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Symposium: Environmental Accountability in an Age of Consequences: Foreword

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SYMPOSIUM: ENVIRONMENTAL ACCOUNTABILITY IN AN AGE OF CONSEQUENCES

FOREWORD

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As this edition goes to print, we are at a pivotal moment in history. There is unequivocal evidence that the climate system is warming.[1] Snow and ice levels have diminished, sea levels are rising, precipitation has increased, oceans are becoming increasingly acidic, and there are observable changes in the salinity balance of the global water cycle.[2] The main cause is the measurable increase in anthropogenic greenhouse gas emissions.[3] Greenhouse gas effects, together with those of other anthropogenic drivers, have been detected throughout the climate system and are extremely likely to have been the dominant cause of the observed warming taking place since the mid-twentieth century.[4] The future is uncertain and the realities are pressing.

The phrase "environmental accountability" encompasses a broad range of mechanisms that expose environmental actions and create either a legal obligation, or a stronger sense of responsibility, to improve environmentally consequential behavior.[5] In an age of colossal climate consequences from human activity, it is now more critical than ever to think broadly about environmental accountability, and utilize a wide range of techniques to assure desirable environmental outcomes.[6]

The five articles in this Symposium each take a different

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1. IPCC, *CLIMATE CHANGE 2014: SYNTHESIS REPORT*, 2 (2014).

2. *Id.* at 2–4.

3. *Id.* at 4 ("Anthropogenic greenhouse gas emission have increased since the pre-industrial era, driven largely by economic and population growth, and are higher than ever.").

4. *Id.*

5. LeRoy Paddock, *Environmental Accountability and Public Involvement*, 21 PACE ENVTL. L. REV. 243, 243 (2004).

6. *Id.* at 243–44.

approach to addressing environmental accountability. Professor Denis Binder's piece, *The Increasing Application of Criminal Law in Disasters and Tragedies: A Global Phenomenon*, documents governments' increasing use of criminal accountability for disasters. Professor Binder describes domestic and international examples of criminal enforcement, organizing them into a descriptive typology that includes oil and gas disasters; structural failures pertaining to defective building and code enforcement; mining disasters; environmental debacles such as food safety and asbestos contamination; transportation disasters covering land, air and sea travel; natural disasters coupled with improper planning; and workplace safety. For purposes of this Symposium, a subset of the tragedies upon which Professor Binder focuses implicating environmental contamination, health and safety are particularly relevant.

From this typology, we glean certain lessons. First, Professor Binder points out that tragedies do not always lead to prosecutions. Even in situations where prosecutions are forthcoming, arrests and indictments do not always result in convictions or plea deals. Second, according to Professor Binder, prosecutors have become increasingly aggressive in seeking out responsible parties to be held criminally accountable, particularly in high profile cases. Third, accountability extends beyond those directly involved in causing the disaster to such entities as corporate parents. Fourth, criminal accountability is increasingly global, applies to both common and civil law jurisdictions, and involves a wide variety of offenses.

Professor Binder's piece considers an important aspect about how society responds to disasters. Many decades ago, sanctions were weak and consequently undermined the effective functioning of our environmental enforcement system. Effective sanctions, and in particular, criminal sanctions, however, are critical to desirable environmental outcomes.

As Professor Binder points out, criminal prosecutions serve a number of important functions. Among other things, they send a strong message that society will not tolerate certain kinds of behavior, they appease public sentiment demanding accountability and redress, and they are retributive.

As a bookend to Professor Binder's piece about criminal liability stands Susan Stark's piece.[7] Stark shows how desirable

7. Susan Perkins Stark, *The Department of Defense Natural Resources Conservation Program: How Military Environmental Activists Conserved 30 Million Acres for Military Use and the Protection of Endangered Species*, 38 W. NEW ENG. L.

environmental outcomes are the result of actions and decisions by particular individuals who should rightfully be recognized. Unlike criminal accountability, which is designed to punish and deter misdeeds, Stark's piece addresses how we can and should recognize those responsible for positive environmental policies.

Stark begins by invoking the theme of *It's a Wonderful Life*: our current good deeds beget future good fortune and prosperity. As Stark meticulously explains, for Jim Perkins, one of the instrumental figures behind the Department of Defense Natural Resources Conservation Program, the connection between his prior positive action and future environmental good fortune took three decades, but ultimately and indeed transpired.

Using the collective research of historian Jean Mansavage, Stark addresses the factors that shaped the culture of conservationist policy within the military. She tackles the task like a recipe, identifying the "ingredients" that led those influential individuals to appreciate the environment because they were later able to translate this appreciation into conservation-minded action. Stark points out that, like each of the actors that played a role in what would become the Department of Defense Natural Resource Conservation Program, Perkins had developed an early connection to the outdoors, which led to an appreciation for wilderness, wildlife, flora and fauna. She shows how early formative connections with the environment shaped the people who, in turn, shaped the policy.

In my piece, entitled *Guardians of Municipal Public Trees: Commonwealth of Massachusetts Tree Wardens' Authority and Accountability*, I write about the individuals who are legislatively accountable for municipal public trees. Through a legislative scheme that requires a permit from a tree guardian before planting, trimming, cutting or removing a public tree, Massachusetts has established a structure that protects the delicate municipal landscape. This guardian is ultimately responsible for protecting public trees and also for protecting the public from those trees when the trees are deemed hazardous. Tree wardens are held publicly accountable for doing so.

Like Stark's article, my article reveals the influential factors that lead to this conservation legislation. I begin by tracing the history of tree protection in Massachusetts. In turn, Massachusetts influenced numerous other states' tree protection legislation.

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Massachusetts creates a position—the tree warden—and then relegates to it nearly all decision making about whether, when and where to place, alter, or remove public trees. By creating a legislatively responsible official who must permit tree alteration, and by creating a public hearing process before trees may be altered, Massachusetts signals the environmental, health and safety importance that shade trees play in society.

Failure to follow the statutory proscriptions may lead to monetary civil penalties and, in certain situations, incarceration. When tree wardens' acts or omissions cause harm to the person or property of others, the municipality may be held accountable. This accountability creates pressure to err on the side of public safety when striking a balance between tree preservation and public needs.

I conclude my article by identifying certain areas in need of legislative reform. The Massachusetts legislation is aspirational and effective; however, it is dated and has yet to be amended to reflect changes in the composition, size and canopy of existing public shade trees, or to reflect advances in tree science and tree care practices.

Chris Erchull and Laura Fisher consider accountability through the lens of how to properly remedy and regulate the unintended consequences of subtherapeutic antibiotic dosing of livestock.[8] The authors begin by tracing the history of antibiotic use in agricultural settings. Through this history, we appreciate the factors that led to the results – both positive and negative – that we face today. Erchull and Fisher explain how non-environmental influences driven by population needs, food price, and herd health, led to antibiotic supplementation that, in turn, created numerous unintended environmental consequences.

The authors focus on, and document, particular categories of concern: animal welfare, human health, and environmental consequences. The addition of antibiotics has led to the proliferation of antibiotic-resistant bacteria. The resulting so-called "superbugs" reach humans and the environment through such vectors as processed meat, employee and transporter handling, and excrement. One particularly acute source of superbug-laden excrement derives from manure runoff and manure

8. Chris Erchull and Laura Fisher, *Remedying and Regulating the Unintended Consequences of Subtherapeutic Dosing of Livestock with Antibiotics: Can the EPA's Implementation of the Clean Water Act Reign in the Problem?*, 38 W. NEW ENG. L. REV. 397 (2016).

application for agricultural practices from which bacteria can be released into the environment and water supply. The authors point out that organic farming is not immune to this because, at present, there are no restrictions on the use of antibiotic-laden manure in agriculture.

The authors then turn their attention to legal mechanisms that enhance environmental accountability. Their pivotal argument is that accountability for the consequences of subtherapeutic dosing of livestock can come from the Clean Water Act. The authors argue that the Clean Water Act's broad definition of toxic pollutants should be read to include antibiotics, and that the EPA should be required to regulate antibiotics much like the EPA was required to regulate greenhouse gases under the Clean Air Act mobile source provisions.[9]

While Erchull and Fisher focus on accountability for antibiotics in agriculture, Daniel DePasquale addresses statutory cleanup accountability for arranging for "treatment" of a hazardous substance. In *CERCLA Enforcement: Terminology and Meaning of "Treatment" Arranger Liability*, DePasquale (i) addresses why Congress included the arranged for "treatment," as distinct from the arranged "disposal" language in CERCLA's liability scheme, (ii) identifies what distinct categories of "treatment" arrangements Congress meant to capture, and (iii) describes how courts analyze the "treatment" line of case law.[10]

DePasquale's article focuses on accountability through the lens of liability and deterrence. CERCLA sets up a scheme of statutory, financial, and deterrence-based accountability for contamination, and DePasquale makes the point that those who arrange for "treatment" are an important and distinct liability category.

DePasquale outlines how, properly read, CERCLA enforcement can and should be broader than it currently is. When the arrangement for treatment angle is properly untangled from its more popular cousin, "arrangement for disposal," it opens up a distinct line of contamination enforcement. DePasquale posits that, properly read in light of this distinct, and broad, Congressional intent, "treatment" opens the door to broader, and more effective, enforcement. It also sends a clear liability message to the regulated community about what type of arrangements lead

9. Massachusetts v. EPA, 549 U.S. 497 (2007).

10. Daniel J. DePasquale, *CERCLA Enforcement: Terminology and Meaning of "Treatment" Arranger Liability*, 38 W. NEW ENG. L. REV. 425 (2016).

to liability.

Environmental consequences are their own form of accountability. In this fashion, accountability is to some degree inevitable—it reflects the effects of our action or inaction. Yet, accountability is also to some degree self-imposed. It reflects societal choice of law and policy, and human behavior. The six Symposium authors challenge us to think broadly about different accountability mechanisms we can utilize to ensure better environmental outcomes.