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BOSTON UNIVERSITY SCHOOL OF LAW FACULTY WORKSHOP

Date: ***6 April 1995***

Speaker: ***Professor Wendy Gordon***

Title: ***Reading the Mind of the Private Law***

To: Colleagues
From: Wendy Gordon
Re: Workshop

March 31, 1995

Dear folks,

We had an unexpected opening in the workshop schedule, so I signed up to obtain your input on the first glimmerings of a larger project.

Eventually I hope to produce an article or book called "Reading the Mind of the Private Law." In this project I hope to do three connected things: to simplify the underlying patterns of the common law and associated statutes to make them more comprehensible to newcomers; to provide a more accurately descriptive and more normatively attractive 'story' than Posner's notion of value-maximization; and to make sophisticated lawyers' understanding of legal patterns more complete by including an explicit focus on benefits. (Traditional jurisprudence focuses more on harms than on benefits; even the practitioners of economic analysis, which technically speaking should be as concerned with harms as with benefits, tend to focus on negative rather than positive externalities. Broadening our view of the private law to be more aware of benefits will itself contribute to greater descriptive accuracy and, hopefully, greater simplicity in the end.)

Because I am in the VERY first stages of this project-- admittedly, I've already published some articles relevant to it, but only now do I begin to have a sense of my overall aim-- I would like to ask you to be tolerant in reading this.

What follows are extracts from a potential introduction, and from a discussion of corrective justice.

Sincerely,

Wendy

Wendy

Extremely preliminary draft
March, 1995

Reading the Mind of the Private Law

Copr. Wendy J. Gordon

INTRODUCTION

My tentative thesis is that the private law, both judge-made and legislative, follows some fairly simple patterns, and that these patterns tend to have a distinctive moral shape.[1] There are many possible explanations for these patterns[2] (different theories are capable of reaching convergent results[3]) yet there is some virtue in identifying the patterns even if we cannot fully agree on their underlying justification.

One reason for identifying these patterns is to articulate a vision capable of competing with Law and Economics, that useful but partial vision which is the primary touchstone utilized today by people who like tools capable of being applied everywhere. Posnerian analyses of common law doctrine are attractive not only because they promise universality, but also because their market models perform much as mnemonics do: though the student sometimes need to make stretchy assumptions of fact to make legal rules capable of yielding "efficient" results, these factual assumptions take the form of stories, and it is easy to remember stories. Further, from the stories it is easy to recall the rules that they appear to justify, and to feel capable of understanding and critiquing new rules as they come along. The profession needs to offer students a competing mnemonic, a competing "conceptual crutch" to aid them in feeling competent, a competing story or tale,[4] with a similarly simple set of central premises.

At first it seems impossible to live up to the demand for simplicity, since for a competing story to really capture the law it would have many strands, both utilitarian and deontological; group-oriented and individualistic; concerned both with productivity and equality; and more. But

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[1]A Scheffler or Rescher-like mixture of distributive and utilitarian concerns.

[2]For example, one could give a Benthamite or Rawlsian interpretation to most of our law and most of our morals-- and given empirical uncertainties, the "truth" of neither interpretation could be proven or disproved.

[3]On the virtues of convergence, see Barnett.

[4]A more accurate title for my project would be, "Telling the Tale of the Private Law". However, I fear the latter title would erroneously suggest I'm writing in one of the traditions that stress *human* narrative, so that readers might be disappointed when they discover that I'm trying to articulate an *abstract* narrative. So I'm settling temporarily for a title -- "Reading the Mind of the Private Law" -- that has the minor virtue of being likely to catch the attention of the anti-reification people (who will be irritated). Alternative suggestions for a title would be appreciated.

if one took a random sample of legally-educated Americans, I suspect that there would be a good deal of consensus on how go about uniting such concerns-- at least in terms of results. For example, most lawyers would probably agree that the government acts properly if it requires one person to give up some trifling possession in order to save another person's life; similarly, most people would agree that persons should not ordinarily be required to give up their lives even if that would create significant improvements for a group. The basic idea would be to recognize that in our lives and in our law we give moral status to certain floors and ceilings of welfare, below which no one should fall and above which one's claims to keep the excess become weak. If this is in fact the consistent central story, we can talk to each other more clearly even when we disagree.[5]

This set of patterns is easiest to introduce by means of Lockean theory, and a simple mental image. Begin by visualizing two bars or tablets (skinny vertical rectangles, shaped like ice cream bars, or-- for the Malthusians among us-- like tombstones). One of these rectangular bars represents the resources or welfare that, in some morally satisfactory sense, "belong" to A. A's body is surely within this bar; as for the rest of the resources in the bar, perhaps A has "earned" them. The other bar is of the same type, but represents the resources or welfare that "belong" to B.

In the Lockean view, there are some things that belong to A or to B deontologically, that is, they belong to A or B for reasons not having to do with the allocative efficiency or other consequences of the resources' assignment.[6] But the imagery is not meant to foreclose debate about how the resources might be deserved by A or B. Rather, the image is a structural device, borrowed obviously from Aristotle's notion of distributive justice, to "get the game going."

So this is our first step: we have these vertical bars representing morally appropriate distributions, one bar per person.

Now picture a solid horizontal line perpendicular to these vertical bars, and label it "survival". Above the survival line, and parallel to it, mentally draw another horizontal line, and label this second line, "flourishing". Above the "flourishing" line, and again parallel to it, draw a third horizontal line. Label this high horizontal line "gross luxury." Lastly, add an even higher horizontal line, and label this fourth and highest line, "waste and spoilage".

The Lockean position on property entitlements is clear: one does not have the same claim to all of one's property, even if its acquisition is proper. Thus, even if A deserves a high amount of resources (so that her bar is tall), Locke argues that A has no claim to anything that

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[5] As in economics: because of agreement about central premises, practitioners can debate more easily about the effect of changing assumptions because they agree about how it all works out. But of course, I can't pretend that the disagreements on moral issues that my system allows aren't more difficult to handle-- and less resolvable-- than the disagreements about empirical fact and/or mathematical extrapolation that arise in economics.

[6] This is developed further in my "A Property Right in Self-Expression," 102 Yale LJ 1533. Also note that in the Lockean view, persons have strong claims not only over their own bodies but also over their own talents. In this the Locke approach is more likely to represent common morality than is (e.g.) Rawls's "common pool" approach to talents.

will rot and spoil in her possession. Further, Locke argues, A will owe a portion from her surplus to someone who has less than enough for survival. That is, A has a non-defeasible claim to everything that "belongs" to her that she needs for survival,[7] which presumably includes her body and perhaps even her bodily liberty. However, her claim to everything above the survival line is a kind of surplus which A holds *contingent upon* there being no one below the survival line.

Let me define 'surplus' as private property which is held in this contingent way. We might think of 'surpluses' as one's possessions that might be rightfully taxed for redistributive purposes.[8] [I later defend this connection between private and public law. That is, I later argue that the underlying pattern of private law account for many of our public laws such as redistributive taxation, and that, in turn, a full account of public law would reveal that the underlying shape of private law is more comprehensive than it appears.]

For Locke, surplus would be anything A possessed above the "survival" line. So: if B's bar falls short of the survival line, and A's extends above it, A owes B enough of her surplus resources to bring B to the survival line. This position is more altruistic than most of ours, but the structure can be a useful way to chart political positions.[9] For most contemporary Democrats, the surplus that should be subject to defeasment is probably seen as anything A possesses above the "flourishing"[10] line. For moderate Republicans, the surplus subject to defeasment would probably be seen what A possessed above the "gross luxury" line. For libertarians, presumably, there would be no such "surplus" at all, for as I understand the libertarian view, under it all property is be held indefeasibly.[11]

Further, the placement of the lines might depend on what administrative machinery was contemplated. Thus, transfers via taxation are much less disruptive than transfers via

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[7]Note that the laborer, A, has first claim to the resources she has earned-- that is, the resources represented by her vertical bar. If A and B both need something in that bar for survival, A has first claim on it. And if A's bar only barely touches the survival line, she will owe B nothing, no matter what B's state of privation would be. (Provided, of course, that A and B are not related, A has not contributed to B's low state of welfare by improperly harming B, etc.) A has only a duty to share with B to the extent she has a surplus above the survival line.

[8]There are distinctions between possessions and actions (etc) which need to be taken into account.

[9]Locke calls this 'charity': the duty to share one's surplus with those in need. There are two major lines of importance: *below* what line is the person with fewer possessions entitled to call upon others for help; and *above* what line is the person with more possessions vulnerable to such demands for assistance.

For example, a conservative might put the former line at a narrowly-defined notion of "survival" while liberal might put the line higher, at a more generously defined level of survival, or perhaps even at "flourishing."

[10] (Need to define flourishing so it doesn't eat up everything. This is another place politics would enter.Also: problem of there's not enough to go around, especially in real-world, multi-nation context.)

[11]Cf., Epstein's "takings" book.

panhandling, but have bureaucratic and incentive problems that panhandling does not. For example, when "welfare" is concerned, a given conservative may argue that B's entitlement should be placed *below* the survival line not because the conservative believes that B doesn't deserve to survive, but rather out of a belief that government does the job of redistribution so badly that it's best not to have the government effectuating such transfers.[12] Though I find unpersuasive this particular argument from administrability, the administrability argument has force in other contexts.

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One can imagine consensus that we might have some duty to work for others' good-- some obligation to use our resources as stewards for value maximization-- even if the others who stand to benefit do *not* have a shortfall in their basic survival needs. Working to be productive tends to be good for the worker as well as for others who benefit; pure redistribution is different from life patterns of reciprocity, and in the latter we might tolerate more "doing for others" than in the former.

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The private law of torts does not recognize any duty in strangers to assist each other. Thus, for example, imagine a person slipping into the maw of some threshing equipment, and imagine he is seen by a passer-by. The passer-by is carrying a rope and could have saved the endangered guy from losing his limbs to the thresher by throwing him a rope. The victim has no cause of action against the passer-by under tort law, even if he can prove that the passer-by saw the emergency and refused to use the rope out of a simple sadistic desire to watch the victim's legs being torn off. In other words, tort law recognizes no generally applicable duty to aid.

One of my underlying arguments is that private law generally does (and should) follow some basic moral paradigms, including one that puts a duty on each of us to use our extra resources (cf., the rope) to assist others who need help surviving (cf., the guy falling into the threshing machine). On the surface, the common law's lack of a duty to aid suggests that I am incorrect in this underlying contention. However, there *is* a duty to aid in our law; but it has largely been passed from individuals to the government, and no one is allowed to sue for it.[13] I argue that the reasons for both the shift to the government, and for the lack of private rights of action against the government to vindicate the duty, can be found in issues of

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[12]The bar imagery has potentially wide application. For example, the notion of surplus makes clear an additional potential justification for the "fair use" privilege in copyright law: for example, perhaps children should get free access to copyrighted works for their survival in an information economy, or for their flourishing. And it also helps explain some reasons why the "fair use" privilege is limited: the plaintiff creator should not herself fall below "survival" or (perhaps) "flourishing" levels.

[13] (DeShaney: no private right of action against the government for not intervening in known child abuse situation).

administrability.[14] Problems of coordination (linked to salience)[15] make the government a much more practical source of aid:[16] efforts at aiding need coordination by an organizing entity; no particular potential rescuer is salient: etc.[17] For example, instead of having a beachful of onlookers panic in unproductive confusion because they don't know how best to save a drowning person, the local government taxes everyone and provides a lifeguard.

Thus, I argue that this absence of a duty to aid in the private law occurs only because the duty has been *shifted* to government. That is, I argue that the common law's refusal to impose on strangers a "duty to aid" is not inconsistent with the notion of Lockean duties to share one's surplus.

Similarly, though the courts will not enforce the government's duty to aid,[18] few of us would support a government that in fact was derelict in helping the majority. The lack of a *privately*[19] *enforceable* duty to aid has more to do with administrative concerns: the desire not to place the question of how to allocate a community's scarce resources in the hands of the judiciary, but rather to keep such decisions in the hands of elected officials.[20]

Although no private plaintiff can sue for breach of a governmental duty to aid, no government that refused to use its resources to aid its citizens would long stay in power. If you doubt this, recall that one form of "aid" is the building of bridges and the maintenance of defensive armies. So there is a duty-- just not one that is privately assertable in a court.

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Anglo-American private law recognizes some duties on *private persons* to share their privately owned property in times of emergency: for example, in Ploof v Putnam the owner of an island was made to pay damages when he ordered his servants to cast off a trespassing boat that had sought shelter from a storm. Along with this, tort law recognizes a privilege of necessity; this privilege makes trespassing like that of the storm-tossed boat owner non-wrongful (though the boater would still have to pay if he causes any damage during the time of enforced sharing.) Thus, others' claims to survival can trump a property owner's usual right to exclude

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[14] (KC Davis: don't want courts to direct governments in how to use scarce resources.)

[15]There are cases where SALIENCE seems the best explanation of why a court DOES allow a private party to assert a duty to aid against another private party, cf. the boat owner whose guest fall off, and there's no one else in the water nearby. Or *Maldonado*: the case imposing liability for refusal to allow someone to use a bar's phone to call for help. Courts use other language, though, to explain it, to avoid problems with slippery slope.

[16]Spread it more evenly, prevent overlaps and confusion etc.

[17]And where these factors are absent, the cases stretch to find a duty to aid; cf., *Maldonado.*

[18]Moch v Rensallear; DeShaney.

[19]

[20]K C Davis.

(assuming, of course, the property owner herself does not desperately need the property the stranger seeks to utilize.) Unlike a duty actively to use one's own body to rescue imperiled strangers,[21] a duty to allow others to share one's physical possessions in times of exigency is largely self-enforcing.

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Independent of government, many of us feel some moral duty to aid strangers,[22] even if there is no tort duty to do so, and even if we are in a state that declines (as most states do) even to impose a modest fine on those who deliberately refuse to rescue. Assume for the moment that the lack of an enforceable duty to aid in most states is attributable to administrative concerns. We can nevertheless use that left-over moral perception to test the Lockean notion both of charity, and its limitation: that charity pertains only to one's surplus.

Most of us don't apply a Learned Hand type balancing test to our perceptions of duty to aid. Viz. the Vermont statute, which imposes a $100 fine for not aiding: it applies only when someone could have aided without endangering herself, not whenever someone could have rescued at a cost less than the likely benefit to be accomplished. The Lockean limiting principle was that imperiled or starving strangers can have rights to more than one's surplus; this approach helps to clarify why we do not apply a strict utilitarian calculus even to our moral notions of when we should aid others.[23]

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The Other Side of Corrective Justice: Deserving Rewards

I shall argue that by recognizing the importance of a plaintiff's claim to deserving reward, we can dissolve several classic puzzles in the literature of corrective justice. First, I shall argue that a combined view of benefits as well as harms gives us some answer to the question of whether defendants must do a wrong in order to trigger corrective justice. Thus, I will show that the "takings" and "private necessity"[24] cases that have so puzzled various commentators have a simple explanation - one rooted in enrichment and not in wrongfulness. In order to make this showing, I will propose that the word "unjust" in "unjust" enrichment has two meanings, each of which is independently capable of justifying recovery. I will argue that one of these meanings is purely transactional and has nothing to do with "injustice" in the popular sense. I will also suggest that intellectual property law, which deals with liability premised upon both desirable and undesirable activity, should be more conscious of the different treatment each warrants.

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[21] (Active use of body is distinguished from passively allowing others to use one's property in times of exigency. The autonomy-based reasons for the distinction are obvious, plus there are administrative reasons.)

[22]Query if this is left over after most of one's duty to aid has been transferred to the government.

[23]This provides one response to Epstein's slippery slope. See his *A Theory of Strict Liability.*

[24]Vincent v. Lake Erie

Second, I suggest that notions of proximate cause need to be attached to "beneficial" as well as "harmful" transactions[25], lest liability unduly expand. In this regard, I suggest some ways to adapt that traditional tort concept to the realm of benefits. Third, I will suggest there are (and should be) some interesting asymmetries between the law of harms and the law of benefits. In particular, I will focus on the concern evinced by restitution doctrine to avoid inflicting a net harm on the defendant. Finally, I shall suggest that our moral and economic intuitions are reliable only when we face an act that causes a simultaneous gain and loss, and I will point out the pitfalls of analogizing too quickly from those situations to those quite different situations where there is only a loss, or only a gain.

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Most Anglo-American jurisprudes still follow Aristotle in distinguishing "distributive" from "corrective" justice. Distributive justice tends to be associated with public law (particularly taxation and redistribution) and corrective justice tends to be associated with private law (particularly torts and unjust enrichment). Although there are perspectives from which distributive and corrective justice blur into each other, there are many purposes for which their separate identities are useful. For my purposes, corrective justice is useful because its simplicity gives us a way to 'strip down' our regimes of noncontractual liability and discover whether they possess any basic patterns. I think that such patterns do exist, but that our profession's current view of these patterns is unfortunately skewed by the focus on harm or damage that was the primary preoccupation of private law liability schemes until the middle of this century. I aim to provide a more accurate picture of our underlying liability schemas by taking fuller account of benefits[26] and the possibility that persons who generate benefits for others may deserve reward.

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Speaking roughly, "distributive justice" is the category[27] that governs the basic allocations of resources in the society. To borrow an example from Aristotle, a sensible scheme of "distributive justice" would ensure that a society's flutes were distributed to the flute-players. As for "corrective justice," it applies (again speaking roughly) when a proper distributive allocation is disturbed. While a scheme of distributive justice may well inquire into questions such as a party's wealth or her abilities (remember the flute players), corrective justice is said to focus not

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[25]This fourth point I will not discuss at length here since I explore it at length in On Owning Information: Intellectual Property and the Restitutionary Impulse, *Virginia Law Review*. Douglas Laycock has, I understand, proposed a similar notion of "proximate" restitutionary results in his remedies casebook.

[26]I am using here a simple status quo baseline for "harms" and "benefit".

[27] It is probably most useful to view corrective and distributive justice as categories rather than self-defining principles-- as concepts or kinds of justice rather than particular conceptions of justice. [Cite to whomever it was-- Dworkin? Hart?-- who made the concept/conception distinction famous.]

on who the parties "are" but rather to focus on what the parties "did".

Say that for whatever reasons of distributive justice that govern a society, one flute is distributed to each flute player. Then imagine that a particular flute player disturbs the allocation by stealing another's flute. The taking of the one flute creates between the two musicians an inequality twice its own size: Whereas before the theft the two musicians' holdings were equal, now one musician has two flutes and the other musician has none. One musician has an unjust gain and the other an unmerited loss. This is the central image of corrective justice-- a simultaneous gain and loss --and it is an imbalance can be "corrected" by returning the flute to its rightful owner. How this might be effectuated is the province of our private law.

The simultaneous gain (to defendant) and loss (to plaintiff) happens only in specific instances, such as theft or conversion. What of battery? Harm to the battered plaintiff is obvious, but where is the gain to the defendant-- what does he have left to disgorge after experiencing the satisfaction of hitting the plaintiff? Or even if the defendant's satisfaction could be measured in money terms, and even if his position could be "corrected" by requiring him to disgorge this sum, it is highly unlikely that its magnitude would be equal to the magnitude of the plaintiff's harm. (In fact, one of the things that persuades us to designate an act as "wrongful" in our system is its tendency to produce more costs than benefits, so it is likely that disgorging the defendant's gains will seldom suffice to make a plaintiff whole.) Aristotle himself went to some trouble to analogize the central paradigm -- to 'stretch' the notion of simultaneous gain and loss -- to cover instances where defendants did harm without benefitting himself. And much of the corrective justice literature since Aristotle has similarly focused on acts of harming: battery, automobile accidents, and the other standard topics of tort law.

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The existing literature on corrective justice often focusses on the defendant who (it is said) has either done a harmful wrong or reaped an unjust gain. The result has been a painfully baroque set of debates about "wrongs" and "wrongfulness." I suspect this results from the commentators' obsession with negligence law, and with a larger inability to rise above the harm-oriented tort contexts in which corrective justice problems have traditionally been associated in Anglo-American commentary.[28] If we turn our attention instead on restitution and intellectual property, two areas of private law where benefits are more important than harms[29], the emphasis

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[28]Weinrib and Coleman both give but glancing attention to unjust enrichment, and Fuller & Perdue's excellent bipolar vision of correcting injustice in the contracts context, has not been followed up.

[29]An intellectual product can often be copied in ways that give benefit to the copyist without doing harm to the product's creator. This is one of the reasons intangibles are sometimes considered "public goods": they are in the ordinary case inexhaustible, capable of being shared, without diminution, by a multitude of persons.

For an example of harmless copying, consider, e.g., the various consumer copying that occurs every day such as photocopying an article or videotaping a TV program. Such copying

naturally becomes more fluid. Many disputed questions resolve themselves if we inquire regarding the plaintiff: what has he or she done to deserve reward.

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I shall stipulate two kinds of meanings for "desert" and for "unjust". Meanings in set *A* are morally loaded: "injustice" or "desert" as active, independent categories. This set of meanings-- Meaning *A*-- is the way we ordinarily use the terms, for example: "he behaved unjustly" so "he deserves to loose the fruit of his bad behavior." By contrast, the meanings of "desert" and "unjust" in set *B* are passive and transactional; this is a less common usage, but it is comprehensible in ordinary language as well. Consider for example, the following sentences: "Given the circumstances it would be unjust for her to retain those benefits, even if she received them through no bad act of her own" or "He was sitting there doing nothing when a car slammed though his living-room window[30] and hit him, so he deserves compensation." Meanings of the set *B* sort are somewhat unfamiliar, but this is (I argue) the way the law sometimes uses the terms. In Meaning *B*, a defendant's injustice may come not from any action the defendant has done, but merely from retaining something honestly come by that, in the circumstances, should be returned.[31]

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The corrective justice literature often assumes that the imbalance in holdings must result from a wrong or a wrongful[32] act.[33] This is incorrect in two ways. First, though wrongfulness or the presence of a prima facie violation of right may be a sufficient basis to trigger liability, this is not a necessary basis. Some transfers may be rightful in all senses yet still trigger an obligation of payment. Second, there need be no "act". A passive, innocent party may sometimes rightfully be required to pay for (or return) something she has received.

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does not decrease existing markets for the copied item, and if the law required such copyists to seek licenses, they would simply stop copying: copyright enforcement would not generate new markets because of transaction costs. See my *Fair Use as Market Failure*, 82 Columbia L Rev 1600 (fair use analyzed as a way to permit pareto-superior copying to occur in circumstances where transaction cost barriers and other forms of market failure would prevent the copying from occurring through a negotiated market.)

[30]Hammontree v. Jenner (car driven by non-negligent person having unexpected epileptic seizure).

[31][Need to define "transactional" and specify the "circumstances."]

[32] it is sometimes argued that a "wrong" can include even justified violations of right (e.g., prima facie trespasses that are justified by the privilege of necessity). See Coleman.

[33]Consider Weinrib's emphasis on "doing" and "suffering" as the paradigm for corrective justice.

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One might well ask, what is at stake in this enterprise?

First, clarity. I don't think we can accurately understand the nature of Anglo-American private law if we ignore the role of benefits, especially since the prospect of benefits unaccompanied by harms-- arising from the inexhaustability of intangible products--has become so economically significant. Does the concept of corrective justice give significant aid to this inquiry? Yes. It's debatable whether we can do without the Aristotelian structure of corrective justice and still have the conceptual vocabulary to describe how private law functions. So my first task is that of clarity: refining our conceptual vocabulary.

Second, private law is filled with a "magical thinking" version of Platonism. We see it in our first year students all the time. What do I mean? Most notably, in Torts class the students think that responsible causes identify themselves: the students imagine that there can be ONE cause of an event, and that "responsibility" is a self-executing concept, and that the task of the lawmaker is simply to match up the facts with this ideal.

After long struggle, in Tort law-- the law of harms -- these myths have largely been destroyed. Or at least we have handy tools with which to dissipate the first year student's Platonic illusions: Coase showing the potentially reciprocal nature of cause and harm; Calabresi showing the hard policy choices needed when a court or policymaker must decide, "what is a cost of what"; or the humor and truth of Saul Levmore's penetrating first-year mantra, "It takes two to tort".

Interdependence of action is crucial in the law of benefits, too; just as it takes two to tort, there is seldom any one creative person or entity that is ipso facto "responsible" for desirable effects. In fact, the biggest challenge of copyright law is designing rules that will provide incentives to first generation creators without unduly increasing the price[34] (monetary[35] and cultural[36]) that second generation creators have to pay in order to use and build upon the first generation's works.

It is my hope that by clarifying the nature of corrective justice, and showing how it runs through both torts and restitutionary causes of action like intellectual property, practitioners and courts on the intellectual property side will begin to apply the logic of torts to intellectual

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[34]Landes & Posner point out that increasing the scope of control granted to one generation of copyright owners will increase the cost of creation to the next generation.

[35]License fee (Lord Macaulay's "tax on reading") has both a distributive and allocative effect; also decreased numbers of people may have access.

[36]"Hegemony" issues

property as well[37]. My guess is that when the ordinary practitioner in the newly significant field called "intellectual property" begins to open her eyes to the field's membership within the larger Anglo-American traditions of common law and equity, some of the field's expansionist absurdities (at least on the judicial side) will begin to drop away.

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Why do I imagine that clarifying the nature of torts and restitution will help clarify the law of intellectual property? It might be argued against me that property is fundamentally different from restitution (unjust enrichment) and torts. The law of restitution and tort largely deals with contextual questions laden with difficult policy issues, while "property" questions are generally decided in a property-owner's favor, without much difficulty or much inquiry into context.

My basic answer is that for intangibles, "intellectual property" is a phrase that began life as a useful metaphor and is threatening to become a misnomer.

Until the last thirty years, "intellectual property" was a metaphor that worked eighty per cent of the time. It still functions adequately sometimes, but in a growing number of contexts the metaphor helps to bring about terrible results. Since the label "intellectual property" is probably here for a good while - it triumphed over its more accurate but more amorphous rival, "unfair competition," some time ago - it is important to be explicit that the metaphor is a metaphor, and that the underlying reality of intangible products more closely resembles the fact patterns of tort and restitution law than it does the fact patterns of tangible property.

First, let us explore what is *useful* about using the "property" metaphor in this field.

> By the way what do we call the field? While examining the words "intellectual property" we can hardly use the same words to describe the field itself. So let us call it the field of "unfair competition by imitation or duplication"[38] or, as a shorter term, the field of "malcompetitive duplication" or "malcompetitive copying"[39]. So: What is the utility of using "property" language in the field of "malcompetitive copying"?

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[37]Cause-in-fact is not the only issue of "magical thinking" - another is proximate cause, another is damnum absque injuria. [Re the latter, recall Justice Homes in INS v AP, pleading with his brethren to remember that basic tort principle and rein in their impulse to hold a news service liable for copying the substance of another's news bulletins.]

[38]Note this is a subset of unfair competition. The overall field of unfair competition embraces not only acts involving imitation or duplication, but other act as well, such as monopolization, predatory pricing, and the like.

[39]Copyright and trade secret law impose liability only where there has been copying. Patent and trademark law can impose liability even on persons who independently happen to recreate and use a duplicate of the owned intangible. I will use "malcompetitive copying" to refer to both.

The first advantage of using the phrase "intellectual property" is imagery. The litigant and the judge can point to a trademark symbol or a painting or an invention and say "there it is" - an object. And we are used to letting any objects be property. Treating intangibles like objects give them a touchability in one's imagination that makes them more easy to handle. Using Bruce Ackerman's distinction between "ordinary observer" and "scientific policymaker", this imagery services the ordinary observer, and helps integrate the public's perceptions with the legal regime.[40]

The property analogy might even be considered a tool for manipulating the public. But that is getting ahead of myself. I should still be outlining advantages rather than raising disadvantages.

A second advantage of using the term "intellectual property" pertains to the structuring of legal relations. This is an advantage that services Ackerman's "scientific policymakers". What is the structure of property? At its core are the "right to exclude," classically vindicated by the trespass suit; a "privilege"[41] or liberty to use the property (albeit limited by a DUTY not to use it in certain HARMFUL ways); and a "power" to share, rent or transfer the property.[42]

Relating this to the field of malcompetitive copying...

How does a society obtain or generate incentives for the creators of intangibles? One way is to give them the right to forbid others from copying them - a right to exclude, if you will, vindicated by an "infringement" rather than "trespass". For this right to be monetarily valuable, the creative folks (or their employers) need powers to license or transfer their right to exclude - like the land owner's powers to share, rent, or sell. They also need privileges or liberties to use the intangible. Voila! The property triad: right to exclude, power to transfer, liberty of use.[43]

Now what about the downsides of this "intellectual property" metaphor? In what ways does it misdescribe reality?

First, it obscures the key difference between tangibles and intangibles. Tangibles cannot usually be used by persons other than the owner without depriving the owner of his use. This is not true of intangibles. As Thomas Jefferson said of ideas, intangibles are like candles: you can light your taper from mine without diminishing my light.

Second, the imagined concreteness of the "intangible object" dissolves on close scrutiny.

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[40]Dangers to legitimacy when public expectations of legal rules diverge too much from how the rules actually operate. Litman, etc.

[41]I follow Hohfeld's language here, in which a "privilege" is a "liberty" to act free of state punishment (e.g., the privilege of self-defense).

[42]For a much more detailed list of property characteristics, see Honore; for an approach that presents as the essential "property" characteristics the simple triad I have presented (rights to exclude; privileges of use; powers of transfer), see Ackerman.

[43]See part I of my *Inquiry into the Merits of Copyright*, 1989 Stanford L Rev.

The "intangible" is independent of objects. For example, a poem does not cease to exist when its only copy is burned, so long as someone has memorized it. Similarly, the copyrightable work of authorship in a painting is not the particular painting, but rather the conceptual identity of the pigments: the arrangement of lines and colors. They happen to appear on this particular canvas but can be reproduced elsewhere. (Tellingly, the copyright act defines an original oil painting as a "copy". 17 USC section 101).

The insubstantiality of this "intangible property" is particularly obvious when the law allows an owner to control not only the exact lines, colors, notes or words of her original, but also "substantially similar" variants. And our law does give the owner such power.

Consider, for example, Superman. The corporation that owned the copyright in Superman tried to claim that its "property" was infringed by a television show featuring a flying yuppie - "The Great American Hero".[44] The confident, dark and muscular Superman looks concrete in our mind's eye, we can even visualize the classic Superman's black hair and muscular chest, but where are the boundaries of this property if a court can take seriously the claim that Superman is also a skinny young schoolteacher wearing baggy red underwear and a mop of curly gold locks?

Imagine how differently our law of real property would look if land was this indistinctly bounded. Among other things, the automatic deference that courts usually show to landowners in preferring them over trespassers would have to be fundamentally rethought. The very notion of boundary crossing would become contestable: loaded with policy implications and influenced heavily by context. In other words, the law of tangible property would look more like negligence law with its ever-present balancing of costs and benefits-- and, I argue, the law of intellectual property *should* partake of such a balancing approach.

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In case the insubstantiality of the "intangible"'s boundaries are not yet clear, take another case, this time one where the absurd position asserted by the plaintiff actually prevailed. Vanna White sued the makers of a television commercial which - amidst various other devices intended to be witty evocations of America's distant future - showed a robot in sparkly gown, high heels, and blond wig, turning over letters in a mock Wheel of Fortune-like game show of the future. This, the court held, violated Ms. White's right of publicity under California law.

Certainly one can imagine Ms. White being annoyed, but what of hers was "taken" or "intruded upon" (which are the questions the property metaphor demands we ask)? Ms. White didn't own the Wheel of Fortune game, or a monopoly on gowns, shoes and blondness. At most what was "taken" or "invaded" was the fact that her existence made the joke in the commercial possible. This is an "intangible object"? Only if the notion of object is so expanded as to lose any reference point at all in everyday imagery.

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One of the big debates in tort law concerns whether the concept of corrective justice

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[44]Cite case.

demands that the plaintiff and defendant must remain connected through the litigation. Need the plaintiff's compensation come from defendant (and not, say, from a no-fault insurance policy) in order to be a proper instance of corrective justice? Similarly, if the defendant pays a fine to the state rather than compensation to the injured victim, can that be considered "disgorging wrongful gains" under a corrective justice principle?[45] As Lawrence Becker has shown in the property context, and Ronald Dworkin in other contexts[46], some claims are comparative: I may deserve something not in the abstract, but because my claim to it is stronger than the claims of anyone else. Thus, it may be that a creative person deserves to be rewarded by those whom she benefits, but may not deserve rewards by society at large. To determine when plaintiffs and defendants need be "connected" in this way, we need therefore to determine whether the underlying claim exists only in a particular relation, or whether it exists independently.

It will be my tentative claim that all claims to deserve reward are relational and comparative in this way. A has a claim on B for the benefits A gave B, but not on anyone else. I will also argue that it is permissible to ignore this fact when dealing with acts which give benefits to a large number of undifferentiable persons, so that it is useful to feel that a benefactor of humanity at large 'deserves' reward.

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[45]Ernest Weinrib argues that the logic of corrective justice is inherently "transitive" - that plaintiff and defendant who have acted on each other as "doer" and "sufferer" must act juridically on each other and payor and payee. By contrast, Jules Coleman approves separating the parties' treatment. Coleman contends that corrective justice is "done" (whatever such a claim might mean) whenever a defendant disgorges her unjust gains and the plaintiff is compensated for his undeserved losses, even if the plaintiff receives nothing from the defendant.

[46]I have in mind his argument in TAKING RIGHTS SERIOUSLY that sometimes the "right" is more important and sometimes the "duty" is more important. Since the two (right and duty) are correlatives, at first Dworkin's argument mystified me. Then I began to see his point: sometimes the *strength* of a particular claim comes from the respect owed to the plaintiff-- e.g., that his or her injuries be recompensed. Other times, the strength of a claim comes from the [opposite of respect] that is owed to the defendant-- e.g. the need to have an unjustly behaving defendant disgorge his or her gains.