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Prosecutorial Indiscretion

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PROSECUTORIAL INDISCRETION

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In honor of John and June Mary Makdisi, this volume's general theme is about the importance of morality to law. They will be missed, having impacted students in a wide array of courses, stretching from Torts, Remedies, and Property to Evidence, Natural Law, and Family Law. Although my remarks strictly relate to my principal area of expertise and interest (i.e., environmental law), they are no less imbued with some of the moral concerns that have marked the academic lives of the Makdisis. As a professor working in the environmental field, moreover, considering the relationship of morality to law can be quite an interesting chore. In general, environmental law is an arena of strict—if not absolute—liability, and *mens rea* has little to do with liability except, occasionally, for criminal liability.[1] Even there, the Department of Justice has been successful in "watering down" knowledge requirements. A criminal defendant need only know *what* he was doing and not *that* his activity violated the law, in order to be liable.[2] So environmental lawyers generally think about science and engineering, not moral responsibility. We think about the law of nature, not natural law.[3] To the extent that we think about moral or ethical responsibility, it is about making our legal analysis reflect the realities of science, say, of climate change.[4]

It is well known that criminal prosecutors wield enormous

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[1] *See generally* J. Manly Parks, *The Public Welfare Rationale: Defining Mens Rea in RCRA*, 19 WM & MARY ENVT'L L. & POL'Y REV. 219 (1993).

[2] *See, e.g.,* United States v. Hoflin, 880 F.2d 1033 (9th Cir. 1989), cert. denied 493 U.S. 1083 (1993).

[3] For the distinction, *see generally* BRIAN TIERNEY, NATURAL LAW, LAWS OF NATURE, NATURAL RIGHTS (2005).

[4] *See, e.g.,* Keith Rizzardi, *Rising Tides, Receding Ethics: Why Real Estate Professionals Should Seek the Moral High Ground*, 6 WASH. & LEE J. ENERGY, CLIMATE & ENV'T 402 (2015).

power, with virtually unfettered discretion in deciding who to charge with a crime, what charges to file, when to drop them, whether or not to plea bargain, and how to allocate prosecutorial resources. In death penalty jurisdictions, the prosecutor literally decides who should live and who should die by virtue of the charging discretion.[5] This does make one uncomfortable. It can be dispositive in the immigration context as well. Immigration and Customs Enforcement ("ICE") can influence an immigration judge to administratively close a case. Administrative closure means that ICE will stop prosecuting a case and will not attempt to deport an alien. ICE may still attempt to deport them in the future, but if they do, they must give them notice and the opportunity to challenge the deportation.[6]

The Jefferson Hypothetical

My claim here, though, is that prosecutorial discretion, even if that term is not used, is very important outside the criminal and immigration contexts, including environmental law. Consider the "typical" early case under CERCLA, the Superfund cleanup statute.[7] The statute includes complicated and convoluted language defining potentially liable parties—past and present owners and operators of a facility, transporters of hazardous substances to a facility, and, significantly, anyone who "arranged for disposal" of such substances that ended up at a facility.[8] The nature of the liability is largely undefined, so the Department of Justice ("DOJ") broadly demands that the standard be strict (absolute, really), joint and several, and retroactive.[9] Remarkably, courts have gone along with the DOJ's

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[5] *See generally* Andrew L. Sonner, *Prosecutorial Discretion and the Death Penalty*, 18 MD. B. J. 6 (1985).

[6] United States Immigration and Customs Enforcement, *Memorandum on Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, at 2 (June 17, 2011), https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

[7] 42 U.S.C. § 9601-9675.

[8] 42 U.S.C. §9607(a).

[9] *Superfund Liability*, EPA.Gov, https://www.epa.gov/enforcement/superfun

arguments that the Government need not show that the materials for which a defendant arranged for disposal are the materials that actually ended up at a problem site. They need only show that the substances connected to the defendant are chemically similar to substances found there.[10]

The net effect of its "embarrassment of riches," in successfully advocating for broad liability under CERCLA (parent company liability, successor liability, etc.), is that, of many potential defendants (potentially responsible parties or PRPs in CERCLA-speak), the Government has virtually unlimited discretion to choose the few whom it wishes to pursue for all of its costs and damages, leaving it to the defendants to pursue, if they wish, others to share in the reimbursement.[11] In addition, the Government may settle with its favored and shift the remainder of the liability to those who resisted its settlement advances, using such factors as "cooperation" and "ability to pay" as part of the basis for the amount of settlement.[12]

In the 1980s, when I was in private practice and right as CERCLA was beginning to take effect, I wrote a hypothetical for an ABA meeting as a satire of the then rapidly developing caselaw. Imagine that the heirs of Thomas Jefferson hid their flatware as the Union army was about to arrive during the Civil War.[13] It was removed to another location, and after 1980 the Government sued to recover its costs of removal. I thought the hypothetical was good satire, but I didn't realize how good until I got it published, and the Eastern District of Virginia began getting requests for the pleadings in the case. The publisher—the Environmental Law Institute—had to publish a note that the case was not "real."[14]

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d-liability (last visited March 29, 2019).

[10] *See* United States v. Monsanto, 858 F.2d 160 (4th Cir. 1988).

[11] *See generally* Alfred R. Light, *Déjà Vu All Over Again? A Memoir of Superfund Past*, 10 NAT. RES. & ENV'T 29 (1995).

[12] Environmental Protection Agency, *Memorandum on Interim CERCLA Settlement Policy*, at 10 (Dec. 5, 1984), https://www.epa.gov/sites/production/files/2013-10/documents/cerc-settlmnt-mem.pdf.

[13] Alfred Light, *United States v. Thomas Jefferson IV et al. (A Superfund Story)*, 15 ENVT'L F. 17 (1985).

[14] Light, *supra* note 11, at 29.

"Real" problems were bad enough themselves back then. For example, the firm for which I worked litigated one of the first CERCLA cases to be appealed in the Fourth Circuit. We represented four defendants, three fortune 500 companies, and one small company that had shipped one drum of hazardous substances to the facility which the Government had cleaned up. Or so we thought? After we lost the appeal, we petitioned the United States Supreme Court for a writ of certiorari.[15] In its opposing brief, the Solicitor General disclosed in a footnote for the first that it had settled with the "one drum" defendant—having contacted its CEO without informing us, its legal counsel for purposes of the litigation.[16] The Land and Natural Resources Division attorneys apparently felt emboldened to do this despite the normal ethical constraints on contacting represented parties directly.[17] Why? Perhaps they feared losing a precedent about "de minimis" contributors. After all, the Assistant Attorney General had testified that he did not believe the United States could impose joint and several liability for the entire amount on such a party.[18]

A Tax, Not a Tort

What does this have to do with the relationship between morality and the law? Because DOJ was so successful in its litigation campaign back then to destroy the normal constraints on civil, tort-like liability in the CERCLA context, the statutory liability regime largely lost its ethical moorings. Although the United States Supreme Court restored some limits to CERCLA liability in a few recent decisions, it remains the case that the CERCLA defendant is mostly at

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[15] This was United States v. Monsanto, 858 F.2d 160 (1988), referred to earlier.

[16] Monsanto Co., et al v. United States of America, No. 88-1404, Brief for the United States in Opposition, at 11 (n. 8) (1988) (referring to "the settlement with AquAir Corp., entered while this case was on appeal").

[17] *See, e.g.,* RULES OF PROFESSIONAL CONDUCT r. 4.2 (D.C. BAR ASS'N 2019).

[18] I know that Henry Habicht, the Assistant Attorney General for Land & Natural Resources, testified to this effect before the Senate Committee on the Judiciary. I was there. *See S. Hrg. 415—Superfund Improvement Act of 1985, Hearing on S.51 before the Senate Committee on the Judiciary, June 7, 1985*, 99th Cong., 1st Sess.

the mercy of the Environmental Protection Agency ("EPA")/DOJ's prosecutorial discretion.[19] The EPA and DOJ acknowledge that they select defendants to sue or settle with on the basis of who is the "deep pocket," rather than their involvement in the activity that led to the pollution. As one staffer in the Office of Management and Budget once put it, it's more like a tax than a tort. However, I think it's worse than a tax, where one can estimate liability based on income or sales. CERCLA liability is more uncertain because the extent of liability also depends on "prosecutorial discretion."

Let's briefly survey in more detail this loss of ethical moorings in the CERCLA context and how one might seek to restore them. This is a pipedream, of course, since no one in academia (or in the practicing bar for that matter) would even perceive this topic as an issue to be addressed. But the application of common law tort principles to CERCLA, in essence the restoration of a relationship of the statute to morality and ethics is a worthy purpose in my view, even if it is only my idiosyncratic pipedream. I will discuss several related aspects: (1) retroactivity; (2) causation; (3) allocation (contribution); and (4) equity. Over the years, the Makdisis taught these principles in their courses in Torts and Remedies. At a minimum, I think they should get my take on how CERCLA has chosen to ignore them.

What made my 1985 Jefferson hypothetical effective satire, I think, was playing off its retroactive application to defendants who acted during the Civil War, more than 150 years ago. Could a statute enacted in 1980 create strict, joint and several liability for such acts? The courts rejected the notion that CERCLA provided a new remedy for acts for which defendants were already liable. Indeed, the statute's *raison d'être* was the creation of expanded liability associated with the pre-enactment conduct over pre-existing law. Were liability standards the same, the statute would not have its intended effect. On the other hand, were the liability imposed criminal liability, the United States Constitution would flatly prohibit its imposition both as *ex post facto*

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[19] *See generally* Alfred R. Light, *Restatement for Arranger Liability under CERCLA: Implications of* Burlington Northern *for Superfund Jurisprudence*, 11 VT. J. ENVT'L L. 371 (2009); Alfred R. Light, *Restatement for Joint and Several Liability Under CERCLA After 'Burlington Northern'*, 39 ENVT'L L. REP. NEWS & ANALYSIS 11058 (Nov. 2009).

and, possibly, under the Bill of Attainder clauses.[20] They do not "apply," however, to CERCLA's civil liability.[21] Until the Government's (or other CERCLA plaintiff's) response takes place, the statute of limitations on a CERCLA violation does not even begin to run.[22] So the activity upon which liability is based can conceivably stretch back to the "deluge." In fact, one of my cases in practice dealt with pollution that resulted from the deposition of coal tar by a utility that burned coal to illuminate street lights in the 1890's.[23]

The common law principle addressing *retroactivity* is that legislation is presumed to apply prospectively only, and retroactive application must be expressly authorized.[24] It also must be consistent with the standards of substantive due process (rational basis), and some members of the Supreme Court have thought that the imposition of retroactive liability can constitute a taking.[25] But no court has ever limited the application of CERCLA on these grounds.

First-year law students learn that strict liability regimes still incorporate principles of moral responsibility through *causation* doctrines such as foreseeability. As one leading remedies treatise puts it, "Events are not inherently or intrinsically foreseeable; events are deemed foreseeable or not because such a finding leads to legal results that are deemed to be socially, morally, and politically acceptable."[26] The Government's campaign in the 1980s for expansive recovery under CERCLA went after this incorporation of jurisprudential principles to eliminate applicability of notions of proximate cause, foreseeability, or indeed, causation-in-fact to CERCLA liability.[27]

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[20] U.S. CONST. art. I, § 9, cl. 1; U.S. CONST. art. I, § 9, cl. 3.

[21] *See generally* Jane Harris Aiken, *Ex Post Factor in the Civil Context: Unbridled Punishment*, 81 KENT. L. REV. 323 (1993-94).

[22] 42 U.S.C. §9613(g).

[23] This is the Pine Street Canal site. *See* EPA.GOV, https://sems pub.epa.gov/work/01/459623.pdf (last visited March 29, 2019).

[24] *See, e.g.,* E. E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1936).

[25] Alfred R. Light, *"Taking" CERCLA Seriously: The Constitution Really Does Not Limit Retroactive Liability*, 13 TOXICS L. REP. 238 (1998).

[26] JAMES M. FISCHER, UNDERSTANDING REMEDIES 80 (3d ed. 2014).

[27] *See generally* Julie L Mendel, *CERCLA Section 107: An Examination of Causation*, 40 J. URB. & CONT. L. 83 (1991).

Though the statute refers to a kind of causation, that is the "release causes the incurrence of response costs,"[28] in the context of generator or arranger liability, the Government successfully argued that it need not trace substances at a site to a particular defendant or prove that the defendant sent, or proposed to send, substances to the polluted site. It was enough that the defendant arranged for disposal of substances chemically similar to substances found at the site.[29] And it need not prove that those substances were part of the problem that the plaintiff EPA responded to. So interpreted, the statute essentially has no causation requirement at all.

The general common law *allocation* principle is that a defendant is responsible for that part of the plaintiff's aggregate injury that was caused by defendant's misconduct. The general approach distinguishes between divisible and indivisible injuries attributable to defendant's misconduct. When the injuries are indivisible, defendant's liability for the total injury turns on causation. If defendant's misconduct was a substantial factor in plaintiff's aggregate injury, defendant is liable for the whole.[30] In the CERCLA context, though, the Government has argued for the application of entire liability in all cases. Having eliminated the causation requirement for any liability, it extended its victory by defeating defendants' argument for a substantial factor requirement to establish joint and several liability. Except in the settlement context where the statute authorizes "cash-outs" for de minimis parties, the Government resists the notion that any defendant can limit its responsibility for entire liability for any "indivisible" harm. And, of course, the Government has never found a harm it could not characterize as indivisible.

Where the Government settles with a defendant in a situation where there are other non-settling defendants, there is another context where the parties must confront the relative responsibility of liable parties for harm. The general principle is that the amount that the

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[28] 42 U.S.C. §9607(a)(4).

[29] United States v. Monsanto, 858 U.S. 160 (1988).

[30] *See generally* David Montgomery Moore, *The Divisibility of Harm Defense to Joint and Several Liability under CERCLA*, 23 ENVT'L L. REP. 10529 (1993).

plaintiff may recover against the non-settling parties is reduced by the settling parties' responsibility. The Government, however, argues, at times successfully, that the amount is only reduced by the amount of the settlement, whatever the settling party's relative responsibility. In this way, it again can avoid issues about the relatively culpability or responsibility for the harm.

The provision of the statute authorizing *contribution* by one defendant against another reads: "In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate."[31] At least in this context, one would assume that the Government would have to concede that determination of relative responsibility is relevant under the statute. But its position is that equity is not its problem so long as it is completely reimbursed. Equity, negligence, culpability, or responsibility is not my problem seems to be the view.

Equity derives from the ideal that a judgment should be based on the particulars of the person and the situation. By contrast, in law justice is seen as a generalized decision making by consistent application of rules.[32] This is sometimes called the distinction between standards (equity) and rules (law). One might see the Government's CERCLA position as the ultimate assertion of equity jurisdiction, but it is not the equitable jurisdiction of courts which must consider fairness to defendant as well as plaintiff. It is instead the plaintiff Government's equitable discretion which sets the liability of each defendant and the extent of the liability. Instead of the court's equitable discretion, it is the Government's prosecutorial discretion that largely determines the result.

In the context of CERCLA, this Government desire for prosecutorial discretion rather than judicial equitable discretion is most easily seen in its campaign to limit judicial inquiry into the documentation of costs in cost recovery cases. CERCLA limits judicial review in such actions to an administrative record prepared by EPA, the executive branch agency that incurs the costs.[33] The

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[31] 42 U.S.C. §9613(f).

[32] JAMES M. FISCHER, *supra* note 26, at 178.

[33] *See generally* Alfred R. Light & M. David McGee, *Preenforcment,*

Government always argues that this limitation on judicial review requires courts to accept its accounting and to reject discovery into cost overruns and waste alleged by defendants. Unlike most civil litigation, there can be little discovery in CERCLA cases in the Government's view. This position most directly exposes the central problem, which is that the Government had reserved for itself not only the determination of liability and the extent of liability but also the extent of the remedy it can recover.

The Remedy to Prosecutorial Indiscretion

Is there a way to curb the Government's prosecutorial indiscretion and reestablish some connection between CERCLA liability and actual moral responsibility for the pollution which the statute is supposed to be addressing? I view this problem as within the umbrella of excessive executive authority *vis-à-vis* the Congress and the courts, that is, as a separation of powers problem. This decision to prosecute a criminal defendant or to pursue a particular potentially responsible party under CERCLA is currently considered a decision exclusively for the executive branch.[34] The history of U.S. Environmental Law suggests some ways that this might be curbed.

During the Reagan Administration, the Environmental Protection Agency dragged its feet with respect to its obligations to enforce the Resource Conservation and Recovery Act (RCRA). This led to the Hazardous and Solid Waste Amendments of 1984, where a Democratic Congress imposed "hammers" in which EPA was given deadlines to promulgate regulations under the Act, or suffer the consequences of a very extreme alternative statutory alternative.[35] For example, in the absence of an EPA proposal of regulation of liquids in

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Preimplementation, and Postcompletion Preclusion of Judicial Review Under CERCLA, 22 ENVT'L L. REP. 10397 (1992).

[34] Gundy v. United States, OYEZ, https://www.oyez.org/cases/2018/17-6086 (last visited March 29, 2019) (argued Oct. 2, 2018).

[35] *See* William L. Rosbe & Robert L. Gulley, *The Hazardous and Solid Waste Amendments of 1984: A Dramatic Overhaul of the Way America Manages its Hazardous Waste*, 14 ENVT'L L. REP. 10458 (1984).

landfills, the statute would drop the hammer of an absolute ban on land disposal, which obviously all of American industry would oppose.[36] The "hammers" essentially circumscribed the Agency's regulatory discretion, then a desire not to regulate.

CERCLA already contains the seeds of a similar approach to addressing the prosecutorial indiscretion problem, at least in part. The statute contains a settlement incentives provision, the nonbinding preliminary allocation of responsibility, under which the Government is given authority to suggest an allocation of responsibility among potentially responsible parties.[37] Unfortunately, at the Government's insistence, the provision, forced on it by Senators Domenici, Simpson, and Bentsen was made "discretionary," not reviewable by courts, and it has never been implemented to my knowledge.[38] If the Government had the obligation to prepare such NPARs or NBARs, and if, after judicial review, they became binding in a CERCLA case, the Government could no longer maintain its position that it can avoid involvement in allocation because of the joint and several liability concept. A blunter, if infeasible, instrument, would be to abolish the application of joint and several liability altogether. A number of state courts have done this in negligence actions.[39]

There are other "solutions" that might be useful at the margins, at least symbolically. A statute of repose, imposing a flat ban on pursuing former site owners, generators, or transporters, who would otherwise be liable under the language of CERCLA, makes some sense.[40] At this point, 38 years after its original enactment, even the abolition of retroactivity, i.e. only allowing for the pursuit of parties who acted after the date of enactment in December 1980, would be

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[36] *Id.*

[37] 42 U.S.C. §9622(e)(3).

[38] EPA did promulgate guidelines for the process, as Congress required. 52 Fed. Reg. 19199 (May 28, 1987). It then ignored the "discretionary" process, as far as I can tell.

[39] *See, e.g.,* Brian Crews, *Florida's Abolition of Joint and Several Liabilty*, BRIANCREWS.COM (Nov. 7, 2017), http://bryancrews.com/floridas-abolition-joint-several-liability/.

[40] *Cf.* 42 U.S.C. §9658, discussed in CTS v. Waldburger, 134 S.Ct. 2175 (2014).

good. It's probably far too late, though, to expect the courts to apply the traditional norm, so setting an earlier symbolic effective date, perhaps December 7, 1941, might be better. Getting Congress to do either of these things (mandatory allocation or a statute of repose) seems unlikely in the current environment.

And that's the really tough part of this prosecutorial indiscretion problem. The tendency of the Congress is recent decades has been simply to delegate authority to the executive branch without adequate standards. An extreme case is currently before the Supreme Court, where Congress seems to have told the Attorney General to decide who is liable under the statute the Congress enacted.[41] CERCLA approaches this in its discretion to select whatever "deep pockets" it wishes to pursue at any particular Superfund site. How can we make Congress do its job? Presidential executive orders are no solution; they simply emphasize the extent of congressional default. We have a rule of lawyers (or politicians) rather than a rule of law.

On the other hand, it might be a good first step for EPA to change direction and try to reconnect moral responsibility to its enforcement actions. If the agency actually had a few billion dollars in the Superfund with which it could approach CERCLA defendants with offers of "mixed funding" in situations where the bad actors have gone bankrupt or are otherwise missing, this might even be feasible.[42] I am not holding my breath, though. The EPA doesn't want to know who the bad actors were (or are), and its managers have convinced themselves that they don't have to know.

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[41] Gundy v. United States, OYEZ, https://www.oyez.org/cases/2018/17-6086 (last visited March 29, 2019) (argued Oct. 2, 2018).

[42] *See, e.g.,* Environmental Protection Agency, *Memorandum on Evaluating Mixed Funding Settlements under CERCLA* (Jan. 28, 2000), https://www.epa.gov/sites/production/files/2013-10/documents/mixfnd-cercla-mem.pdf.