# Liberty and the Law of Tort*

Richard A. Epstein

"Pleadings and Presumptions," 40 U. Chicago Law Rev. 556 (1973).
"A Theory of Strict Liability," 2 J. Leg. Studies 151 (1973).
"Defenses and Subsequent Pleas in a System of Strict Liability," 3 Leg. Studies 165 (1974).
"Intentional Harms," 4 J. Leg. Studies 391 (1975).

Reviewed by Roger Pilon

Theorists of liberty, from classical liberals to modern libertarians, have tended to fall into either of two camps. Thus Hayek speaks of the "British" and the "French" traditions of liberty, the former "empirical and unsystematic," the latter "speculative and rationalistic."[1] Among the empiricists he includes Hume, Adam Smith, and Burke, but also Montesquieu and de Tocqueville; into the rationalist camp he places Rousseau and the philosophes, but also Hobbes and, after his stay in France, Jefferson. (Curiously, Locke is omitted from this taxonomy.) Although Hayek makes no serious attempt to characterize these two strains according to the kinds of moral principles each has tended to emphasize (and he himself falls uncertainly on both sides in this regard[2]), it is not uncommon to speak of the British utilitarian tradition of liberty as opposed to the French (or continental) deontological tradition. The former is frequently to be found arguing for liberty as conducive to the greatest good, whereas the latter, stressing more the place of individual rights, argues for liberty either as a good in

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* This review essay appeared in 2(3) Law & Liberty 1-4 (Winter 1976) under the title "Rethinking Torts." I duplicate the original in order to avoid some unfortunate editorial errors. Law & Liberty is a quarterly publication of the Institute for Humane Studies in Menlo Park, California, and has a circulation of approximately 8,000, primarily to law schools, professors of law and philosophy, and judges.

itself, independently of whether it produces good consequences, or as a right, quite apart from whether it may be thought good in itself.

This taxonomy cannot of course be exact (and here it must be kept brief, and hence only suggestive); but it does serve to adumbrate a division that persists, with significant variations, even to the present. Empirically inclined free-market economists and lawyers, for example, proceeding often from utilitarian moral assumptions, have frequently sought to show that governmental incursions upon liberty have not produced an increase in general well-being -- contrary (usually) to the expectations of those advocating the incursions -- but just the opposite. Or they have claimed, in a similar utilitarian vein, that the law concerns itself not with equity but with the most efficient allocation of resources (the greatest good) by allowing for the maximum freedom conducive to that end, as witness Richard A. Posner's Economic Analysis of Law, recently reviewed in these pages.[3] The difficulty for this strain of libertarianism arises, of course, when the protection of what we would want to call a rightful liberty may not be productive, according to some calculus, of the greatest good. At this point the deontologist could be expected to object to his free-market colleague that a particular incursion may indeed increase the general welfare, but it is not right. Indeed, he would add that end-state considerations of the sort proposed by the utilitarian in this situation have nothing whatever to do with the justice of the matter.

This other side of the libertarian case has been set out forcefully by Robert Nozick in his recent Anarchy, State,and Utopia, also reviewed in these pages.[4] A central theme of the book is that liberty is a right, and it would be so even if it did not maximize the good. For all the merit of Nozick's densely packed tome, however, it only assumes a (Lockean) theory of individual

rights, it does not set one out in any detail. In truth, a thoroughgoing libertarian theory of rights -- which would constitute the details of Nozick's entitlement theory of justice -- remains to be worked out. In the articles under review, however, we have at least a part of that theory, the part that fills out much of Nozick's third principle -- justice in rectification.

Richard Epstein is a colleague of Richard Posner at the University of Chicago Law School, though he is most decidedly not of the same utilitarian inclination. These four articles, taken together, set out a principled theory for handling most of the private wrongs that are today handled under a patchwork of private law, one often producing inconsistent or otherwise unacceptable results. "The task," Epstein writes, "is to develop a normative theory of torts that takes into account common sense notions of individual responsibility," He observes that such an approach, by virtue of its primary appeal to notions of justice and fairness, "stands in sharp opposition to much of the recent scholarship on the subject because it does not regard economic theory as the primary means to establish the rules of legal responsibility." Far from looking to any end-state distribution of goods, then, "the major assumption of these articles is that, as a substantive matter, the tort law should be seen as a system of corrective justice that looks to the conduct, broadly defined, of the parties to the case with a view toward the protection of individual liberty and private property." In looking to conduct, "to what given individuals have done to upset the initial equilibrium between themselves and others," Epstein is presenting a theory that offers principled (and richly detailed) solutions to many of the persistent difficulties surrounding the principle of equal freedom.

Very briefly, the first of these articles provides the analytical

framework of this system of corrective justice, the framework for the three substantive articles which follow. It sets out the rationale for and constraints upon a multiple stage system of pleadings -- each stage in the pleadings creating a substantive presumption in favor of either plaintiff or defendant -- which "both allows and requires us to establish the appropriate relationships among those concepts regarded as relevant to the tort law." The second article is the heart of the theory: here Epstein takes a close look at the negligence standard which dominates the law of tort today, finds it unacceptable on a number of grounds, and then sets out his own theory of strict liability, which he argues convincingly (and contrary to much conventional wisdom) is the only moral standard of civil liability. The title of the third article best describes it -- it is a detailed working out of the system outlined formally and substantively, respectively, in the first two articles. And finally, in the fourth article, that curious and sometimes difficult area of tort law, intentional harms, is fit within the system developed in the first three articles. It is here that Epstein treats at some length the issue of so-called economic harms; free-market lawyers and economists will find especially interesting the conclusions of this section regarding, for example, trade regulation, for Epstein is an unusually rigorous free-market theorist.

Now for a more detailed look. In providing the analytical framework for the system, the first article is concerned in particular with the relationship between the rules of civil procedure and the substantive rules of law, especially as the former may contribute to the development of the latter. This contribution can be made by viewing the rules of civil procedure as formal constraints on legal argument, as means for delineating the distinctive

features of a legal argument; such was the accepted view throughout the formative years of the common law, Epstein observes. The modern rules, however, are limited primarily to a "notice" function, and thus they contribute little to the articulation of the general propositions of substantive law. While we needn't return to the forms of action and arcane rules of pleading, Epstein continues, an appreciation of the rules he proposes could nevertheless be of significant use in the conduct of litigation:

> It could help attorneys to identify the strength and weaknesses of their case before they commit themselves to costly litigation, assist at pre-trial conference in isolating the issues to be tried and facilitate the more precise formulation of legal issues on appeal. Even if the rules could not do much to improve the operation of the legal system, they remain of great value in efforts to systemize the rules of substantive law and thus to make them both more coherent and more just.

Briefly, then, Epstein proposes that the substantive legal rules of entitlement and responsibility be viewed not as a system of absolute rules but as a complex network of presumptions, or defeasible propositions. Thus in stating a prima facie case -- say, that defendant has harmed him -- the plaintiff has set forth a proposition which,

> ...though not conclusive, is entitled to a presumption of validity that retains its force in general even if subject to exceptions in particular cases;...the plaintiff has given a reason why the defendant should be held liable, and thereby invites the defendant to provide a reason why, in this case, the presumption should not be made absolute. The presumption lends structure to the argument, but it does not foreclose its further development.

Indeed, the argument may develop through several stages (unlike the simple division of the elements of a lawsuit into the two stages of claim and defense, as is generally accepted in the modern law). At each stage, the party pleading must introduce material minimally sufficient to establish a presumption in his favor. This process of alternating pleas continues until

one of the parties chooses to join issue on a question of law or fact.

The purpose of this first article, then, is to show what formal constraints must be imposed upon legal argument when it is thus viewed as a series of staged pleadings which treats substantive rules as presumptions. The details cannot be gone into here; but among the issues Epstein develops are (1) the distinction between conclusions of law and ultimate issues of fact, (2) the division of the elements of a case into a cause of action and the possible defenses thereto, and (3) the proper means of allocating the different elements of the case between the plaintiff and defendant. In the development of these formal elements each of these points is treated in considerable detail, though the merits of the entire structure cannot be fully appreciated until its more extensive applications are demonstrated in the third and fourth articles.

The theory of strict liability set out in the second article is, again, the heart of Epstein's system. It is here that the questions of justice with which the law of tort is ultimately concerned are brought out, which Epstein does by considering the differences in approach, and often in result, between the negligence and strict standards of civil liability.

> The first holds that a plaintiff should be entitled, prima facie, to recover from a defendant who has caused him harm only if the defendant intended to harm the plaintiff or failed to take reasonable steps to avoid inflicting the harm. The alternative theory, that of strict liability, holds the defendant prima facie laible for the harm caused whether or not either of the two further conditions relating to negligence and intent is satisfied.

The negligence standard has come, since the nineteenth century, to be called the "moral" standard, for it holds an individual liable for the consequences of his action only if his conduct was unreasonable. In practice, however, an economic and not a moral analysis has increasingly delineated this

"reasonable man" standard: Epstein treats at some length, for example, Learned Hand's famous Carroll Towing formula.

Yet this "cost-benefit" analysis of negligence serves only to obfuscate the fundamental issues, Epstein argues; for the assumptions underlying the negligience approach itself are centrally flawed. Far from developing the "moral" standard, theories of negligence, whether they use economic or moral criteria, altogether misconstrue the problem. They assume "that once conduct is described as reasonable no legal sanction ought to attach to it." But the situation of only one of the parties is being looked at here; in a civil action a loss has already occurred, concerning which it is only proper for the court to ask "Which of the two parties is the more innocent?" That the defendant acted "reasonably" is no justification for leaving the consequences of that action upon the victim! The court cannot allow the defendant, in pursuit of his own ends, to shift the costs of his actions, however unforeseen, to innocent parties.

Thus the strict or "causal" theory of negligence suggests itself. Here the simple causal paradigm "A hit B" serves, when proven, to establish a presumption in favor of B:

> ...proof of the non-reciprocal source of the harm is sufficient to upset the balance where one person must win and the other must lose. There is no room to consider, as part of the prima facie case, allegations that the defendant intended to harm the plaintiff, or could have avoided the harm he caused by the use of reasonable care. The choice is plaintiff or defendant, and the analysis of causation is the tool which, prima facie, fastens responsibility upon the defendant.

Epstein's arguments on these matters have been only touched upon here; they are thorough, detailed, and, in the judgment of this reviewer, altogether sound, both technically and morally. His analyses of various approaches to

negligence and causality -- say, those of Posner and Ronald Coase -- are both subtle and perceptive. "Proximate cause," "but for" tests, "reasonable foreseeability," "duty of care" -- each of these comes in for treatment before he presents his own causal theory.

The outline of that theory can also be little more than mentioned here. After presenting his own straightforward analysis of causation -- including a telling criticism of Coase's discussion of "reciprocal causation" -- Epstein sets out four distinct causal paradigms covered by the proposition "A caused B harm." These models are based upon the notions of force, fright, compulsion, and dangerous conditions, the last of which is divided into sub-paradigms. (A fifth paradigm, the tort of false imprisonment, is discussed briefly in the third paper; and I believe the elements are here for extrapolating to yet a sixth paradigm, involving the defamation torts.) Armed with these causal paradigms -- each of which serves as a model by which the plaintiff may establish, prima facie, a presumption in his favor -- Epstein applies his theory to a rich variety of cases, as this shift from a negligence to a trespass theory of harm would suggest he might. Problems in accident law, issues of right of way, trespass to property, products liability, malpractice, self-defense, pollution cases, "taking" issues, market combinations -- each of these and many others come in for treatment under this system (though most are reserved for discussion in the third and fourth articles). The range of cases to which the system can be applied to produce principled solutions is truly remarkable. Mention should be made, for example, of Epstein's discussion, toward the end of the second article, of the Good Samaritan problem. Here a rigorous defense is put forth, on causal and other grounds, of the common law's traditional unwillingness to hold individuals liable for omissions toward

strangers.

In the third article the system of staged pleas can be seen fully worked out. Here Epstein presses the moral implications of the causal analysis of tort situations to their logical conclusions. Thus, for example, private necessity, infancy, and insanity are shown to be ineffective defenses, for the question "is not whether it is fair for an insane person to be held responsible for the harm he has caused, but only whether it is fairer for him or for the plaintiff to bear those costs." (It should probably be emphasized, because the point is often missed even by those who should otherwise be expected to know, that Epstein is talking throughout of civil, not criminal liability, of compensation, not punishment. It is surprising how frequently these elementary distinctions are forgotten.[5]) A system of effective defenses (e.g., those involving reciprocal causality, assumption of risk, or plaintiff's trespass) as well as rejoinders thereto is worked out as well.

It is likely, again, that the fourth article will be of special interest to free-market theorists (though it is equally likely that it will be less than fully appreciated if read without the other three). Here Epstein treats intentional harms as they are countenanced in such cases as recklessness, self-defense, protection of property, even medical malpractice. He shows how, by introducing intentional factors at the proper level through his system of staged pleadings, heretofore "difficult" cases can be resolved in a principled way, one respecting the common law rights of the parties to the dispute. But he goes on to discuss at considerable length the so-called "economic harms" that arise when individuals, making legitimate "moves" (e.g., making market offers), are said to be thereby "harming" others. To barely sketch a part of the argument, Epstein shows that judicial dicisions purporting to prevent "economic harms" have the effect of interfering with trade by limiting the

making of offers -- and their acceptance by third parties. For plaintiff's claim, "defendant drove me out of business," must involve the third party with whom defendant did trade. But no appropriate causal paradigm can be invoked by plaintiff here, and no prima facie case of invasion of a protected interest can be established. It is in this sense, then, that Epstein is setting out a rigorous free-market theory; moreover, the unified approach developed in these articles enables him to legitimate competition without resort to ad hoc or utilitarian devices. No doubt Epstein's conclusions will be troublesome even to some free-market theorists; but they follow ineluctably from his system which itself sets out the moral boundaries for a large and important area of liberty.

These essays are highly recommended. They will take time to digest, for they challenge a number of assumptions that even libertarians are often to be found holding. But they break important ground in presenting a probing, detailed, and well thought out system to organize many of our deepest convictions about liberty.

## Notes

[1] F. A. Hayek, The Constitution of Liberty (Chicago: University of Chicago Press, 1960), p. 54 ff.

[2] Compare op. cit., e.g., pp. 67-68 with p. 159.

[3] Law & Liberty, vol. 1, #3, p. 5.

[4] Law & Liberty, vol. 2, #1, p. 3.

[5] For good examples of this see my "Justice and No-Fault Insurance," The Personalist, Winter 1976.

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# LAW & LIBERTY

A PROJECT ON THE LEGAL FRAMEWORK OF A FREE SOCIETY

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## Book Review

**The Morality of Consent. By Alexander M. Bickel. New Haven: Yale University Press. Pp. 156. $10.**

*In his last book, Alexander Bickel admonishes us to fix our eyes "on that middle distance where values are provisionally held, are tested, and evolve within the legal order—derived from the morality of process, which is the morality of consent."*

*by Jon R. Waltz*

Because the lawyer and law teacher Alexander Bickel died at the age of 49 shortly after delivering the lectures on which this book is based, there is a temptation to employ the occasion of a brief review to say all the wrong things about his last book. One could write that *The Morality of Consent* is a fitting culmination to a short but thoughtful life. One could insist that the timing

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*Jon R. Waltz is Professor of Law at Northwestern University School of Law. This review is adapted from an earlier* Washington Post *review of Professor Bickel's work.*

Inside This Issue . . .



Review Essay

## Richard A. Epstein: Rethinking Torts

*This review essay examines a radical new approach to tort theory developed by Professor Richard A. Epstein. This theory has emerged, piecemeal, in a series of recently published articles † by Professor Epstein and is presented here in an integrated form for the first time.*

*by Roger Pilon*

Theorists of liberty, from classical liberals to modern libertarians, tend to divide into two camps. Thus, F. A. Hayek speaks in his *Constitution of Liberty* of the "British" and the "French" traditions of liberty: the former "empirical and unsystematic," the latter "speculative and rationalistic." Among the empiricists he includes not only Hume, Adam Smith, and Burke, but also de Montesquieu and de Tocqueville; into the rationalist camp he places not only Rousseau and the *philosophes*, but also Hobbes and, after his stay in France, Jefferson.

It is not uncommon to speak of the British utilitarian tradition of liberty as opposed to the French (or continental) deontological tradition. The former is frequently to be found arguing for liberty as conducive to the greatest good, whereas the latter, stressing more the place of individual rights, argues for liberty as a good in itself, independently of whether it produces good consequences.

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The title of the third article presents a detailed working out of the system outlined formally and substantively, respectively, in the first two articles.

Finally, in the fourth article, that curious and sometimes difficult area of tort law—intentional harms—is fit within the system developed in the first three articles. It is here that Epstein treats at some length the issue of so-called economic harms. Free-market lawyers and economists will find especially interesting the conclusions of this section regarding, for example, trade regulation, for Epstein is an unusually rigorous free-market theorist.

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rules of pleading, Epstein continues, an appreciation of the rules he proposes could nevertheless be of significant use in the conduct of litigation:

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> The first holds that a plaintiff should be entitled, prima facie, to recover from a defendant who has caused him harm only if the defendant intended to harm the plaintiff or failed to take reasonable steps to avoid inflicting the harm. The alternative theory, that of strict liability, holds the defendant prima facie liable for the harm caused whether or not either of the two further conditions relating to negligence and intent is satisfied.

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> . . . proof of the non-reciprocal source of the harm is sufficient to upset the balance where one person must win and the other must lose. There is no room to consider, as part of the prima facie case, allegations that the defendant intended to harm the plaintiff, or could have avoided the harm he caused by the use of reasonable care. The choice is plaintiff or defendant, and the analysis of causation is the tool which, prima facie, fastens responsibility upon the defendant.

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*Roger Pilon is a doctoral candidate in philosophy at The University of Chicago. He has published several articles on liability problems, including "Justice and No-Fault Insurance" in* The Personalist, *Winter 1976, and a review of O'Connell's* The Injury Industry and the Remedy of No-Fault Insurance *in* The Academic Reviewer, *Fall-Winter 1974.*

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*Davis E. Keeler*
*Project Director*