

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

*Stanley Mosk, First Panelist**

Thank you very much, Attorney General Barr. I must say before starting out, I particularly appreciate being introduced by an Attorney General because I served as Attorney General of California for some six years. I must say that I love that title "general." I would come in the morning, "Good morning, general. Good evening, general." (Laughter.)

This is pretty heady stuff for someone who served as a private in World War II. (Laughter.)

I should tell you one experience I had while attorney general. I was at a nice dinner party in Southern California where the host was taking me around and introducing me to the various guests, "General Mosk, meet Mr. so and so, General Mosk, meet so and so." Finally, we came to one imposing looking man and my host said, "General Mosk, meet Omar Bradley." (Laughter.)

When General Bradley said, "What outfit were you in, general?" I beat a hasty retreat for the hors d'oeuvres table. (Laughter.)

In a pluralistic society, many demands, often conflicting, will be made on our resources. How best to meet fairly the needs of a complex society and at the same time protect the resource base is our challenge for today and for the future. This challenge involves learning how to create and strengthen models of mutual coexistence of humans and nature that simultaneously allow economic growth and protection of nonrenewable resources. As the problems confronting our natural world become more complex and the solutions fewer and less obvious, cooperation between the public and the private sectors will become increasingly important.

Primarily through technology and population growth, we can and do manipulate nature. Consequently, one of our major problems involves protecting the environment against the unintended consequences of our actions. This problem is twofold because we must ask "who" can address the problem, as well as "how" we can address it. Is the environmental common law an effective tool and can it be used by the Federal Government, the states, or perhaps both?

We have a multitude of federal laws on environmental protection, representing almost every letter in the alphabet. Consider, for example, TSCA,¹ FIFRA,² WSRA,³ CZMA,⁴ ESA,⁵ CWA,⁶ NEPA,⁷ RCRA,⁸ CAA,⁹ and CERCLA.¹⁰ I have even heard of RICO¹¹ being employed in an environmental abuse case.¹²

Undoubtedly, a certain uniformity in environmental protection requirements throughout the country is desirable. Indeed, a healthy society is important from one end of the country to the other. That was the concept of pioneer environmentalists like Thoreau, Audubon, John Muir, and Teddy Roosevelt.

On the other hand, as a lifelong federalist who sometimes annoyingly argues for states' rights, I believe that much of environmental protection must be left to the states. The intent of the original federalists was that we have to respect states' rights.

For example, I do not know of anyone in my state who has seen a spotted owl. Maybe some have, but certainly their plight is not the major issue that it is in Washington and Oregon. On the other hand, I doubt that the people in Nebraska or Indiana are concerned about cougars as long as they have one or two of them in their zoo. Californians, however, like cougars in the wild. In the Santa Ana mountains, south of Los Angeles and north of San Diego, cougars have always roamed wild and with relative safety. The enemies of these magnificent cats were disease, some cannibalism, and an occasional gunshot wound.

A recent study, however, reveals that traffic kills cougars more than anything else does. Of the thirty-two cats that had been fitted with electronic tracking collars, only seven have survived. It can be demonstrated that at least a substantial number of those that perished were hit by cars on Southern California's well-traveled highways.

1. Toxic Substances Control Act, 5 U.S.C. §§ 2601-2692 (1988 & Supp. IV 1992).

2. Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (1988 & Supp. IV 1992).

3. Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-1287 (1988 & Supp. IV 1992).

4. Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464 (1988 & Supp. IV 1992).

5. Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1988).

6. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1988 & Supp. IV 1992).

7. National Environmental Policy Act, 42 U.S.C. §§ 4321-4347 (1988).

8. Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k (1988 & Supp. IV 1992).

9. Clean Air Act, 42 U.S.C. §§ 7401-7671q (1988 & Supp. IV 1992).

10. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. §§ 9601-9675 (West 1983 & Supp. 1994).

11. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1988).

12. See, e.g., *United States v. Paccione*, 949 F.2d 1183 (2d Cir. 1991) (affirming RICO and mail fraud convictions for illegal waste disposal).

We can decry this result. Certainly the ecosystem would be a much sadder place without cougars, the epitome of strength and stealth. Even the most ardent animal rights people, however, admit that there is little that can be done by statute or regulation to prevent animals, like people, from becoming highway statistics.

As I mentioned, I have always been a staunch federalist who has consistently advocated states' rights even when their assertion might be ignored or frowned upon in Washington. Having said that, I must concede that in the protection of wildlife, state boundaries often create a protection and enforcement problem. I wrote an opinion for the California Supreme Court not so long ago declaring that "[v]enison on the hoof and peripatetic trout are unlikely to feel controlled by metes and bounds."¹³

As an illustration of the problem, take beautiful Lake Tahoe. The boundary between California and Nevada runs right through the lake. If either state passes statutes regulating environmental concerns, obviously they can only be effective in one-half of the lake. I doubt that the fish in the lake will respect that unmarked state boundary.

Another type of conflict that sometimes arises between federal and states' rights involves Indian reservations. In the West, as you well know, there are many Indian reservations. These, of course, are controlled by federal law. It is not uncommon to have a stream run through an Indian reservation. To protect species of fish from total depletion, our state prohibits the use of nets to capture fish. They must be caught individually. Indians, however, have traditionally used nets to obtain their food supply and they do so as the stream courses through their reservation. Thus, in many cases, the stream below the reservation is nearly depleted. Since Indian conduct is controlled exclusively by federal law, there is nothing our state can do in its conservation effort.

An important problem that some states face is water resource management. It may be difficult these days after the recent floods in the Midwest for people to understand a problem of too little water, but that is what we in the Southwest have faced for many decades as population has moved from East to West. Our environmental problems in the Southwest—the southern half of California, Arizona, and New Mexico—involve not too much water, as the Midwest has, but too little water. Competition for that scarce water inevitably develops, creating conflicts among environmentalists, city dwellers, farmers, and other interests, and among states.

Intense competition for water has not always existed. Going way back to the 1860's, California elected its first Republican Governor.

13. In re Wilson, 634 P.2d 363, 373 (Cal. 1981).

He was Leland Stanford, one of the Big Four in the Transcontinental Railroad Enterprise and later the founder of Stanford University. As the story goes, the Sacramento River was uncontrolled at the time Stanford was inaugurated. As he was about to go to his executive mansion, the Sacramento River flooded so badly that he had to make his approach by rowboat and climb into the second story window.

That illustrates how at one time we did have adequate and sometimes too much water in parts of our state. But today the situation is entirely different and has been for some time. As a matter of fact, for five years California has suffered a serious drought. I was amused by a question that was asked yesterday, somewhat in an irate manner; somebody was complaining about a suggestion that he ought not flush toilets after each use. But for the past five years in California we have had to adopt that very practice. In other words, never the flush the toilet for number one, only for number two. (Laughter.)

The point is that we got used to conserving water in many ways. We could not wash our cars. We could not water our lawns and do the things that we would normally do. Harnessing the few sources of water for people and industry in parched Southern California has been a major problem for many years. I vividly recall the long and bitter fight between California and Arizona over distribution of water from the Colorado River, which for a considerable distance runs between the two states. Our case wound up in the United States Supreme Court.

Most lawyers talk only about their great victories. I have to relate my great defeat. As Attorney General of California, I argued the case of *Arizona v. California*¹⁴ before the high court. At the time, I thought my peroration was brilliant. I concluded my argument by rising with oratorical fervor to declare that the conflict was simply over who gets water from the Colorado River, people in California or asparagus in Arizona. By an eight to one count the Court seemed to prefer asparagus. (Laughter.)

The Central Valley water project helped by diverting water primarily from the Sacramento River, before it runs into the sea, several hundred miles to Central and Southern California. The program was initiated by Republican Governor James Rolph and completed by Democratic Governor Pat Brown. Nevertheless, even with that water now being transported to Southern California, there is a constant conflict over who gets the water: farmers, industry, or cities. That issue remains to this very day.

One of the great problems faced by states like California and other states bordering the oceans is protection of the public interest in

14. 373 U.S. 546 (1963).

access to the water for transportation, swimming, fishing, and other recreational purposes, or just for aesthetic beauty. On the other hand, developers, understandably, seek to construct attractive homes and hotel sites, taking advantage of the view and providing for private access to the water. So, there again, conflict becomes inevitable.

I cannot speak for other ocean fronting states, but in California we recognize the public trust doctrine. That is an interesting concept that can be traced all the way back to Justinian in ancient Rome. Under ancient Roman law, according to Justinian: "By the law of nature these things are common to mankind—the air, running water, the sea and consequently the shores of the sea."¹⁵ This concept spread to England through the writings of Brackton in the mid-thirteenth century, though England drew a distinction between tidal and nontidal waters.¹⁶

Our West experienced a rather different route. From Rome, the fundamentals of the public trust doctrine were adopted by Spain. From Spain, they crossed the ocean to Mexico, where they came up to Alta California when Mexico owned that part of our continent. In the Treaty of Guadalupe Hidalgo, we, in effect, guaranteed preservation of the public trust doctrine. Since then, our court has adopted the doctrine in a whole series of cases.¹⁷ The New Jersey Supreme Court did so as well, declaring in a 1972 case called *Neptune City v. Avon* that "[t]he public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities."¹⁸

Let me make it clear that we do not prohibit shore development along the ocean. Indeed, many parts of our state encourage construction of marinas, commercial shopping centers, hotels, residential homes, apartments, and so forth. Under our interpretation of the law, however, public access to the water cannot be denied. Therefore, before a project will be approved, the promoters must assure the state or its subdivisions that there will be adequate access to the water for the public. Obviously it is not required that a private apartment building permit bikini-clad bathers to march through its lobby, but some reasonable provision for access to the water will generally suffice.

Let me quickly discuss a type of case that we are likely to hear more about in the future, indeed a comparable matter is pending in our courts. A manufacturing company deliberately disposes of its

15. See *National Audubon Soc'y v. Superior Court*, 658 P.2d 709, 718 (Cal. 1983) (quoting *INSTITUTES OF JUSTINIAN* 2.1.1).

16. See *City of Berkeley v. Superior Court*, 606 P.2d 362, 364 (Cal. 1980).

17. See, e.g., *Marks v. Whitney*, 491 P.2d 373 (Cal. 1971); *City of Berkeley*, 606 P.2d 362, *National Audubon Soc'y*, 658 P.2d 709.

18. *Neptune City v. Avon-by-the-Sea*, 294 A.2d 47, 54 (N.J. 1972).

toxic wastes in a landfill adjacent to a number of homes. It is unquestioned that the landowners were subjected to prolonged exposure to certain carcinogens. Toxic chemicals contaminated their domestic water wells.

The question is not whether the manufacturer is liable, but how far this liability extends. The plaintiffs sued for, among other damages, compensation for intentional infliction of emotional distress, which of course covers a multitude of sins. While none of the landowners alleged that they presently suffer from cancer, testimony was offered to the effect that they faced an enhanced, though unquantified, risk of developing cancer in the future due to their exposure. In other words, the landowners claimed damages for fear of cancer, as well as funds for periodic medical monitoring to detect the onset of cancer at the earliest possible time.

It may seem remarkable that damages could be awarded for fear of future illness and not be limited to actual, clinically proved illness. However, a number of courts have permitted damages for fear of cancer, notably the Third Circuit, Florida, Massachusetts, Michigan, Washington, and federal district courts in Illinois and Michigan.

On the other hand, there is a line of decisions holding that unless the manufacturer has assumed a duty to plaintiffs specifically in which the emotional condition of the plaintiff is an object, recovery is available only if the emotional distress arises out of the defendant's breach of some other legal duty. In that case, the emotional distress is proximately caused by the breach of the other duty. Even then, with very rare exceptions, a breach of the duty must threaten tangible physical injury, not simply damage to property or financial interests.

I should point out, however, that limits on recovery for emotional distress caused by negligent conduct of another may not aid a manufacturer who deliberately violates a duty imposed on it by law. Thus, there is a distinction necessarily made between negligent conduct and deliberate conduct.

It may also be contended that substantial policy reasons support a physical injury requirement for recovery of fear of cancer damages where no preexisting relationship exists. It has been suggested that allowing recovery in the absence of a physical injury would create limitless liability and will result in a flood of litigation, thereby imposing onerous burdens on courts, corporations, insurers, and society in general.

To complicate this scenario where the allegation was a claim for fear of cancer, suppose the plaintiffs were longtime cigarette smokers. Cigarette smoke apparently contains high concentrations of benzene, more than the concentration often detected in contaminated water. Query: What effect, if any, should be given to the evidence that plain-

tiffs suing for alleged fear of cancer voluntarily and regularly ingested a cancer producing object, to wit: cigarettes? Does that reflect on their alleged fear of cancer? Is there comparative negligence or comparative result? Well, at these prices I am not going to offer a conclusion. (Laughter.)

Another type of local environmental control is municipal zoning. A community decides that for various reasons, such as convenience, traffic, health, and civic duty, it should require businesses to be here, manufacturing plants there, multiple unit residences here, and single residences there. This type of "Euclidean zoning" is generally accepted by society. We all like this kind of orderliness.

On occasion, however, local zoning officials depart from environmental concerns by undertaking a process of exaction. That is, they may permit a variation of existing zoning limitations in exchange for a concession. For example, it is not uncommon for a community to allow a developer who desires to exceed a certain limitation on the number or location of his projects to do so, if he provides at his expense a park, or road, or a school to accommodate the increase in community population. This type of exaction has been generally approved.

Not unusual, however, is another problem we have to face, a problem I think we will also face more and more in the days ahead. It can be described with two acronyms, LULU's and NIMBY's. LULU's are Locally Unwanted Land Uses and NIMBY's are Not In My Backyard. There are innumerable examples of LULU's: halfway houses for the mentally incompetent or for recovering alcoholics, homes for unwed mothers, homes for released prisoners on parole or probation, sites for toxic chemical production, nuclear plants, or sewage treatment facilities. NIMBY's occur when one agrees with the necessity for a certain facility, but wants it to be placed in an area distant from his own backyard. In both instances, the viability of government and the serving of our economic interests are at stake. Such controversies often end up court.

Let me conclude by just mentioning an interesting article in the September 1993 issue of *Atlantic Monthly* by Matt Ridley and Professor Bobbi Low.¹⁹ Their theme is that conventional wisdom has it that the way to divert ecological disaster is to persuade people to change their selfish habits for the common good. They believe that this is generally futile.

A better approach, they suggest, would be to tap a boundless and renewable resource—the human propensity for thinking mainly of

19. Matt Ridley & Bobbi S. Low, *Can Selfishness Save the Environment?*, ATLANTIC, Sept. 1993, at 76.

short-term self-interest. In other words, rather than using governmental coercion to compel concern for the environment, they urge that we find the means of appealing to self-interest. It is a practical thought, but how to do it is the problem.