

1998

## How Green Was Common Law?

David Schoenbrod

*New York Law School*, [david.schoenbrod@nyls.edu](mailto:david.schoenbrod@nyls.edu)

Follow this and additional works at: [https://digitalcommons.nyls.edu/fac\\_other\\_pubs](https://digitalcommons.nyls.edu/fac_other_pubs)



Part of the [Common Law Commons](#)

---

### Recommended Citation

Schoenbrod, David, "How Green Was Common Law?" (1998). *Other Publications*. 275.  
[https://digitalcommons.nyls.edu/fac\\_other\\_pubs/275](https://digitalcommons.nyls.edu/fac_other_pubs/275)

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Other Publications by an authorized administrator of DigitalCommons@NYLS.

## How Green Was Common Law? [1]

On December 17, the Center for Private Conservation hosted a roundtable on the Common Law Approach to Pollution Prevention to assess the extent to which traditional common law protections or private property addressed – or might address – pollution problems. Participating in the discussion were Bruce Yandle, Director of the Center for Policy and Legal Studies at Clemson University; David Schoenbrod, former attorney with the Natural Resources Defense Council, now Professor at New York Law School; Hope Babcock, former General Counsel for the National Audubon Society and a Professor at Georgetown Law School; and Elizabeth Brubaker of Environment Probe Canada, author of *Property Rights in the Defence of Nature*. Following are excerpts from the discussion, beginning with Dr. Yandle's outline of what a "new order" for environmental protection should accomplish.

BRUCE YANDLE: 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 discovered in my encounters with the common law . . . that these are characteristics that are found in the old common law. . . . 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 . . . .

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., . . . 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. . . .

DAVID SCHOENBROD: 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 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." . . . Now, under that maxim, whether there's a nuisance or not really depends upon the customary use of the neighborhood . . . . 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 . . . . 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 . . . .

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? . . .

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 changing 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 . . . 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 100 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 . . . .

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.

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. . . . 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 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."

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 . . . .

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.

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.

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. . . . 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. . . .

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.

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 . . . .

Of course, there is one obvious question: If the common law is so effective, why do we have so much air and water pollution? . . .

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 . . . .

Copies of the complete Center for Private Conservation Roundtable, The Common Law Approach to Pollution Prevention, are available from CEI for \$4.00.

**Date:**  
Tuesday, March 31, 1998

**Experts:**  
David Schoenbrod

**Issues:**  
[Energy and Environment](#) [2]  
[Lands and Wildlife](#) [3]

Competitive Enterprise Institute | 1899 L St NW, 12th Floor | Washington, DC 20036 | Phone: [202-331-1010](tel:202-331-1010) | Fax: 202-331-0640

---

**Source URL:** <https://cei.org/news-letters-cei-planet/how-green-was-common-law>

#### Links

- [1] <https://cei.org/news-letters-cei-planet/how-green-was-common-law>
- [2] <https://cei.org/issues/energy-and-environment>
- [3] <https://cei.org/issues/lands-and-wildlife>