March 1994

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Richard B. Stewart

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Recommended Citation

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z384C2D

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Panel I: Liberty, Property, and Environmental Ethics

Richard B. Stewart, Fourth Panelist*

Well, I think we heard Turley I and Turley II. The first Turley spoke, in response to Professor Rothman, about environmental crimes and what is happening in Washington. I am tempted to continue that line, having been the subject of a few *Wall Street Journal* editorials myself in connection with the *Exxon Valdez* prosecution.¹

But I am going to follow Turley II and Bob Ellickson and talk about institutional issues that are of particular concern to lawyers. I will not discuss how ultimately to define the respective limits of private property and government authority, or the normative foundations of any such effort. Instead, I will evaluate how different legal and institutional regimes designed to protect the environment affect liberty and property.

As we have been reminded by several speakers, liberty and property are reciprocal in the common law. One person’s license is another person’s injury. If we regard the common law as rules of coordination among members of civil society, then we have to look at both sides of the coin. Laws to prevent or redress environmental spillovers constrain the exercise of rights to liberty and property, but such spillovers often cause real harm, impairing the liberty or property of others. This reciprocity is less evident today because there is far reaching separation and specialization of production functions and consumption functions. We are no longer all yeoman farmers in an exactly reciprocal situation.

Among the legal regimes of environmental protection, there is a conventional contrast between command-and-control administrative regulation on the one hand, and the common law system that defines and regulates property rights and market exchange on the other. The command-and-control system, depending on your view, is either inherently incompatible with liberty or at least has an inherent tendency to overreach and unjustifiably undermine liberty and property. By

contrast, the common law is decentralized, flexible, adaptive, and re-
spectful of private ordering.

I think there is much truth in this contrast. But I want to argue,
in the brief time available, that the advantages of the common law are
overstated, particularly in dealing with environmental problems.
There are serious institutional limitations in the common law system
for dealing with the collective externalities or spillovers that charac-
terize many environmental problems. When the common law at-
ttempts to deal seriously with these problems it often overreaches and
undermines liberty and property.

I also wish to suggest that we must consider alternatives to the
conventional dualism between the common law and command-and-
control administrative regulation. I have in mind economic incentives
such as pollution taxes or transferable permit systems. I also wish to
mention environmental contracting, which is a new development in
Europe with promise for use in the United States, since government
as well as the private sector has begun to recognize the limitations of
our central planning system of command regulation. Under environ-
mental contracting, government and business negotiate an agreement
on the reduction of aggregate risks at a given industrial facility over a
period of time. The business has five or ten years to achieve the
agreed risk reduction in the cheapest and most innovative way, uncon-
strained by the myriad of specific regulations directed at air, water,
and waste pollution from particular sources within the facility. I be-
lieve that these alternatives can help relieve, if not entirely eliminate,
some of the conflicts between the demand for environmental protec-
tion, on the one hand, and the important interests in liberty and prop-
erty, on the other.

There are a number of questions that have to be resolved by any
legal or institutional regime for environmental protection. First, what
is the universe of activity that is going to be subject to legal control or
review? Conventionally, we distinguish between conduct that imposes
"bads" on others, and conduct that withholds a "good." Regulation,
liability rules, criminal sanctions, taxes, and most other legal disincen-
tives should, in principle, be targeted on bads. If society collectively
desires goods, then it should expend society's resources through taxes
levied by a political process, in order to obtain them.

As Ronald Coase made clear, economists are agnostic when it
comes to distinguishing between collective goods and collective bads.
Is air pollution a problem of a collective good? If so, we have too
much pollution because factories are unable to sell clean air to people
by reducing pollution, because the nonexcludability problem prevents
markets from operating. Or, is air pollution a collective bad? If so,
we have too much pollution because pollution spillovers are taking
other people's health and property without obtaining their consent and without compensating them. There is no objective way, on economic grounds, to resolve this question.

Nonetheless, the common law does draw a clear distinction between physical harms that people impose on one another, which are regarded as bads properly subject to legal sanctions, and the withholding of benefits, which is not subject to sanctions. The government cannot coerce the provision of benefits, except for public purposes on payment of just compensation financed by tax revenues.

The excesses and dysfunctions of the command-and-control system are familiar to this audience: the limits of centralized information gathering, the inevitable tendency towards rigidity, the economic and decisional inefficiencies, the foreclosure of diversity, and the inability to provide incentives for innovation. Command regulation is commonly justified as eradicating bads, but in practice it sometimes threatens to turn into a selective and arbitrary coercion of benefits. In order to deal with this threat and the other shortcomings of regulation, we superimpose costly court review and formal litigation procedures, with a consequent diffusion of responsibility and accountability, producing a system of central planning through litigation—Madison's nightmare.

Faced with these intractable difficulties in administrative regulation, we are tempted to turn to the common law to deal with pervasive environmental problems such as hazardous waste dumps, toxic and other air pollutants, contaminated drinking water, and other harmful byproducts of human activity. But the common law is transactionally very costly and relatively ineffective in dealing with such problems, particularly in cases where there are large numbers of actors and large numbers of people who are exposed to environmental spillovers. Complex issues of causation, long latency periods before harm manifests, and the lack of adequate financial responsibility on the part of many actors also undermine the efficacy of the traditional common law damage remedy. For example, underfunded waste operators can cause enormous harm with adverse effects that long outlive their period of operation. Because of the limitations of traditional common law litigation and remedies, the liberty and property of those suffering from such spillovers will be impaired.

What happens when a common law system attempts to address what society regards as serious problems that are not being adequately handled by traditional remedies? Experience indicates that efforts to transform the common law to deal with environmental problems has led to excessive zeal and overdeterrence. For example, in the pre-Superfund era, the government sought injunctive relief
from the courts under RCRA. We got some really amazing court
decisions on cleanup, where the judges disregarded traditional limita-
tions on equitable relief and went beyond even what EPA would do
today in remedies, in part because of their unfamiliarity with risk anal-
ysis and management and the ad hoc character of adjudication.

Courts have also expanded toxic tort liability to provide recov-
eries for medical monitoring and cancerphobia. People are exposed
to cancer-causing chemicals. They say they are afraid of getting sick at
some undefined future point, and they are getting recoveries. Courts
have also played an important "common law" role in interpreting
Superfund, expanding liability for cleanup and natural resource dam-
ages far beyond traditional principles, creating in the process an enor-
mously costly and unfair system of arbitrary and unpredictable
liability.

These threats to liberty and property may be inevitable when the
common law tries to transcend its own inevitable institutional limita-
tions to deal with environmental problems that are beyond its capaci-
ties. One can criticize the judges, as Peter Huber has done, on the
ground that they have tried to act like welfare czars. The real prob-
lem, however, is institutional. The judges are trying to respond to real
societal problems for which the public demands solutions, but in doing
so they are exceeding their institutional capabilities. The inevitable
limitations of the common law and the drawbacks of command regula-
tion should lead us to consider the advantages of the alternatives that
I mentioned at the outset.

The advantages of emission fees and tradable permits are quite
clear in economic terms. They will produce a much more cost-effec-
tive cleanup or pollution reduction. They will encourage innovation
and flexibility. They will reduce administrative overload. They will
avoid the enormous transaction costs and other inefficiencies in at-
tempting to use a case-by-case common law system to address wide-
spread environmental harms.

These incentive systems are much more accountable and predict-
able, and also more realistic than either command-and-control regu-
lation or litigation. The government sets a price. Each source pays for
the pollution that it emits or the waste that it produces. Alternatively,
the government establishes a limited stock of property rights in com-
mon resources, as it is doing in the acid rain program of the Clean Air

4. See, e.g., Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146 (1st
Cir. 1989); New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985).
5. See generally Peter Huber, Safety and the Second Best: The Hazards of Public Risk
Sources can trade those rights in a market. Each pollution source faces prices for pollution rights that are the equivalent of a fee on pollution. Companies that can find better ways to protect the environment while meeting people’s demands for goods and services will make money by paying less pollution taxes than their competitor or having excess rights that they can sell. The price system will provide strong incentives for innovation and pollution prevention by firms. It will also provide strong incentives for consumers, as the social costs associated with more heavily polluting products and processes are passed on in the form of higher prices for goods and services. In this way, the amazing efficiency of the price system in conveying information and inducing efficient responses both from producers and consumers can be used as a powerful motor to promote environmental protection.

Pollution fees and transferrable pollution permits have been criticized as “market socialism” by Fred Smith and other critics. They would prefer to see property rights in collective resources developed through a decentralized, common law process rather than created by legislative and administrative programs such as the sulfur trading provisions in the Clean Air Act. For reasons already indicated, I think their faith in the capacities of the common law is wholly misplaced.

The use of more efficient market-type incentives to promote environmental protection is sometimes also opposed on the grounds that it will make environmental quality much cheaper and thereby people will demand, through the political process, too much of it. But in a democracy, one must ultimately leave it to the political process to decide how much environmental cleanup we should have. If we can achieve environmental protection more efficiently and cheaply while allowing greater diversity, flexibility, and scope for innovation, we ought to applaud our luck rather than bemoan our fate.

The other alternative approach that I mentioned is environmental contracting between government and industry, a practice that is emerging in the Netherlands, Denmark, and Germany, as well as a number of other European nations. Contracting is most appropriate in dealing with localized problems, where trading systems are inappropriate because they demand larger markets and because they are difficult to tailor appropriately to local circumstances. In lieu of the

7. See e.g., Fred L. Smith, Jr., Conclusion: Environmental Policy at the Crossroads, in ENVIRONMENTAL POLITICS: PUBLIC COSTS, PRIVATE REWARDS 178, 188-89 (Michael S. Greve & Fred L. Smith, Jr., eds., 1992).
8. E.g., id. at 189-95.
prevailing command-and-control system’s micromanagement of par-
ticular releases and wastes from particular sources, the business and
the government first undertake a comprehensive multimedia audit of
existing environmental risks posed by the facility’s operation. They
then agree on a schedule for reducing those risks by certain amounts
over a period of years. The source has full flexibility to decide which
releases to address and how to reduce them. Studies indicate that this
flexibility can achieve far greater reductions than command-and-con-
trol central planning, at much less cost.

I believe that these mixed approaches, including the public-pri-
ivate contract, the creation of new property rights through transfer-
rable pollution permits, and pollution fees, are the most promising
alternatives to command-and-control regulation and the common law.
These methods can meet the public’s demand for environmental pro-
tection in ways that are respectful of liberty and property.