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Desert Theory: The No-Harm Notion

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0.1 Outline

1. Basic Locke

2. Public Domain

3. As Good Left in Common

- Rothbard here? Consent analysis. things coming to you w/out being sked

Relation Between Labor and Appropriation

4. Waste

5. Becker and Mill: Labor Beyond What's Required

In seeking to understand what lies behind the courts' apparent eagerness to grant property in intellectual products, a helpful starting place would seem to be the labour theory of property found in Locke's SECOND TREATISE OF GOVERNMENT.¹

Speaking most generally, the theory suggests that a person who

1. E.g., "[I]n spite of its strained logic... [Locke's] case soon became a standard one." PROPERTY: MAINSTREAM AND CRITICAL POSITIONS ed. by C.B. Macpherson at 14 (1978).

²
 successfully uses his or her efforts to make useful those things which no one else has used or claimed may be rewarded with ownership of the things. The common law has long used a simpler variant of such a principle, awarding ownership to those who take possession of unclaimed physical resources.³ Creators of new ideas and literary writings would seem to be creating something out of nothing, and thus would seem to be unusually meritorious candidates for such rewards.

Locke's labor theory demands more than mere labor as the precondition of property. Among other things, the labor must be mixed with something from the common, or public domain, and not with products of other persons' production;⁴ and the

2. All of Locke's images are those of successful appropriation—the nuts gathered, the land plowed to yield crops, the water caught in the pitcher. Not all labor will result in successful appropriation; some efforts are failures.

For another example of the lack of overlap between appropriation and labor particularly relevant to the area of intellectual products, see — below.

3. ~~See, e.g.,~~ the classic case of Pierson v. Post (he who captures a wild fox owns it; efforts at capture which fail to succeed yield no claim). For a sketch of the legal applications of such a principle, see Epstein, Possession as the Root of Title. Although the common law generally rewards the physical act of appropriation with ownership, that trend is not without exceptions. (Discuss different water law rules.)

4. Under current law, similarly, the 'officious intermeddler' who labors in another's vineyard usually receives legal claim to neither property nor pay for his efforts, while the

laborer in the vineyard is not entitled to the fruit.

appropriation resulting from ⁵ the labor must leave "as good left in common for others." ⁶ In contemporary ^{American} settings it would appear virtually impossible to find a large amount of appropriable ⁷ ~~"common"~~ ^{resources} not yet owned, and harder still to find cases of appropriation which would meet the proviso's test of leaving "as good left" for others.

Many attempts have been made to adapt Locke's theory to a modern landscape. ⁸ When attention turns to intellectual products, however, no such straining at interpretation appears necessary. Since there seems to be a nearly infinite store of possible melodies, poems, novels, ideas, designs, and the like, the scope of the "common" seems broad and far ranging. As for

5. "Labor" is of course not synonymous with "appropriation," but for Locke labor was the mode of appropriating. See below at ____.

6. Locke Par. 27

The resources in the US. which are unowned are, by and large, those which are
7. ~~Some resources are~~ not easily appropriable ~~and may yet be largely unowned~~ e.g., the air. ~~To the extent appropriability is difficult,~~ of course, the issue of whether such appropriation will be honored will arise less often.

8. Nozick, for example, suggests that the proviso "is meant to ensure that the situation of others is not worsened," and suggests various interpretations under which grants of property today leave nonowners no worse off than they would be otherwise. "Here enter the various familiar social considerations favoring private property: it increases the social product by putting means of production in the hands of those who can use them most efficiently ... experimentation is encouraged... [etc.]" R. NOZICK, ANARCHY, STATE AND UTOPIA at 174-182.

having transformed the proviso into a sort of Pareto Optimality test,

the proviso^{is}, any one of these intellectual products can be appropriated without depriving future creators of ample ^{as among the myriad possibilities remaining} resources. In applying the proviso, ^{concern that "as good" be left for others,} Locke suggests that a covetous stranger has no justification to complain of another's taking possession and ownership of land if, after the owner's appropriation, "there was as good left, as that already possessed, and more than he [the potential complainer] knew what to do with, or his Industry could reach to." Locke at 34. The range of possibilities would indeed seem to outstrip any one creator's abilities to realize.

----- The relation between labor and appropriation is assumed to be simple:

...every Man has a Property in his own Person. ... The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property....

Though the Water running in the Fountain be every ones, yet who can doubt, that that in the Pitcher is his only who drew it out? His labour hath taken it out of the hands of Nature, where it was common, and belong'd equally to all her Children, and hath thereby appropriated it to himself.

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stage of arg: how else use. but if others can use too?

He assumes everything is in common as his starting point.

It's also necc to make sence. If more than one person contributed, then under his principles it's unclear who owns. Also epstein (the marble)

Everything isn't common in i/p. Build on what's come before. If say those are in the p/d- their in the p/d only cuz no prop. If we're asking how prop shd be give & saying maybe give it wherever theres effort, then those old ideas are in comm.

at least potentially so, at any rate. So: not clear Locke applies.

0.2 No Harm

Locke suggests that a covetous stranger has no justification to complain of another's taking possession and ownership of land if, after the owner's appropriation, "there was as good left, as that already possessed, and more than he [the potential complainer] knew what to do with, or his Industry could reach to." Locke at 34. At first blush, the creation of i/p seems to meet the test of Locke's proviso. Since there seems to be a nearly infinite store of possible melodies, poems, novels, ideas, and the like, granting ownership over any one such product wouldn't seem to interfere

with the stranger's ability to create his own.

In fact, however, there are limits on the seemingly infinite variety of i/p products. First, consider the problem of simultaneous invention. At a certain point in time, many scientists will likely be working on similar problems. If the first inventor gets a patent, all the others will have to give up their hope of perfecting their version for sale (except for purchase of licenses etc.) They are in a quite real sense left with "not as good" opportunities left over.¹⁰ They have invested precisely in the oppty now foreclosed.

The prior problem might be partially overcome simply by restricting the reach of the patent remedies. Under current patent law, any duplication of the invention-- even if produced by independent invention-- is prohibited as an infringement. This could be revised, to make the patent law's reach match that of the copyright and trade secret laws,¹¹ namely, to prohibit only those duplications of the creator's work which copied from that creator. Even under such a revised legal

10. Remember Nozick on the opportunity v other interp. of the proviso.

11. Such an alteration in the patent law might cause other problems, of course, such as introducing the difficult question of proof of copying; potentially eroding the incentive effect of the patent grant by weakening its reach; interfering with the prospector's "centralization of research & dev't" function put forward by Kitch.

rule, however, there are problems. First, some inventors may use a combination of copying (or inspiration)¹² drawn from the first creator; their copying would condemn their efforts as infringements, while their independent work would go unrealized.¹³ Second, even assuming these technical problems could be worked out,¹⁴ the fact remains that not all options are equal to each other. In Locke's example: he says not only that there's Land left remaining, but also that the remaining land is "as good." That will not always be the case with i/p.

In the realm of inventions, certain things are needed at certain times, and have more value at some times than others. ONce invented by an initial creator, they may be impossible for others NOT to copy. (Consider someone trying to independently "invent" the safety pin after having seen one. Some inventions

12. Knowing an invention is possible is often a valuable piece of information, spurring results which might otherwise not be reached.

13. One might argue for partial property rights, of course, so that any infringement didn't yield injunctive relief, and any "improver" could do their own invention (or in copyright, derivative work) subject only to an obligation to pay reasonable royalty). That option is discussed below at____. The basic problem with the idea is the high cost in transforming everything to a liability rule system: great inefficiency in substantive result cuz central decisionmakers don't know much; lots of cost for the judicial system; loss of centralization of information; loss of the feeling of control impt for moral rights or other dignitary type concerns.

14. see prior note for one possibility

"infect" one immediately with knowledge of their workings.)
Giving property as against copying will therefore close off
some of the best opportunities.¹⁵

Even aside from the copying problem, there may be room for only one of a given type of thing. Many different handicapping systems might be developed for golfers; what they need, however, is one standardized system so that they can communicate with each other meaningfully to set up matches. Many different college admissions tests might be developed; what colleges need, however, is a finite and uniform set of tests to provide comparisons between candidates. Many different industrial averages might be developed for tracking the stock market; the one with the longest history, however, is likely to have the most importance, because only with the long history will people come to know how it functions and what to expect from it, so that the longevity can give it some uniqueness. It may also serve as a standardized mode of

15. Note Nozicks'sides- give propr only for so long as will repay the ADVANCE INTIME yuou saved the world. If there are many simult inventions, you've saved the time ZIP. But, of course, without some sort of prop award, there may have been no ionventions at all- so without the reward maybe neither you nor anyone else would create.

The usual snake's circle of time.

communication, like the handicaps.¹⁶ Thus, the number of valuable options are likely to be limited, even if the possibilities for variation are in the abstract limitless.

The sometime impossibility of avoiding copying also leads to another point. Locke's provision seems to assume an independence among the various individuals comprising humankind; each lives from his own garden and, so long as there's enough good land left that one can make a good garden, one has no right to complain about another's appropriation of a plot of land. But we live interdependent lives today. If X were given a property right to pollute, Y might have quite a lot to complain about.¹⁷ If what we're looking for is conditions under which strangers have no right to complain about property being granted, then it would seem appropriate to broaden the proviso a bit¹⁸ and say, the stranger has no right to complain so long as he's not harmed by the grant of property.

In looking at what "harm" can be caused by the grant of

16. RE standard modes of communication, that's also what's at issue with trademarks. Is there a similar need for legalprotection here, to safeguard the communic function? Think on it.

17. Note a good example of the pt.

18. Nozick, Becker

intellectual property, we of course have a definitional problem. For now, let's assume "harm" doesn't include "refusal to bestow" a benefit, but merely means some bad impact on the actuality or expectations one would otherwise have (including changes in the calculus of risk, pro or con). Of course, if the new creation causes a special need for the benefit which wdnt otherwise be there, that's a divf matter. Example: you alter people's chemistry so they need a new rare earth to wurvive. You may have an oblig to supply that rarte earth in ways you wouldnd't be obligated to supply other nutrients.

When people make things they have investments. Great room for strategic begh,. The inj prob. W the reliance you cause comes obligations. So compelte "prop" shdnt be given. Prop limited by the need to avoid harm. (Fair use)

Similarly, showing how cration of interrelaitonship can give rise to duties: DUTY TO AID once there's a beginning relationship.

choice: no choice (artists' compulsion to create).----

---- re locke: He reasons as follows:

...I shall endeavour to show, how Men might come to have a property in several parts of that which God gave to Mankind in common, and that without any express Compact of all the COMMONERS.

--- The very range of possibility inheres in the blank page.

describe the OO reasonsing. It may be reasoning such as this which accounts for the judicial receptivity to creating property rights in intellectual products: you made it, you deserve it, no one else made it or has a claim to it, so why not you.