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0.1 IMPORTANT. Kaldor Hicks and doing wrong:
the basic structure of entitlements

If one does harm without a privilege in our system, one pays. Our tort system suggests there is a general entitlement to the status quo, enforceable only against certain actors. See Holmes, prima facie tort.

If you do wrong, people are permitted to injure you, take things from you, to stop you, within limits of course. (I have a priv to use force to stop you from beating up that man)[1] By doing wrong, you lose certain entitlements - like the entitlement not to be punched- and others gain privilege vis a vis you. And if you do wrong, not only do individuals get privileges to do you real-world injury without legal reprisal, but also they or the crim system can use the courts to cause you add'l injury.

EREWHON showed how crucial the notion of doing wrong was. In that system, to be unlucky was to do wrong. And if you were unlucky enuf to be punched, or to bel called into court to answer for a crime you didn't committ, the unluckiness was a "wrong" justifying anything done to you. Thus "wrong" and "entitlement" better have separable roots.

An economic version of the EREWHON problem is this: Posnerians might argue that any time you refused to use your property for socially desirable purposes, you did wrong. On second thought, barring market failure, this is probably a contraction in terms for a Posnerian, since if you refuse it's cuz you "value" your nonuse more than others "value" their use, or their offer of payment would convince you. So let's say there's m failure- or someone is using a measure of social value which isn't dependent on willingness to pay. So, there you are, refusing to use your property inefficiently. Being selfish.

If that's a wrong, then ANY state or private action which gets things to an efficient state is justified. Including

1. Note the confluence of the hohfeldian and ordinary legal meanings of privilege here.

"taking" the thing from you. At which point you'd have no property, no freedom, cuz everying would have to be used eff'ly (for everyone's benefit) or you'd lose it. Of course, there'd need to be some decisionmaker to decide what the efficient allocation was. But if he said you were using your prop wrong, you'd lose it. Your property rights would self-destruct cuz (like luck) they cd only be used the way the state wants. Like the poor EREWHON defendant whose sin of "unluckiness" depends on what other people and the state feel like doing.

Is there a way to break that circle? Maybe. The market PROCESS is less expensive, more accurate, etc. than any system by which outsiders could decide if you're being inefficient. It'd be too expensive etc to analyze each time if you were being stolen from for efficient purposes, or not.

BUT REMEMBER, we started out positing market failure. Where there's mkt failure are there to be no property rights? It's ture there are some erosions on prop rts, and use of objective decisionmakers, when market failure appears. (Negligence, fair use etc.) The problem w market failure tests is slippery slope, since PERFECTION is never present: either there'll be market fialure, or we'll be malcontent w distrib of income, or something will be at issue for which "value as measured by WILL TO PAY" isn't a normatively appropriate measure. Too much concentration on mkt failure may destroy prop rts.

It may be that part of having prop rts should be a right NOT TO CARE if there's market failure. If you're a separate sovereign, why not maximize YOUR value & utility- why ever be required to help others do theirs? If one looks at the market as a way to GET THINGS TO THE RIGHT (EFFIC) ALLOC, then using efficiency is an approp measure of wrongfulness. if one looks at the market as a way to respect individuals, then effic is an odd criterion. There may be obligations to respect or aid other prople which erode "market rights"; there may be a wide range of wrongs which can make you use your entitlement; but if property is meant to create a separate sovereignty, then something more than mere inefficiency shd be necc before you're in the wrong.

This may be the point at which considerations of INJURY enter in. That is, one can be inefficient by doing harm to someone which isn't justified (pollution) (car accident), or one can be inefficient by giving less benefit than one might be (being less productive than one might be, refusing aid.) As Epstein suggests, there may be more problems in making the latter actionable, than the former. More importantly, it seems

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quite credible and desirable for each of us to have an entitlement not to be HARMED by others without a privilege. It's very hard to see why we might have an entitlement to be aided. Law and economics uses effic to explore what harms maybe should be permitted; but effic only operates as a criterion in areas where we normatively believe it should fit. It's a criterion of interrelatedness; if we have INDEP rights to things, then effic shd be irrel. I think this is right- but what's also impt is seeing how LIMITED our so-called independent rights might be.

Wrongs are (at least) the doing of injury. They may sometimes also consist of not aiding (eg, when one has induced reliance... for in the sequence of reliance and withdrawal, one finds injury).

If there is some coherent way of distinguishing doing injury from "not giving benefit", that may be the key to this whole area.

0.2 Prima Facie Tort and the Ackerman concern

Not all harms are actionable, of course. Re govtal action, only takings of "prop" are compensable, or things covered by Tort Claims Act etc. Similarly, there's a strong common sense distinction between ongoing investments and mere opportunities, as Ackerman's Layman realizes. People don't expect protection for the latter, except insofar as particular things (the Wisconsin barber case; contracts) give them ground. UNUSED opportunities (like Jan Frank's "unused choices") aren't p-f protected from harm-- to get THEM protected you as plaintiff have to SHOW why it's in everyone's interest you get this unusual protection.

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0.3 Entitlements again- vocabulary

One can speak of questioning "entitlements to the status quo" or "entitlements not to be injured" and "entitlements to security." The connotations are manipulable. One feels that the paretans have a burden to justify "entitlements to the status quo"- and that the utilitarians have a burden to justify "not respecting entitlement not to be injured."

0.4 Fairness, wrongs, and pseudo-property rights

Someone might justify much common law int prop in this way: the desire to have people who've been wronged end up with the same expectations as one who hasn't been wronged. This encourages people to have expectations on the basis of not being wronged which may be good psychologically and economically, (from a pris dilemma pt of view, and ARROW's LIMITS OF RATIONALITY pt of view) and which also seems fair. OF course, law neednt do this, for the wrongdoer not the legal system has created the inequality and SHELLY V KRAMER notwithstanding, there's a difference for most purposes today betw state and private action, and the requirement of fairness in the due proc clause (and the comp clause reqmt of fairness) wouldn't strictly apply to the private wrongdoer. But if it's easy to restore someone to a nonwronged position, they should be.

If they're unlucky enough to be wronged, so their work gets disseminated wrongfully, it's true that the usual reasons IN FAVOR OF trade secret law (like the desire not to erode contracts of confidence) have vanished vis a vis third parties. But a separate policy seems to step in- that of protecting people against wrongs. AND NOTE: to stop a wrongdoing party frm disseminating the secret to 3rd parties, we may end up benefitting the secret keeper "inefficiently." The wrongs notion, being tied to a sense of independent entitlement, works as a trump over efficiency. [2]

"Life isn't fair" and the law can't make it fully so. But law can try to make life as fair as possible.

2. Of course, some notions of efficiency can go INTO deciding wrongs. eg. negligence. But some wrongs are decided on other bases.

0.5 "Voluntarily" committed to others

Why does Brandeis say noble notions are free after "voluntary" communication? It's cuz of the need to protect against force. After an involuntary disclosure, the breacher or forcer is punished, and kept from using the notions. But Brandeis overspoke if he meant to imply that only voluntary dissemination caused "freedom." As against a nonwrongdoer, the noble notions are free regardless of the voluntariness or non. (Consider: but what if there's some easy way to "recapture" the flown bird? It's hard to visualize a mode of recapture in which the relevant concerns can be isolated. EG one might require the wrongdoing party not to disclose further, but is that explainable in terms of keeping people who have secrets & have been wronged on a par w those who have secrets & haven't.