EPSTEIN'S THEORY OF ENVIRONMENTAL PROTECTION

Ronald Hamowy

Professor Epstein's paper makes much of the difficulty of collecting reliable evidence in suits involving environmental damages. This difficulty, he appears to conclude, is of such magnitude that solutions that one might not sanction in other areas of the law are necessary if one once concedes that the protection of one's environment from despoliation is as much a right of each individual in a free society as is the protection of one's property from theft. However, the premise that the evidentiary problem in environmental law is somehow *qualitatively* different than it is in other areas of law is, I think, faulty.

The level of reliability of evidence, such that it constitutes legal proof that a tort or crime has been committed, is no less difficult to establish in one area of litigation than in another. All areas of the law have struggled with this problem. In reality, it is the *predictability* of what the courts will view as reliable evidence that determines whether litigation will take place, and not whether a wrong has in fact been committed. If two people are alone in a room out of earshot of anyone else and one physically threatens the other, an assault has occurred, but it is unlikely that a criminal charge will ensue or that a civil suit will avail. The existence of this evidentiary problem does not, however, warrant recourse to substantial government intervention so that suits in tort, where harm has in fact occurred, are more likely to prove successful.

With particular respect to environmental law, Epstein wishes to minimize the evidentiary problem by sanctioning the issuing of permits to those who possess hazardous substances. He does this in order to permit the ready identification (and insure the solvency) of potential offenders — releasers of hazardous substances into the

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environment. But if the implications of this argument were carried to their logical conclusion, there is no reason why the government should not issue permits to engage in all potentially criminal or tortious activities where the offender cannot readily be recognized. Under this argument, not only should automobile drivers and gun owners be licensed — Professor Epstein explicitly defends the former — but so, for example, should building contractors using dynamite and, at the extreme, all possessors of poisons and knives. It is not self-evident that facilitating access to reliable evidence by licensing warrants these intrusions into private life.

The licensing provision does not solve the problem of attribution of the source of the harm. As Epstein notes, "many different pollutants can enter a given water system at different times and in different quantities. Some of these may prove stable and others not. The re-creation of past conditions often poses enormous challenges when the evidence is available, and insuperable obstacles when it is not." (p. 20) I cannot see how issuing licenses that permit the disposal of hazardous substances will help in tracing the level of harm contributed by any specific pollutant or in determining what harm issued from which polluter unless the licensing arrangements were so elaborate and extensive that they begin to resemble the very provisions of the Superfund bill that Epstein argues against.

It is possible that without a permit system, some individuals might suffer without being able to identify the source of the wrong or, having identified it, find that the tortfeasor is insolvent. But I would suggest that this possibility alone does not warrant the sorts of intrusions Epstein would allow by sanctioning a permit system. We would tolerate such situations when the alternative is a significant level of government intervention into social and economic life, as there doubtless would be were the possessors of all potentially hazardous substances subject to government license. It might, for example, facilitate the identification of a certain class of noise polluters to license all owners of radios and phonographs and to require them to carry sufficient insurance to cover the cost of damages should they be successfully sued by irate neighbors. It is possible that without some licensing scheme, noise pollution has increased substantially and large numbers of prospective plaintiffs have been denied access to reliable evidence with which they could successfully prosecute a suit. Admittedly, the harm that could result from the release of chemical pollutants into the environment appears to have the potential of being far more serious than the noise emanating from a neighbor's radio, but it cannot be argued that this

kind of noise pollution is always less harmful. The noise generated in one's immediate neighborhood by powerful sound reproducing equipment can be as extensive as is that generated by factories, airplanes, building construction, street repairs, and so on. I assume that Epstein does not support the imposition of a permit system here as well. Yet the reasons for sanctioning a licensing arrangement are not dissimilar. If the law is to be consistent, the principles governing noise pollution should be the same as those operating with respect to chemical pollution.

Of course, Epstein has not argued for a comprehensive system of permits for all possible polluters. Government licensing presumably will extend only to holders of those waste materials that are known to have the potential of causing "real difficulty." Here I am at a loss. Most chemicals, in sufficient quantity, carry such a potential. Some, in minute quantities, are hazardous, but only when in contact with other, otherwise harmless, chemicals. I would question Epstein's statement that "identifying the type of waste materials [subject to permit] should not be difficult." (p. 34) The number of potentially hazardous effluents alone is staggeringly large and encompasses suspended solids, dissolved organic and inorganic compounds, plant nutrients, bacteria, and viruses. The sources of these pollutants are omnipresent in any industrial society and the harm they cause may vary from noxious odors to speeding up the corrosive process on electrical equipment to substantially shortening one's life. How extensive is this permit system to be? And, having established it, would it in fact make it simpler to identify tortfeasors? Liberal political doctrine does not sanction recourse to government intervention except in certain limited instances where no voluntary alternatives are available and then only when the harm that ensues is of such magnitude that it clearly outweighs the social damage that follows upon the enlargement of state activity. I cannot see how a government permit such as Epstein envisions contributes sufficiently to solving the problem of identifying polluters, given the mischief such a system would allow.

I also have difficulty with Professor Epstein's conclusion that the government's jurisdiction should extend to the common pool of unowned natural resources. The solution to this problem appears to lie not in surrendering control over unowned things to the government — whose primary interest does not lie in either protecting these resources or in using them most economically — but, if possible, in bringing the common pool into something approximating

private ownership for the purposes of tort law. Epstein's argument here relies heavily on the conclusions of Sweeney, Tollison, and Willett with respect to resources having common-pool properties. However, the Sweeny-Tollison-Willett analysis does not address the question of pollution of unowned resources, but rather the problems involved in defining property rights over certain common-pool resources and in conserving these resources in the face of multiple exploiters. There is no reason why the law could not recognize any exploiter of such resources as custodian of the resources, that is, as plaintiff in a suit for damages in instances where the resources are polluted. Indeed, it would be to the advantage of all exploiters to enter into a joint action for damages if injury is provable.

The outcome of such an arrangement would clearly be more efficient than that which would obtain if the government were recognized as the exclusive trustee of common-pool resources. This is especially true since the state, in fact, cannot show damages, but can only be deemed to have suffered damage by legislation to that effect.

I assume that a solution along these lines is legally possible and that there is no inherent theoretical obstacle to allocating to individuals the right to sue in tort in such common-pool situations. If such difficulties do exist, it is unfortunate that Professor Epstein has not examined them. I cannot foresee any insurmountable theoretical difficulty arising out of solving the common-pool problem in this way, although, admittedly, tort law would have to be altered to accommodate the category of private trustee without power to sue in certain areas of trespass.

One of the major thrusts of Epstein's essay, which emerges in both his theoretical discussion and his recommendations for a workable environmental statute, concerns the best method of providing ex ante relief where large numbers of possible litigants are involved. His position is summarized in his discussion of automobile drivers. Epstein argues here that government intervention via licensing is a more efficient means of administering injunctive relief than is the court system responding to many individuals acting independently.

The benefits of this solution to the problem of large numbers appear self-evident to Epstein. He sketches out the criteria of who ought to grant injunctive relief but he offers no evidence to substantiate his claim that the benefits of granting wholesale injunctive relief through a licensing system clearly outweigh the

problems that follow upon the creation and operation of a licensing authority. There is no acknowledgement that a licensing system requires a massive and intrusive government apparatus and that the licensing authority itself must face the question of what criteria to employ in granting or withholding licenses. What evidence is germane to determining who is to be licensed, and what correlation do the criteria for the withholding of a license have to the criteria that would lead a court to enjoin a particular driver?

Epstein's argument here suffers from a conceptual confusion. Strictly speaking, there is no permanent ex ante relief in tort. There is, at best, an increased ad hoc penalty attached to engaging in a certain activity that is, in its own right, tortious. Injunctive relief is relief only so long as the behavior is not engaged in; it does not stop the activity, but only punishes it more severely, should an enjoined defendant engage in it. More importantly, it must first be proven to the court's satisfaction that the activity would be tortious before it will issue. The remedy is available only to those complainants who can prove that the action to be enjoined is injurious.

An injunction is not a form of preventive detention, which thwarts a defendant from violating the law by restricting his movements, generally by physical confinement. Nothing prevents a person against whom a permanent injunction has issued from engaging in any act that is not tortious. He is as free to go about his daily business and to engage in all noninjurious acts as is anyone else. The denial of a license, on the other hand, *is* as blunt an instrument as is preventive detention, since, by its nature, it prohibits a large area of harmless activity to someone in order to prevent an injurious act from being committed; it thus punishes *before* a wrong has been committed, while injunctive relief does not.

The denial of a license prohibits a person from engaging in certain conduct, whether or not that conduct is tortious. The withholding of a license, unlike the granting of a permanent injunction, does not occur only in instances where it can be proved that a harm would result from a specific action of the prospective licensee; indeed, the denial of a license does not even require a complainant. Refusing to issue a license amounts to prohibiting certain individuals from engaging in a whole area of activity, tortious or not, without any evidence that its issuance would result in a specific injury. In gist, a licensing system, unlike a system of injunctive relief, limits the freedom of all those who are refused licenses not only to engage in harmful activities, but to engage in any activities falling under the purview of the particular licensing board. Even more pernicious, a

licensing system restricts the freedom even of those awarded licenses, since in any licensing scheme, the burden of proof falls on the applicant to prove his competence, and away from the licensing authority to prove that the applicant should be denied a license. The reverse-onus provisions of licensing laws are perhaps their most offensive feature and are incompatible with any system of law that punishes only the guilty.

There is a clear legal distinction between injunctive relief and licensing, and I cannot imagine why Epstein has opted for the truncheon when the law provides something akin to a surgical knife. I cannot agree that the problem of large numbers warrants recourse to as noxious a device as licensing, either to solve the problem of highway accidents — assuming that it *has* lowered accident rates — or to provide a system by which environmental polluters can more easily be identified. Nor is it self-evident that the transaction costs generated by a licensing system are far lower than those that would be incurred under a system limited to private relief in law. Licensing is a cumbersome instrument at best and a powerful weapon for repression at worst; it deserves short shrift from legal theorists like Epstein, who are concerned with the delineation of rights in a free society or the delineation of remedies consistent with those rights.

POLLUTION, LIBERTARIANISM, AND THE LAW

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Introduction

In his paper, Professor Epstein sets himself two main tasks. First, he seeks to inform libertarians of the complexities involved in applying their ethically-based legal theories. Second, he critically analyzes the Superfund legislation from the perspective of a liberal system of rights, as well as with regard to the legislative purpose of the act.

In analyzing Epstein's paper, I will first consider certain arguments in detail. I will focus in particular on certain questions raised by Epstein or implicit in his analysis. At the end of this paper, I consider more general issues. Accordingly, I begin with Epstein's section on the Superfund.

Superfund

Professor Epstein describes the Superfund legislation "as a comprehensive attack on the release of toxic substances into the general environment." (p. 22) In the preceding section he argues for treating pollution as a nuisance, and thus a tort. Accordingly, he then examines the Act and its remedies for efficaciousness in protecting the environment, as well as its consistency with a system of substantive rights. His objections to the Act are to its remedies and to government's role under the Act. His criticisms are trenchant and to the point. I will review some of them briefly.

The first major problem with the Act is its sheer breadth. This

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