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American Association of Law Schools Conference: Foreword

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**Foreword to the Association of American
Law Schools' Seminar**

BOBBIE ANNE FLOWER

The Association of American Law Schools (AALS) hosted a seminar during its annual conference in Washington, D.C., held on January 6, 1997. The seminar, entitled *Three Perspectives on Risk: Common Law, Environmental Regulation, and Law and Economics*, focused on the ever-present and eminent role that risk assessment plays in all aspects of environmental law. More specifically, the seminar examined how common law, environmental regulation, and economics use risk concepts in the search for coherent risk analysis procedures. Hope Babcock of Georgetown University Law Center served as the moderator of a panel of three lecturers, all of whom are law professors with much experience and knowledge in this complex area of law.

The three articles following this foreword are transcripts of the speeches given at the seminar. The Pace Environmental Law Review (PELR) has edited the speeches from their original forms in order to conform them to publishable formats. This entailed adding footnotes where pertinent or in situations where the speaker wished to include additional information such as current events and new developments that relate to the focus of the speech. We have made every attempt to preserve the integrity of the speeches throughout the editing process. The remainder of this foreword provides a brief overview of the main theories and issues presented by the lecturers; Professors Marshall S. Shapo, Stephen Gilles, and Robert V. Percival, each in their respective turns.

In *Tort Law and Environmental Risk*, Professor Shapo¹ examines the role that tort law plays in modern environmental risk assessment. Taking his audience through an explanation of common law liability theories, Professor Shapo demonstrates the importance of risk assessment in traditional common law disputes and its evolution into a critical part of shaping present-day environmental cases. He touches on areas of common law such as: 1) negligence, a concept that necessarily draws on notions of morality and asks whether the activity at issue exposed persons to an unreasonable risk of harm; 2) strict liability, faultless liability which is a key component in tort remedies applicable to environmental harms; 3) private nuisance, a theory requiring plaintiffs to explicate that the risk associated with defendant's actions went beyond socially acceptable limits; 4) public nuisance, the product of centuries of common law development which requires the actor knew or had reason to know that his/her action(s) would significantly effect the public right; and 5) trespass, a legal concept which defies the inescapable balancing factor involved in risk assessment and typically finds its way into the language of many CERCLA opinions. Professor Shapo's examination yields two basic conclusions: 1) tort law is the ultimate refuge for threatened citizens; and 2) environmental cases are decided by tort-like formulas of risk assessment.

Similarly, Professor Gilles² discusses the integration of environmental and tort law in today's society in his presentation entitled, *What's So Great About Lay Judgments? What's So Bad About Expertise?*. The discussion focuses on the egregious dichotomy between layperson and expert risk evaluation. Professor Gilles opines that expert perspectives do not receive the respect warranted, and that lay judgments should be heavily examined before any reliance occurs due to their inherent flaws and pertinent costly problems that reliance may cause. Why are lay judgments tainted? The answer lies

1. Marshall S. Shapo is Frederic P. Vose Professor at Northwestern University School of Law.

2. Stephen Gilles is a law professor at Quinnipiac College School of Law.

in the factors laypersons consider when assessing risks. Professor Gilles points out that where the typical expert views a death as a death, the layperson has a more complex and context-sensitive method of approaching risk evaluation. Several detailed examples are provided to illustrate the pitfalls of lay judgments which most often result in economic hardship to those who rely upon them. Professor Gilles closes his presentation with two suggested conclusions: 1) lay judgments regarding risk are generally flawed; and 2) the dichotomy between lay and expert risk assessment should not be overdrawn. If we want economically sound decisions made regarding risk, regardless of who performs the analysis, we must give the decision makers better incentives to evaluate.

On a different note, Professor Percival³ explores another side to the "expert v. layperson" dichotomy in *Responding to Environmental Risk: A Pluralistic Perspective*. Professor Percival offers a pluralistic approach to the regulatory policy which results from modern environmental risk assessment. He suggests abandoning the practice of imposing more detailed analytical thresholds which seem to return regulatory policy to a common law model. Instead, Professor Percival believes environmental policy should embrace preventative regulation while simultaneously cultivating flexible regulatory standards. As a result, liability as well as market forces are harnessed as mechanisms to control risk. He suggests that by improving public understanding of risk assessment, this pluralistic trend can succeed and work to our benefit. Since the public spurred the tremendous federal governmental movement in environmental law in recent decades, by educating the public about how to deal with involuntary exposure to environmental risks, regulatory policy may be capable of amplifying the power of common law liability and market forces thereby creating additional opportunities for improving the fairness and efficiency of regulatory policy. In other words, Professor Percival suggests that it is possible to use the lay perspective of risk assessment to our benefit as

3. Robert V. Percival is a Robert Stanton Scholar and the Director of the Environmental Law Program at the University of Maryland School of Law.

long as the public is educated as to the proper assessment procedures.

As previously noted, this has been solely an introduction to the wealth of information you will uncover as you continue to read the speeches that follow. Although each of these lecturers offer different perspectives on risk assessment and its status in today's world of tort and environmental law, all seem to agree on the notion that risk assessment plays a tremendous role in trying to right environmental wrongs. We must master this assessment procedure if we are to successfully protect public health and safeguard the natural environment.

The Pace Environmental Law Review would like to thank Pace University School of Law Professors M. Stuart Madden and William R. Slye for their efforts in helping to organize this seminar, the AALS, Hope Babcock, and the speakers themselves for presenting this highly educational and intriguing seminar at the 1997 AALS annual conference. A special thanks to Professors Madden and Slye and the speakers for allowing the PELR to publish the occasion.