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Abstract

Richard Epstein, over a long and distinguished career, has offered inspired insights into how a legal system should be framed to serve the goals of those it governs. In that pursuit, he has relentlessly applied a sharp logic — call it *Epstein's Razor* — to shave away the detritus of complexity and confusion that surround perplexing problems, leaving standing only truths unscathed by competition among ideas. Over decades of diverse writings on law and political theory, highlighted by his elegant *Simple Rules for a Complex World*, Professor Epstein offers a vision of law constructed on the view that simplicity in law is good — that legal rules have become too numerous and complex and that, if law were set more firmly on elemental principles, the planet would be a better place to live.

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More than half a millennium in the past, when scholars mostly worked in monasteries, William of Ockham, a Franciscan friar who lived in England (c. 1285–1349), announced *pluralitas non est ponenda sine necessitate*—"plurality ought not be posited without necessity" —meaning that the simplest explanation usually is best. This idea, sometimes called "the law of economy" (or of "parsimony," *lex parsimoniae*) is traceable to Aristotle and endorsed by, among others, Thomas Aquinas and Isaac Newton. In the words of Aquinas: "If a thing can be done adequately by means of one, it is superfluous to do it by means of several; for we observe that nature does not employ two instruments where one suffices." In 1852, Sir William Hamilton, 9th Baronet of Preston, dubbed this concept *Ockham's Razor*, and the moniker has stuck.[1]

I

Richard Epstein may not work in a monastery, but "the law of economy" fits his view of law like a glove. In a masterful opus that extends far beyond the law of torts, *Simple Rules for a Complex World*,[2] Professor Epstein offers a vision of law constructed on the view that simplicity in law is good, and that simplicity in fact frames many aspects of law as it has evolved, and as it might better be conceived. With inspired insight yet elegant simplicity, Epstein argues that legal rules have become too numerous and complex, and that if law were set more firmly on simple principles, and if it were comprised of fewer and simpler rules, the planet would be a better place to live. Call this *Epstein's Razor*.

In a world where people chase limited resources, the goals of fewer and simpler rules proceed from a few simple premises: (1) that law should promote the freedom of human beings, "autonomy"; (2) that freedom is enhanced by maximizing resources, and resources are maximized by allowing a broad domain of conduct governed by self-interest rather than by other-regarding norms; (3) that rules should foster, not frustrate, human efforts and aspirations; (4) that simple rules are preferable to those that are complex (rules that are dense, technical, multi-sourced, and indeterminate); (5) that complex rules are administratively expensive—to understand, comply with, and enforce—and so drain the limited resource pool; and (6) that complex rules are acceptable only when they better serve the first premise—promoting freedom.[3] Revealing the virtues of simplicity, Epstein's premises are elemental and largely irrefutable.

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[1] Adhering to this precept, I direct readers for authority to *Occam's Razor*, http://en.wikipedia.org/wiki/Occam's_razor.

[2] Harvard University Press, 1995.

[3] *See id.* ch. 1.

Notwithstanding its essential virtues, simplicity has some enemies.[4] First is "perfect justice," which, Epstein reminds us, is a legal iteration of an ideal that easily falls prey to the familiar maxim that the perfect is the enemy of the good. Obsessive efforts to achieve *perfect* justice in *every* case, rather than *rough* justice in *most* cases, multiply the complexity of rules—which results in better justice in some instances, but at a price that often is too high. Though increasing the freedom of persons whose legal outcomes detailed rules convert from wrong to right, such rules decrease the freedom of all persons who now must live in a more complicated regime. And, not infrequently, the latter decreased freedom is greater than the freedom saved by the effort to move justice toward perfection.

Another enemy of simplicity, Epstein explains, springs from efforts to apply the types of complex rules that govern families and other kinds of intimate groups to large-group situations involving strangers. In family and other small-group settings, behavioral norms reflect a multitude of differing talents, resources, preferences, and expectations of the individual members of particular groups. When people move norm-setting principles from groups that are small to those that are large (as in the world of strangers we all inhabit), the nuanced set of norms that operate so well (often implicitly) in small groups fit awkwardly at best. Because people operating in large groups do not have the same levels of information about and trust in other members that prevail in small-group settings, norms for large groups must be framed as formal legal rules with operating principles that are fewer, less individualized, and less complex.

Before examining how Professor Epstein's simple-rule construct applies to tort law problems, we might note how tort law fits broadly within his "libertarian synthesis" of simple principles for organizing a complex world: "First apply the property rules of self-ownership and first possession; next apply the general rules of contract with respect to the endowments so acquired; and afterward apply the tort laws to see that no impermissible actions of aggression took place."[5] More fully, he explains that: (1) people have a natural right to "self-ownership"—individual freedom or autonomy; (2) people have an inherent right to acquire resources[6] and put them to uses they deem best—freedom of property; (3) people can maximize their personal welfare through voluntary exchanges of resources for mutual gain—freedom of contract; and (4) since all people have an equal right to freedom, they may not use force or deceit to infringe on the freedom interests of others—infringements rectified by the law of torts. Together, these principles

[4] *See id.* ch. 2. In the spirit of *Ockham's Razor*, I direct readers for authority hereafter to Professor Epstein's book, which I shall henceforth cite only for quotations.

[5] *Id.* at 72.

[6] "[Y]ou take what you can get." *Id*. at 59.

"describe a world with strong and well-defined rights in persons and property, complete freedom of exchange, and powerful protection against external threats."[7]

II

Now that we have an outline of Richard Epstein's fundamental principles, we are equipped to examine how *Epstein's Razor* informs a few particularized rules of tort. What this inquiry reveals is that the razor is sharpest—and, hence, operates most effectively—when rules are clear and reflect commonly-understood communal norms. More simply, *Epstein's Razor* explains and improves the law of torts.

Comparative Negligence. For many years, Professor Epstein has explored how tort law should apportion accidental losses among wrongdoers, notably between a negligent defendant and a negligent plaintiff but also between multiple defendants. On this issue, he long has advocated that damages be apportioned equally ("pro rata") between all parties responsible for an accident. So, if one driver runs a red light, another is intoxicated and fails to maintain a proper lookout, and a collision thereby ensures, both drivers should split the resulting damages 50–50. If three negligent drivers together cause a collision, they should split the damages evenly, three ways. Although contrary to prevailing law, Epstein's equal-division rule for damages apportionment draws from hoary legal precedent (such as traditional admiralty law), and the pro rata principle still is sound. So long as the negligence of each actor (say three) is a substantial and proximate cause of a collision, it seems that none should be allowed to gamble on coming out at the right end of a finely-tailored division of the damages—say, 28%, 37%, and 35%—but that each should simply be required to pay an equal share. In addition to being easy to understand and cheap to administer, such a simple and fundamentally fair (if "imperfect") approach to apportionment should decrease gaming and increase settlements, for it avoids asking jurors to formulate divisions that reflect the advocacy skills of counsel more than any "true" divisions of metaphysical responsibility.

Negligence. While Epstein's view on apportionment illuminates the value of his system of simple rules for accident law, his argument that strict liability is

[7] *Id.* at 110. While this libertarian synthesis of principles sets the stage for a world of ordered liberty, Epstein explains that this set of principles must be tempered by two others that cut the other way, both of which are captured by his adage of "take and pay"—first, a limited privilege of private necessity, actuated by "imminent peril to life or to property"; and, second, a police-power principle of eminent domain, allowing government to take private property to benefit the community, on paying the owner just compensation. *Id*. at 113, 128.

preferable to negligence is more difficult to accept. While acknowledging that the Hand calculus for determining due care and negligence fairly reflects a Golden Rule approach that dates at least to Roman times (a norm requiring people "to take the same level of care with the affairs of others that you would bring to your own affairs"),[8] he argues that informational and psychological frailties that frustrate rational decisionmaking, combined with the indeterminacy of cost-benefit evaluations of untaken precautions, support a general rule of strict liability for causing harm. While Epstein's arguments for strict liability are firmly grounded in simplicity, minimizing costs, determinacy, and respect for equal freedom, I agree with most observers that a better default rule for accident law, if admittedly more complex, is fault—because, quite simply, it allows for a greater sphere of freedom.[9]

Landowner Liability to Entrants. The common law conventionally determined a landowner's duty of care toward entrants based on whether the entrant was a trespasser, licensee, or invitee. Under this scheme, landowners did not have to provide safety for trespassers whose presence was not anticipated, reflecting Epstein's simple rule of property; and a landowner's duty to licensees (reflecting their equal right to freedom) normally was only to warn them of hidden dangers. Toward invitees drawn onto commercial premises for business purposes, however, landowners (being engaged with invitees in mutual exchange) had a duty of reasonable care to warn them of hidden dangers and, often more importantly, to put the premises in a reasonably safe condition. More recently, of course, the trend has been to abolish these traditional categories in favor of a single standard of reasonable care to entrants of most types, an approach Professor Epstein accepts as a workable proxy for the traditional classification scheme. Ultimately, however, Epstein justifiably opts for the traditional approach—on grounds of lower cost, better results, and because the categorical approach captures common mores more closely than a uniform standard of reasonable care, a standard that may be simpler to state but is conceptually and administratively more complex.[10]

Punitive Damages. A final tort law issue, on which Richard Epstein uncharacteristically has said little, is punitive damages—in particular, on the

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[8] *Id.* at 94.

[9] *See* David G. Owen, *Philosophical Foundations of Fault in Tort Law*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 201 (David G. Owen ed., 1995); David G. Owen, *The Fault Pit*, 26 GA. L. REV. 703 (1992).

[10] *See* RICHARD A. EPSTEIN, TORTS § 12.11 (1999).

method by which the amount of such awards should be determined.[11] Traditionally, once a jury decides that a defendant's flagrant misconduct warrants punitive damages, it then determines a proper amount for such damages by considering three factors: "the character of the defendant's act [reprehensibility], the nature and extent of the harm to the plaintiff which the defendant caused or intended to cause, and the wealth of the defendant."[12] More recently, the United States Supreme Court, searching for a way to limit excessive awards of punitive damages under the due process clause, has hinted that some multiple of compensatory damages (drawing from the second conventional measurement factor) might appropriately cap the amount of such awards. Because of the variety of purposes served by punitive damages, most commentators have shunned this simple-multiple approach as a clumsy method for ascertaining how much civil punishment should be assessed in specific cases of flagrantly inflicted harm.

Perhaps Epstein's reluctance to engage this provocative issue more fully reflects his being tugged in different directions between two strong impulses, two differing "rules of economy": a rule of optimal deterrence, using the particular malefactor's likelihood of detection to generate a particular multiple of compensatory damages applicable in particular circumstances; or, a rule that simply assigns a predetermined multiple—like treble damages—in every case, an approach that promotes deterrence (and restitution), if only roughly. In view of Professor Epstein's paucity of analysis on which of these two rules of economy should control this vexing question, we might turn to a tool of decision he has handed us already: *Epstein's Razor*. And with this sharp instrument, the correct approach is clear: treble damages, or some other predetermined multiple.[13] Apart from its grounding across many civilizations over the millennia, and over many centuries of Anglo-American law, a predetermined multiple-damages approach is far simpler and less expensive than the particularized optimal-deterrence rule; and it has the added benefit of trimming the Supreme Court out of tort law's hair, which the optimal deterrence rule may not. Moreover, at least in cases involving serious harm, a simple-multiple method serves roughly to cover *all* a victim's losses resulting from a flagrant wrong, a vital restitutionary function of this special type of remedy in private law.[14]

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[11] The only source for Epstein's views on this topic that I could find is RICHARD A. EPSTEIN, MODERN PRODUCTS LIABILITY LAW 190 (1980). He there briefly notes his preference for retribution over deterrence as a rationale for such damages, and for a double damages rule in certain situations.

[12] RESTATEMENT (SECOND) OF TORTS § 908(2).

[13] Double damages are, indeed, what Epstein long ago suggested, if only as a casual aside. *See supra* note 11.

[14] *See* David G. Owen, *Aggravating Punitive Damages*, 158 U. PA. L. REV. PENNUMBRA 181 (2010).

III

Over a long and distinguished career, Richard Epstein has investigated how tort principles fit in a legal system designed to serve the fundamental goals of the people it governs. In that pursuit, he has relentlessly applied his razor, shaving away the detritus of complexity and confusion, leaving only those truths that remain unscathed by competition among ideas. Always, he has reminded us to stay grounded in common sense, and grounded in the fundamentals—especially in tort law's foundational role in setting a behavioral structure by which humans can live peaceably together while competing for resources in a world of scarcity. Tort law accomplishes this objective by "enforc[ing] the separate domains in which all of us, singly, can live our own lives as we see fit."[15] Libertarian elegance, at its best, said so simply because it has nothing to hide, but rests on truth.

[15] EPSTEIN, *supra* note 2, at 92.