pozsgai was not prosecuted for contempt. He was prosecuted for many different reasons, but contempt was not one of them. There was never a formal cease and desist order in that case.

But my question goes to a comment that you made in connection with environmental crime. I thought I heard you say that you were

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bothered by criminalization in the environmental area. If I am wrong, correct me. But if you did say that I would like to have you explain further and give this audience some examples of environmental prosecutions that trouble you.

**Professor Turley:** It is clear I will have to keep my fluids up. I can see that we have people from the Washington Legal Foundation on both sides of the room today. I seem to bring out your organization like a Rolling Stones concert. (Laughter.)

We clearly have disagreements on John Pozsgai and clearly we have disagreements in many other cases. The prosecutor in the Pozsgai case, Jane Barrett, obviously had a different opinion of the facts in that case.

**Audience:** She was not the prosecutor in that case. It was Webber.

**Professor Turley:** I am sorry. I was thinking of the Bill Ellen case.⁵ You are absolutely right on the name of the prosecutor. But there are clearly disagreements as to how people portray Mr. Pozsgai and I do not want to rehash that debate. But to answer your question, you did hear correctly. I do have trouble with the trend toward criminalization in some areas.

My concern, primarily as an academic, is that there is a rush toward criminalization of offenses that were once civil. The extent to which this has occurred bothers me. There are cases involving negligence, for example, in the environmental area that are problematic when criminalized. While very few cases have been prosecuted in such situations, we should look at those provisions critically as we restructure our enforcement efforts. I cannot go into much detail on proper punishments because I am on the advisory group and we are presently working on these issues. From a conceptual standpoint, I will say that I believe when we call someone a criminal, we should mean it.

I think there is a problem when people can commit acts without being clearly aware that they are committing a crime or without having good reason to believe that what they did was criminal. Such was not the case with the gentleman that your organization represented. Whatever differences there may be over those cases, it was abundantly clear that John Pozsgai and Bill Ellen knew they were committing crimes. Consider the case of Marinus Van Leuzen. In that case, the Corps of Engineers witnessed the destruction of the wetlands. Van Leuzen refused to obtain a permit; violated a cease and desist order; refused to comply with EPA orders; had a search warrant executed on his property and still refused to comply; and dared prosecu-

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tors to bring a criminal action. There was no problem of notice there. There was no mistake about the law. There was also no prosecution. The Justice Department ultimately decided not to prosecute the case over the objections of federal officials in the Galveston area. The problem with past enforcement by the Justice Department has certainly not been overzealous prosecution.

Having suggested a narrowing of some provisions, however, I want to emphasize that this must be a two-way street. I think that we should have a clear, narrow definition of what a criminal is. That may mean decriminalizing some things. But when we decide that someone is a criminal, or that an organization is criminal, I think we should impose very heavy sanctions. Violating a criminal law is no trivial matter, but there is currently little to concentrate the minds of would be violators. When it comes to environmental crime, I do not believe that we have a deterrent today. Many of these cases have clear statutory standards and clear criminal violations. What has not been clear is the commitment of the Department of Justice to enforce the criminal laws on the books.

AUDIENCE: This question is for any of the panelists, since all of you addressed this, albeit indirectly. Isn't the central problem behind deciding whether you can have an individual rights approach to environmental regulation deciding what individual rights we have in the various resources affected by environmental regulation? Rather than viewing private property as a convenient instrumental device and then debating whether it is a more efficient way to get somewhere, if we start by defining individual rights to various resources, an individualist conservative might come out as being a sort of radical environmentalist on some things and radically anti-environmentalist—as that term is currently understood—on other things.

For instance, some approaches to environmental regulation would supplant the law of nuisance. If somebody does something that affects my right to breathe a certain quality of air, he has to pay me because he has taken away a right that I have. This notion would be supplanted by environmental regulations that establish an acceptable level of pollution. The conservative approach, in this case, might be more environmentalist.

When one asserts a new and different right to have a view of the ocean, the conservative might respond, "Well, these guys are just socialists trying to impose their values on the rest of us and they ought to do it by buying the person's land."

PROFESSOR ELLICKSON: The issue of defining basic property rights lies at the core of much of this discussion. Few people have been able to work out appealing, and ideologically consistent positions on how to define these rights. I sense that libertarians are hawks in protecting
landowners from trespassers, but doves in protecting them from nuisances, even grievous nuisances. Why so?

One thing I am willing to say emphatically is that the Federalist Society, if it is to be faithful to the principles of federalism, should adamantly oppose nationally uniform definitions of property rights. If we are unsure how best to define property rights and protect the environment, we should allow for experimentation and variety. Our federal system allows for such experimentation and enables people with different tastes to vote with their feet, with the Libertarians ending up in New Hampshire and Professor Rothman's Stalinists in Vermont: (Laughter.)

**AUDIENCE:** I am with the Washington Legal Foundation, and another member of the Professor Turley fan club.

**PROFESSOR TURLEY:** You can begin the human wave at this point. (Laughter.)

**AUDIENCE:** I would like to return to John Pozsgai since you regard him as public enemy number one in the environmental area. He did receive the longest sentence in the United States—a three-year unsuspended prison term—for daring to place topsoil and clean fill on his property that was zoned industrial. Mr. Pozsgai wanted to clean up the property to build a garage, but EPA deemed part of the property a wetland and Mr. Pozsgai did not have a permit for his fill activities.

Public enemy number two was Ocie Mills in Florida who was sentenced and served twenty-one months in federal prison for placing nineteen loads of clean building sand, the kind in my kid's sandbox, on a quarter acre lot to build his retirement home.6

Considering that in these cases, the government conceded that there was no hazardous or toxic waste involved, that no person was injured by the activity, that not a single bird, fish, or sea lion was killed, injured or threatened, and that no water supply was contaminated, can you tell us why you think these first-time environmental felons, as you call them, should spend two or three years in prison for such minor regulatory offenses when prison space for real criminals is at a premium?

Is it just contempt for the law? A shoplifter has contempt for the law, and also private property, but I dare say that you would not want a first-time offender for shoplifting to serve two or three years in prison.

**PROFESSOR TURLEY:** I would be happy to explain why I would take such a seemingly bizarre position. But first of all, it is good to have

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you here, Paul. It structures my life to see you at my every public outing.

AUDIENCE: I am sure it is mutual. (Laughter.)

PROFESSOR TURLEY: Well, I was surprised that you did not mention Bill Ellen. You are supposed to build up to Bill Ellen as the background music starts. The fact is that they were not convicted of hazardous waste violations. They were convicted of destroying wetlands and destroying wetlands is a crime.

AUDIENCE: It is not a crime. That is where you are wrong. There is no such thing as an environmental crime. As Dick Stewart will tell you, prosecutorial discretion allows one to punish filling wetlands administratively, civilly, or criminally. So it is not a crime. That is a misnomer.

PROFESSOR TURLEY: You know acceptance is really a critical part of legal therapy. You and your organization could make a breakthrough by simply admitting that there are environmental crimes. You are going to have to come to grips with this notion. I feel like the Washington Legal Foundation is going through the Kubler-Ross, stages but it is stuck on denial. You are going to have to face it and you are going to have to deal with it. There are environmental crimes. There have been people who go away to prison, including your clients, for violating the law. It is a crime to destroy a wetland. That is the law. I do not understand why the Washington Legal Foundation, which has been so consistent in its calls for tougher criminal sentencing, has concluded that criminal conduct in the environmental area should be ignored and even condoned.

Further, I find it odd that we have had two previous administrations opposed to all plea bargains with street offenders, and yet former officials in those administrations seem to embrace plea bargains when the defendant’s name ends in an “Inc.” or a “Corp.” It does not make any sense. Suddenly, our fiercest warriors in the war on crime have become committed peaceniks. There is a high use of plea bargains in the environmental area that is unparalleled in other criminal areas. At some point, we have to be somewhat consistent if for no other reason than to give credibility to our legal system.

I will also mention something about sentencing of criminals. I have the honor of directing two pro bono projects, a prison project and an environmental project, both of which happen to be opposed by the Washington Legal Foundation. Every day we see prisoners who are sentenced to long prison terms and I do not challenge those convictions. These prisoners go away under ten-year minimums for drug offenses and other mandatory standards that your organization supports. Yet it is rare for an environmental criminal to serve any time for an environmental crime. That is a fact. The sentences in environ-
mental crimes are significantly lower than in any other criminal area. For the few individuals serving time under the Clean Water Act, the average prison sentence in 1989 was 1.5 months. The average for RCRA was zero. Environmental crime remains an excellent market opportunity for the enterprising felon.

I believe we should look at the empirical data and ask why there is such a discrepancy in sentencing. Instead of denying reality, we need to look at the way certain criminals can injure or kill others without penalty or stigma. We should ask why we deify individuals who openly violate the laws, like your clients, and then demonize the career prosecutors who convicted them.

AUDIENCE: You still have not answered the question as to why Mr. Pozsgai deserved his particular sentence.

HONORABLE MR. MEESE: I think for now we will accept that answer. I do think there is a lot more that can be said on both sides of this particular issue.

AUDIENCE: While I am not from the State of Washington or anything like that, I do have a question that is probably best directed to Professor Turley; however, I invite any panelist to address it. Back in the early 1970's during the Vietnam War we had something called a “body count.” Body counts can distort rational decisions.

Over the last couple of years, senior administration officials, the Department of Justice, and the Environmental Protection Agency, have issued statements saying, “Another record year, we got larger penalties, higher civil fines, and more criminal convictions.” Every now and then zealots emerge on both sides of the issue. There may be individuals who are career opportunists, and an aggressive prosecutorial record against criminals and scum bags may help them in their quest for an Assistant U.S. Attorney position, or the next rung on whatever career ladder they are on. If the criminals are scum bags, that is fine. But if it is a very minor offense where some corporate employee, without the knowledge of a senior executive, throws a few flecks of paint into the ocean, pursuing a criminal misdemeanor conviction solely for the purpose of accumulating a “body count” is worrisome.

When does the misconduct of prosecutors in exercising their discretion become a possible environmental crime. And if you would consider abuse of prosecutorial discretion an environmental crime, do you think a mandatory minimum sentence would be appropriate?

PROFESSOR STEWART: When I was in the Justice Department, I told my staff that we were not in the business of maximizing the number of prosecutions. Our job was to help maximize compliance. Compliance can be achieved in part by vigorous prosecution. However, more prosecutions are not the only or always the correct answer. I issued
guidelines for federal environmental prosecutors that allowed us to take into account good-faith, voluntary efforts by corporate violators who undertook audit and compliance programs or who cooperated with and made disclosures to the government.

There is a real and understandable concern on the part of some executives that if their company performs an environmental audit which reveals noncompliance (no plant can comply 100% with all regulations), and the company continues to operate the plant the next day, both the company and the executive may be engaged in a knowing violation of the law, which is a felony. As a result, companies may be dissuaded from undertaking audit and compliance programs, or from revealing audit results to top management, for fear of handing prosecutors a smoking gun.

Accordingly, any enforcement policy must recognize the vital role of self-policing and self-monitoring by using carrots as well as sticks in the enforcement regime. The Justice Department’s guidelines for environmental prosecutions seek to reward companies with good audit and compliance programs by taking them into account in decisions about prosecution. A company that detected and did not immediately remedy a violation might not be prosecuted for a felony, or prosecuted criminally at all, if they have a good self-policing and self-monitoring program in place.

The problem of overzealous prosecutors is a very difficult subject because, as I learned, decisions about prosecutions are highly contextual. Because “Main Justice” reviewed every environmental prosecution, I had the opportunity to speak with some of the U.S. Attorneys offices. In certain cases, the U.S. Attorney and I agreed to change the enforcement treatment after discussion and a full review. This experience illustrates the existence of institutional safeguards in the present system. These safeguards are especially important in the case of environmental crimes, because current federal environmental statutes cast a sweeping net of potential felony liability. In addition, environmental regulations are so extensive, detailed, rigid, and complex that 100% compliance is, as a practical matter, impossible for any large facility.

Audi ence: I would like to return to Professor Turley’s discussion of externalities. I want to change the topic to preservation of open space, in the context of either a local zoning board, where residents are seeking to block industrial development, or a national-level group seeking to add lands to the national park system.

To a certain extent there are private benefits to those who are most directly affected by open space decisions. To what extent is the creation or preservation of open space a public good or a private good, and how do we internalize these external costs and benefits?
PROFESSOR STEWART: I think your remarks apply to anything the government does. There are private benefits and there are public benefits. One of President Madison’s goals for our political structure was to achieve a system that avoids the distortion of private benefits.

PROFESSOR ELLICKSON: Dick, I thought you were going to refer to your prior distinction between forcing goods and preventing bads. I used to live in Palo Alto, California, where homeowners on lots averaging 1/6th-acre had zoned the vacant land in the city for ten-acre minimum lots. I regarded that as forcing the good of open space, in that the current homeowners were imposing a standard that their own houses violated. When a government requires some citizens to engage in above normal conduct, it should bear the burden of justifying the fairness of its policy.7

Some of the attorneys in this room are looking for test cases on the scope of the constitutional protections of property. I advise them to consider a case of the type I just described, where the current residents of a suburb impose on newcomers standards higher than the ones that most existing homes meet. I am not a Lochnerian, but I do favor meaningful judicial scrutiny in situations like these. Any attorney who is truly a federalist would pursue a case of this sort in the forum where it belongs: a state court.

AUDIENCE: I would like to ask Professor Turley if he thinks that the decision of whether to bring an environmental crime prosecution should be politicized or not and whether he regrets his role in bringing this phenomenon about?

PROFESSOR TURLEY: I suppose this is where I should recite my camp confession and turn in my parents or something. (Laughter.) No, I am not ashamed of the role that I have had in environmental crime prosecutions. I understand the import of your question and I will respond in this way. The environmental crimes fight has gone on for two years. There have been mistakes made and I am more than willing to list them. I think there have been mistakes made by industry, and mistakes by Congress. I think there were mistakes made by the Department of Justice. I think there were mistakes made by everyone but me. (Laughter.)

There are four investigations going on at this point, so all of this discussion is occurring in a super-heated environment. I regret this. I also regret that there is a lot of self-recrimination and personal attacks. This is a pretty rough city and there are attorneys on all sides of this issue. Somewhere along the way this environmental crimes issue became confrontational and personal.

The tenor of this fight, however, has much to do with the response of the Department of Justice to internal critics and congressional investigations. When one of my students was attacked by a Department of Justice official after we turned in our preliminary report, I requested an investigation by the Office of Professional Responsibility, which is now being conducted. That is the first time any student of mine has ever been accused of wrongdoing. We have been involved in many difficult fights against some truly disreputable individuals, but it took the Department of Justice to attack one of my researchers. While the Department of Justice found that the charge had no basis and that conflict of interest forms completed by all students at the outset protected against this type of charge, the Department refused to clear the student publicly. Faced with what we believe is clear retaliation, and part of a pattern, we decided to go to Congress, and Congress has made inquiries to see if there was an attempt to harass individuals working with Congress.

So you do not have to ask me about the unnecessary personal attacks in this area. My students and I could write a book on that subject. Clearly, the fight has gotten out of hand, and we still have not resolved many of the substantive questions raised in this debate, like what environmental crime is and how we should deter it in the future. These are open questions. That these questions remain is probably the only position on which I have ever agreed with the Wall Street Journal editors. It should be an issue of public debate. We should debate these questions, we should define environmental crime, and, when it is defined, we should prosecute environmental crime like any other crime.

But do I regret the extent to which this has become personal and political? You bet I do.

AUDIENCE: Well, if I could just make a very short statement. Professor Turley, I am glad that you have set the premise that this area has become politicized, and I hope that you will use your best efforts and your relationship with the relevant congressional committees to get them to depoliticize their role. It is in no one's interest, not environmentalists, not industry, not anybody, to have prosecutorial decisions made in a highly politicized context. However, that is where we are headed with the Dingell investigation.8

AUDIENCE: My question is also for Professor Turley. I guess you are getting a better idea now of why you are here.

PROFESSOR TURLEY: I have never worked so hard for a vial of water.

AUDIENCE: This comment is in support of Professor Rothman's comments, which I thought were brilliant. Maybe you are right, Professor

Turley, the environmentalists are not socialists anymore, they are just in favor of massive redistribution, especially from the developed world to the undeveloped world, like Brazil.

I think you sloughed off much too easily the responsibility of environmentalists in promoting bad science and, in particularly, the big lie about issues like global warming. I have heard people like Al Gore and Tim Worth say, “There is no scientific debate over this subject, everyone agrees that it is a problem,” and I know for a fact that is not true.

Professor Turley: I am really not quite sure how I should respond except to say that I actually disagree with the business of buying rain forests in Brazil, while ignoring our own old growth forests. I think it is odd for us to purchase old growth in South America, while allowing the small remaining North American old growth to be lost. I do not understand why old growth in South America is more important than old growth in our country. We have seen aerial shots of Washington and Oregon, and it is not a pretty sight. So we agree on that—I suppose not, but you do not get a chance to respond. (Laughter.)

Honorable Mr. Meese: Well, “Liberty, Property and Environmental Ethics” is a topic that I suspect will be coming up not only in future Federalist Society conferences, but in many other forums as well. We have just begun to scratch the surface. We appreciate all four of our panelists for the excellent presentations and answers to the audience’s questions.

Thank you very much.