Potential fordham keynote howard harmlessness and property 10-22-08

(maybe a preumption that harmless use gets only nominal damages? And NO inj? That is: assume donative intent. Or communal intent.)

in Stanf I was talking about gift instituitons, like creative commons or gpl. Now talking about a new rule for ocpyright, pat, tmk. Esp tmk.

My inquiry is into whether harmless uses of property should give the property owner a right to sue. Under current law, harmless trespasses to land and to copyrights and patents do indeed give rise to liability. Should they? Neither moral philosophy, political science nor economics deals well with the harmless free-ridcr. The possibility I'm exploring-- just exploring at this stage-- is the following: that where inexhaustible products like information become a primary source of value, our institutions might serve us better if instead of mandating payment for harmless use via legal compulsion, payment for harmless use be left to the informal pressures of gratitude and reciprocity. Needless to say, I'm also interested in the *downsides* of gratitude and reciprocity, the resentment and wasteful status-competition that can arise in gift economies. This is the "negative" side reciprocity that has been emphasized by legal scholars like [cardozo woman Jeanne schroeder?] and anthropologists like Annette Weiner. But if we can develop gift instituitons that constrain the downsides of gift-- take the sting out of gift and reciprocity-- perhaps gift instead of markets should be the starting place for inquiry. That is, it's usual in today's policy debates to start with the assumption that the market should be the

instituiton of first resort, and that governments should intervene only when the market fails. What I'm exploring is whether instead gift should be the ihsntitutiton of first resort, and that goverbmebts should intervene to create property rights only when it's proven that the regime of gift has failed.

You may wonder why instead of gift, I don't chose as my alternative to ordinary private property, the commons, which has been so well analyzed by Elinor Ostrom, and which is the subjrect of one of today's primary papers by the triwizard team of strandburg, frishman & __. [discuss]

Fifteen years ago I wrote that the essence of community was uncompensated free-riding. I had in mind at that time both the free-riding that caused harm, and the free-riding that caused no harm. But the example I used was telling. I talked of the institution of gleaning: that a Hebrew landowner in Biblical times was required to leave the corners of his field unharvested, so that the poor could find wheeat to make their bread. The practice of the poor was called gleaning, and you perhaps remember, gleaning is how Ruth met Boaz. Ruth and Boaz the couple from whose line the Hebrew Testament says King David sprang, and the Christian testament says Joseph husband of Mary sprang.

Gleaning is not very harmful to the landowner. Harvesting in the corners is difficult anyway, and not much grain was lost. So the example of free-riding that I put at the emotional center of my argument was an example of harmless free-riding.

Recognizing that led to a larger question: whether the notion of harm should be taken as a guide for civil liability. We all know and honor John Stuart Mill. He's

probably the best-known philosopher of his century among us lawyers, and his book ON LIBERTY one of the most read volumes. One of Mill's central arguments for liberty was that the law should not intervene except to prevent harm.

Mill was speaking in the context of criminal law, and defending among other things the freedom of couples to engage in private, consensual sexual behavior without the state intervening. That argument finally prevailed in the US with cases like [the condom case and the second sodomy case.] The argument for liberty can be extended beoynd the criminal law context. [the condom case? Griswod v conn] My question is whether Mill's principle-- that the law has no business regulating harmless behavior-- should be extended into the civil context, primarily the context of property. And that can be divided into two queries: whether an injunction should issue against a harmless behavior, and whether monetary recovery should issue.

As you'll find, in what follows I'll turn that familiar distinction between property rule and liability rule on its head. Usually we think that the property rule is the stronger, because it allows its holder to refuse entry until he's ready to sell permission, while the liability rule looks weak because it only allows its holder to collect money for an entry which he might not have sold for the amount the court awards in compensation. But there are some ways in which the property rule is weaker, and the liability rule is stronger. To see it, let me introduce some history.

The common-law rule for land has long held -- maybe forever, for all I know-- that harmless entries on to land were actionable. Even if no blade of grass was bent, the owner could sue. Holmes explained the common law's position by saying that allowing a trespass cause of action in the absence of harm afforded the owners of neighboring

parcels a way to TRY TITLE and settle boundaries. It provided a 'case or controversy' from which to get a judicial ruling. Apparently declaratory judgments weren't available for boundary disputes in the early days. In any event, when someone successfully sued for trespass in the context of a harm-free boundary dispute, there were only nominal damages to collect. What the winner got was a declaration of boundaries-- a property rule remedy, saying what he could or couldn't sell. This is a property rule rememdy in a sense purer even than an injunction remedy. It spoke to the instituion, not to private parties; it decleared boundaries as against the world.[any problems of third parties claiming they're not bound by collateral estoppel? Maybe, but in practi cal terms they probably wouldn't bother suing further. Cheaper to buy from whomever of the neighbors was declared the victor] And let me repeat: the monetary award was nominal.

Over the years the question was often raised, what if a harmless trespass gave the trespasser benefits without hurting the landowner. And until about 1936, the rule was unclear, but at least some commentators thought that the landowner could stop the trespass, but not collect any money. That still may be the rule in England. That is, prior to _(casename)_ in the US, if a landowner learned that, someone else had for the last year or five been making a profit off of a trespass to his land, he could stop the trespass but probably couldn't get a share of the profit. This made a certain sense in terms of the law of restitution, also known as unjust enrichment. Under that area of law, an enrichment wasn't UNJUST-- that is, it couldn't be the successful subjecgt of a lawsuit-- unless the plaintiff could show that the defendant's enrichment had come at his expense. That is, the plaintiff whose resource had generated a profitable spillover couldn't sue unless he'd been harmed by the defendant's use. And harmed in some way *other* than loss of license

fees the defendant *would have paid* if the property right had been enforced. Foregone license fees probably didn't count as harm.

For the copyright folk among you, my mentioning foregone license fees mihgt make you prick up your ears and think a bout the circularity problem in defining 'relevant harm' for fair use cases. We can get back to that during question time if hyou like.[1] for now let's stick with history. Until around 1936, in this country as well as England, the landowner couldn't get a share of the profits that someone else made, harmlessly, from using the land. (Phillips case)

In 1936, that changed. (tell sotry of Edward v Lee Adminostrator.-)

Consistent with law of real property. Harmless trespass after all.

But law of personal property-- cars and such-- were different. Mere harmless leaning on a car, no cause of action.

Yet olwell v nye and nissen

Shoud this e?

Consider paretosuperiority.

Machinery of making the compnsation work.

---

[1] That's the issue that arises in c opyright cases where the defendant copyist would only owe the plaintiff license fees if the court denies the defendant's fair use claim. The question arises whether those hypothetical foregone license fees should count as a harm that weighs as an eq1uity against honoring the defendant's claim of fair use. The circularity problem is obvious, and not yet fully resolved. So you may be wondering, does Wendy have an answer for the circularity issue? Maybe.

Maybe discard the machinery, just rely on grat etc. if not harm, then no prob re incentives. Foreseeability.

The possib that all unknown things will benefit an author… that's overbroad and silly (tho jane says otherwise)

No harm to incenbtives.

Maybe worth the incentives when most uses are harmful, or when want to centraloize exploitation

But where doubt either of those things

Kitch was probaly wrong

Inexhaust

"ideas" defined by ability to be used by many