EPSTEIN'S TORT THEORY: A CRITIQUE

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INTRODUCTION

IN three articles published in this journal between 1973 and 1975, my colleague Professor Richard Epstein set forth an ambitious normative theory of tort law.[1] Among the distinctive features of this theory were the author's insistence that strict liability based on causal principles should be the prima facie standard of liability, that notions of liberty rather than of economic efficiency should be the foundation of tort law, and that the imposition of affirmative tort duties (e.g., on a bystander to warn or otherwise assist a stranger in distress) was improper. Although the theory set forth in these articles deserves and has received recognition as an original contribution to tort scholarship, it contains, I believe, fundamental inconsistencies quite apart from those, relating to Epstein's use of causal concepts, discussed by Professor Borgo in his article in this issue.[2]

Recently Epstein published in this journal a fourth article,[3] which purports merely to apply the theory developed in the earlier articles to nuisance law but which, I believe, changes the theory. In this paper I will attempt to trace the evolution and, as it seems to me, the contradictions in Epstein's approach.

Although Professor Epstein and I differ, of course, in the importance we ascribe to economic factors in tort law,[4] this paper will not criticize Epstein

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[1] See Richard A. Epstein, A Theory of Strict Liability, 2 J. Legal Stud. 151 (1973); Defenses and Subsequent Pleas in a System of Strict Liability, 3 *id.* at 165 (1974); Intentional Harms, 4 *id.* at 391 (1975). These papers (hereinafter cited without cross-reference as Strict Liability, Defenses and Subsequent Pleas, and Intentional Harms, respectively) create the impression that Epstein regards his tort theory as having considerable positive (i.e., descriptive) as well as normative content and criticize other positive theories of tort law, notably the positive economic theory. This paper will be limited, however, to the normative aspects of Epstein's theory.

[2] See John Borgo, Causal Paradigms in Tort Law, 8 J. Legal Stud. 419 (1979).

[3] See Richard A. Epstein, Nuisance Law: Corrective Justice and Its Utilitarian Constraints, 8 J. Legal Stud. 49 (1979) (hereinafter cited without cross-reference as Nuisance Law).

[4] For my views see, *e.g.*, Richard A. Posner, Economic Analysis of Law, ch. 6 (2d ed. 1977).

for failing to give adequate weight to economic factors. I shall refer to economic principles occasionally but to support a logical rather than an economic analysis of his position. The basic points that I shall argue are the following:

1. Epstein treats tort and contract law inconsistently. The logic of the analysis that leads him to take a strong position in favor of freedom of contract should lead him to accept the propriety, in principle at least, of sometimes imposing affirmative duties and of sometimes relaxing a prima facie standard of strict liability.

2. He fails to explain why causal principles should provide the exclusive basis for imposing tort liability.

3. Once he shifts from causation to rights as the starting point for analyzing tort liability—a shift accomplished in the fourth article—his argument for the principle of strict liability in personal-injury cases becomes circular. He derives the principle from the unexamined assumption that the right to one's body includes a right to compensation for personal injuries even when they are inflicted without fault on the injurer's part.

4. He does not explain why tort liability should be limited to cases in which a property right has been invaded.

5. If, as the fourth article concedes, economic principles may properly be used both to limit tort liability and to create new tort obligations, uncabined by causal principles, all of the major conclusions in his earlier articles must be reexamined.

I. Epstein's Original Approach

A. *Summary*

At the heart of the theory set forth in Epstein's first three tort articles is the idea that the categories and conventions of ordinary, nonlegal language are an important repository of moral ideas. One of these ideas is that people are morally responsible for the harms they cause. It follows that liability for personal injury should be based, at least prima facie, on notions of cause. This in turn implies *strict* liability: if I cause an injury to you I am responsible and the fact that I could not have avoided it by the exercise of reasonable—or of any degree of—care is irrelevant. To be sure, generations of legal scholars, and the economist Ronald Coase,[5] had denied that causal principles could be used to determine sensible rules of liability. But they had done so (Epstein argued) because they mistakenly equated cause with necessary condition. To make a person legally responsible for events of which

[5] See R. H. Coase, The Problem of Social Cost, 3 J. Law & Econ. 1, 2 (1960), discussed in Strict Liability 164-65.

some action of his was a necessary condition, a "but for" cause, would indeed be absurd. But cause in ordinary language does not mean necessary condition. Its meaning is shown by a few paradigmatic examples of which the simplest is the proposition "A hit B." Although B's presence is a necessary condition of the injury, the differentiation of A and B into subject and object linked by a transitive verb shows that A is the cause of the injury and not B. Hence A should be prima facie liable for the injury.

Epstein recognized that the law *could* assign tort liabilities without reference to cause in his sense, simply by asking (as an economist would) which assignment of liability in a particular case or class of cases would create the right incentives for minimizing the relevant costs. But such an approach, he argued, was objectionable because it would give judges a roving commission to impose positive duties on people. He illustrated with the example of the good Samaritan. An economist might conclude that a bystander should be held liable for the consequences of failing to assist someone in distress, at least where the bystander could have rendered assistance at trivial cost. But this conclusion would be a step toward a general judicial conscription of the population to perform social duties. Any such movement is barred by the causal approach: the failure of the bystander to warn or rescue cannot be fitted into any causal paradigm and hence cannot give rise to liability.

The above is a summary of just the first article. The second and third articles erect upon the first an elaborate edifice of defenses, rejoinders, and other subsequent pleas, thus making clear that the principle of strict liability announced in the first article is one only of prima facie liability and allows room for consideration of other factors, such as consent and malicious intent—but not economic factors.[6] For my purposes most of the details of the second and third articles can be ignored. But what cannot be ignored is the importance that Epstein attaches to freedom of contract, as a principle that, for example, requires the law to recognize a defense of assumption of risk in tort cases.[7]

B. *Critique*

Professor Borgo's article in this issue argues, in effect, that Epstein has got the relationship between causation and responsibility backwards.[8] Epstein argues that responsibility is ascribed on the basis of cause; Borgo, to the

[6] See, *e.g.*, Defenses and Subsequent Pleas 179 ("As ever, only one's view of fairness should determine the choice of rule"), 185, 200-01, 209.

[7] Epstein's commitment to the principle of freedom of contract is most clearly shown in Richard A. Epstein, Unconscionability: A Critical Reappraisal, 18 J. Law & Econ. 293 (1975); and Richard A. Epstein, Medical Malpractice: The Case for Contract, 1976 Am. Bar Foundation Res. J. 87.

[8] See note 2 *supra*.

contrary, that cause is ascribed on the basis of responsibility. From the array of necessary conditions antecedent to some event we pick out one as "the cause" on the basis of contextual criteria which include, where relevant, motive, opportunity, and other factors bearing on moral responsibility. Epstein's criterion for prima facie liability is thus circular.

I want to make the different argument that Epstein's attempt to make liability follow a pattern dictated by causal principles is inconsistent with his own deeply held belief in freedom of contract. I begin with the good Samaritan question. Suppose that if all of the members of society could somehow be assembled they would agree unanimously that, as a reasonable measure of mutual protection, anyone who can warn or rescue someone in distress at negligible cost to himself (in time, danger, or whatever) should be required to do so. These mutual promises of assistance would create a contract that Epstein would presumably enforce since he considers the right to make binding contracts a fundamental one. However, there are technical obstacles—in this case insurmountable ones—to the formation of an actual contract among so many people. Transaction costs are prohibitive. If, moved by these circumstances, a court were to impose tort liability on a bystander who failed to assist a person in distress, such liability would be a means of carrying out the original desires of the parties just as if it were an express contract that was being enforced.

The point of this example is that tort duties can sometimes (perhaps, as we shall see, generally) be viewed as devices for vindicating the principles that underlie freedom of contract. It may be argued, however, that the contract analogy is inapplicable because the bystander would not be compensated for coming to the rescue of the person in distress. But this argument overlooks the fact that the consideration for the rescue is not payment when the rescue is effected but a commitment to reciprocate should the roles of the parties some day be reversed. Liability would create a mutual protective arrangement under which everyone was obliged to attempt a rescue when circumstances dictated and, in exchange, was entitled to the assistance of anyone who might be able to help him should he ever find himself in a position of peril.

I have suggested that a tort obligation is like a contract obligation, but one can approach the matter from the other direction and show that a contract obligation is like a tort obligation. The essence of contract is that the parties bind themselves to refrain from certain types of action (e.g., abandoning performance because of a rise in costs). The parties are thereby enabled to do things that they might not otherwise dare to do (like completing performance before payment, or vice versa) because each would be afraid that the other party would take advantage of him. A good Samaritan tort obligation would perform the same enabling function. I could take greater risks knowing that other people would assist me in danger and they likewise could take

greater risks knowing that I (or others) would come to their assistance. Yet in the absence of a legal obligation—an obligation that, because of transaction costs, must be a tort rather than a contract obligation—it would be in everyone's interest *not* to help others (because there would be no obligation to reciprocate), and the scope for advantageous risk-taking activity would be reduced.[9]

One can of course object that a tort duty is never identical to a contract duty because it is not founded on an explicit agreement. To state this point differently, my initial assumption that the members of society would agree *unanimously* to accept a good Samaritan duty is unrealistic. This point is valid but not fundamental; at least, Epstein does not seem to regard it as fundamental. He is willing to allow a rescuer a right to claim a reward from the rescued person under the law of restitution,[10] and this amounts to enforcing a purely hypothetical contract. So far as the question whether it is ever proper to force people to perform (or pay for) services not actually (though perhaps hypothetically) contracted for is concerned, there is no difference between giving the rescuer a right to demand payment from an unconscious or otherwise unconsenting recipient of his services and imposing a tort duty on potential rescuers, although there are important practical (or economic) differences between these approaches.[11] Even in cases involving explicit contracts, courts are frequently called upon to determine how the parties would have resolved a contingency they did not foresee or provide for, and Epstein has no quarrel with this procedure.[12] Of course there are differences of degree between interpreting explicit contracts to effectuate the (unknown) intentions of the parties and creating tort duties based on purely hypothetical contracts—and one can debate where in this spectrum the "quasi-contract" illustrated by the physician's right to claim his fee from an unconscious stranger falls—but they are just that: differences of degree rather than of kind.

[9] See further note 18 and accompanying text *infra*.

[10] See Strict Liability 203; Defenses and Subsequent Pleas 193-94. Also relevant to Epstein's view of the propriety of hypothetical implied contracts is his statement that tort liability may be predicated on "implied contracts for good behavior"—specifically, completely hypothetical implied contracts not to make ugly practical jokes. Nuisance Law 64 n.44.

[11] Professor Landes and I have argued that the tort approach may be inferior on economic grounds to the restitution approach as a solution to the rescue problem, because the tort approach tends to deter potential rescuers from engaging in activities that would expose them to liability for failure to rescue. See William M. Landes & Richard A. Posner, Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism, 7 J. Legal Stud. 83, 119-27 (1978). But this point is not relevant to the logic of Epstein's argument.

[12] Where a tort occurs in the course of a consensual relationship (medical malpractice is an example), the role of the court is "to approximate the risks which each of the parties would have assumed if they had reached an express agreement allocating them." Richard A. Epstein, Private-Law Models for Official Immunity, 42 Law & Contemp. Prob. 53, 55 (1978).

Epstein concedes at one point that the good Samaritan question could be viewed as one of interpreting an implied contract of rescue, but concludes that the courts are incapable of filling in the contractual terms, remarking: "It is for good reason that the courts have always refused to make contracts for the parties."[13] But that is precisely what the courts do when they award the physician his fee for treating someone whom he finds lying unconscious in the street. Epstein also argues that, once the good Samaritan case is in court, the plaintiff is arguing "not for an *exchange* which makes both parties better off, but for a *transfer* of wealth which makes him better off."[14] Again, the same thing is true in a lawsuit over an express contract, where the plaintiff will be asking for a transfer of wealth (damages) which will make him better off rather than for an exchange which will make both parties better off.

Epstein's clinching argument against a good Samaritan duty is that tort law should be viewed in terms of its "political function . . . . [T]he liberty of one person ends when he causes harm to another. Until that point is reached he is free to act as he chooses, and need not take into account the welfare of others."[15] But this argument would seem equally to require rejection of the principles of the law of restitution for benefits conferred without express consent. The man who faints in the street and is treated by a physician who happens to be passing by has not caused harm to another. Yet the law of restitution will force him to pay the physician's fee—for services, and at a price, that he may not have desired and certainly did not agree to buy.

If Epstein had argued merely that restitution was a more efficient approach to the rescue question than tort, I would have no basis for alleging an inconsistency in his theory. The inconsistency lies in the fact that he defends the no-tort-duty rule on personal-autonomy grounds that seem logically incompatible with his willingness to accept the restitution approach. There is a similar inconsistency in Epstein's unwillingness to allow cost considerations to influence the choice between strict and negligence liability in accident cases. Suppose it could be shown that, if a rule of strict liability were adopted to govern collisions between automobiles, the average cost of owning and driving an automobile would be higher than it is under the negli-

[13] Strict Liability 202.

[14] *Id.* (emphasis in original).

[15] *Id.* at 203-04. The reference to the political function of tort law may suggest that Epstein's primary concern is not with the limits of liability as such but with the allocation of responsibility for devising rules of liability as between courts and legislatures. And one could argue that judges are not in so good a position as legislators to ascertain the existence of a social consensus on such issues as whether to require people to rescue strangers in distress. Epstein has nowhere set forth explicitly his theory of the state. But it would be surprising if he regarded the libertarian values that (in his view) animate and justify the no-duty-to-rescue rule as limitations on the appropriate scope just of *judicial* authority. This is an area in which clarification of Epstein's views would be welcome.

gence system today. There are various ways in which such a result could come about: more claims would be filed, since injurers would be liable even if they had exercised reasonable care; and there might be a higher accident rate because contributory negligence would no longer be a defense.[16] But I do not really care how realistic the example is. I am interested in the question: if drivers as a class would—let us say unanimously—reject a regime of strict liability because of its effect on their expected driving costs, would the imposition of such a regime be consistent with the ideals of free choice that underlie Epstein's belief in liberty of contract? Would it be if most rather than all drivers preferred a negligence system?

Let me offer another example. Consistently with his belief in liberty of contract, Epstein regards assumption of risk as a good defense in tort cases. But he ignores the possibility that there may be an entire class of activities whose participants would like to assume certain risks—such as the risk of being run down by a car driven with all due care—yet in which transaction costs preclude their doing so explicitly. If such a purely technical obstacle prevents people from explicitly assuming the risk, why should not the law prescribe a liability rule that will carry out their desires, which might be a rule of negligence-contributory negligence rather than one of strict liability? One view of the common law in general is as an instrument for bringing about the same (or as nearly as possible the same) allocation of resources as a free market unimpeded by transaction costs. In such a market, freedom of contract would be maximized. A tort law designed to overcome the adverse effects of transaction costs on the operation of free markets would therefore promote values regarded by Epstein as fundamental. It would expand the area in which the allocation of resources was controlled by individual choice.

Epstein views the domains of tort and contract law as wholly separate—tort protects us from unwanted impositions by others, contract gives effect to our voluntary undertakings. But in fact both tort and contract law impose constraints to the end of enlarging freedom. By making a contract which prevents him from taking advantage of the other party to it, a person increases rather than reduces his ability to achieve his ends.[17] Tort liability is similar. By preventing us from taking advantage of the defects in the market system, it likewise makes the world more like what it would be if the market system—which is the system of freedom of contract—operated without con-

[16] Epstein does recognize various defenses in automobile accident cases—for example, the defense that the victim was blocking the injurer's right-of-way or violating a traffic ordinance. See Defenses and Subsequent Pleas 176-79. Epstein suggests that these defenses cover much of the territory now occupied by the defense of contributory negligence. See *id.* at 184. But it would be surprising if there were no, or only a very few, cases where careless victims obtained damages in Epstein's system—a system in which victim negligence, as such, is not a defense.

[17] See Richard A. Posner, Gratuitous Promises in Economics and Law, 6 J. Legal Stud. 411 (1977), and for the same point from a philosophical perspective Charles Fried, Contract as Promise (Harv. L. Sch., unpublished).

tingent and irrelevant technical obstacles, what the economist refers to as "transaction costs." To be sure, tort law does not provide monetary compensation to the people on whom it imposes duties—compensation for whatever costly steps they may have to take in order to avoid inflicting, or receiving, injury for which they would be liable. But as I suggested earlier, to view compensation solely in ex post pecuniary terms ignores the fact that people may be compensated ex ante in a variety of forms—such as greater freedom of action, lower insurance costs, or a reduced risk of injury—by virtue of being part of a system of tort rules that may require them to take some accident-avoidance measures without compensation ex post.[18]

In emphasizing transaction costs as the basic difference between tort and contract, I may seem to be making a purely economic distinction. But the point is a broader one simply clothed in the language of economics. That duties can be derived from hypothetical contracts is, after all, the foundation of John Rawls's theory of justice. Charles Fried rejects strict liability in favor of negligence on the basis of an extended notion of assumption of risk not unlike my own but grounded in philosophical rather than economic considerations.[19] It is even possible that a good Samaritan duty could be derived from the sociobiological concept of reciprocal altruism.[20] Most important, the arguments I have made are (or can be) based on notions of liberty of contract that, as Epstein himself has shown, need not be formulated in economic terms. The obligations that Epstein places in watertight compartments of tort, contract, and restitution (but which Continental legal theorists, like economists, are apt to view as different aspects of a unitary theory of obligations[21]) reflect a common concern with facilitating the operation of free markets given positive transaction costs.

I am, in short, not criticizing Epstein's tort positions on the ground that they cost too much, that they are inefficient. I am arguing that liberty in the sense in which I understand him to use the term may dictate rules of tort different from those he derives on causal grounds. An adamant refusal to impose—or to relax—tort liability in cases where high transaction costs preclude voluntary transactions will reduce human liberty. If I must drive

[18] This point resembles Fried's concept of the "risk pool." See Charles Fried, An Anatomy of Values: Problems of Personal and Social Choice 187-90 (1970). Epstein in his nuisance article advances a notion of "implicit in-kind compensation" which resembles Fried's "risk pool," but he does not examine the potentially damaging implications of the notion for the position taken in the earlier articles. See Nuisance Law 77-78.

[19] See Fried, *supra* note 18.

[20] Cf. Robert L. Trivers, The Evolution of Reciprocal Altruism, 46 Q. Rev. Biology 35, 45-54 (1971); David P. Barash, Sociobiology and Behavior 314 (1977). Conversely, a strictly economic analysis may, as suggested earlier, indicate that a restitutionary approach is preferable to a tort approach to the rescue question. See note 11 *supra*.

[21] See, *e.g.*, The German Civil Code §§ 241-853, at 41-139 (Ian S. Forrester, Simon L. Goren, & Hąns-Michael Ilgen trans. 1975).

more slowly because I would be liable to some careless person whom I might hit, though if only we could have negotiated in advance of the accident we would have agreed that I would *not* be liable if his carelessness contributed to the accident, then my liberty is curtailed. Epstein seems to give such impairments of liberty no weight.

Epstein's unwillingness to derive tort obligations from contractual principles reflects another weakness in his method. Let us grant for the sake of argument that causal principles are an appropriate basis for imposing tort liability and ask: why should they be the *sole* basis?[22] Causal principles appeal to Epstein because he believes that they are rooted in fundamental moral perceptions. Whether or not this is so, causal principles do not encapsulate the totality of our moral perceptions. Most people would think it more egregious for a person to refuse to aid a bystander in distress though he could do so at negligible risk or other cost to himself than to refuse to compensate someone whose property he had damaged in an unavoidable accident. Why cannot this moral perception be translated into a good Samaritan duty? And, wherever in the hierarchy of moral impulses the revulsion against a person who fails to aid another human being in distress may rank, Epstein himself ascribes fundamental importance to the moral values embodied in the principle of liberty of contract. Why cannot tort duties be founded on those values as well as on the causal categories of everyday speech?

II. The Approach of the Nuisance Article and Its Implications for Epstein's General Position

A. *From Causation to Rights*

The view of tort law in Epstein's recent article on nuisance seems a departure from the theory of the earlier articles. In particular, there is a noticeable displacement of emphasis from causation to rights. The Santa Barbara oil spill case[23] is said to turn on the anterior question of who owned the fish destroyed by the spill. The role of causation is reduced to that of identifying when a right has been invaded. Perhaps a theory of rights was implicit in the earlier articles, but I doubt it.[24] Indeed, one of the most arresting features of those articles was precisely the suggestion that legal responsibility could be determined, at least prima facie, on the basis of causal principles alone. In the simplest of Epstein's causal paradigms—"A

[22] This question is different from that discussed by Borgo. His argument is that Epstein's causal paradigms illustrate rather than exhaust the relevant meanings of cause. Mine is that cause is not the only basis for the imposition of liability.

[23] Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974).

[24] Although there are occasional references to rights in the earlier pieces. See pp. 469-71 *infra*.

hit B"—there is no inquiry into whether, or the sense in which, B may be said to be the owner of his body. Liability follows directly from the fact that A may be said to have caused the injury.

The issue of rights is inescapable in the fish case because the fish, of course, are not the plaintiffs—the fishermen are, and they must somehow be linked to the fish. It is as if B were C's slave and C were suing A. But Epstein does not introduce the idea of rights simply to take care of the special case in which the damaged object and the plaintiff are not identical. He recasts the theory of the earlier articles so that the identification of a legally protected right becomes the first step in the inquiry.[25] The use of causal principles to determine whether the defendant invaded those rights is now the second step.

This shift undermines the case for strict liability argued in the earlier articles. To ask not did A hit B but does B have a property right, which A invaded, in his body is to embark on uncertain seas. Analysis must begin with a recognition that legal "rights" are typically quite limited—and the rights of the person in some respects more limited than rights over property. The Fifth Amendment protects property from uncompensated takings by the government but does not require that a person conscripted for military service be compensated. And while I am permitted to sell my house, I am not permitted to sell myself.[26] Consider also the difference in the standards applicable to trespass to land and trespass to the person. If I cross your boundary I cannot defend, in an action for trespass, by showing that my intrusion was reasonable in the circumstances. But if I run you down in the street, there isn't even prima facie liability unless you can prove that the running down was either deliberate or negligent. There are reasons for the difference in standards.[27] But its very existence casts doubt on the proposition that we have a property right in our bodies that is infringed by someone who injures us when he is exercising due care.

Epstein might reply that my argument is premised on a negligence system that he rejects. But it is one thing for him to reject the negligence principle on the ground that the common law went wrong in failing to recognize that causation imports moral responsibility and hence that strict liability is the proper standard of liability for personal injury, and another thing for him to reject the common law tradition that defines the nature of the property right that the law will recognize in one's body. Moreover, even in those parts of tort law that are governed by strict liability, as in damage done by wild

[25] See Nuisance Law 50, where the identification of the plaintiff's right is described as "the point of departure" even in a simple assault and battery case. See also *id.* at 52.

[26] Epstein considers the impermissibility of a man's selling himself into slavery an example of the strength of the property right that we have in our persons. See Richard A. Epstein, Privacy, Property Rights, and Misrepresentations, 12 Ga. L. Rev. 455, 456-57 and n.5 (1978). It seems, rather, a limitation of that right.

[27] See, *e.g.*, Posner, *supra* note 4, at 39-40.

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animals, the law permits the injurer in effect to make a unilateral determination that the bodies of other people are worth more to him than to them. He may engage in dangerous activities so long as he is prepared to pay compensatory damages to his victims. The fact that they may not be indifferent between their lives and an award of compensatory damages to them or their heirs does not count. The property right that we have in our bodies is, in short, severely circumscribed.

But I am less concerned with the source or nature or precise contours of the right to bodily integrity than with the uncomfortable position in which the nuisance article places Epstein in defending a system of strict liability for personal injuries. The earlier articles based liability on the proposition (now placed in doubt by Borgo) that responsibility follows causation. The nuisance article says that before invoking causal principles one must find a right. Therefore, if the negligence principle is unsound not because it tolerates some uncompensated accidents of the form "A hit B" but because it fails to protect fully the right we have in our bodies, it is so only because that right embraces unavoidable accidents and accidents in which the victim is also at fault. Epstein obviously believes that the right is that broad. But his discussion of the question is confined to a couple of sentences in an article otherwise devoted to nuisance. The answer is hardly self-evident.

Another question is whether his procedure of making tort liability turn, in the first instance, on a determination of property rights makes sense. I believe not. Consider his treatment of the Santa Barbara fish case. He says the critical question is who owned the fish. If the fishermen who brought the suit neither owned the fish nor had a license from the true owner, their suit must fail. Epstein does not attempt to resolve the question of ownership but he suggests that one possible answer is that the fish are wild animals within the meaning of the common law. At common law, rights in wild animals were based on possession. Since the fishermen had not reduced the fish to possession when the fish were killed by the oil spill, Epstein concludes that the fishermen had no property rights in the fish if the fish are to be treated as wild animals.[28]

Epstein does not ask why the common law took the position it did on rights to wild animals or why that position should be thought to control the oil-spill case. Let me take a stab at these questions. Property rights do not make economic sense if the value of the right would be less than the cost of enforcing it.[29] This was probably the case with respect to most wild animals during the formative years of the common law.[30] The animals were plentiful

[28] See Nuisance Law 51-52.

[29] See Harold Demsetz, Toward a Theory of Property Rights, 57 Am. Econ. Rev. 347 (Papers & Proceedings, May 1967).

[30] However, for criticism of the common law position with respect to wild rabbits, see Coase, *supra* note 5, at 36-38.

relative to the demand and their market value was therefore low, whereas the cost of establishing property rights by fencing their habitats would have been high. But growing scarcity might at some point justify recognizing property rights in some species of wild animals; and with regard to the commercial fishing industry, that point was reached some time ago. Overfishing is a serious problem today.[31] So, potentially at least, is the excessive destruction of fish by oil spills—excessive in the sense that, when the value of the fish killed is added to the other losses from the spill, the total losses exceed the costs that would have been required to prevent the spill from occurring. One way of preventing oil companies from ignoring the effects of oil spills on fish is to make the companies liable to the fishermen for the value of the lost catch. Tort liability would do this.

But Epstein's insistence that the first step in every tort case is to identify the property right that has been infringed, and that no tort action can be maintained unless a property right has been infringed, frustrates this simple and sensible solution. For it is probably impracticable to vest the fishermen with a property right, as that term is ordinarily understood, in the fish in the Santa Barbara Channel. However abstractly desirable the vesting of such rights might be from a resource-conservation viewpoint, the practical difficulties of tracking schools of fish or fencing or otherwise establishing exclusive fishing "territories" seem insuperable.[32] But why should the impracticability of giving fishermen a property right preclude giving them a tort right? To be sure, some torts, notably trespass to land, are created in order to enforce property rights. But others, clearly, are not (e.g., defamation). Recognizing a tort right in an *Oppen*-type case serves to reduce the divergence between private and social costs that is created when oil companies do not take into account the effects of oil spills on fish. As we shall see, Epstein later in the nuisance article recognizes the propriety of basing tort rights on such purely economic considerations. But this recognition is nowhere reconciled with the earlier insistence that the only proper plaintiff in *Oppen* is the owner of the fish or someone holding a right derived from the owner.

B. *Epstein's Theory of Rights*

Despite Epstein's increasing insistence that tort questions should be decided on the basis of an anterior determination of property rights,[33] he seems

[31] For discussion of, and references to the large literature on, this question see Richard James Sweeney, Robert D. Tollison, & James D. Willett, Market Failure, The Common-Pool Problem, and Ocean Resource Exploitation, 17 J. Law & Econ. 179, 180 n.2 (1974).

[32] See *id.* at 184. And for an account of recent governmental regulatory efforts—falling far short, however, of creating property rights—to deal with overfishing, see Wall Street Journal, March 28, 1979, at 1, col. 1.

[33] See also Epstein, *supra* note 26, at 455-64.

to lack a clear theory of rights. As we have seen, he does not explain the basis or source of the supposed right not to be injured even by a person who took every possible care to avoid inflicting the injury, or the relevance of rules governing property rights in wild animals to a tort suit by fishermen whose livelihood was impaired by an oil spill. I am baffled by his insistence that tort liability can be predicated only on the violation of a property right. This position requires him to do contortions to find a property right in one's body that will support a principle of strict liability in accident cases and it requires him to reject the sensible result of the *Oppen* case. Yet he does not explain what feature of his underlying theory of law requires that tort liability be linked to property rights in this fashion.

More generally, Epstein fails to indicate what is necessary in his view to affirm, or to reject, the existence of a property right. In one of the earlier articles, Epstein asks whether it should be a tort for a shipping cartel to charge below-cost prices in order to drive a competitor out of business.[34] He says it should not, because the competitor has no right to the trade of which the cartel deprives him. He has a right to make offers but not to have them accepted, so if purchasers prefer to deal with the cartel because it is offering lower prices no right of his has been infringed. But why shouldn't a seller have a right to be free from predatory competition? If you believe there is such a thing as predatory pricing—and if you don't, you will have to suspend your disbelief momentarily in order to grasp the point at issue here—then it follows that the successful predator, having driven his competitors from the business, will then raise his price to a level that will more than make up for the losses sustained during the period of below-cost selling. This also means, however, that the purchasers in the market will be losers in the long run from predatory pricing. To be sure, if this is so, they may refuse to buy from the predator despite his lower price and the scheme of predatory pricing will fail. But where the purchasers are numerous, it is more likely that each will buy at the low price—reckoning that nothing he does will influence the outcome of the struggle between the predator and the victim—than that any of them will continue to buy from the victim. Thus we have once again a technical obstacle—a form of transaction costs—which prevents the market from working efficiently. Everyone except the predator would be better off if the competitor had a right of action against him. Even the predator might be better off, ex ante, if he was concerned that some other firm or group of firms might be a predator. The question is then: why cannot the legal system give expression to preferences, perhaps unanimous preferences, through the recognition or creation of rights? And why may not these sometimes be pure tort, and not property, rights?

[34] See Intentional Harms 424-33. The case is Mogul v. McGregor, 23 Q.B.D. 598 (1889), *aff'd*, [1892] A.C. 25.

It is another instance of a point I made earlier—that Epstein tends to regard his preferred grounds for liability as the only possible grounds. Even if it is granted that anyone who can show that he is in the same position as B in "A hit B" has a right of action, why must a harm fit that or any other causal paradigm to be actionable?[35] Once causal principles are confined, as in the nuisance article, to the office of determining whether an infringement has occurred (as distinct from whether a cause of action has been stated), so that it becomes necessary to search elsewhere for the right whose infringement if proved would be actionable, the fact that the right itself is not based on causal principles becomes irrelevant. It is true that a good Samaritan obligation, unlike an obligation to refrain from predatory pricing or from polluting, cannot readily be expressed in causal terms. If a flower pot fell on my head and some bystander had failed to warn me it was about to fall, I would probably not describe the bystander as "the cause" or even "a cause" of the accident. But so long as there is a moral basis, though unrelated to causal principles, for claiming a right to some minimal benevolence from our fellow man, there is no problem in concluding that the bystander *violated* my rights (it should make no difference that these are not property rights) and is answerable for the consequences. The causation would be the same as in the case of a breach of an express contract to rescue someone.

There is a further wrinkle to the predatory-pricing case that deserves comment. I said that Epstein does not recognize a right to be free from predatory competition. But he does recognize a right, protectable in a tort action, "to *offer* one's property or labor to another on whatever terms he sees fit."[36] This is not, however, a property right in the usual sense of the term; nor did Epstein, in this early article, describe it as one (he described it as a "close parallel" to a property right).[37] If he is to adhere to the logic of the nuisance article, he must either redefine the right to trade as a property right or abandon his earlier view that forcible or fraudulent interferences with that right are actionable under tort law. If he takes the former course, I do

[35] As Epstein acknowledges (see Intentional Harms 433), the plaintiffs in the shipping case could have used the language of causation without violating any of the canons of ordinary language. The same is true in the fish case. The fishermen could have said that the oil companies had ruined their livelihood just as the shipping firm could have said that the shipping cartel had ruined it. These are no more strained uses of the language of causation than B's saying that A's punch spoiled his looks. Borgo has shown why: the word cause is used to identify a necessary condition that happens to interest us, perhaps because somebody might want to do something about that condition. Epstein's paradigms do not exhaust the contexts in which the word cause is used in ordinary language. Where there is a discrepancy, it is apparently ordinary language that must yield. "The legal system cannot be in total harmony with the popular sentiment that uses these broad causal expressions invoked by losers in the competitive struggle." Intentional Harms 433.

[36] *Id.* at 426 (emphasis in original).

[37] *Id.*

not see why he should continue to question the result in *Oppen,* a clear case of forcible interference with the "right to trade."

Let me give still another example of what seems to me to be the inadequacy of Epstein's theory of rights. Two of his articles discuss the classic case of the locomotive which emits sparks that cause damage to the crops of a farmer located along the railroad's right-of-way.[38] Epstein considers this a clear case for liability because the farmer's property right has been invaded. But that conclusion depends on his assumptions concerning the precise scope of the respective property rights of the railroad and the farmer. If the right-of-way owned by the railroad carries with it the right to emit sparks, then the farmer's property right has not been invaded. In neither article is there a discussion of the basis for the assumption that it is the farmer who has the broader right. The economist would argue, and there is basis in the case law, for defining the respective rights of the parties in such a way that the sum of the relevant costs—the cost of spark arresters, the cost of reducing the speed or number of trains, the cost of crop damage, and the cost of using the farmer's land in some other way—is minimized.[39] It is not my purpose here to defend that approach to the question of defining the scope of the railroad's and farmer's property rights but only to ask what Epstein's approach to the question is.

C. *The Role of Economics*

My questions regarding the sources of obligation in Epstein's tort theory are underscored by the final respect in which the nuisance article departs from the theory of the earlier articles. In it Epstein for the first time admits that economics has an important role to play in the design of tort rules. The spirit of the earlier articles was that rules based on causal principles defined and implemented wholly without reference to economics would probably turn out not to be very costly to society; but if they did turn out to be very costly, that was just too bad.[40] Economics was regarded as a slippery tool which judges would use, if allowed, to impose far-reaching affirmative duties on people.[41] Some of the criticisms of economics were overstated,[42]

[38] See Defenses and Subsequent Pleas 197-98; Nuisance Law 90-91.

[39] See Richard A. Posner, A Theory of Negligence, 1 J. Legal Stud. 29, 60 (1972).

[40] See, *e.g.,* Strict Liability 203; Defenses and Subsequent Pleas 209, 214 ("what is the price of justice?").

[41] See Strict Liability 199. This theme recurs occasionally in the nuisance article despite its generally kindlier tone toward economics. See Nuisance Law 75.

[42] An example is Epstein's failure to distinguish the case for affirmative duties where transaction costs are prohibitive from the case in which they are low. There is no economic basis for his suggestion that tort principles might require a surgeon to travel against his will across India to treat someone because there was no one else to treat him. This is not a case of high transaction costs. See Strict Liability 199, discussed in Landes & Posner, *supra* note 11, at 126-27.

but that is almost a detail.[43] The main point is that the tort system was to be constructed wholly on noneconomic principles. This position is explicitly rejected in the nuisance article, which identifies two sources of legal principles—justice and utilitarianism.

This result is forced on Epstein by the absurdities that a thoroughgoing system of strict liability applied to pollution would produce. But once the merger of justice and utility is accepted for nuisance, it is difficult, despite Epstein's efforts, to keep it from spreading back to the simple accident cases with which he began. Now costs are to count in the choice between liability systems. As suggested earlier, it is possible that a system of strict liability would be more costly than a system of negligence in, say, the automobile accident area. If so, that would count—perhaps decisively, depending on the magnitude of the cost difference—in the choice between the two tort systems. In one of his earlier articles Epstein criticized me for pointing out that the choice on economic grounds between negligence and strict liability was indeterminate—the balance of costs and benefits presented an empirical question and the requisite empirical research had not been done. He said the decision of great issues of principle couldn't await the result of empirical research.[44] Now it appears that his own principles require measuring the costs and benefits of alternative systems of liability.[45]

The nuisance article purports to apply cost-benefit principles to some of the issues, notably automobile accidents, that had been discussed in the previous articles.[46] The same conclusion is reached: accidents should be governed by the principles of strict liability. But the conclusion is virtually compelled by the way in which Epstein frames his utilitarian or economic analysis.[47] It is not a straight matter of balancing the costs and benefits of alternative legal rules, and then comparing the results with the merits of the rules evaluated from the standpoint of (noneconomic) principles of justice. Rather, Epstein applies a four-factor test to govern claims for exemption, as it were, from the stringent requirements of his system of corrective justice. Under this test, the strongest case for a departure from strict liability is presented when the following factors concur: the administrative costs of compensating accident victims are high; the costs of transacting around the

[43] Not entirely, because the error discussed in note 42 *supra* enabled Epstein to paint a scary picture of how the economically minded judge might impose all sorts of onerous social duties on people.

[44] See Intentional Harms 442.

[45] Yet he continues to state, in the nuisance paper: "Individual rights do not rest upon foundations so insecure that any fresh wave of empirical research may displace them." Nuisance Law 75. But that is precisely the situation once it is admitted, as Epstein now does admit, that cost considerations can properly be used to extinguish a right. See, *e.g.*, *id.* at 81-82.

[46] See *id.* at 78-82.

[47] Epstein uses utilitarian and economic as synonyms.

liability rule are also high; the economic value of the rights sacrificed by departing from the strict-liability principle is low; and there is implicit compensation in kind to the victim (the last two conditions assure that departing from strict liability will not bring about a substantial redistribution of wealth).[48]

By omitting from the list of relevant factors the key determinant of the costs and benefits of a liability rule—its effect on the conduct of the parties—Epstein loads the dice against recognizing any significant utilitarian or economic exception to principles based on his justice considerations. Suppose that under a rule of strict liability the accident rate would be *much* higher because pedestrians would take fewer precautions. The higher accident rate would be a cost of the strict liability system, and a substantial one. But it would not enter into Epstein's list of factors used to evaluate a claimed utilitarian or economic exemption from the principles of corrective justice that he earlier suggested would, without such exemptions, lead to unacceptable results. For the higher accident rate would not be an administrative or a transaction cost; the loss to the victim of the accident if he was not compensated would not be trivial; and the presence or absence of implicit in-kind compensation would not be affected. As a matter of fact, under Epstein's analysis, the higher the cost of the accident to the victim, the weaker the case for relaxing strict liability. Yet, from an economic standpoint, the higher that cost is, the greater will be the social costs of an accident system that fails to create proper incentives for potential victims to avoid being injured. In short, it seems that Epstein has rigged his utilitarian-economic analysis in such a way as to avoid having to confront the possibility that a system of strict liability for automobile accidents would be substantially more costly than a negligence system, in which event he would have to trade off the extra costs against the "justice" gains of a strict liability system. And as I noted earlier those gains might be negligible if what people mainly desire is simply the cheapest accident system, that is, the system in which the sum of all costs—administrative, accident, and accident-avoidance—is minimized.

I have thus far been speaking of the way in which Epstein uses, or at least purports to use, cost considerations to limit (at least potentially) the reach of liability rules derived from notions of justice. But if economic considerations can be used to limit rights, presumably they can also be used as a source of rights. If economics teaches that some forms of pollution are better left without remedy, either to economize on the costs of administering the legal system or to create incentives for the victims of pollution to relocate or otherwise to take steps to avoid the pollution, and this teaching must now be accepted, should we not also heed the economist when he tells us that some harms should be brought within the remedial scope of the legal system

[48] See Nuisance Law 79.

through the creation of new tort duties? In fact the nuisance article accepts, if somewhat grudgingly, the propriety of sometimes creating new rights in order simply to promote economic welfare.[49] But the implications of this startling departure from the position in the earlier articles are not pursued. If economics can found rights, perhaps it can found a good Samaritan right. At least the costs and benefits of such a right would have to be examined. It is true that in a portion of the nuisance article which does not appear in the published version (it was omitted, at the editor's suggestion, because of the length of the article), Epstein reexamined the good Samaritan question and concluded that his original answer was correct. I will not comment on the omitted discussion beyond repeating my earlier point that Epstein's four-factor test for applying utilitarian considerations to the analysis of tort questions obscures the ultimate economic question, which in the good Samaritan case is simply the net social value of a rule requiring people to help strangers in distress. If that value is substantial, an empirical question, Epstein faces the difficult problem of trading it off against the (presumably nonmonetizable) cost of reducing people's freedom from social control. The four-factor test seems an effort to avoid having to make this difficult trade-off.

This discussion underscores a serious inconsistency *within* the nuisance article. On the one hand, Epstein there insists that tort liability may be imposed only for violation of a property right. On the other hand, he also insists that economic considerations can, in principle at least, furnish a basis for tort liability. What then are we to do in a case where economic analysis indicates that there should be tort liability but no property right, as in *Oppen* and (perhaps) the predatory-pricing case?

Conclusion

Professor Epstein has now written a number of articles on torts and related areas (I hope I have succeeded in showing that contracts is a related area). The articles make many challenging and illuminating points, including many that I have not touched on in this paper. And, whether or not Borgo's criticism of Epstein's views of causation is sound, I predict that those views will permanently alter the way in which tort lawyers think about causation. Epstein's advocacy of strict liability on libertarian rather than on the conventional "deep pocket" grounds and his vigorous attack on the economic approach to tort law also constitute challenges to current thinking which cannot be ignored. Yet whether his articles express a coherent and defensible point of view concerning the source and nature of tort obligations may be doubted. Perhaps Professor Epstein will feel challenged by my criticisms, as well as by those of Professor Borgo, to provide a more systematic exposition of his premises than he has thus far attempted.

[49] See *id.* at 94-98.

In particular, one may hope that Professor Epstein will explain more clearly wherein he distinguishes the classical libertarian position which he claims to espouse from the economic approach. The fundamental objective of both approaches is to create conditions in which people can accomplish their self-chosen ends through voluntary transactions. The (normative) economist believes, however, that the existence of positive transaction costs will sometimes justify judges or legislatures in imposing coercive rules designed to make the market work more effectively or to simulate the operations of an efficient market. But this is not to say that judges should have carte blanche to impose on people whatever duties may advance someone's conception of the public interest—the proper scope of judicial (and legislative) intervention in people's lives in a social system based on efficiency or wealth maximization is in fact very narrow.[50] I therefore have difficulty understanding why Epstein regards the economic position as excessively collectivist or interventionist. Perhaps his notion of liberty is fundamentally different from the economist's after all. Or perhaps the differences between Epstein and the economic analysts are in the end mainly differences in vocabulary, or in estimates of the relevant empirical magnitudes, rather than in fundamental principles. I hope that Professor Epstein will clarify these important questions.

[50] See Richard A. Posner, Utilitarianism, Economics, and Legal Theory, 8 J. Legal Stud. 103, 119-35 (1979); and Posner, *supra* note 4, pt. II.