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Panel IV: Culpability, Restitution, and the Environment: The Vitality of Common Law Rules

William P. Barr, Moderator*

Are traditional common law doctrines of tort liability adaptable to modern complex environmental problems? This panel will explore various aspects of that question. Today, the traditional common law system is overlaid by a comprehensive system of statutory regulation. Increasingly, direct government regulation is replacing the common law as the primary means of managing risk.

Central government bodies, particularly the Federal Government, set standards and seek to control emissions or exposure beyond those standards through various pricing or deterrence systems. Modern statutes authorizing civil litigation have now substantially departed from traditional common law rules by relaxing causation requirements, expanding notions of joint and several liability, and eliminating fault as a basis for liability.

Additionally, over the past decade, statutes have increasingly included criminal law sanctions as a means of deterrence. Traditional criminal law requirements have also been relaxed, particularly with the steady erosion of the mens rea requirement and a move towards strict liability. The result is really a quasi-strict liability in the area of criminal law.

It has been suggested that these developments have been necessary because traditional common law principles ineffectively deal with complex environmental problems. Is this true or are there areas where these common law principles remain viable? Even if it is true, what is being lost by giving up traditional common law doctrines?

It is certainly true that there are difficulties in adapting common law rules to modern environmental problems. The common law system originally dealt with more ascertainable risks with more localized impacts than many of the environmental problems we face today. Modern risks, however, are highly uncertain and broadly distributed throughout society.

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How usefully do common law principles address these environmental risks? What should be the standards of causation considering the number of different issues that are transected? What kind of evidence should be allowed to establish those standards? Are courts and juries appropriate places to determine these issues on a case by case basis?

Does asbestos cause cancer? Even if asbestos causes cancer, did it cause this cancer? Even if this cancer was caused by asbestos, whose asbestos was it? Maybe some of those issues are amenable to the common law adjudication, but perhaps others are more usefully addressed through central agency decisionmaking.

How effective are common law principles in apportioning cost? Can the common law system move quickly enough to deal with threats that may be latent, but potentially catastrophic? Can the common law system provide uniformity? Is uniformity desirable? These are some of the questions that we will address in this panel.

The first speaker needs no introduction. Justice Mosk is a legend in the history of common law and a member of the Supreme Court of California. He is going to be talking about some of the advantages of the common law system at the state level. The second speaker is Judge Steve Williams, who is no stranger to the Federalist Society. He was a well known student of regulation as a law professor and now is a distinguished judge on the nation's foremost regulatory court. Judge Williams is going to carry along this issue by discussing the implications of the shift of economic regulations from the state to the federal level. Our last speaker is Professor Daniel Farber, a distinguished professor at the University of Minnesota and a recognized expert on environmental law and on regulation generally. Professor Farber was going to speak on the issue of causation in the *Daubert* case, but tells me that having heard the conference, the whole conference, he has been moved to expand his comments. I am looking forward to what he has to say.

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