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THE SINGLE OWNER REVISITED: A BRIEF REPLY TO PROFESSOR LEWIN

RICHARD A. EPSTEIN

Professor Lewin's short comment on my lecture about regulation and contract in environmental law raises, in thoughtful fashion, some difficulties with my thesis. They deserve some brief comment in reply. To set the stage, Lewin accepts my two initial premises for dealing with environmental problems. First, that the appropriate level of environmental harms should be determined with reference to a hypothetical test that asks what level of pollution would be accepted by a single owner of the entire world (or any isolated sub-system thereof) who had to internalize all the gains and losses of his own decisions. Second, that in a world with multiple actors, the trading of rights to pollute is normally a good thing, so long as the rights of third persons are not diminished by the exchange. The voluntary exchange benefits both parties to it, while the protection of third-party rights through coercive legal means insures that third-party losses do not exceed the gains of the immediate parties to the transaction. Both of us recognize, indeed insist, that this system is not foolproof. Mistakes can be made in the estimation of the measurement of environmental losses and in the anticipated gains from private exchange. But all rival systems of environmental control are prey to these errors. The best we can hope for, therefore, is to create a set of incentives to induce actors, both private and public, to seek out the optimal solution.

Notwithstanding some broad areas of agreement, Lewin and I part company over both theoretical and practical issues. At the theoretical level, he believes that I have chosen the wrong "single owner," the large corporation which is risk neutral with respect to environmental harms. He would choose a very different single owner, the loving, risk-averse parent who cares deeply about the environment, her children, and her children's children; someone, in his words, who worries about "the effects of acid rain and the hole in the ozone [layer]" (p. 896). His view is that the difference in choice

of the single owner will clearly influence the patterns of use and consumption within the system. Where intangible benefits are given pride of place, and where risk aversion is the dominant position, we should not expect otherwise. The identity of the single owner therefore influences the mix of choices that will be made, within the incentive structure that both Lewin and I believe is appropriate.

I cannot of course tell Professor Lewin who his preferred single owner should be, but I can indicate briefly where I think his approach misfires. I do not think that the single owner should be the risk-neutral corporation, or indeed any abstract entity at all. Corporations are composed of shareholders, and no matter how many corporate layers are interposed between ordinary human beings and the assets that they control, it is the people and not "the" corporation whose preferences and desires should control. My quarrel with Lewin is his premise that it is possible to identify one person who is the proper single owner; I am very much skeptical that this can be achieved. I do not wish to give pride of place to persons who share my own view about the appropriate tradeoff between productive gains and environmental risks, but, by the same token, I am leery in ceding that right to Lewin or any other person. Instead, I believe we have to think of some *composite* person (that hypothetical person behind the veil of ignorance), and, thus, look at some version of the median person in order to make our global assessment. We must seek some cross between the crass materialist and the loving parent. With the increase in a standard of living, I suspect that this person, however identified, will be willing to invest greater sums in environmental protection than otherwise, given the reduced cost of environmental improvements that comes with prosperity. It is one thing to sacrifice aerosol deodorants to protect the ozone layer. It is another thing to risk mass starvation because of the failure to protect crops against destruction by pests. While we can never be sure who the median person is, and what that person desires, we can be sure that Professor Lewin's approach, which is to take the single person most sympathetic to his own causes, is not the correct methodological response to his own excellent query. Lewin has thus pointed out an added and unavoidable difficulty that any environmental program has to overcome, but his proposed solution runs the risk of polarizing the response to the debate.

Professor Lewin's second point builds on his first but has a more practical bent. The source of difference between us is over two current environmental programs that have generated a large amount of political controversy: wetlands regulation and the approximate original-contour requirements of the strip-mining statutes. Lewin is sympathetic to both these programs, which allow the government to impose regulation on private landowners without having to compensate them in cash for the diminution in value that they suffer. Part of our differences start from an issue so vast that it extends far beyond the domain of environmental law. Lewin writes, "In my view, private property is the creation of the government, and all property is held subject to the right of government to impose reasonable regulations to promote public health, safety, and welfare." (p. 897). Lewin's view is at dramatic odds with that of the framers who thought (1) that the institution of private property was prior to and independent of government, and (2) that the justification for the state was to protect both individual liberty and private property as they knew it. This choice of baseline is not one of mere words: if property begins with the state, then there is a heavy burden on those who seek to privatize it; if property begins with the individual, then the burden is placed on those who seek to regulate its use.

The question is how does one decide which baseline is appropriate for the analysis. The question is a complex one, and a full discussion would take us far beyond the scope of my brief reply. However, it is useful to give some clues to what I believe to be the proper approach. No initial assignment of rights will place all resources where they are most highly valued. Some subsequent rearrangements, whether through private transactions or public force, will be required. The proper assignment of initial rights is that which reduces the number of obstacles that have to be overcome before that optimal assignment of rights is achieved. Where property is thought to reside initially with the government, then the question of subsequent transfer and redeployment is tied-up politics, faction, and the standard conundrums of collective choice. The lamentable collection of giveaway programs for federal-range lands, national forests, and public water rights that Lewin rightly condemns (pp. 898-99) are illustrations of what can and will go wrong when valuable resources are subject to initial government ownership. A sys-

tem of private ownership would prevent the immense social losses that follow when these resources are given to the politically well-connected for a fraction of their market value. Where property rests with individual owners, the political and transactional problems are far less. Logging, grazing, and irrigation are done by competitive bid so that resources are directed to their highest value. The failures of socialism for natural resources are not simply fortuitous. Socialism fails for natural resources for the same reason that it fails everywhere else. It rests on the fatal initial assumption that there should be collective ownership over the means of production. Whatever the imperfections of ordinary markets based on private ownership, they are dwarfed by the structural problems of centralized planning.

There is, then, good reason to reject Lewin's basic proposition as a general matter. The question is whether it can be sustained in the more narrow area of environmental regulations. Here in defense of that position, Lewin outlines some of the bargaining risks that could emerge if the government were required to pay compensation in order to impose wetland restrictions on certain lands, or to require landowners to restore lands to their original contours. With respect to the strip mining situation, Lewin asserts that landowners could falsely claim that any minimal efforts at restoration are sufficient to meet the standard of "safe state," and then use that claim to hold up the state in its quest to impose more stringent regulations (p. 898). That risk is certainly one that has to be taken into account in any overall assessment of the situation, but, by the same token, it also has to be placed in perspective.

Two points bear special note. First, there is, under the present system, enormous pressures that prevent the mining of the coal in the first place, and the occasional administrative exemptions for 'steep-slope' operators are (I am confident) rarely dispensed and costly to obtain. There is, in other words, an endemic risk of excessive regulation when the power to regulate resides in one party while the losses fall on a second. The separation between legal control and financial responsibility is as mischievous in the environmental area as anywhere else. The problem is not only serious with

strip mining, but is all pervasive with respect to wetlands, where the government is willing to designate far too much land as wetlands, including lands that are only marginally related to the original program. The loss of valuable development rights does not enter into the equation of those who obtain the benefit, psychic or otherwise, of the wetlands designation.

Second, Lewin overlooks the other remedies that can be imposed on landowners who make false claims that their property is in a safe state. Most critical to this inquiry, it is possible to have private damage actions, state fines or both, if land claimed to have been restored to a safe condition in fact turns out to be dangerous. The state could also impose insurance or other financial responsibility obligations on the landowner to make sure that insolvency does not defeat the force of the monetary remedy that it imposes. There might also be a system of inspection to see that the restoration done does not impose any risk of water or soil damage on other parties. *Ex post* remedies can also be used along with the *ex ante* ones, and one major mistake of present environmental policy is to place too great a reliance on the public prohibition of certain courses of conduct. It is, in short, possible to devise remedial structures that address the risks of external harms without imposing the heavy costs of restoration to original contours. There is little reason to believe that these contours are required to control nuisance-like harms, and no reason to believe that these are the restrictions that would be insisted upon by any single owner, including Lewin's loving parent. While Lewin claims that the original contour is a simple, bright-line approximation to a "no environmental damage" standard (p. 898), I believe that the fit between these two is very bad indeed. A safe state standard coupled with damage actions for actual violations is a far better solution to the present system.

Finally, there is a larger point that links the theoretical with the practical issue. Even persons who are risk averse with respect to environmental losses have to respect the budget constraints. So long as the loving parent is risk averse with respect to all environmental hazards, then she should be willing to take money which is spent on one environmental area and use it to control the abuses that lie

in another. Where the choice is not between other goods and environmental protection, but different forms of environmental protection, risk aversion tends to drop out of the picture because it does not give us any reason to prefer one environmental risk to another. In general, I think that the risk averse person should have this same level of priorities that is held by the median person, or indeed someone who lies on the other side of the distribution. For example, I think that the risk averse person should have far more sympathy for the “live and let live” arguments than are typically found today in the environmental movement with its excessive attraction to zero-risk (or near zero-risk standards). The major difference between risk averse and nonrisk averse persons should, in principle, be resolved by a single variable: the size of the resource budget that is devoted to protection against environmental losses. Professor Lewin has, I believe, opted for a strategy that makes inefficient use of available resources to deal with environmental losses. I think that he would be far more faithful to his own cause if he adopted my general approach to wetlands and strip-mining and other environmental problems, and then supported greater budgetary allocation to environmental concerns relative to others. At that point we can all face the truly difficult question of how to allocate our expenditures for education, health, welfare, or environmental protection — a truly insoluble set of choices for both Lewin and myself.