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The Limits of Statutory Law and the Wisdom of Common Law

by Michael D. Axline

Editors' Summary: Although federal environmental statutes may largely have been created to address limitations in the common law, common law still retains some advantages over statutory law for plaintiffs seeking redress in the face of risk or uncertain harms. In this Article, Michael D. Axline explains some of the shortcomings of statutory law. For instance, although citizen suit provisions are built into most federal environmental laws, plaintiffs bringing actions pursuant to these provisions face substantial burdens such as notice limitations, standing challenges, mootness, and jurisdictional issues. Common law, on the other hand, offers plaintiffs a greater range of remedies as well as more flexibility and creativity. Common law also affords plaintiffs the opportunity to make their case to a jury, which has the ability to make determinations of reasonableness in the face of uncertainty.

I. Introduction

One of the best ways to understand the effectiveness of the common law in addressing environmental harms is to examine the limitations of statutory law. This Article provides a review of some of the major limitations of environmental statutes. The most compelling evidence of the potency of the common law, however, is the fact that defendants in common law environmental cases regularly rely on statutory law as a defense to common law claims. Defendants may complain about the burdens of statutory law, but when faced with the choice, they would almost always prefer to be in front of regulators, where they can wield their economic and political clout—rather than in front of a jury, where 12 of their peers will evaluate whether their conduct, and its environmental consequences, was "reasonable."

Statutes depend for their effectiveness on the quality of bureaucracies and the strength of incentives for citizen participation. Statutes also may have significant gaps in what they cover, whether due to design, e.g., the Federal Water Pollution Control Act (FWPCA) does not truly regulate nonpoint sources of pollution or groundwater,[1] or lack of political will to enforce the law, e.g., the U.S. Environmental Protection Agency's (EPA's) reluctance to regulate carbon dioxide (CO_2) emissions.[2]

Statutory environmental law is often described as a response to the limitations of the common law in dealing with uncertain harms and risks. The common law demands proof of specific causation, while statutory regimes allow the government to regulate without proof of specific harm and causation. For public law regulators, though, uncertainty can lead to paralysis. Regulated entities have been quite successful in forcing agencies to provide extensive scientific justifications for drawing regulatory lines. Regulators therefore require a high level of certainty before they will act, even if limited available information, combined with their experience and instincts, tells them that there is a basis for acting.[3]

The common law, by contrast, is not subject to political pressures and bureaucratic inertia. Plaintiffs in common law actions often have stronger incentives for initiating and prosecuting such actions, such as the immediate risk of personal harm and the potential to recover economic damages. Moreover, although proof of causation is required in common law cases, judges and juries still have flexibility to act in the face of uncertainty. The "more probable than not" standard of proof, for example, allows juries to make decisions in the face of uncertainty far greater than would be tolerated in the scientific arena. The fact that jury decisions

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1. *See* Oregon Natural Desert Ass'n v. Dombeck, 172 F.3d 1092, 1097, 28 ELR 21491 (9th Cir. 1998) (finding that the FWPCA "provides no direct mechanism to control nonpoint source pollution") (citations omitted).

2. *See* Massachusetts v. EPA, 127 S. Ct. 1438, 37 ELR 20075 (2007) (holding that EPA failed to adequately justify its refusal to take regulatory action with respect to greenhouse gas (GHG) emissions from new motor vehicles); *see also* Joel Mintz, *Has Industry Captured the EPA? Appraising Marver Bernstein's Captive Agency Theory After 50 Years*, 17 Fordham Envtl. L. Rev. 1 (2005).

3. Restatement (Third) of Torts: Burden of Proof §28 (Tentative Draft No. 3, 2003).

may be based on less than complete information does not mean that such decisions are more likely to be wrong. In fact, instinct, experience, and "group" decisionmaking may lead to not only more rapid, but more accurate, social decisions. When the Space Shuttle Challenger exploded, for example, the market figured out within a half hour that Morton Thiokol was responsible for the disaster. It took a scientific commission six months to reach the same conclusion.[4]

Judges, too, are capable of creative but fair allocations of responsibility in the face of uncertainty, where the ponderousness of regulatory decisionmaking might simply result in paralysis. In *Sindell v. Abbott Laboratories*,[5] for example, the court applied a novel "market share" theory when plaintiffs were able to prove that their injuries were caused by one of several entities that had manufactured the anti-miscarriage drug diethylstilbestrol (DES), but could not pinpoint the particular entity that was the sole and ultimate cause of their injury. By requiring each potentially responsible entity to either prove that it was *not* responsible, or pay a share of plaintiffs' damages proportionate to that entity's share of the market for the injury-causing product, the court was able to reach a solution in the face of uncertainty that still satisfied general standards of fairness and equity.[6]

A more recent example of how the common law can address modern environmental problems can be found in *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*,[7] a multidistrict federal court proceeding involving claims from at least 15 states based on contamination of groundwater with the gasoline additive methyl tertiary butyl ether (MTBE).[8] In *In re MTBE Products Liability Litigation*, the court noted that five states (California, Florida, New York, Washington, and Wisconsin) have adopted some form of market share liability and predicted that other states would adopt collective liability approaches when presented with cases—such as the MTBE cases—involving fungible goods that create difficult manufacturer identification problems and pose equal risks of harm.[9] The *In re MTBE* court then modified the "market share" approach and adopted a "commingled product" theory to address circumstances in which multiple manufacturers of an essentially identical product that has commingled in a groundwater plume may be held severally liable for a percentage of harm corresponding to the individual manufacturer's percentage contribution to the contamination.[10]

Like environmental statutes, common law remedies in some respects promise more than they actually deliver. A frequently cited public "good" from common law actions is that they deter objectionable conduct by subjecting those engaged in such conduct to liability. In the environmental arena, however, the lag time between the conduct and the consequences can significantly diminish the deterrent benefits of imposing common law liability. The relatively brief history of toxic torts litigation proves that although an ounce of prevention can be worth a pound of cure, i.e., spend $10,000 now to prevent pollution and avoid paying $10,000,000 in the future for the harm caused by such pollution, the person or company paying for the prevention is not always the same as the person paying for the cure many years later.

Understanding both statutory and common law approaches to environmental problems is a necessity for anyone holding themselves out as an environmental attorney. Familiarity with both leads to greater comprehension of each field and more effective advocacy.[11] It can, however, be difficult to tell where common law ends and statutory law begins. Common law decisions often look to statutes and regulations to determine the existence and scope of duties, as well as the reasonableness of particular conduct.[12] Statutory provisions frequently enlist common law rules to elaborate and provide context for statutory and regulatory language and goals.[13] This overlap is unavoidable and, in some respects, even desirable, but it also can be confusing to practitioners trying to determine how best to achieve their clients' environmental goals.

This Article discusses some of the major hurdles to bringing statutory enforcement actions, the constraints of environmental statutory remedies even when plaintiffs prevail, and the trend toward the curtailment of attorneys fees provisions that are critical to encouraging private environmental enforcement. The Article concludes with a discussion of the flexibility and creativity of the common law.

II. Procedural and Substantive Limitations of Environmental Statutes

Although statutory provisions for protecting the environment are principally implemented by agencies, many of the federal statutes also provide for some level of citizen "enforcement" to supplement agency efforts. In addition, 16 states have environmental citizen suit provisions that authorize private enforcement of at least some environmental legislation.[14] Citizens seeking to enforce environmental statutes, however, must run a procedural and substantive gauntlet before receiving the benefits of the remedies provided by those statutes.

4. *See* James Surowiecki, The Wisdom of Crowds 7-11 (2004).

5. 26 Cal. 3d 588, 612-13 (Cal. 1980)

6. *Id.*

7. 379 F. Supp. 2d 348 (S.D.N.Y. 2005).

8. Defendants moved to dismiss the complaints filed in Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Vermont, Virginia, and West Virginia. *Id.* at 361-62.

9. *Id.* at 376-77, 379, 382, 396, 400, 404, 407, 411, 416, 440.

10. *Id.* at 377-78.

11. Statutes and common law rules involving the environment can themselves be divided into two broad categories: resources laws and pollution laws. Resources laws govern the use of real property and extraction from real property of economically valuable goods. Pollution laws govern the external environmental consequences of economic activity. Statutes and regulations dominate the natural resources law landscape, particularly when public property is involved. Common law plays a larger role in addressing pollution because pollution affects neighbors and is more likely to create public versus private conflicts.

12. *See, e.g.*, Newhall Land & Farming Co. v. Superior Court, 19 Cal. App. 4th 334 (Cal. Ct. App. 1991); Jordan v. City of Santa Barbara, 46 Cal. App. 4th 1245 (Cal. Ct. App. 1996). Both of these cases found that "[p]ollution of water constitutes a public nuisance," and that water pollution that violates California Water Code §13000 is a public nuisance per se. *Newhall Land*, 19 Cal. App. 4th at 341; *Jordan*, 46 Cal. App. 4th at 1257.

13. *See, e.g.*, City of Modesto Redevelopment Agency v. Superior Court, 119 Cal. App. 4th 28, 37 (Cal. Ct. App. 2004) (finding that statutory reference to "nuisance" should be interpreted in light of common law rule governing nuisance).

14. Michael D. Axline, Environmental Citizen Suits (1991); James R. May, *The Availability of State Environmental Citizen Suits*, Nat. Resources & Env't, Spring 2004, at 53, 55.

Statutory provisions for citizen involvement typically restrict the scope of that involvement in several important ways, such as by requiring advance notice to potential defendants, or by prohibiting actions that might duplicate agency efforts. In addition to these statutory limitations, courts have developed judicial "avoidance" doctrines that limit judicial involvement in the enforcement of public laws. As a result, the public-spirited citizen trying to bring a polluter to justice faces significant procedural hurdles before the merits of any claim will be addressed.

A. Statutory Restrictions

Citizen suit provisions uniformly contain two types of restrictions. The first is a requirement that the party seeking to enforce an environmental statute provide advance notice to the government and the defendant before initiating litigation. The second is a bar on private enforcement actions when the government already is "diligently prosecuting" a violation. Although each of these restrictions makes sense as a policy matter, in practice both restrictions operate to unnecessarily bar meritorious citizen enforcement efforts.

1. Notice Requirements

A private party seeking to enforce an environmental law must provide advance notice to the government and to the potential defendant of the planned enforcement action. There are two principal rationales for this notice requirement. First, advance notice gives the defendant an opportunity to fix the problem prior to litigation. Second, advance notice alerts the relevant regulatory agency to the problem and gives the regulatory agency an opportunity to prosecute its own enforcement action, should it choose to do so.

Jurisprudence applying the notice provisions of citizen suits unfortunately has treated the requirement so literally that it now serves principally as a stumbling block to initiating enforcement actions, rather than as the device for informing regulatory agencies and promoting voluntary compliance that its drafters originally intended.[15] Courts and defendants hostile to the concept of private citizen enforcement of environmental laws can comb through notices looking for technical errors or omissions to bar perfectly meritorious cases involving serious pollution problems. In contrast, pleading requirements for common law claims merely require that complaints notify tortfeasors of the "gravamen" of the claims against them.[16]

2. Diligent Prosecution Defenses

Congress was concerned that citizen enforcers might "pile on" to agency enforcement actions, or get out in front of prosecutors when regulators were planning enforcement but had not yet acted with respect to a particular defendant. Most citizen suit provisions therefore provide a "diligent prosecution" defense to citizen suits, which can be invoked when the defendant in a citizen suit is already being diligently prosecuted by a regulatory agency.[17]

As with the notice requirement of citizen suits, the diligent prosecution defense has in practice served more as a technical and political shield to meritorious citizen suits than as a true safeguard against overzealous citizen advocates. All too frequently, after receiving a notice of citizen suit, polluters will actually seek government enforcement as a shield, knowing that the government is much less likely to prosecute vigorously than citizens directly affected by pollution. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,[18] the court rejected a diligent prosecution defense after finding that the defendant had written a complaint against itself, persuaded the state to sign the complaint, and filed the complaint (and paid the filing fee) on the 59th day of a 60-day notice of intent to file a citizen suit, all to develop a "diligent prosecution" shield against the anticipated citizen suit. As another court noted in a different case: "The state was acting as a pen pal, not a prosecutor."[19]

3. Claim Preclusion by Subsequently Filed Government Actions and Consent Orders

Although less frequently encountered than notice or diligent prosecution defenses, some courts have barred citizen enforcement actions based on subsequent government enforcement actions resulting in judgments against the defendant. Several cases have held that even when a citizen suit is properly filed, i.e., at the time of filing, no government action had been filed and thus no government agency was "diligently prosecuting" an action against the defendant, if the government subsequently files an enforcement action and reaches a consent order resolving the same claims as those alleged in the citizen action, the citizen suit is barred from going forward on grounds of claim preclusion.[20]

15. *See* American Canoe Ass'n v. City of Attala, 363 F.3d 1085 (11th Cir. 2004) (affirming dismissal of citizen suit as premature because filed one day before "notice" period ran); Washington Trout v. McCain Foods, Inc., 45 F.3d 1351, 25 ELR 20539 (9th Cir. 1995) (affirming dismissal because notice of citizen suit did not provide home addresses and telephone numbers of plaintiffs, and not all plaintiffs were named in notice). *But see* WaterKeepers N. Cal. v. AG Indus. Mfg., Inc., 375 F.3d 913, 34 ELR 20056 (9th Cir. 2004) (upholding adequacy of notice).

16. *See* Robin K. Craig, *Notice Letters and Notice Pleading: The* Federal Rules of Civil Procedure and the Sufficiency of the Environmental Citizen Suit Notice, 78 Or. L. Rev. 105 (1999).

17. *See, e.g*, 33 U.S.C. §1365(b)(1)(B) (FWPCA); 42 U.S.C. §7604(b)(1)(B) (CAA).

18. 890 F. Supp. 470, 477-79, 26 ELR 20457 (D.S.C. 1995), *vacated*, 149 F.3d 303, 28 ELR 21444 (4th Cir. 1998), *rev'd*, 528 U.S. 167 (2000).

19. New York Coastal Fishermen's Ass'n v. New York City Dep't of Sanitation, 772 F. Supp. 162, 168 (S.D.N.Y. 1991). *See also* Peter A. Appel, *The Diligent Prosecution Bar to Citizen Suits: The Search for Adequate Representation*, 10 Widener L. Rev. 91, 97-98 (2003/2004); Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by* EPA and Citizens, Part One: Statutory Bars in Citizen Suit Provisions, 28 Harv. Envtl. L. Rev. 401, 463-73 (2004).

20. *See, e.g.*, EPA v. City of Green Forest, 921 F.2d 1394, 21 ELR 20610 (8th Cir. 1990); Citizens Legal Envtl. Action Network v. Premium Standard Farms, No. 97-6073-CV-SJ-6, 2000 U.S. Dist. Lexis 1990 (W.D. Mo. Feb. 23, 2000); Old Timer, Inc. v. Blackhawk-Central City Sanitation Dist., 51 F. Supp. 2d 1109 (D. Colo. 1999). *But see* Atlantic States Legal Found. v. Koch Ref. Co., 681 F. Supp. 609, 613-14, 18 ELR 20804 (D. Minn. 1988) (finding that district court has no authority to dismiss citizen suit brought under the FWPCA as a result of subsequently filed enforcement action by the United States involving similar issues).

B. "Avoidance" Doctrines

For the last two decades, the U.S. Supreme Court has been hostile to private efforts to enforce environmental laws. The Court has not directly criticized citizen enforcement, but has vigorously developed and applied several doctrines that make it more difficult for private plaintiffs seeking to enforce environmental statutes to get through the courthouse door.

1. Standing

The "standing" doctrine is based upon Article III of the U.S. Constitution, which empowers federal courts to hear "cases or controversies." The theory behind the doctrine is that courts are authorized to hear only "actual" controversies presenting concrete disputes between parties with incentives to advocate vigorously for their respective positions. The Court has developed a now familiar three-part test to determine the presence of Article III standing.[21] This test requires parties seeking to invoke the jurisdiction of federal courts to establish (1) an "injury-in-fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[22]

Until the decision in *Laidlaw* in 2000,[23] the Court had been steadily reducing the circumstances in which private citizens had "standing" to enforce environmental laws. The Court's standing jurisprudence had reached its nadir (or zenith, depending upon your point of view) in *Steel Co. v. Citizens for a Better Environment*.[24] In *Steel Co.*, the Court held that citizens seeking civil penalties for admitted violations of a federal "right-to-know" law did not have standing to seek civil penalties for the violations because the defendant had come into compliance before the case was filed.[25]

Several lower court opinions following the *Steel Co.* case threatened to undermine Congress' authorization of citizen suits, and in *Laidlaw* the Court finally granted certiorari to review one of the more radical of these opinions. In *Laidlaw*, the U.S. Court of Appeals for the Fourth Circuit cited *Steel Co.* in finding that a citizen suit under the FWPCA should be dismissed because the company had stopped violating the Act several years after the case was initially filed (but before the case came to trial).[26] The Court reversed and found that the imposition of civil penalties for past violations was a sufficiently concrete remedy to satisfy the "redressability" component of the test for standing.[27] The Court also found that plaintiffs need not show actual harm to themselves to satisfy the "injury" component of the standing test, but instead could rely upon a "reasonable concern [ ] about the effects of" environmental law violations on their interests.[28]

The *Laidlaw* opinion also drew an important distinction between "standing" and another avoidance doctrine—"mootness." The Court found that the Article III standing analysis must be made at the beginning of the case, and if post-complaint changes in circumstances diminished the strength of the controversy, the court's continued involvement should be evaluated under the doctrine of mootness.[29] The distinction is important because the burden shifts from the plaintiff, when standing is at issue, to the defendant, when mootness is at issue. When jurisprudential avoidance doctrines with room for judicial values come into play, the placement of this burden can be dispositive.[30]

2. Final Agency Action

In cases seeking judicial review of agency action under the Administrative Procedure Act (APA), plaintiffs must show that the challenged action or decision is "final" and not still under development or consideration within an agency.[31] The statutory language upon which the "final agency action" doctrine is based is sufficiently vague to create significant space for judicial policymaking. The requirement is closely related to, and sometimes confused with, the equitable doctrine of "ripeness."[32] Not surprisingly, the current Court has occupied the interpretive space created by the vagueness of the statutory phrases "agency action" and "final" with opinions that limit judicial review of agency actions affecting the environment.

In *Norton v. Southern Utah Wilderness Alliance (SUWA)*,[33] the Court distinguished between what it charac-

21. In addition to imposing a constitutional "standing" requirement, the Court has developed what it explicitly acknowledges as a "prudential" standing requirement that empowers the Court to refuse to hear cases, even when parties have constitutional standing. The primary focus in "prudential standing" cases is whether parties who have suffered "injury-in-fact" by government action should nevertheless be excluded from federal court because they are outside the "zone of interest" created by the statutory provisions they are seeking to invoke in federal court. *See, e.g.*, Bennett v. Spear, 520 U.S. 154, 162-65, 27 ELR 20824 (1997) (discussing "zone-of-interests" test and the fact that the U.S. Congress may override judicially created "prudential" standing); Cetacean Community v. Bush, 386 F.3d 1169, 34 ELR 20120 (9th Cir. 2004) (finding that while animals are capable of having constitutional standing, they do not have "prudential" standing).

22. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 22 ELR 20913 (1992).

23. 528 U.S. at 167.

24. 523 U.S. 83, 28 ELR 20434 (1998).

25. *Id.* at 104-05.

26. Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc,, 149 F.3d 303, 306, 28 ELR 21444 (4th Cir. 1998).

27. 528 U.S. at 167.

28. *Id.* at 169.

29. *Id.* at 189-93.

30. *See generally* John D. Echeverria, *Standing and Mootness Decisions in the Wake of* Laidlaw, 10 Widener L. Rev. 183 (2003-2004).

31. *See* 5 U.S.C. §702, "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof," and *id.* §704:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

32. *See, e.g.*, High Sierra Hikers Ass'n v. Blackwell, 381 F.3d 886, 895, 34 ELR 20084 (9th Cir. 2004) (discussing "final agency action" provisions of the APA under the heading of "ripeness").

33. 542 U.S. 55, 64, 34 ELR 20034 (2004).

terized as "discrete" or "specific" agency actions, and "broad" or "sweeping" agency actions. The Court rejected a request for judicial review of the U.S. Department of the Interior's failure to prevent off-road vehicle use of wilderness study areas by first finding that the "final agency actions" under the APA were confined to "discrete" actions, and then concluding that agency *failures* to act, which also are judicially reviewable under the APA, are similarly limited to failures to take "discrete" actions. As a consequence, agency refusals to enforce entire programs are *less* reviewable than agency refusals to act with respect to discrete components of programs. The APA itself does not make the distinction drawn by the Court between "discrete" agency action and "sweeping" agency action, but practitioners must be aware of the distinction when seeking judicial review of agency actions that impact the environment. The irony of the Court's approach to defining "final agency action," of course, is that "actions" with greater adverse impacts on the environment are more insulated from judicial review than actions with lesser impacts.

3. Ripeness

The ripeness doctrine is in some respects the equitable counterpart to the "final agency action" provisions of the APA. "Ripeness" requires that a dispute be sufficiently developed and concrete so that it makes sense for a court to step in and resolve the dispute. In *Lujan v. National Wildlife Federation*,[34] the Court addressed in some detail the relationship between the ripeness doctrine and the final agency action requirement of the APA, and determined (as it was later to affirm in *SUWA*) that "size matters." The Court found that agency actions with broad impacts are not "ripe" for judicial review until some discrete and specific act implementing the broader action has occurred. Judicial review was premature until a court could evaluate the larger action in the context of more manageable facts and specific controversies.

Justice Antonin Scalia wrote both the *National Wildlife* opinion and the *SUWA* opinion. He was quite candid about the impacts of the opinions on the implementation of environmental laws.

> The case-by-case approach that this requires is understandably frustrating to an organization such as [National Wildlife Federation], which has as its objective across-the-board protection of our Nation's wildlife and the streams and forests that support it. But this is the traditional, and remains the normal, mode of operation of the courts. Except where Congress explicitly provides for our correction of the administrative process at a higher level of generality, we intervene in the administration of the laws only when, and to the extent that, a specific "final agency action" has an actual or immediately threatened effect.[35]

Although the ripeness doctrine is similar to, and sometimes confused with, the doctrines of exhaustion and primary jurisdiction discussed below, the doctrines serve distinct purposes and must be analyzed separately. Each doctrine has to do with the "timing" of review, but ripeness is intended to ensure that final decisions have been reached before courts review those decisions. Exhaustion is intended to ensure that plaintiffs provide agencies with a chance to consider the plaintiffs' challenges to agency actions before those challenges are presented in court. Primary jurisdiction is intended to ensure that agencies have had an opportunity to address broad "issues" implicating agency expertise before courts consider claims involving those issues.

4. Exhaustion and Primary Jurisdiction

The exhaustion doctrine is entirely a judicial creation, developed to regulate the relationship between the judicial and executive branches of government. The doctrine can be altered by legislation. In a rare opinion expanding access to the courts under what is ordinarily considered an "avoidance" doctrine, the Court found in *Darby v. Cisneros*[36] that Congress had altered the exhaustion doctrine through §704 of the APA.[37] Section 704 is one of the worst written and most impenetrable statutory provisions ever created, but the Court correctly interpreted §704 as providing that in cases involving judicial review under the APA, courts may not require "exhaustion" of administrative remedies unless the agency has provided, by regulation, that the decision for which judicial review is sought will not be implemented while the review is occurring.

The doctrine of primary jurisdiction is intended to give courts an opportunity to take advantage of agency expertise on issues that have not previously been addressed by an agency and that arise in judicial proceedings. Even when a claim is otherwise properly presented to a court, the court may invoke the doctrine of primary jurisdiction and remand the matter to an agency—not as a way of dismissing the case, but simply to provide the agency with an opportunity to apply its expertise to the issue before the court decides it. As explained by the Court in *United States v. Western Pacific Railroad Co.*[38]:

> "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.[39]

Exhaustion, primary jurisdiction, and ripeness all delay, but do not preclude, judicial review. Nevertheless, the doctrines slow the process of enforcing environmental laws and discourage the assertion of claims in ways that the common law does not.

5. Mootness

Mootness, like many of the "avoidance" doctrines, was developed as a means of conserving judicial resources. The

34. 497 U.S. 871, 20 ELR 20962 (1990).

35. *Id.* at 894 (citations omitted).

36. 509 U.S. 137 (1993).

37. *See* text of 5 U.S.C. §704, *supra* note 31.

38. 352 U.S. 59 (1956).

39. *Id.* at 63-64 (citations omitted). *See also* Farmers Ins. Exch. v. Superior Court, 2 Cal. 4th 377, 399 (Cal. 1992) (referring insurance issue to Insurance Commissioner for consideration prior to judicial consideration of claim).

doctrine applies when it becomes "absolutely clear," after a case is filed, that "the allegedly wrongful behavior could not reasonably be expected to recur."[40] Under such circumstances, the theory goes, it would be a waste of judicial resources to proceed to a decision.

The problem with the mootness doctrine, as with the other "avoidance" doctrines, is its manipulability. Defendants in environmental cases can defend themselves (and even continue violating environmental laws) until it becomes clear that they are likely to lose, then attempt to "moot out" the case at the eleventh hour by reforming their conduct. Citizen plaintiffs who may have devoted years of their time and much of their scarce resources to enforcing an environmental law against such a defendant could then be left with nothing to show for it other than temporary reform of a defendant's conduct.[41]

6. Laches

Laches is not truly an "avoidance" doctrine, but rather an equitable principle that applies in both statutory and common law cases. The doctrine operates as an equitable "statute of limitations." The doctrine requires that actions be brought within a "reasonable" period of time and that parties not "sleep on their rights" before filing suit. Although the long-time delays involved in many environmental cases between challenged conduct and environmental harm occasionally implicate the doctrine of laches, as a practical matter courts seldom dismiss claims based on the doctrine.[42]

III. Differences Between Common Law and Statutory Remedies

The distinction between statutes and the common law is perhaps most evident in the remedies available for each. Civil penalties and equitable relief are the primary remedies in actions involving statutory provisions. Civil penalties have a punitive dimension, but the driving rationale behind penalties is that they deter future misconduct.[43] Equitable (injunctive) relief is even more directly forward-looking and intended specifically to bar future misconduct. Thus, while public law remedies are concerned about stopping misconduct and building a better future, they are not primarily concerned with addressing past misconduct.

Damages, in contrast, are the primary common law remedy[44] and are not intended to alter future conduct, but rather are intended to compensate victims for injuries caused by tortious conduct after that conduct has occurred. Large damage awards, of course, may cause environmental tortfeasors to alter their future conduct, but the only aspect of common law damages explicitly concerned with future conduct is punitive damages.

Punitive damages can have an even greater deterrent effect on future conduct than civil penalties because punitive damage awards are often significantly larger than civil penalties. In fact, one of the rationales for punitive damages is that regulatory efforts cannot solve all problems. As the court stated in *Grimshaw v. Ford Motor Co.*[45]:

> Governmental safety standards and the criminal law have failed to provide adequate consumer protection against the manufacture and distribution of defective products. . . . Punitive damages thus remain as the most effective remedy for consumer protection against defectively designed mass produced articles. They provide a motive for private individuals to enforce rules of law and enable them to recoup the expenses of doing so . . . .[46]

The Court, however, recently restricted the permissible size of punitive damage awards, and therefore the deterrent effect of such damages. In *State Farm Mutual Automobile Insurance Co. v. Campbell*,[47] the Court struck down a punitive damage award that was 145 times the compensatory damages, and stated: "Single-digit multipliers [for punitive damage awards] are more likely to comport with due process, while still achieving the States' goal of deterrence and retribution, than awards with ratios in range of 500 to 1."[48] Although state and federal punitive damages jurisprudence following *State Farm* is still wildly in flux, it is clear that *State Farm* has diminished the value of punitive damages in deterring conduct that harms the environment and threatens public safety.

Statutory and common law remedies are distinct in other ways as well. Statutory remedies are directed toward solving environmental problems at the societal level, rather than the individual level. Common law remedies are directed toward individual and site-specific problems. If your property has been contaminated with a toxic substance, or a member of your family has cancer as a result of exposure to a carcinogen, civil penalties and injunctive relief will not remedy your problem. Common law damages, however, are intended to address just such individual circumstances and to bring the experience and judgment of juries to bear on both the reasonableness of the conduct that led to such circumstances, and the appropriate remedy for such conduct.

IV. The Erosion of Economic Incentives for Private Enforcement of Public Environmental Statutes

Regulatory agencies enforce environmental laws, provide an infrastructure necessary for maintaining environmental information, and ensure minimum standards of environmental quality. There are serious and inevitable limitations, however, on what bureaucracies charged with protecting the environment can accomplish. These constraints include limited budgets and the inevitable "capture" of regulatory agencies by private sector entities the agencies are charged with regulating.

Congress recognized these regulatory shortcomings when it encouraged citizen suits as a supplement to regula-

40. United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968).

41. *See* Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 30 ELR 20246 (2000); Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 18 ELR 20142 (1987).

42. *See, e.g.*, North Carolina Wildlife Fed'n v. Woodbury, 19 ELR 21308 (E.D.N.C. 1989).

43. *See, e.g., Laidlaw*, 528 U.S. at 185 ("Congress has found that civil penalties in Clean Water Act cases do more than promote immediate compliance by limiting the defendant's economic incentive to delay its attainment of permit limits; they also deter future violations.").

44. Although injunctive relief is available in common law cases (and is particularly relevant in nuisance cases), the principal relief sought will usually be monetary damages.

45. 119 Cal. App. 3d 757 (Cal. Ct. App. 1981).

46. *Id.* at 810.

47. 538 U.S. 408 (2003).

48. *Id.* at 416, 425 (citations omitted).

tory action. Congress also recognized, however, that private enforcement actions will not be prosecuted unless there is at least some economic incentive to do so. Because citizen plaintiffs in private enforcement actions are acting on behalf of the public and receive no pecuniary compensation for their effort, Congress included fee-shifting provisions in citizen suit legislation. These fee-shifting provisions are essential to citizen enforcement of environmental statutes. Without them citizens simply could not afford to prosecute environmental cases.Unfortunately, the Court has displayed the same hostility toward private enforcement of environmental laws in fee-shifting cases as in cases involving standing, ripeness, exhaustion, and mootness. The Court first displayed this hostility in *Alyeska Pipeline Service Co. v. Wilderness Society*,[49] when it refused to award costs and fees to the Wilderness Society after the society devoted over 4,000 hours to a successful effort to force the government to comply with the National Environmental Policy Act and the Mineral Leasing Act.

Although Congress has now altered the landscape by adopting explicit fee-shifting provisions in more than 150 statutes,[50] the Court's attorneys fee jurisprudence continues to steadily erode the economic incentives for citizen enforcement of environment legislation.

A. Removing the Contingency Incentive

In *City of Burlington v. Dague*,[51] the Court reduced the financial incentives for attorneys to represent citizens in private enforcement actions by prohibiting lower courts from using a "contingency" factor to enhance statutorily authorized fee awards. Prior to *Dague*, the Court had recognized that there is a relationship between fee award amounts and the willingness of attorneys to accept contingency cases. Justice Scalia asserted in *Dague* that if fees were enhanced to account for the contingency of losing, it would provide financial incentives for attorneys to bring nonmeritorious, high-risk cases in the hope of winning large fee awards.[52] This falsely assumes that plaintiffs may prevail in nonmeritorious cases—a truly cynical view of the judicial system.[53] The assumption, however, leads to the result that Justice Scalia prefers—less citizen enforcement of public laws.

B. The Trap Door

In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*,[54] the Court created a "trap door" through which defendants in citizen suits can escape paying costs and attorneys fees at the last minute, even in meritorious cases. If a defendant concludes that it is about to lose, even after years of litigation (and significant investments of time and resources by citizen plaintiffs and their attorneys), the defendant can at that point conform its conduct to the law, move to dismiss the case as moot, and claim that the plaintiff did not "prevail" for purposes of fee awards because the only "judgment" in the case is the one dismissing the case as moot—a judgment in defendant's favor.[55]

In *Buckhannon*, the Court determined that the plaintiffs were not "prevailing parties" for purposes of awards of costs and attorneys fees, even though their litigation had caused the defendants to provide at least part of the relief that the plaintiffs were seeking. The Court rejected the reasoning of several circuits that plaintiffs should be awarded fees when a suit served as a "catalyst" for changing challenged conduct. Instead, the Court found that plaintiffs could be considered "prevailing parties" for purposes of fee awards only when litigation resulted in a "*court-ordered* 'change in the legal relationship between the plaintiff and the defendant.'"[56]

When Justice William Brennan observed in his dissent in *Evans v. Jeff D.*,[57] that "[e]nforcement of the law is what really counts," he was referring to the fact that attorneys are unlikely to enforce public laws unless they will be compensated, at least when they prevail. And less enforcement of the law means less protection for the environment. As the Court whittles away at the availability of attorneys fee awards in public law cases, the contingency fees available in common law tort cases become more important in the choice between statutory remedies and common law remedies for environmental problems.

V. The Flexibility and Creativity of the Common Law

Although the common law is, in theory, anchored by stare decisis and fidelity to precedent, the greatest strength of the common law is its flexibility and ability to achieve justice and fairness in individual cases. As Oliver Wendell Holmes (before becoming Justice Holmes) stated in his first law review article: "It is the merit of the common law that it decides the case first and determines the principles afterwards."[58] Or as Justice Holmes more famously put it in *The Common Law:* "The life of the law has not been logic; it has been experience."[59]

The common law allows judges and jurors to apply experience and common sense even in the face of uncertainty. The flexibility of the common law also allows societal norms to be tailored to account for specific problems that

49. 421 U.S. 240, 5 ELR 20286 (1975).

50. *See* Ruckelshaus v. Sierra Club, 463 U.S. 680, 684, 13 ELR 20664 (1983) (noting that Congress has included fee shifting provisions in over 150 statutes).

51. 505 U.S. 557, 22 ELR 21099 (1992).

52. *Id.* at 563.

53. For a more detailed critique of this opinion, see Michael Axline, *Decreasing Incentives to Enforce Environmental Laws:* City of Burlington v. Dague, 43 J. Urb. & Contemp. L. 257 (1993).

54. 532 U.S. 598 (2001).

55. *Id*. at 609-10.

56. *Id.* at 604 (quoting Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792 (1989)) (emphasis added). Some federal environmental statutes, such as the CAA and Endangered Species Act (ESA), authorize recovery of attorneys fees "whenever appropriate." Post-*Buckhannon* cases under these statutes have allowed fee recoveries under the catalyst theory. *See* Sierra Club v. EPA, 322 F.3d 178, 33 ELR 20181 (D.C. Cir. 2003) (CAA); Loggerhead Turtle v. County Council of Volusia County, 307 F.3d 1318, 33 ELR 20057 (11th Cir. 2002) (ESA).

57. 475 U.S. 717, 743 (1984).

58. 1 Oliver Wendell Holmes, *Codes, and the Arrangements of the Law (1870), in* The Collected Works of Justice Holmes 212 (1995).

59. 3 Oliver Wendell Holmes, *The Common Law (1881), in* The Collected Works of Justice Holmes 115 (1995). *See generally* L. Menand, The Metaphysical Club: A Story of Ideas in America 337-47 (2001) (describing the genesis of Justice Holmes' common law and "reasonable man" jurisprudence).

environmental statutes and regulations may be too generalized and abstract to reach. The FWPCA's prohibition on "discharges" of pollutants without permits, for example, undoubtedly benefits society as a whole by improving overall water quality, but the FWPCA cannot resolve the specific question of whether John Smith should pay his neighbor Mary Clark for the unpleasant odor in Mary's drinking water caused by a gasoline spill on John's property.

The primary fulcrum for applying the flexibility and creativity of the common law to the complexity and uncertainty inherent in environmental problems is the "reasonable person" standard. The "reasonable person" standard allows jurors to apply their own experience and common sense to evidence in order to allocate costs. If a company's discharge of a pollutant is "reasonable," a jury may allocate the external costs of the discharge (in the form of reduced water quality) to downstream water users. If, on the other hand, the discharge is not "reasonable," a jury may allocate the costs of the discharge to the company, in the form of payments to downstream users.

Perhaps the best examples of how the common law can reach environmental problems not addressed by public law or regulatory programs comes from a series of cases, first prosecuted by my partner, Duane Miller, in California, involving contamination of public drinking water supplies with mass-produced chemicals.[60] Miller understood that the chemicals turning up in public water supplies were in fact products manufactured and sold by the chemical and petroleum industries. He began bringing common law actions, including product liability actions, against those manufacturers to hold them accountable for the costs their products were imposing on water users.[61] The application of common law products liability theories in this context has resulted in hundreds of millions of dollars of water treatment costs being borne by the companies that manufactured polluting chemicals, rather than by innocent citizens who depend on groundwater for their drinking water source.

Historically, the busiest intersection between the common law and the environment has been in the realm of nuisance. As Prof. William Rodgers explains:

> There is no common law doctrine that approaches nuisance in comprehensiveness or detail as a regulator of land use and of technological abuse. Nuisance actions have involved pollution of all physical media—air, water, land—by a wide variety of means. Nuisance actions have challenged virtually every major industrial and municipal activity that is today the subject of comprehensive environmental regulation—the operation of land fills, incinerators, sewage treatment facilities, activities at chemical plants, aluminum, lead and copper smelters, oil refineries, pulp mills, rendering plants, quarries and mines, textile mills and a host of other manufacturing activities.[62]

Other common law doctrines not unique to environmental cases also provide creative decision rules that help in solving allocation problems in the context of specific environmental disputes. Rules apportioning harm to and among multiple parties, for example, are particularly useful in circumstances, such as a toxic plume of groundwater contamination, where a number of parties have contributed to environmental harm, and it is impossible to determine with any precision the exact amount of any given party's contribution. Section 433A of the *Restatement (Second) of Torts* provides: "(1) Damages for harm are to be apportioned among two or more causes where (a) there are distinct harms, or (b) there is a reasonable basis for determining the contribution of each cause to a single harm . . . ."[63] Comment d (divisible harm) to this section of the *Restatment* explores the meaning of "reasonable" by stating:

> Such apportionment is commonly made in cases of private nuisance, where the pollution of a stream, or flooding, or smoke or dust or noise, from different sources, has interfered with the plaintiff's use or enjoyment of his land. Thus where two or more factories independently pollute a stream, the interference with the plaintiff's use of the water may be treated as divisible in terms of degree, and may be apportioned among the owners of the factories, on the basis of evidence of the respective quantities of pollution discharged into the stream.[64]

Environmental statutes and regulatory programs, with their broad sweep and general standards, simply cannot match the common law's ability to address the nearly infinite fact variations that arise in particular cases.

VI. Defendant's Efforts to Use Statutory Schemes As a Shield for Common Law Claims

Statutory and common law approaches to environmental problems each have their attractions and limitations. In the end, however, as noted at the start of the Article, the best measure of effectiveness may be how defendants in environmental cases view each approach. By this measure, there is little doubt that the common law is more effective. Defendants frequently attempt to use statutory programs as a "shield" from common law claims. The converse is not true. Defendants do not argue that juries, rather than regulatory agencies, should hear environmental claims.

Defendants use statutory schemes to "shield" themselves from common law claims in two ways. Each demonstrates how common law remedies can address gaps in regulatory programs. One way is to argue that regulatory programs preempt common law claims. In *Bates v. Dow Agroscience, Ltd. Liability Co.*,[65] for example, defendants argued that the labeling provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) preempted common law claims by peanut farmers that they were entitled to damages against Dow, because a pesticide marketed by Dow had ruined their peanut crops. The Court rejected Dow's attempt to invoke FIFRA as a shield from common law damages and took an unusually close look at how regulatory programs and common law damage claims affect the behavior of defendants in environmental cases:

60. For more information on the cases, see South Tahoe Pub. Util. Dist. v. Atlantic-Richfield Co., No. 99-9128 (Cal. App. Dep't Super. Ct. filed Apr. 16, 1999) and City of Santa Monica v. Shell Oil Co., No. 01-04331 (Cal. App. Dep't Super. Ct. filed June 19, 2000).

61. The groundwater that supplies much of the public's drinking water is, ironically, also one of the least regulated "commons" in the environment. This water becomes heavily regulated as soon as it is extracted for drinking purposes, but, with the exception of limited provisions of the Safe Drinking Water Act, little is done to prevent the water from being contaminated when it is underground. Public water suppliers faced with the need to treat contaminated groundwater had historically simply passed the costs of treatment along to ratepayers.

62. William H. Rodgers Jr., Environmental Law: Air and Water §1.1, at 1 (1986).

63. Restatement (Second) of Torts §433A (1965).

64. *Id.* cmt. d.

65. 125 S. Ct. 1788, 35 ELR 20087 (2005).

> A requirement is a rule of law that must be obeyed; an event, such as a jury verdict, that merely motivates an optional decision is not a requirement. The proper inquiry [in deciding Dow Agroscience's preemption claim] calls for an examination of the elements of the common-law duty at issue . . . it does not call for speculation as to whether a jury verdict will prompt the manufacturer to take any particular action (a question, in any event, that will depend on a variety of cost/benefit calculations best left to the manufacturer's accountants).[66]

The fact that a jury award might "induce" Dow to change the label on its product did not interfere with or "preempt" FIFRA's labeling requirements. Rather, as the Court noted: "Private remedies that enforce federal misbranding requirements would seem to aid, rather than hinder, the functioning of FIFRA."[67] Most federal statutes do not preempt state common law claims, but preemption analysis requires careful examination of the specific statutory language at issue in each case.

A second way in which defendants use regulatory programs to shield themselves from common law liability is by arguing that compliance with regulatory standards satisfies the common law standards of due care. Courts have also consistently rejected this argument. For example, in *Amos v. Alpha Property Management*,[68] a California appellate court rejected an argument that compliance with "fire, building and safety codes establishes due care," reasoning that "one may act in strict conformity with the terms of such enactments and yet not exercise the amount of care which is required under the circumstances."[69] These principles apply equally to nuisance claims. As explained in one treatise: "Nuisance defendants frequently seek to insulate themselves from liability by demonstrating that they are in compliance with applicable regulatory requirements administered by a government agency [but] regulatory compliance provides a nuisance defendant very little shelter from the broad power of the courts."[70]

Defendants' use of statutory provisions to shield themselves from the common law provides the best possible evidence that the common law remedies for environmental problems are often more powerful than their statutory counterparts.

VII. Conclusion

As the hidden costs of the "industrial age" continue to be visited upon ordinary citizens, common law remedies will become increasingly important. Environmental statutes will continue to play a necessary role in society's struggle to protect the environment, but the creativity and flexibility of the common law may ultimately provide the best mechanism for striking a balance between the need for economic activity and the need for individual justice.

66. *Id* at 1799.

67. *Id*. at 1802.

68. 73 Cal. App. 4th 895 (Cal. Ct. App. 1999).

69. *Id.* at 901 (quoting Perrine v. Pacific Gas & Elec. Co., 186 Cal. App. 2d 442, 448 (Cal. Ct. App. 1960)); *see also* Hasson v. Ford Motor Co., 32 Cal. 3d 388, 407 (Cal. Ct. App. 1982) (finding that compliance with regulations does not fulfill manufacturer's tort duties).

70. 2 N. Levy et al., California Torts: Nuisance and Trespass §17.09(3)(c), at 17-47 to -48 (Matthew Bender 2003).