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"Natural Property Rights" in Products of the Mind:

Locke and Contemporary Controversies in Intellectual Property

Table of Contents

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Table of Contents

0.1 Nature of the problem

In many areas courts are giving new intellectual property rights for reasons they largely leave unarticulated.[1] Noncopyrightable stock averages are being protected by state law.[2] Merchandising emblems and symbols are being protected in non-trademark contexts by trademark law.[3] The right of

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1. As has previously been observed, the most articulate statements of position have, ironically, been those opposing common-law intellectual property rights ; they have lost to conclusory and confused opinions bearing greater numbers of votes or coming later in time (consider e.g., Learned Hand in Cheney as compared with the later course of Second Circuit opinions; the minority positions of Holmes and Brandeis in INS)(cite). Part of the purpose of the instant enterprise is to examine what sort of claim the proponents of such property rights might make if they were called upon to give a systematic account.

2. (Dow Jones and Standard & Poors cases.)

3. Trademarks historically have been protected from copying only when they cause confusion as to source or sponsorship. Several recent cases have protected marks from copying even when no such confusion is present (e.g., giving sports teams a monopoly over the production of emblems bearing the team names and symbols, regardless of whether the defendants had made their "unauthorized" status clear by conspicous disclaimers on the packaging. Boston Hockey (5th Cir.)) Also cite Gay Toys, (monopoly over the production of toy cars resembling the automobile on the Duke of Hazard television show), etc.

publicity has expanded[4] to such an extent that judges and commentators alike bewail the imminent dangers to the First Amendment caused by the imprecision of the new right's boundaries.[5] Even in federal copyright law, which explicitly says that facts and ideas should be free of protection,[6] and where inadvertent copying is supposed to be as actionable as intentional piracy,[7] odd things are happening. Summaries of copyrighted factual reports have been enjoined on the ground, inter alia,[8] that the copier is a "chiseler," and in a leading fair use case concerning The Nation magazine's publication of a

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4. Writes Paul Goldstein: "We can now expect an average of one or two reprinted decisions a month on same aspect of the right of publicity -- a right that twenty years ago wasn't litigated more than once a year." P. Goldstein, Publicity: The New Property?, STAN.LWYR. 8, 9-10 (Winter 1982/3).

5. (The dissents in the KING and HERE'S JOHNNY cases; articles.)

6. 17 U.S.C. section 102(b). The prohibition has gone further than prohibiting protection in facts and ideas per se; it has been held that where protection of expression would indirectly restrain communication of ideas, the expression must go unprotected even if otherwise copyrightable. Morrissey v. Proctor & Gamble.

7. Harrisongs. Also: mention that intentionality can be relevant to damages (e.g., innocent infringer provisions.)

8. Wainright Securities Inc. v Wall Street Transcript Corporation, 558 F.2d 91 (2nd Cir. 1977), cert. denied 434 U.S. 1014 (1978): "This was not legitimate coverage of a news event; instead it was, and there is no other way to describe it, chiseling for personal profit." 558 F.2d 91 at 96-97 (footnote omitted.)

summary of President Ford's as-yet-unpublished memoirs,[9] the majority held the magazine's quotation of only a few scattered sentences[10] amounted to copyright infringement.

Uniting these various developments is an urge to reward creators. Perhaps most obvious in the misappropriation cases,[11] but also underlying most of the arguments in favor of

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9. Harper & Row, Publishers v. Nation Enterprises, ___ U.S. ___, 105 S. Ct. 2218, 53 LW 4561 (1985), hereinafter referred to as "Harper & Row v. The Nation" or "The Nation case."

10. Approximately 300 to 400 words in The Nation's article were verbatim quotes of copyrighted expression from the memoirs, see 105 S. Ct. 2218 at 2235-2240, but the majority felt the excerpts had a "Key role in the infringing work." 105 S.Ct. at 2234. Justice Brennan wrote in dissent that the majority's analysis "has fallen to the temptation to find copyright violation based on a minimal use of literary form in order to provide compensation for the appropriation of information from a work of history." 105 S.Ct. at 2246.

Historical facts are not themselves copyrightable; one underlying issue in The Nation case was whether or not a court, in assessing whether a contested use of an author's copyrighted work is "fair," should take into account the defendant's also having copied noncopyrightable elements from the same work. This and other issues raised by The Nation case are discussed infra at ___.

11. The origins of the misappropriation doctrine are in the famous case of INS v. AP, 248 U.S. 215 (1918), where the Supreme Court enjoined the International News Service from, inter alia, wiring to its west coast member newspapers the news appearing in early morning editions of the Associated Press's east coast papers. In that case the natural rights strain was quite obvious:

> [INS]... admits that it is taking material that has been acquired by [AP] as the result of organization and the expenditure of labor, skill, and money...

protecting emblems and symbols regardless of consumer confusion,[12] and in favor of the right of publicity,[13] some variant of a labor theory of property seems to be operating. Similarly, in The Nation case, Justice Brennan in dissent intimated that his colleagues had been relying not on copyright law but on a "feeling that an author of history has been deprived of the full value of his or her labor"[14] and an "urge to compensate for subsequent use of information and ideas..."[15] all of which, Justice Brennan implied, were in turn traceable to what he considered an improper incursion of

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[INS] in appropriating it and selling it as its own is endeavoring to reap where it has not sown...

248 U.S. at 138-9. Incentives were also important to that case, for, without protection, the Court believed that the plaintiff news service might be forced out of business as its competitor under-sold the plaintiff with the news plaintiff had been put to the expense of gathering. 248 U.S. at ____. Thus, "Although an artists's natural rights have been at best an undercurrent in federal intellectual property law, the misappropriation doctrine of INS and its progeny have recognized them explicitly. Individuals are protected both because they are deserving and because they serve the public's interest in the production of information." Baird, The Legacy of INS, 50 U. CHI. L.R. 411, 416 (1983) (footnote omitted).

12. (DeNicola's excellect article)

13. Here supplemented by privacy and personality arguments. (Cites)

14. 105 S.Ct. 2218 at 2246, 53 LW at 4576

15. 105 S.Ct. 2218 at 2246, 53 LW at 4576.

16
"natural rights" theory.

Nature of this enterprise

The time is ripe for sustained consideration of the argument that creators deserve ownership of their creations. This article will build on one of the historically most important theories of property, John Locke's labor theory, and examine what ~~natural~~ rights (if any) would emerge in intellectual products under the Lockean system. It will then apply those findings to illuminate the problems mentioned above, namely, (1) misappropriation law, (2) new growth in merchandising rights, (3) the so-called "first amendment"

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16. Quoting 1909 legislative history, Justice Brennan in The Nation case chided his brethren that "The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings..." H.R. Rep. No. 2222, 60th Cong., 2d Sess. 7 (1909), quoted by Justice Brennan at ___ US___, 53 LW 4562 at 4573.

Note that in 1909, federal copyright law did not generally protect unpublished manuscripts; that was left primarily to state law. State law tended take "desert" sentiments into account. See Baird, U CHI L REV. The 1976 Copyright Act brought unpublished works under the federal umbrella, 17 USC section 301. Congress took this step largely for reasons related to administrability rather than because of policy disagreements with the course of state law. See HOUSE REPORT at ___. Given that the Ford memoirs were unpublished works at the time of the infringement, it may be that judicial implementation of a desire to reward the author was not entirely out of place. See ____, infra, where these matters are discussed at some length.

limitations on rights of publicity, and (4) the fair use doctrine of copyright law. Regarding fair use doctrine, the discussion will focus on (a) copying of factual material, (b) intentionality, (c) new technologies, and (d) unpublished works.

Note that this article aims to "illuminate" these areas, not resolve them in any final way. Although one may follow Locke's terminology and call the entitlements which emanate from his system "natural" rights,[17] I do not make the claim that Lockean analysis leads to rights which in fact are superior to those which our Constitution, legislatures and courts create. The phrase "natural rights" can indeed have these connotations, but I make no such strong claim; Locke's "natural law" language is used here merely to identify the legal relationships which would result from one particular sort

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17. See, e.g., J. LOCKE, SECOND TREATISE ON GOVERNMENT, CH. V, par. 30-31:

> The original Law of Nature of the beginning of Property, in what was before common, still takes place; and by virtue thereof, what Fish any One catches in the Ocean, that great and remaining Common of Mankind... is by the Labor that removes it out of that common state Nature left it in, made his Property who takes that pains about it.... The same Law of Nature, that does by this means give us Property, does also Bound that Property too.

(Emphases and spelling altered.)

of argument. While I hope to show that the form of argument has some independent persuasive power, and while the Article as it proceeds will attempt to identify those junctures in which Lockean analyses would be most consistent with prior precedent, the goal here is less to provide programmatic guidance than to provide a heuristically interesting set of insights into the way a system of intellectual property rights might, or should, work. As of now, we lack a complete systematic and coherent structure in which to talk about intellectual property. Economics is ~~so far~~ the leading candidate for providing such a structure, but it is drastically incomplete as a normative system.[18] To erect such a complete structure, a logical place

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The ~~primary~~ most often-cited flaw is that ecg focuses on w-to-pay, and thus depends on distrib patt-- Yet it lacks a distrib system.

18. In an earlier piece, I advanced a qualifiedly economic view of copyright law and the fair use doctrine, and explored the suitability, and the some of the limitations, of economic analysis in that context. See generally, Gordon, Fair Use As Market Failure: A Structural and Economic Analysis of The Betamax Case and Its Predecessors, 82 COLUM. L. REV. 1600 (1982), reprinted in 30 J. COPR. SOC'Y 253 (1983). Commentary on my views can be found at, e.g., Baird, Changing Technology and Unchanging Doctrine: Sony Corporation v Universal Studios Inc., 1984 S. CT. REV. 237 at 241 et seq.; Sinclair, Fair Use Old and New: The Betamax Case and Its Forebears, 22 BUFF.L.REV. 269 at 277-288 (1984); Raskind, A Functional Interpretation of Fair Use: The Fourteenth Donald C.Brace Memorial Lecture, 31 COPR.SOC'Y BULL. 601 at 621 - 624 (1984). Also see 3 NIMMER, COPYRIGHT TREATISE section 1305.A at n.26.1; PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW (1985) at 456-7 n. 520; Easterbrook, HARV LAW REV; Ladd, The Harm of the Concept of Harm, etc. Also see the Betamax case at ___ (dissent) and The Nation case at ___ (opinion by O'Connor, J.).

One reason for ~~my exploring~~ natural rights theory here is that

to begin is with one of the primary sources of American property theory, John Locke.[19]

This article has a second object in view: to introduce non-specialists to the peculiarities of intellectual property law. Now that the field has gained salience, many scholars and students in varying areas of inquiry find they need to deal with its issues. The relationships surrounding intellectual

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it provides an opportunity for me to test some of my prior conclusions.

19. While Locke's theory has utilitarian and economic components (see ___, infra), it is not primarily utilitarian or economic. James Krier has suggested in conversation that there is little difference between economic theories of property based on incentives, and "deservingness" theories such as Locke's; he argues that the differences which appear may be largely those of vocabulary, in that economists say that giving rewards for productivity is "wise" and desert theorists say it is "just." While Professor Krier is certainly correct that there are some potential areas of overlap between the two types of theory, the economic and desert types of arguments produce quite different results in many circumstances. Thus, for example, an economic view of fair use suggests that if no harm (including foregone license fees) would come to a creator from free use of his product, such free use should be permitted. Gordon, supra note ___ at ___. If, however, a creator has "property" under the Lockean theory, then the owner's right to exclude persons from using his creation would not depend on whether or not the contemplated use might cause the owner harm. See infra at ___. For other aspects of the differences between economic and Lockean theory, see ___, infra ("Locke and current controversies over the social justice implications of `law and economics'"); ___, infra ("Waste"); and ___, infra (new technologies and market failure.)

For a brief discussion of some of the relationships between incentive arguments and desert arguments, see, e.g., L. BECKER, PROPERTY RIGHTS, at 52-53 (1977).

products are governed by quite different ordering principles from those pertaining to tangible products and resources. Intellectual property law has its own classification systems (e.g., "subject matter"[20] and "exclusive rights"[21]), and its own policy assumptions.[22] Further, the area is divided into several subfields, each governed by its own statutes and precedent and each serving related, but somewhat different, purposes.[23] Of course, no one article can explain all of the law affecting intellectual products. It is nevertheless hoped that by exploring a range of issues through the lens of one unifying inquiry, a labor theory of property, the reader will come to understand the distinct nature of the questions

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20. See ___, infra.

21. See ___, infra.

22. The clearest example of the difference in starting-points is probably duration. While most people assume that property lasts in perpetuity, most forms of intellectual property are time-bound. The Constitutional clause granting patent and copyright power to Congress says that such grants are to be made "for limited times." U.S.CONST. ART.8 CL. 8. James B. White in conversation has suggested that the wording of the Constitutional grant serves as a warning that when one deals with intellectual products, one deals with a realm of "policy, not property," and that usual assumptions regarding the proper dominion of a property owner must be foregone.

23. The usual list is: copyright, patent, trademarks, trade secrets, misappropriation, rights of publicity, and unfair competition. Most of these are hybrids of tort and property, which makes them capable of shedding light on the basic tort and property areas as well.

presented by the unusual set of physical characteristics,[24] and the unusual power for influencing cultural and business life,[25] possessed by these intangible products of humanity's ingenuity and labor.

0.2 Locke

0.2.1 Locke's labor theory of property

In seeking to understand what lies behind the courts' apparent eagerness to grant property in intellectual products, the best starting place is probably the familiar theory of property found in John Locke's SECOND TREATISE OF GOVERNMENT.[26] Locke's account of how property might be

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24. See ___, infra.

25. See ___, infra.

26. Locke may well have had more influence on this country than any other political philosopher. See, e.g., M. WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM (1957); M. WHITE, SCIENCE AND SENTIMENT IN AMERICA; PHILOSOPHICAL THOUGHT FROM JONATHAN EDWARDS TO JOHN DEWEY at 9-11 (1972). Locke's historic influence is admitted even by his less sympathetic critics. Thus, of Locke's theory of property, C.B. Macpherson writes, "[I]n spite of its strained logic... [Locke's] case soon became a standard one." Macpherson, John Locke (Introduction), PROPERTY: MAINSTREAM AND CRITICAL POSITIONS. (C.B. Macpherson, ed., at 14) (1978). (Macpherson's views on Locke can be found in C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE, 194-278 (1962).)

justified in a state of nature seems itself to reflect or capture most peoples' intuitions about what would constitute a noncontroversial case of entitlement to property rights.[27]

Unless otherwise indicated, all citations to Locke are to the SECOND TREATISE (1690) as found in T. COOK (Ed.), TWO TREATISES OF GOVERNMENT BY JOHN LOCKE (1964).

27. The account, as here applied, is noncontroversial from two points of view. First, many critics of Locke's theory attack the appropriateness of analyzing contemporary institutions of land ownership by reference to a set of standards which could be satisfied (if at all) only in a very different hypothetical or primeval state of nature. Such criticism loses its force when the analytic focus is on a form of intangible product which, although created today, might itself satisfy the Lockean standards.

Second, some criticism might be addressed to the very stringency or harshness of the Lockean standards. For example, Locke suggests that giving an appropriator property in what he has seized and labored upon is unjustified whenever the appropriation would harm others in a particular way; a utilitarian would probably argue instead that property might be justified even if it harmed some individuals, so long as the property award created a net increase in utility.

From the perspective of viewing the Lockean standards as insufficiently generous to property creation, there is nothing particularly controversial about using Locke to identify a minimum domain for property. This article makes no strong affirmative claim that the Lockean standards exhaust the categories of permissible property, and its use of Locke's framework is compatible with such a minimalist position. (For elaboration of the latter point, see ___ infra.)

There are other perspectives from which the Lockean standard case would be more controversial. One might, for example, mount an attack on the Lockean standards for being too generous toward property; thus, for example, a communitarian might demand that all benefits generated by one's labor be shared ("from each according to his means") regardless of other circumstances.

Speaking broadly, Locke suggests that a person who successfully [28] uses his or her efforts to make useful those things which no one else has used or claimed may be rewarded with property in the things. American common law has long used a simpler variant of such a principle, awarding ownership to those who take possession of unclaimed physical resources, [29]

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28. 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. Locke does not deal with those cases in which effort fails to result in successful appropriation.

Locke's theory would not seem to grant property in labor per se. He is also concerned with consequences. This is suggested by his imagery, which focuses on that labor which is appropriation, by his argument that he who gathers perishable fruit and lets it go to waste thereby loses his property in it despite the labor which he put into the initial gathering (LOCKE, Chapter V, par. 46, discussed below at ___) , and by his argument from necessity (LOCKE, Chapter V, par. 26.) (The matter is also discussed in the immediately following note.)

The potential gap between appropriation and labor, not accounted for by Locke, may be particularly relevant to the area of intellectual products.

29. The American common law rule of possession is simpler both in its definition (e.g., there is no requirement, as there is with Locke, that the appropriation leave "enough, and as good left" for other potential appropriators if it is to result in property) and in its administrability. Concerns with administrability may indeed have been the reason for the judicial hesitation to adopt labor as a sufficient basis for property in unowned resourced. See , e.g., the classic case of Pierson v. Post, 3 Cai.R. 175, 2 Am. Dec. 264 (N.Y. 1805) (he who captures a wild fox owns it; efforts at capture which fail to succeed yield no claim):

> If first seeing, starting, or pursuing such animals,

suggesting that judges have indeed found attractive the notion that people who appropriate unused and unclaimed resources have some claim of right to them. Creators of new ideas and literary writings seem to be creating something out of nothing, and thus appear to be unusually meritorious candidates for such

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> without having so wounded, circumvented, or ensnared them, so as to deprive them of their natural liberty, and subject them to the control of their pursuer, should afford the basis of actions against others for intercepting and killing them, it would prove a fertile source of quarrels and litigation.

3 Cai.R. 175 at _____.

For a sketch of the possession principle, its applications and exceptions, see Epstein, Possession as the Root of Title.

Locke does not seem to deal explicitly with the possibility that labor (e.g., pursuing a fox) might not issue in success (catching it.) Some of his writing might suggest that labor itself creates the property. For reasons mentioned above (see note 28, supra), I think Locke does not mean to go so far, and that his conception of labor-plus-appropriation is close to the legal notion of possession.

It is ironic that one of the passages which stresses labor rather than appropriation is a passage in which Locke seems to be reaching out to common law (albeit English rather than American) for an analogy to buttress his labor principle.

> And even amongst us the Hare that any one is Hunting, is thought his who pursues her during the Chase... whoever has imploy'd so much labour about any of that kind, as to find and pursue her, has thereby removed her from the state of Nature, wherein she was common, and hath begun a Property.

(LOCKE, Chapter V, par. 30. Emphasis in original.) Labor may "begin" property, but appropriation seems to complete it, and waste (as we shall see) to divest it.

rewards.[30]

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 (the theory does not apply to labor mixed with other persons' appropriated resources)[31], and property results only provided that the laborer's appropriation[32] of resources from the

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30. Persons who employ creators would also seem to be meritorious candidates for ownership under Locke, for he thinks of "the Turfs my Servant has cut" as removed from the common by "labour that was mine". LOCKE, Chapter V, par. 28 (emphasis altered from original).

While a good deal could be said about whether creators and their employers should be treated differently, this article will by and large accept Locke's assumption; discussions of the creator's effort or labor in the text which follows should therefore be understood as also including the employer's effort or expense in hiring the creator.

31. Many current rules of law embody this principle. For example, the 'officious intermeddler' who labors in another's vineyard usually receives legal claim to neither property nor pay for his efforts, while he who labors in the wild may keep what he reaps. (Cite) The finder can keep what he finds only if it is unclaimed. (Cite.). The music arranger is free to sell his version of the melody only if the original is in the public domain. (Cite.)

32. "Labor" is of course not synonymous with "appropriation," but here in Locke, the relation between labor and appropriation is pictured as simple:

> 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

common leaves "enough, and as good left in common for others."[33] The latter condition is commonly known as the "proviso,"[34] or the "sufficiency condition."[35] It is the presence of this proviso which gives Locke's theory much of its force.[36]

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belong'd equally to all her Children, and hath thereby appropriated it to himself.

LOCKE, Chapter V, paragraphs 27, 29 (emphasis in original). See note 28, supra.

33. LOCKE, Chapter V, par. 27.

34. BECKER; NOZICK

35. MACPHERSON.

36. Many of the traditional critiques of Locke amount to asking "why should property form." Thus, for example, Nozick asks, why should property follow from the laborer mixing his effort with common resources-- after all, notes Nozick, when one dumps one's tomato juice into the sea, one merely loses the juice, and gains no claim to own the ocean. NOZICK, ANARCHY, STATE AND UTOPIA at ___.

The proviso serves to turn that question of "why should property form," around. If the claims of the nonpropertied can be satisfied by the proviso, then the more pressing question becomes "why shouldn't property form." (Becker makes a similar point about the proviso. Cite.)

Nozick's tomato juice example, while vivid, overstates its case because it is offered in isolation. Combine his example with the proviso, and give it a slightly more realistic touch, and the following not-so-absurd argument emerges: "If by stirring some dye into the sea I change its color slightly, and I want to keep everyone else out of the colored area so that my aesthetic appreciation isn't marred by their eddies and diluents, I should be able to do so if the world offers all the other swimmers and aestheticians equally good oceans for their use. So long as the proviso is thereby satisfied, they are not

0.2.2 Locke and current controversies over the social justice implications of "law and economics"

0.2.2.1 Welfare criteria

For Locke, an appropriation which satisfies the proviso that "enough, and as good" be left, "does as good as take nothing at all."[37] The proviso operates therefore essentially as a requirement that other persons not be made worse off by a grant of property. As such, it satisfies most fairness-based objections to private property systems.[38] The proviso makes the Lockean analysis interesting for reasons other than Locke's

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prejudiced by my claiming this particular ocean as my own, and therefore there is no reason for me not to have property in it."

Of course, the proviso could not be satisfied in a case where the resource being claimed was an ocean. So, under Locke, oceans cannot be owned. There is nothing surprising in that. In those cases where the proviso can be satisfied, the burden of persuasion would seem to fall on those who would deny that property follows from labor.

This and related issues recur throughout what follows.

37. LOCKE, Chapter V at par. 33.

38. See note 27, supra (discussing the ways in which, and the perspectives from which, Locke's view is or is not likely to be controversial). Also see the discussion of whether "harm" can be distinguished from "benefits witheld" on a principled basis, below at ___.

pervasive historic influence, and other than the growing importance of natural law sentiments in intellectual property caselaw.

The proviso tests the justice of resource distribution in much the same way as do the "paretan" criteria of welfare economics. Employed to evaluate shifts in social, legal, or economic relations, this modest set of criteria originated by Vilfredo Pareto approve only those changes which bring benefit to some participants, and hurt no one.[39] In recent years, Judge

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39. The various paretan criteria work as follows: A situation is "pareto-inferior" to another if changes could be made to which all would consent; the various states of affairs to which all would consent are "pareto-superior" to the conditions prior to the change. A situation is "pareto-optimal" if no change could be made to which all could consent. Recommendations can be made to change from "pareto-inferior" to "pareto-superior" states of affairs, but "pareto-optimal" states are noncomparable.

The criteria are named after the originator of the "optimality" criterion, Vilfredo Pareto. See, V. PARETO, MANUAL OF POLITICAL ECONOMY, appendix at section 89 (Schwier trans. 1971). Renato Cirillo, a contemporary economist, summarizes the pareto-optimality criterion as follows:

> [T]here is quite a universal consensus as to what constitutes a Pareto optimum: it indicates a position (organization or point) such that any change which makes some people better off results in making others worse off. In other words, if such a state is reached it is not possible to increase the utility of some consumers without diminshing that of others."

R. CIRILLO, THE ECONOMICS OF VILFREDO PARETO (1979), 42, 44. According to Pareto, an economist cannot (though the same

Richard Posner and others have vigorously adapted the tools of welfare economics to the analysis of law.[40] In the transition, the diffident paretan criteria were replaced. It was imagined that a no-harm criterion would be next to useless in practice, since most changes do hurt someone; to be "more useful",[41] the paretan criteria of doing no harm were gradually supplanted by the "efficiency" criterion of doing only cost-justified harm.[42] The common understanding of pareto-optimality even

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person wearing a non-economist's hat might) recommend changes away from a pareto-optimal point, or among such points, for any such recommendations would involve interpersonal comparisons of utility. Pareto's "definition of welfare... gives rise to the possibility of an infinite number of non-comparable optima." CIRILLO at 43.

40. See, e.g., R.POSNER, ECONOMIC ANALYSIS OF LAW (2d ed.) (1977); A.M. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (1984).

Although there are many variants of "law and economics" (compare e.g. Adelstein's evolutionary view with the views of Posner), persons using an efficiency criterion will here be referred to as "law and economics" practitioners. Since I am occasionally one such person, (see Gordon, Fair Use as Market Failure, 82 COLUM.L.REV. 1600 (1982)), and ordinarily object strongly to any such label, I can only suggest that one must occasionally bow to necessity; some summary form of reference is needed in order to make the differences between the criteria clear.

41. Markowitz.

42. Posner defines "efficiency" as the maximization of value. "Value," in turn, is defined as "human satisfaction as measured by aggregate consumer willingness to pay for goods and services." R. POSNER, ECONOMIC ANALYSIS OF LAW 10 (2d ed. 1977) (emphasis added). "Note that under this definition, it is `efficient' to take resources from a person in whose hands

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seemed to undergo a transformation. As a partial result of

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they have less "value" and give them to another person in whose hands they have more "value," even if the loser is not compensated for the value." Gordon, supra note 40 at 1606 n. 38 (1982).

43. Thus, Calabresi and Melamed write:

> Economic efficiency asks that we choose the set of entitlements which would lead to that allocation of resources which could not be improved in the sense that a further change would not so improve the condition of those who gained by it that they could compensate those who lost from it and still be better off than before. This is often called pareto-optimality.

85 HARV. L. REV. 1089 at 1094 (emphasis added). In its original form, pareto-optimality asked not that the gainers "could" compensate the losers (which is how Calabresi and Melamed put it), but that gainers actually compensate and, by so doing, obtain the losers' consent to the change. Calabresi and Melamed were aware they were redefining the paretan criterion (see their article at note 10), though it is unclear which of the implications arising from their redefinition they were conscious of at that time. Their definition of the pareto-optimality criterion is closer to the criteria associated with Barone, Hicks, and Kaldor, which "do not presume actual payment". CIRILLO, supra note 39 at 50-51. Also see Coleman, Efficiency, Exchange and Auction: Philosophic Aspects of the Economic Approach to Law, 68 CALIF. L. REV. 221 (1980).

Although Calabresi and Melamed erred in suggesting that "economic efficiency" is the same as pareto-optimality, the two concepts are related. In a perfectly competitive system with no transaction costs and no strategic behavior, all participants will, generally speaking, "trade up" to an efficient result which will also be pareto-optimal. (See CIRILLO, supra note 39 at chapter IV, for a discussion of the qualifications which Arrow and others offer to that observation.) In an imperfect system, however, the "trades" may stop well before the efficient point. In other words: while an efficient allocation will be pareto-optimal, so will many nonefficient allocations. In an imperfect system,

these changes in scholarly priorities, recommendations are often made which largely ignore the status of those persons who would be harmed in pursuit of the "greater good".[44] This has been troublesome to many observers.[45]

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reallocating resources to maximize their net value might not be achievable consensually.

44. The most accessible account of the different welfare criteria is probably Jules Coleman's excellent piece, cited at note 43, supra.

"Law and economics" accounts are not oblivious to the problem of the "losers", of course. One of the most outstanding treatments of the compensation problem, Michelman's "JUST COMPENSATION" piece, drew heavily on the Law & Economics tradition, and some discussion of the compensation problem is now common. See, e.g., Polinsky, who argues that efficiency is the most appropriate criterion for choosing legal rules, and that it is best to handle questions regarding the redistribution of income separately. (Cite.) While I argue at ___ infra that a program such as Polinsky recommends is likely to retard appropriate distributional action, Polinsky's argument nevertheless admits that distributional concerns are a legitimate concern for social action. The matter is more one of emphasis, as piece after piece has stressed the net efficiency gains from one piece of legal rule-changing or another. See (e.g.)(cites)

(Perhaps discuss here how in my economically-based fair use test, the "losers" there (the copyright owners) were protected from substantial injury.)

45. Coleman; mu unpublished panel discussion; etc.

often made which largely ignore the status of those persons who would be harmed in pursuit of the "greater good".[45] This has been troublesome to many observers.[46]

The efficiency criterion is not flawed because it refuses to honor all claims to the status quo. Few of us would argue that a thief is entitled to keep his loot. Rather, use of the efficiency criterion is flawed when it is employed to recommend changes in the law and no distinction is made (except on efficiency grounds) between those claims which should be

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honored and those which should not.[47] A wrongdoer is not ordinarily entitled to be protected from being stripped of his gains,[48] but most of us would feel uncomfortable if a mere failure to use one's property efficiently were to count as a sufficient "wrong" to cause its forfeiture.[49]

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47. Additionally, of course, the "efficiency" criterion has other problems. It shares many of the controversies of utilitarianism, for example, with one particularly notable exception. The problem of how to "count" the utility generated is not a problem for Posnerians, for money values are more easily measured than "utility". See POSNER, (THE ECONOMICS OF JUSTICE?) at ___.

On the other hand, this monetization "solution" generates its own problem, one of which is more troublesome than the controversy over how to define and measure utility: namely, that an economic viewpoint seeks to maximize value "as measured by willingness to pay." See note ___, supra. Willingness to pay is in turn dependent on ability to pay. Unless one is satisfied with the distribution of income as an initial matter, using willingness to pay as a measure of welfare is highly suspect. While economists recognize this (e.g., Posner says that the economist "cannot prescribe social change," ECONOMIC ANALYSIS OF LAW at 10), the efficiency criterion is often used for this normative purpose. (Cites.) I argue that such normative use will ordinarily be proper only if simultaneous attention is paid to the distributional issues.

48. The Kaldor-Hicks criterion, under which no payment need be made to those who would lose from an anticipated legal change, was originally created to deal with situations in which the losers had little in the way of justificable claims to entitlement, e.g., antitrust violators. See Coleman, supra note 44.

49. Although the "law and economics" school seeks to to encourage efficient resource use, most persons employing the "law and economics" analytic tools do not go so far as to argue that there should be no privilege of inefficient use. Rather, most such writers would permit a degree of inefficient use in

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A. Mitchell Polinsky and others have argued that efficiency should be the primary criterion for choosing legal rules, and that redistributive concerns should be handled separately. Such a position would have some appeal, if indeed the use of efficiency criteria increased the size of the social pie available, and that larger pie were then divided in accord with some notion of equity. But I suspect a program of action such as Polinsky recommends is likely to lead to societal underattention to the distributional issues, and may actually retard appropriate redistribution since persons who "win" under applicable legal rules are likely to feel entitled to keep their gains.

Part of the goal of this Article is to explore whether the

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some particular cases because of the inefficiencies which a rule requiring perfection would involve. (Such a rule would involve high supervisory costs, the state would face information-gathering problems in seeking to guarantee efficiency, etc.) See the discussion of Calabresi and Melamed's position at ___ in the Appendix, infra. In our law inefficiency causes one to forfeit some of the property entitlements only rarely or indirectly. As examples of forfeitures in our law which might credibly be explained by a societal desire to avoid inefficiency, consider e.g., nuisance injunctions which bar a landowner from some formerly privileged use or, e.g., contributory negligence rules which bar a plaintiff from obtaining compensation for possessions destroyed by a negligent defendant. (Cites.) Note that, of course, inefficient use can be enjoined, but the user compensated for the restriction. See the Appendix at ___.

50. Cite.

traditional, ethically more satisfying, no-harm criteria are really as toothless as supposed, or whether they can be meaningfully incorporated into rules of decision. It will be suggested that, at least for intellectual property law, no-harm criteria have already been influential,[51] and have additional, previously unexplored explanatory power. From an institutional viewpoint, the proviso has a special appeal: being modest, and asking for legal intervention to enforce property rights only when no harm is done,[52] the criterion helps courts avoid some

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51. See ___, infra (subject matter and exclusive rights) and ___ (fair use). I have previously suggested that courts in deciding fair use cases in copyright law have applied a rough equivalent to a no-harm criterion. See Gordon, Fair Use as Market Failure (I argued there that fair use should be granted to users of copyrighted materials when it would benefit society and not deprive copyright owners of significant revenues; various situations in which new and valuable uses might not generate revenues for copyright owners, even if the owners' copyrights were fully enforced, were examined under the "market failure" rubric.)

(The no-harm criterion plays out somewhat differently in the contemporary copyright system than in a natural rights system, however; see the discussion entitled "New technologies" at ___ infra, for further discussion.)

52. For an explanation of how it can make logical sense to say that a defendant can be restrained from doing something he or she wants to do and yet be "not harmed", see ___ infra. Briefly, (1) making judgments about "harm" presupposes some sort of baseline (Feinberg; Wittman) from which the "harm" can be judged, and (2) persons who are restrained from doing things the system defines as "wrong" are not usually described as being "harmed" when this happens, since they had no baseline entitlement to the thing desired.

of the difficult policy weighings for which they are arguably ill suited.[53]

0.2.2.2 The proviso as a no-harm criterion: caveats

Three caveats should be noted, however. First: Although the proviso and related paretan criteria may **simplify** the value choices, their use would not completely eliminate the need for such judgments. As an initial matter, to adopt a no-harm criterion involves deciding that nothing is more important than (i.e., nothing can "outweigh") the particular entitlement. Further, any decision-maker utilizing a criterion which works by addressing whether persons are made "worse off" in relation to some baseline, must make a normative choice of what baseline to employ. To apply those observations: the concern of this Article is with seeing if one can erect an intellectual property system even if one honors the proviso. The proviso, as here interpreted, grants the nonpropertied an entitlement, which cannot be outweighed,[54] to be free from any duty to

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53. Baird characterizes the institutional judgment that judges may be "poorly situated to identify the policies at stake" as one of the key objections to state judge-made misappropriation doctrine. Baird, The Legacy of INS, 50 U. CHI. L. REV. 411, 416-7 (1983).

54. Ordinarily, once one adopts a paretan set of criteria as the governing rod for social or legal change, one is taking the

refrain from entering or using resources improved by another's labor if that duty would make them worse off than they would have been in a world without the laborer's efforts. The latter hypothetical world constitutes the applicable baseline for our argument. (Under such an approach, all the current economic arguments about how exclusive property rights aid in the efficient utilization of resources would be irrelevant;[55] for if imposing on the nonpropertied a duty to refrain from using others' creations would cause them harm, no such duty would be imposed even if the duty would create great benefits for the rest of society.) While the Article defends using that choice of baseline and entitlement to answer certain legal questions,[56] other choices might legitimately be made, and the

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position that change will not be recommended if any harm- however minor- would be caused by the change. The harm cannot be **outweighed** by any benefits which the change would bring to other persons, though the harm might be **eliminated** by compensatory payment. (That change goes unrecommended does not mean the status quo will be recommended; the paretan is often agnostic, incapable of recommending either change or no-change.) It must be recognized that the paretan criteria do not themselves make weighing undesirable; in choosing a paretan criterion, one is deciding to choose a priority system which does not permit weighing.

55. See, e.g., DUKEMINIER & KRIER; POSNER; GOETZ.

56. For extensive discussion of this baseline entitlement and some alternatives, see subsection 3, "The proviso as a limitation," infra at ___.

(Basically-- the proviso is the least protection that someone should have. And if property is given despite the proviso,

need for making some choice on the matter can be difficult for a court.

Second: The Lockean proviso is not fully equivalent to a no-harm criterion. When Locke identifies what arguments will defend property against the claims of a covetous and contentious stranger, he believes that being able to tell the stranger that there is "enough and as good left," i.e., that the proviso is satisfied, constitutes a full answer. However, even after the proviso is satisfied, the non-laboring neighbor may still object to his industrious neighbor's having exclusive access to the created resources. He may, e.g., feel aggrieved by the inequality of possession which he now perceives between himself and his industrious neighbor.[57] If that feeling, which we might call envy, is a harm,[58] then Locke's proviso diverges

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other compensating subisidies, rewards, privileges or etc. should be given the nonpropertied.)

57. Even if he does not feel envy, he may refuse to give his consent simply because he wants to share in what the laborer has made. For further discussion of this issue, see ___, infra.

58. In common speech, envy might well be called a sort of harm. Some philosophers would argue that distinctions should be made between harms and other sources of unpleasantness, and that social and legal action which might be justified in order to prevent harm might not be justified in order to prevent lesser unpleasantness. Feinberg, for example, distinguishes between harms to interests, on the one hand, and "offenses" and other "disliked things," on the other hand. FEINBERG, ON DOING HARM, supra note ___ at 31-55. He would probably take the

from a true no-harm criterion, for it takes no account of [59] envy.

This step of disregarding envy, which the proviso shares with most other attempts to adapt no-harm criteria to [60] particular situations, should not make the proviso

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position that the covetous and contentious stranger might feel an "offense" if his industrious neighbor began to accumulate possessions, but that such envy does not consitute a "harm." Since at this point I am not prepared to justify on policy grounds the conceivable distinction between "harms to interests" and "other disliked things" which are also capable of making one worse off, that recourse is not open to me.

(Compare FEINBERG at 249 n.11) (acknowledging that the colloquial meaning of "worse off" can embrace offenses as well as harms.)

59. The proviso merely requires that the laborer's appropriation of resources from the common leave other persons' abilities to use the common unaffected, and does not require that the laborer soothe the non-propertied persons' covetousness by sharing with them what he has made or grown.

Locke gives no credence to any objection based on envy; he simply seems to assume that natural law has no concern with protecting persons against it. Given the theological foundation of Locke's work, this is not surprising; one of the commandments is, "Thou shalt not covet." In addition, however, Locke also assumed that prior to the invention of money, no great inequalities would result from giving property in appropriations which fulfilled the proviso, for without a medium of exchange people could have property only in what they could use or store without spoilage. See LOCKE, Ch. V, Par. 36. He further assumed that when inequalities followed after the adoption of money, that the inequalities (and the medium of exchange which gave rise to them) were consented to, and thus not subject of complaint. Id.

60. Most applications of no-harm criteria will need to take the step of disregarding envy. (Becker). Thus, although one

normatively unacceptable. Where a possession causing envy is created by the efforts of another, and the envious person has the resources available to him[61] to create an equally desirable possession if he would but labor,[62] protecting that

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attraction of no-harm tests for social change is that they appear to free the decision maker of the need to weigh one person's desires or utility against another's, a no-harm criterion will be virtually unable to compare different world-states (even those involving intellectual property), unless the judgment is made not to "count" one particular kind of disutility, namely, envy. The dynamics work out this way:

Under the paretan criteria, any situation or point is optimal (and thus noncomparable with other points) if a change would cause even one person to object, regardless of the person's motives for objecting. It is usually imagined that under these criteria, changes would be acceptable even if not everyone gained, so long as no one were harmed. But if some persons gain and others' welfare levels stay the same, the gap between the two groups widens. An unpleasant sensation often results from the bare perception of inequality. Let us call that sensation envy. If envy "counts" as a harm, then (barring saintly dispositions among those affected) virtually all situations would be pareto-optimal. If envy does not "count," however, then a wider range of change opens up.

For further discussion of the nonpropertied person's entitlement, see ___ infra.

61. The proviso seeks to ensure that "enough, and as good" common resources will still be available for all to work on.

62. Re handicapped persons, the amount of common which would be "enough" for them may be larger than the amount of common which would be "enough" for non-handicapped persons. Since the proviso is satisfied only when "enough" is left, a laborer might find it harder to get exclusive property rights if the other members of the community are handicapped. This does not seem inappropriate.

person against envy should not be an important goal.[63] (When we feel envy in such situations, we usually feel ashamed of the emotion, rather than entitled to share in the other person's goods.) I suggest we should feel little reluctance to approve a property criterion which refuses to take account of envy, but which does ensure that the law will not exclude nonowners from the resources they need to produce their own equivalents of the envied possession.[64]

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63. Thus, if the contentious stranger is truly covetous, and remains distressed even after learning that the common stands ready to provide him the same raw materials as it provided to the person being envied, then satisfying the proviso may not eliminate all possibility of doing harm. I have made the value judgment that it is more important to reward the laborer with an exclusion right than it is to avoid such an emotion. Others may disagree with this value judgment, or seek other ways to implement it. The Reader will thus hopefully find the proviso at least heuristically useful. (Thanks to Rick Lempert here.)

64. On occasion, as the argument progresses, the Article will evaluate whether discrete harms, motives, or claims should be "entitled" to the protection of the no-harm criterion. Any such judgments are as open to question as are, e.g., judgments that property owners should not be privileged to use their property inefficiently. But the value judgments when made will be explicit, as was the judgment regarding the relative unimportance of envy, above. The Reader can therefore evaluate them for what they may be worth, within the Reader's own value structure.

The style of making direct reference to my and my Reader's moral sentiments may seem a trifle odd for a Law Review: some introductory material about the method of discourse will probably be in order.

(Use Feinberg's intro as a model, perhaps.)

The third and last caveat involves an interesting little paradox which suggests that no-harm criteria may not always be as easy for courts to apply as they may seem.[65] Pareto developed his criteria in part because he wished economists to avoid making recommendations which would weigh one person's change in welfare against another's.[66] In order to avoid the hazards of trying to make interpersonal comparisons of utility,[67] Pareto implicitly recommends[68] relying on the participants' unanimous consent to show that none are being harmed. However, a participant may well refuse to consent to a change even if he is not going to be hurt by it, merely because he sees that the change will bring benefits to others in which he wants to share.[69] In other words, people do not always

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65. The difficulty here eis, again, one which virtually any no-harm criterion will share when attempts are made to use it in practice.

66. See CIRILLO at ___.

67. Many philosophers and economists have argued that utility, being a subjective phenomenon, cannot be objectively measured. See e.g., PARETO, supra note ___ at ___. Others, such as Brian Barry, contend that the importance of such difficulties is overstated. B. BARRY, POLITICAL ARGUMENT at 44-47 (1965)

68. (Need to review how well this is supported by the Manual; CWR person may assist here.)

69. The distinction between harm and nonbenefit it explored at ___, below, where it is argued that principled conceptual and policy distinctions can and should be made between "doing harm" and "not sharing benefit". (Also see generally, FEINBERG, ON

follow instructions. Similarly, Locke argues that if the laborer's "neighbour... would still have room for as good and as large a possession-- after the other had taken out his--"[70] then the neighbor would not be "prejudiced" and would have no "reason to complain or think [himself] injured",[71] Locke nonetheless recognizes that human nature is not limited to making complaints based on real prejudice or backed by reason.[72] If a decisionmaker wants a criterion which will approve all changes where no harm is done, then relying on consent as the sole means of measuring whether or not harm is present will not work. Some form of "objective" measuring of welfare may be necessary -- and one would then be back in the business of making interpersonal comparisons.

DOING HARM (VOL. I of MORAL LIMITS OF THE CRIMINAL LAW) (1984) at chapters 2-3.)

Locke takes it as virtually axiomatic that, in most situations, one has "no right" to "the benefit of another's Pains." LOCKE, CH. V, par. 34. One can trace this belief to the privacy which he gives to liberty. Id. See ___, infra.

70. LOCKE, Ch. V, Par. 36.

71. LOCKE, Ch. V, Par. 36 (by implication).

72. See LOCKE. Ch. V, par. 34.

(Also include here a short discussion of the special meaning that "reason" had for Locke as revelatory of natural law and Gd's ways. A useful source is probably J. TULLY, A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES, Cambridge 1980.)

To put this in more concrete terms: A laborer might have occasion to sue a stranger for entering on his property and using it or stealing it. If a Lockean rule of decision were adopted, the stranger might defend on the ground that excluding him would cause him "prejudice" or harm. The court would necessarily have to decide whether the defendant is telling the truth, i.e., whether the exclusion really does make the defendant worse off than he otherwise would have been according to a normatively appropriate baseline. If the Lockean court found that the defendant was merely making a specious claim of harm, the court would rule against his defense. Thus, while adopting no-harm criteria can simplify a court's fact-finding role, some tasks of factual investigation will remain, along with the possibilities of error which inhere in them.[73]

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73. Given the possibility of error, some harm might at some time be done. But such possibility inheres in any human system for decisionmaking. Cf., BARRY, supra note 67 at 45:

> Of course, there is no way of reading off on a dial the answer to the question whether a broken leg for A is worse than a pinprick for B, but that does not mean it is not open to evidence amounting in simple cases to proof. Establishing the relative importance of frustrating or satisfying different people's wants does not seem more (or, no doubt, less) insoluble than, for example, establishing causal dependencies in a complex train of social phenomena.

Thus there is an additional value-ordering underlying the Article's acceptance of the proviso, namely, the judgment that the institution of property should not be abandoned out of

To sum up: The foregoing placed Locke's proviso within the context of the modern debates regarding welfare criteria, and reviewed some of the difficulties which necessarily attend use of the proviso. We now return to applying Locke's test to the world and its resources.

0.2.3 Tangible and intangible property

Many attempts have been made to use Locke's theory as the basis for evaluating private property today.[74] Most such accounts are complex, and depend for their application on still

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deference to a possibility of harm arising out of erroneous application of a no-harm criterion.

Determining if the proviso is satisfied may be a complex question. See ___, infra.

74. Nozick suggests various interpretations under which one could ask whether a grant of property today would leave nonowners no worse off than they would be otherwise. In applying such an inquiry, he suggests, one would entertain "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.

Note that even if the institution of private property is socially desirable, the distribution of private property rights among the populace raises its own difficult questions. Re intellectual products, the two questions tend to be mixed: to the extent private property is a desirable systemic mode of allocation, the creator has a special distributional claim; to the extent it is not a desirable mode, the creator's ownership claims are likely to be disregarded.

additional difficult questions.[75] In contemporary American settings it would appear virtually impossible to find a large amount of appropriable[76] resources not yet owned by individuals (a "common")[77], and harder still to find cases of appropriation which would meet the proviso's requirement of leaving "as good" for others.[78]

When attention turns to intellectual products, however, no such straining at interpretation appears necessary.[79] Since

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75. Consider, e.g., the way in which Nozick's version of Locke is dependent on empirical assumptions re efficiency and the like. Also, consider in this connection the complexity of applying Rawls' difference principle.

76. The resources in the U.S. which today are unowned are largely those which are not easily appropriable- e.g., the air.

77. (Explain why Locke views "unowned" property as "commonly" owned.)

78. While today's pattern of ownership in tangible property might perhaps be justified by reference back to a time when Locke's conditions could more easily be met because land was undeveloped and population low, or by some variant of contractarian theory applied to today's status quo, the force of such arguments becomes attenuated with time or complexity.

79. For example, the argument has been made that so long as <u>some</u> eventual appropriation of land will deprive <u>someone</u> of the opportunity to appropriate his own plot of ground, no property in land is possible. Imagine: there are 1,000 ample plots of ground in the unclaimed wilds of America. Immigrants numbers 1 through 999 each takes one of these plots, and claims property in it. When Immigrant number 1,000 tries to take the last plot, a Lockean spokesperson tells him, "You can't take ownership in the last plot, because if you take it you will

there seems to be a nearly infinite store of possible melodies, poems, novels, inventions, ideas, designs, and the like, the scope of the "common" seems broad and far ranging.

As for the condition that "enough, and as good" be left for others, Locke suggests this test for determining whether the proviso is satisfied: a covetous and contentious 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

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violate the proviso as to Immigrant number 1,001, whom we know is on her way here. By taking the last plot, you'd be leaving her with less than you'd have, and less than she could use; in fact, you'd be leaving her with nothing of the land which she owns in common with you and the rest of humanity. You're not entitled to take all the common that way. In short, any last (ultimate) potential appropriation is prohibited for it will leave some future potential appropriator frustrated without the possibility of property. You have the bad luck to be the last one." As to which, Immigrant number 1,000 may reply, "What you're telling me is that Immigrant number 999 took land which made the next comer, namely me, unable to own land. That means I'm left without `enough, and as good' as compared with Mister 999. Therefore, awarding property to Mister 999 would violate the proviso. The penultimate appropriation should be as prohibited as the ultimate one, for it leaves two frustrated potential appropriators: myself and Madame 1001." So number 999 would also not be entitled to property. And if the penultimate appropriation is prohibited, so would be the one before that, "zipping back" (in Nozick's phrase) to the first appropriation.

The problem does not seem to arise for intellectual products, for which an infinite range of creations is conceivable. If infinite, there is no "end point" from which to zip.

Industry could reach to."[80] Such a test seems to be met here.

Any particular intellectual product can be appropriated and owned[81] without depriving future creators of ample resources.

Thus, property in intellectual products seems strongly

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80. LOCKE at par. 34.

81. Locke's writing largely treats rightful appropriation as if it were coterminous with property, perhaps because of a confusion between privilege and right. One of Locke's arguments is this: that since one is justified in seeking to prolong one's life, this in turn justifies appropriation and injestion of food, and that in turn suggests the appropriateness of property. LOCKE, Ch. V at ___. This argument ignores the possibility that one might have a **privilege** to e.g., drink water from the spring, but have no property in it, and thus no right to exclude others from drinking. (The terms "right" and "privilege"are discussed below at ___, and their relation to this issue is discussed below at ___.)

This article will follow Locke's treatment here, for, despite the potential for error, it is particularly fitting in the instant context to treat "appropriation" as equivalent to "owning" or "having property in", for the following reasons.

The word "appropriation" connotes a use which excludes outsiders or their use. Since intellectual products are susceptible to simultaneous physical use by many persons, a person "appropriates" only to the extent that the law gives him a privilege to physically exclude or a legal right to have the courts perform the excluding function. Physical exclusion is essentially unavailable for disseminated works; once a work is no longer secret, multiple reproductions can be made without the creator being aware of the copying. (Cite Liebowitz on the problems of physical exlcusion.) Given all this, in order to "appropriate" a disseminated intellectual product, one would indeed require a type of property right.

supported by Locke's theory [82] -- more strongly than property in tangible forms property such as land. [83] Since our legal system clearly recognizes property in land, whose roots are more

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82. Locke himself seems not to have turned his attention to intellectual products when developing his property theory; his focus was on land, and its relation to civil society. It is clearly possible that Locke might not have conceptualized intellectual products as the proper subjects of property. (See, e.g., paragraph 44 of Chapter V.) However, Locke was concerned with examining the ownership of land and capital in his society, and their relationship to government, during a period when intellectual products were of comparatively little commercial value. Any specific conclusion he may have come to regarding the issue of intellectual property should not dissuade us from taking the mode of analysis he developed for analyzing his society's valuable resources and applying it to a type of resource increasingly more valuable in ours.

83. J.S. Mill, in the course of a utilitarian critique of land ownership, made a similar point about the favored status of created property using almost Lockean terms:

> When the "sacredness of property" is talked of, it should always be remembered, that any such sacredness does not belong in the same degree to landed property. No man made the land. It is the original inheritance of the whole species. Its appropriation is wholly a question of general expediency. When private property in land is not expedient, it is unjust. It is no hardship to any one to be excluded from what others have produced: they were not bound to produce it for his use, and he loses nothing by not sharing in what otherwise would not have existed at all. But it is some hardship to be born into the world and to find all nature's gifts previously engrossed, and no place left for the new-comer.

J. S. MILL, PRINCIPLES OF POLITICAL ECONOMY, BOOK II, Chapter II, Section 6, at 233 (W. Ashley ed. London & NY 1909).

questionable,[84] courts may feel that property in one's creations should a fortiori be recognized.

0.3 General Applications

Of course the a fortiori argument just expressed has a flaw. Considerations of stability can persuade in favor of continuing established patterns, regardless of how well-justified those patterns might or might not have been at the time they came into being,[85] so that existing patterns do not always provide reliable guides for dealing with new phenomena.[86] (This is one of the dangers in that mainstay of

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84. One need not make a Mill-type analysis (summarized in the preceding note) to have doubts about current distributional patterns in the ownership of tangible property. For example, the typical law student or lawyer will find it more congenial to make a strong argument on behalf of granting intellectual property in one's own creations than she will to make an argument on behalf of inheritance.

85. Considerations of stability have great importance in the property field. Consider, e.g., (Esptein's defense of the posession principle), (discussions of inheritance, especially H. Pilpel's discussion of the need for continuity in publicity rights), etc.

86. The presence of an existing pattern may, however, provide similarly-situated persons claims based on fairness which they might not otherwise have had. This issue is briefly addressed at ___, infra, where it is argued essentially that intellectual products and physical products are sufficiently different that

the common-law adjudicatory process, reasoning by analogy.)[87] Nonetheless, even discounting the a fortiori argument from land, the lure of the labor theory and the common-law possession cases[88] is strong. In the following sections, the article will explore what shape a Lockean intellectual property system might take. First the Article will examine the general shape of "property" in a Lockean system. Second, the Article will analyze whether, if one looks closely at the way intellectual products function in the world, persons creating them really do satisfy the Lockean preconditions for property (i.e., use of only "common" resources, and the proviso) as easily as it originally appeared. Third, the Article will focus on the nature of protectable subject matter, and on the particular forms which an owner's 'right to exclude' might take

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it is not unfair for the legal system to treat them dissimilarly.

The presence of a valuable existing pattern may also create a concern that new legal developments not erode what came before. The "slippery slope" and erosion problems are discussed at ___, infra.

87. Compare Baird, The Legacy of INS, 50 U.CHI.L.REV. 411 (1983) arguing that in the misappropriation area, reasoning by analogy should take precedence over systemic inquiry.

88. See the brief discussion of the role "possession" plays in the law of tangible personal property, at note 32, supra, and accompanying text. It has a similar importance in the law of real property (cites to e.g., adverse possession cases; Esptein's discussion of land, etc.)

in a Lockean system.

After these basic issues have been dealt with, the Article will address particular controversies in the areas of misappropriation law, merchandising rights, rights of publicity,[89] and fair use. Much of the groundwork will already have been laid by the time the particular controversies come to be analyzed.

0.3.1 The nature of "property"

"Property" is sometimes loosely used to indicate a wide variety of things; what we will do here is identify a central or core meaning which thoughtful uses of the term usually mean to embrace, and compare it with the meaning which Locke attributes to property.[90] In order to better analyze what form

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89. See ___, infra. (Give page cites for each subsection.)

90. A common error, often called the error of "reification", is to assume that "property" or some other word always means the same thing, and thus to apply in Case X the rule of Case Y merely because both cases involve the same term. Judges are not perfectly consistent in their use of their terminology, of course, and different policies and consequences may appear subsumed under similar labels.

For example: merely because a judge awards a trademark originator an injunction against copying in one context (a context where there is consumer confusion), and happens to call him a trademark "owner" or his mark "property," does not mean

property would take in a Lockean system, a short terminological discussion will be useful.

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that the same person can have an injunction against copying of the mark when the circumstances are different (i.e., where there is no confusion). See Cohen, Transcendental Nonsense and the Functional Approach, 35 COLUM L.REV. 810-817, 820-821. If a particular trademark as "property" always entailed a right to forbid use, then a nonconfusing use of the mark `Chanel' would be as enjoinable as a confusing and deceptive one. The law in fact generally permits the former and forbids the latter.

"Reification" minus the Latin translates simply as "thingification." The reification error sometimes is made because the error-maker thinks that "property" always denotes the same unchanging "thing," like a Platonic ideal. The error is also sometimes made simply as a result of overeagerness or a lack of care. Whatever its source, lawyers are often and usefully warned to guard against the tendency "to start thinking that `the' property owner, by virtue of being `the' property owner, must necessarily own a particular bundle of rights over a thing." B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION, 27 (1977)(emphasis omitted).

The "reification" warnings sometimes discourage scholars from attempting conceptual analysis, but that is not their point. The "reification" mistake lies not in trying to delineate concepts clearly, but in assuming that, regardless of context, judges and other writers always use a particular word to denote the same concept.

Here I will present a particular complex of rights and privileges, and I will mean to indicate by the words "property owner" that such a person presumptively possesses those rights and privileges; by stipulation I will have defined "property owner" in just that way. (See ___ infra.) Nothing in this Article should be taken to indicate that whenever in caselaw a judge happens to use the word "property", the rights and privileges stipulated herein must obtain. It is likely but far from inevitable that the judge will have the instant conception in mind.

0.3.1.1 Hohfeldian **Rights** and **privileges**: in general

Property usually denotes a set of legal relations, the most important of which are most easily identified by utilizing two categories developed by Wesley Hohfeld: **rights** and **privileges**.[91] The Hohfeldian distinction between **rights** and **privileges** requires some further attention, since Hohfeld (and the First Restatement of Property, which adopted Hohfeld's terminology) used the words in somewhat unusual ways.

Briefly, one can use a court or other instrumentality of the law to protect a **right** from other persons' interference. **Privileges** denote areas in which one is entitled to act without legal interference, but **privileges** do not entitle their possessors to have the law aid them by restraining persons with opposing interests.[92] Thus, a right is an entitlement to use

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91. W. N. HOHFELD , FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS (W.W. Cook, ed. 1923).

When there might be the possibility of confusing the Hohfeldian terms with the common ones, the Hohfeldian terms will appear in bold face or in quotation marks.

92. See W. N. HOHFELD , FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS, (W.W. Cook, ed. 1923), especially at 35-50. "[I]t is very common to use the term `right' indiscriminately, even when the relation

the legal system to constrain the liberty of others, while a **privilege** is an entitlement to be free from legal restraint in regard to some possibility of action one might have in mind.

To illustrate Hohfeld's usage of right and **privilege**, and the related term, duty,[93] first consider the following: if C wants to do something (e.g., enter a cornfield, copy a book) which A has a right to prevent C from doing, then, by definition,[94] C has no privilege to do that thing. In fact, C has a duty to refrain from doing it. Conversely, if C has a complete privilege to do something (e.g.,to enter, to copy), that is equivalent to saying no other person or entity has a right to stop him (although other people may be privileged to interfere), and he has no duty to refrain from doing it. One's rights and privileges may be good only against certain actors and not others; C might have a privilege to enter or copy (e.g., his copying may be "fair use") in circumstances where

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designated is really that of 'privilege'; and only too often this identity of terms has involved for the particular speaker or writer a confusion or blurring of ideas." Id. at 39-40.

93. **Right** and **duty** are jural correlatives in Hohfeld's system, so that if X has a **right** to do something, Y has a judically-enforceable **duty** to refrain from interfering. **Privilege** and the absence of **right** are also jural correlatives, so if X has **no-right** to do a certain thing, Y has a **privilege** to interfere if he wishes. See HOHFELD, supra note 92, at 5, 36.

94. A fortiori, C has no "right" to do it.

someone else would owe A have a duty to refrain from entering or copying.[95]

Areas of **privilege** are, in the common sense, unregulated. The law exercises its power on neither party's behalf. What can and cannot be physically accomplished in a realm of privilege often depends on the happenstance of physical strenth and advantage, or on unrelated legal entitlements and restrictions which serendipitously extend some coverage to disputes within the realm of the privilege.

Thus, consider another example: assume that in a given legal system, authors have no copyright, that is, no **right** to restrain copying of their work by third parties. If A, an author, has no right to restrain copying of her work, that means Copyist C would have a privilege to copy A's written material regardless of Author A's protests. However, since the existence of one privilege does not presuppose the existence of other privileges or the existence of a right, Copyist C might have no privilege to use physical force to make A lead him to a hidden masterwork, and he might have no right use the legal system to compel A to reveal it.

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95. The text will sometimes speak broadly about "a privilege" for the sake of simplicity when, in fact, one can have a "privilege" against some people but not others, against some types of intervention but not others, and so on.

If Author A has a privilege to refuse to disclose her work, whether or not Copyist C will be able to use his copying privilege to copy a particular work will depend on physical events (e.g., whether A carelessly leaves the manuscript in a public area) and on the other legal relations which exist in that system (e.g., whether the legal system gives A a right to exclude strangers from the house in which she stores the manuscript.)[96] Similarly, to assess the value of A's privilege of nondisclosure[97] one would have to know things about the

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96. Another variable of particular interest is whether the system's contract law would permit A to condition sales of the manuscript on the purchasers' promising not to copy and promising not to show what they've bought to C. Note that even if a contract is possible, it will not create the equivalent of copyright. See the discussion of Rothbard's consent theory of copyright at ___ infra.

97. Re unpublished works of expression, such as private letters, there has long been a right against copying in addition to a privilege of nondisclosure. It has been known as "common law copyright", and was recently incorporated into federal copyright law. See 17 U.S.C. section 301. Also see Abrams, Exploding the Myth of Common Law Copyright (cite)(demonstrating that common law copyright never extended to published works) and (standard cases)(suggesting that common law copyright was somewhat more powerful than a mere protection of private documents; these cases demonstrate that widely disseminated works might be considered technically "unpublished" and thus entitled to common law copyright.)

Thus, by the time of its modern evolution, common law copyright (the right to prohibit unauthorized copying of one's unpublished works) had become more than a privilege against nondisclosure or a byproduct of one's rights against physical force and intrusion. It was a right exercisable in its own regard. Unpublished literary manuscripts could be protected from copying without reference to whether or not the copyist

non-legal realm, such as whether, in the structure of the industry involved, the lead time advantage of being first on the market [98] would be so important that A need not fear C's competition. Thus, if a product is difficult to reproduce either because of physical complexity (consider bookmaking prior to Gutenberg) or lack of information on how to make it (it may be possible to both sell coca cola and keep its formula secret; it's virtually impossible to keep secret the design of a safety pin or the contents of a textbook after placing them

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had breached an agreement of confidentiality, had gained unlawful entrance to the author's home, or had otherwise violated legal rights unrelated to copying simpliciter. See, e.g., Brandeis & Warren, 4 HARV L. REV.193 at 197-202 (1890)(in arguing for recognition of a right to privacy, they note re: private letters that, "No one into whose hands those papers fall could publish them to the world, even if possession of the documents had been obtained rightfully...")

This is by contrast to the law regarding trade secrets. Re unpublished industrial secrets, their originator has little more than a privilege of nondisclosure. (Cite - trade secrets treatise.) Even today the ability of the trade secret originator to obtain legal redress against unauthorized copying depends on a showing that the defendant has violated rights other than a per se right against copying, such as, e.g., showing the defendant has breached an agreement of confidentiality, or has bribed employees who have signed contracts not to disclose.

98. Copyists ordinarily are able to copy only after the originator makes his product physically available by putting it on the market. To the extent the originator's privilege of first marketing gives him a significant advantage in the marketplace, rights against copying may be unnecessary to give him the highest possible rate of return.

Cite to Breyer, Plant, Liebowitz; standard economic literature.

on the market) a right to prevent copying may be relatively unimportant.

Although one might be free (have a privilege) to pursue some course of action, he or she may possess no right to have governmental protection from persons interfering with the desired activity. It is possible that one may have such a right,[99] and the existence of the privilege may even be an argument in favor of the right (since the law seeks to be seen as consistent)[100] but, analytically, whether the law should

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99. When privileges coexist with rights, the entitlement holder can both act in the physical world, and also enlist the legal system's aid in controlling other persons' interfering behavior. Thus, in the American system, one has a privilege of using reasonable force in self defense when one is attacked, and one also has rights against the attacker which enable the victim to call a member of the police force to subdue the assailant, and which enable the victim to obtain damages from the attacker in a civil suit later. (Of course, if the victim knows that a police cruiser is nearby, he may no longer have a "privilege of self defense," for that privilege is dependent on there being some necessity for his using self-help.)

100. In making the suggestion that the existence of a privilege may provide some ground for urging the recognition/creation of a right, I am of course diverging somewhat from the Hohfeldian path. His goal was to clarify the differences which common speech tended to obscure, while I am suggesting that given the tendency of common speech and common assumptions to link "rights" and "privileges," it may be desirable to link them in law lest the common speaker feel he or she is being treated unfairly or inconsistently.

For the instant purposes, it is unnecessary to specify what precise impact the perception of inconsistency should have, other than to suggest this: citizen disaffection is at least one criterion which legislative and judicial decisionmakers may

provide a **right** involves separate questions from whether it should provide a **privilege**. The legal system has a different, and financially much greater, investment in the creation of rights than in privileges, for enforcement of rights involves the state more directly[101] and expends its resources.[102] On the other hand, privileges pose a greater danger of disorder and misuse; precisely because privileges do rely on self-help, the exercise of privilege is less easily supervised by the courts and other governmental entities.

0.3.1.2 Property rights and privileges in American law

The primary group of **right**-type entitlements which attach

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legitimately take into account.

On the issues of how Laymen's perceptions have influenced the law and how that influence should or should not be permitted to exercise itself, see generally B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977), (suggesting, inter alia, that even a utilitarian judge who sought to avoid such citizen disaffection as might be caused by lay misapprehensions of "correct" legal decisions, would not necessarily come to the same decisional results as would a judge who sought to implement the lay understandings for their own sake.)

101. On the risks which the government runs in enforcing controversial legal relations, see e.g. (cite discussions of citizen disaffection.) On the many ways in which state power differs from individual power, see, e.g., (articles on the state's power of stigmatization).

102. Rights thus tend to be rarer than privileges. One often has a **privilege** to do whatever he or she has a **right** to enlist the aid of the legal system in doing.

to tangible property have to do with an owner's rights to exclude strangers from entering or taking possession of the property.[103] The primary group of privilege-type entitlements which attach to property have to do with an owner's privileges of using the property. Thus we see Justice Holmes and Professor Ackerman, from differing perspectives a century apart, describing property in ways which similarly demonstrate the importance of these two poles of inquiry. Justice Holmes wrote:

> Within the limits prescribed by policy, the owner is allowed to exercise his natural powers over the subject-matter uninterfered with [privileges of use], and is more or less protected in excluding other people from such interference. The owner is allowed to exclude all [rights of exclusion], and is accountable to no one.[104]

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103. The American legal system has no one pattern of intellectual property. Copyright, patent, misappropriation, trademark, rights of publicity... each area has its own rules. (In fact, one of the goals of the instant enterprise is to see whether these various doctrines of American statute and caselaw can be illuminated by the application of a central, systemic set of inquiries.) In each area, however, one thing is clear: persons claiming ownership of intellectual property ordinarily seek to forbid the defendant from using the property without their permission.

See infra, at ___.

104. O.W. HOLMES, JR., THE COMMON LAW (1881) at 246 (emphasis and material in brackets added).

Bruce Ackerman puts the matter of the ordinary concept of property this way:

> A particular thing is Layman's thing when: (a) Layman may, without negative social sanction, use the thing in lots more ways than others can [**privileges of use**]; and (b) others need a specially compelling reason if they hope to escape the negative social sanctions that are normally visited upon those who use another's things without receiving his permission [rights to exclude].
> 105

Limitations and Exceptions

As Holmes and Ackerman recognized, neither the right to exclude, nor the privilege of doing as one pleases with one's property, is complete.[106] In the law of property, various exigencies may justify strangers' entrance onto land or

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105. B.A. ACKERMAN, PRIVATE PROPERTY AND THE CONSITUTION, at 99-100 (1977) (emphasis in original; material in brackets added; footnote omitted.) Ackerman cautions that the Scientist and the Ordinary Observer take "a very different view." The view presented above is Layman's Ordinary conception of property. It is the cluster of rights and privileges which this ordinary conception describe, with which this paper is concerned. One might break down the ordinary conception of property into its "scientific" components (ACKERMAN at 27) and analyze each entitlement separately, but it is a complex of several rights and privileges which interests us here.

106. Holmes says his description applies "within the limits prescribed by policy." (See text at note 104.) Ackerman says Layman can use his property in "lots more ways than others can," not in all ways, and he also notes that "a specially compelling reason" can nullify the right to exclude (See text at note 105).

interference with other property (i.e., the exigencies may give the strangers privileges). Similarly, statute or common law sometimes limits the owner's ability to use the land (e.g., the law may give strangers the right to make the owner change his use of the property.)[107]

The matter can be viewed as one of proportionality: the more complete the right to exclude and the **privileges** of use, the more comfortable most American lawyers feel calling the phenomenon to which these characteristics attach, "property".[108] Further, the exceptions can be systematized.[109] From a substantive point of view,in the

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107. For example, if your land use is inconsistent with a neighbor's use of her land, nuisance law may give the neighbor a **right** to make you stop-- or may, contrariwise, give you a **privilege** to keep on pursuing that use.

108. For an interesting summary of the role that identifying a "central case" has played in defininitions of property, see Terrell, "Property," "Due Process," and the Distinction Between Definition and Theory in Legal Analysis, 70 GEO. L. J. 861, 865-874 (1982)."

109. An overview of the substantive dimension of this relation in American law would look as follows:

First, looking at **rights**, (a) an owner has a prima facie **right** to forbid (exclude), and get damages for, intentional invasions of his real property and harmful use of his personal property. (b) This owner's prima facie **right** to exclude tends to be limited when strangers can show an extraordinarily strong need for the property and/or some failure of the market system which would ordinarily allow them to purchase the use or entry they need.

American system one ordinarily has a right to exclude from one's property persons who could have purchased entrance,[110] and one is ordinarily free to use one's property as long as no harm is caused.[111] From a procedural point of view, in the

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Second, looking at the property owner's **privileges** in the American system, (c) the owner has a prima facie **privilege** to use his property, and (d) his privilege of using his property tends to be limited only when the use causes harm to others. Thus: (e) some harm-causing uses of one's property are privileged while some harm-causing uses of one's property violate the rights of others.

Despite the exceptions, "property" in the American system remains meaningful as a sphere where, presumptively, (1) strangers need a special justification to enter, and (2) within which, so long as the owner harms no one else, he or she will be left alone by the law.

For a fuller discussion of the American law governing the relations between owners and the people their property affects, see the Appendix.

110. Regarding the qualification that one can exclude only those "who could have purchased entrance," see the Appendix.

111. I thus argue that the breadth of the privilege of use depends on how the legal system defines actionable harm. "Harm" is not self-defining; while I suggest a stable meaning for it in a Lockean system (see ___, infra), the term "harm" can colloquially embrace conceptions ranging from physical damage inflicted (governed, e.g., by nuisance and tort law), to aesthetic disutilities inflicted (governed primarily by zoning law), to benefits not conferred (governed by, e.g., the "no duty to aid" rule, and its exceptions, in tort law.) (On the latter point, see e.g., RESTATEMENT OF TORTS sections 314 - 328 (1934)). How the legal system defines actionable harm is crucial. Thus, as Esptein suggested, if the legal system were to recognize "failure to render efficient amounts of benefit" as an actionable harm, duty would replace privilege in virtually all spheres. (Cite to Epstein's Good Samaritan piece.)

American system, persons who intentionally invade protected interests typically bear a burden of proving that their invasion was privileged.[112]

0.3.1.3 Rights and privileges in a Lockean system

The American system derives in part from the British common law of Locke's day,[113] but this would not in itself indicate that Locke shared the above conception of property. The fact that the ordinary conception of property has proved fairly stable in the common law discourse of this country during the hundred years between Holmes and Ackerman[114] does not itself prove that the same conception prevailed two hundred

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In sum, my argument here concerns the structure of legal relations, not their substantive content. I suggest that in the American system, an owner's "privilege of use" is insecure to the extent the legal system recognizes any particular concept of harm applicable to the owner's contemplated use.

112. (Holmes, etc.) The structure of rights and privileges in American tort and property law is discussed more fully in the Appendix, infra.

113. (There are controversies about the extent to which the British common law was accepted by the various North American colonies and by the states which followed them. See, e.g., the debate in Wheaton v Peters regarding Pennsylvania common law (cites).

114. Holmes: 1881. Ackerman: 1977

years prior to Holmes,[115] nor would that conception's prevalence in the legal literature of Locke's time necessarily prove that Locke shared that conception.[116]

We will here review what Locke has to say about the structure of entitlements which constitute that "property" to which laboring on the common, and satisfying the proviso, gives rise. Our task will be not only to determine what Locke himself thought, but also to see what new truths regarding intellectual property Locke can lead us to.

Entitlements to exclude, to consume, and to use harmlessly

As a first step, we can infer the nature of Locke's assumptions from the structure of his argument. By noting what Locke takes care to protect the stranger from, one can infer what rights, duties and powers he expected the property owner to have.

The proviso is an expression of the concern expressed in varying ways throughout the SECOND TREATISE, that no person

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115. Date of Locke's SECOND TREATISE: 1690

116. As exemplified by Ackerman's presentation of scientific conceptions of property differing from the ordinary conception, even within a given time frame varying conceptions can exist. See generally, ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977).

cause another harm.[117] It requires that "enough, and as good" be left in the common for third parties to use, after the appropriation. As previously noted, Locke felt that an appropriation which leaves this much behind "does as good as take nothing at all."[118] The proviso thus ensures that no harm comes to third parties by having some resources taken out of the common and removed from their access and use. Under a Lockean view, then, it would seem that the owner receives an entitlement to exclude the stranger from the appropriated resources, since being hurt by exclusion is the form of harm

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117. Locke often insists that no harm be done, except to save life. This can be seen e.g., at Chapter II, par. 6: "[N]o one ought to harm another in his life, health, liberty or possessions" for all of these things are the "property" of God, who made them. Id. The only exception is that one can harm wrongdoers, or do harm as necessitated by the need for survival. See generally Chapters II, III.

Locke largely ignores the problem of inconsistent uses, and offers little guidance on the issue of how to handle those inconsistent uses which fail to invade rights. When some harm must inevitably be caused-- when either the actor will harm a victim by his privileged actions, or a potential victim will harm the actor by enforcing a right against the contemplated harmful act-- Locke is not helpful. It is here that other analytic tools must be used. See the Appendix at ___ for how economic tools might approach the problem of inconsistent uses. (Also consider Spur v. Del Webb as an application of both economic and Lockean principles: the inefficient use is enjoined, but the efficient use must compensate the loser.)

A useful exploration of this issue of harm without remedy (the damnum absque injuria problem) can be found at Singer, (Wis. L. Rev. cite). Also see Appendix at ____.

118. LOCKE, Chapter V at par. 33.

against which the proviso operates.

The owner also would seem to have an entitlement to consume the property. Locke seeks to make resources "beneficial" for mankind; he argues in favor of appropriation, use, and consumption.[119] Also, since exercising a privilege of consuming or otherwise appropriating has the same effect as does exclusion, consumption of the resources would seem to cause no harm if the proviso is satisfied. Similarly, the owner would also seem to have a broad privilege of using his property in any way which causes others no harm,[120] since by definition such a privilege fulfills Locke's more general

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119. LOCKE, Ch. V, Par. 26-27.

120. The American system contains a presumptive privilege for harmless use, discussed at note and accompanying text, supra, and in the Appendix at ___.

Note that the property entitlements so described do not say whether the owner has or lacks a privilege to use the property to inflict harm; the system as so far described merely leaves the entitlements of inflicting harm unspecified.

The rights that can be generated under a no-harm condition are extensive enough to be worth discussing, especially when one considers that it is the right to exclude, which itself might not cause harm, which enables an owner to draw revenues from those who seek to enter or use his property, and which is at issue in most intellectual property cases. What other rights an owner may have in an, e.g., utilitarian property system, where harms may be weighed against benefits, is not our concern here. See the discussion of pareto-optimality at page ___, supra, and ___ (economic analysis of inconsistent uses of property).

no-harm concern.

All of the above sets of entitlements ([a] to appropriate and consume, [b] to use harmlessly, and [c] to exclude) can be seen operating in Locke's argument from necessity. He writes:

> The earth and all that is therein is given to men for the support and comfort of their being...[the earth's fruits and beasts] being given for the use of men, there must of necessity be a means to appropriate them some way or other before they can be of any use or at all beneficial to any particular man. The fruit or venison which nourishes the wild Indian ... must be his, and so his, i.e., a part of him, that another can no longer have any right to it before it can do him any good for the support of his life.
> 121

Further, because of the effect of labor itself, the entitlements operate even where there is no need to exclude if the owner is to enjoy:

> [L]abour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough and as good left in common for others.
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While the above entitlements clearly include at least a

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121. LOCKE, CH.V, par. 26.

122. LOCKE, Ch. V, par. 27.

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privilege of consumption and a privilege of harmless use, the outlines of the entitlement to exclude are less distinct. Does the exclusion entitlement merely amount to a privilege to use one's physical abilities and resources (whatever they may be) to build fences, stand guard, and keep out intruders? Might it also include a privilege to employ one's strength and resources to use violence against a thief who has succeeded in broaching one's walls and has made off with one's property? And can it include any **rights** at all?

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123. Locke's insistence that under the law of nature, one should be free from all harm, might suggest that in addition to privileges of use, one could have a **right** to use, free from interference (harm) caused by others. In support of such an interpretation, one might offer excerpts such as the following:

> He that in obedience to this command of Gd subdued, tilled, and sowed any part of it, thereby annexed to it something that was his property, which another had no title to, nor could without injury take from him.
>
> LOCKE, Ch. V., par. 32.

Holmes' language at ___, supra, might be similarly interpreted. I do not think that either Locke's argument or the American common law gives owners a general **right** to use their property in any manner they desire although, as is true with any legitimate sphere of action, some interferences and harms to an owner's use of property might give rise to **rights**.

In any event, most interference with a creator's use of his intellectual product can be remedied by a right to exclude others from using the property. (For exmple, if a creator finds he cannot sell in a particular market because imitators have flooded it, an injunction against the imitative use of his invention or work of authorship will often open up the markets to his use.) It is this right to exclude which is our primary focus. See ___, infra.

Locke takes the position not only that an owner in the state of nature has a privilege[124] to build walls against thievery, but also that every "every man hath a right to punish the offencer and be executioner of the law of nature."[125] In his view, thieves are criminals against whom the owner has a privilege to use violence in order to recapture the property, and in order to punish.[126]

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124. Note that I am using the word "privilege" where it more accurately conveys Locke's meaning than other words; Locke himself used a variety of terms.

125. LOCKE, Ch. II, par. 8 (emphasis omitted.)

126. See generally LOCKE, Ch. II. The privilege of using violence also extended to whatever might be necessary for making of this thief an example to deter others. Ch. II, par. 8. One might criticize Locke here for using the thief as a means to an end rather than an end in himself; in defense, Locke would seem to argue that the thief, in breaking the law of nature, has lost a claim to the obligations others owe him under that law, and is "as a beast." (Ch. II. par. 11; Ch. III, par. 16.).

Few Americans today take such an all-or-nothing view of criminality, of course; while it is likely that imposing astronomically high penalties on only a few offenders might preserve deterrence at a great savings of administrative and enforcement costs, see POLINSKY, the Eighth Amendment to the Constitution prohibits using any one offender so harshly. (Cite.) However, Locke's views may not be so different from our own. Our criminal law poses penalties with an eye to deterrence, even if (unlike Locke' view of the criminal as "beast") our law contains an outer boundary beyond which one person cannot be used as an example for others.

Locke's attitute toward what can be done to "re-take" stolen property has similarities to our procedures. (This similarity is more important than the other, since this article is concerned with civil rather than criminal liability, with

All of this says nothing about whether the possessor of property has a right to community assistance in stopping or catching the thief.[127] Of course, Locke uses the term "rights,"

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injunctions ordering the cessation of nonpermitted use and the payment of damages or profits arising out of the use.) If a thief refuses to return stolen property in violation of an injunction, he can be held in contempt of court; for so refusing to accede to legitimate authority, he can be fined in a higher amount or jailed for a longer term than the original theft would have occasioned. (Cites to treatise on the contempt power.)

While some issues of proper remedy are discussed herein (see ___, below), many of the issues re the impact of enforcement and penalty patterns on the legitimacy vel non of law cannot be discussed at any length here.

127. Given the absence of government in the state of nature, the Hohfeldian term "right" must be redefined. Instead of embracing a right to have the goverment and legal system act in one's behalf (since there is no governmental system), it would have to embrace a right to have the relevant community or group of neighbors take such action.

Note that the Hohfeldian **right** always involves two different types of duties owed to the right-holder: the governmental entity owes the holder a duty of enforcement against the wrongdoer, and the wrongdoer owes the holder a duty not to do wrong. (Hohfeld himself focused on the latter only.)

If one wonders what these duties amount to, one way of analyzing them is in terms of what will happen if they are breached. (Cf., Holmes's "bad man" view of law.) Thus, the wrongdoer might see "duty" in terms of what unpleasant things will happen to him if he does a prohibited thing.

Duty for the wrongdoer is therefore at least partially defined by the state's ability and willingness to enforce it. Whether the duty is justified might be analyzed by asking whether the wrongdoer would have good ground for complaining about the relevant prohibitions. (The latter mode of inquiry is expressed in Locke's proviso.)

but the use of the terminology is not determinative.[128]

Neither the argument from necessity[129] nor the proviso itself justifies a right to exclude. True, if one has an

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But what about the state's duty? Who stands to enforce the state's obligations? Here a pure "bad man" or power analysis breaks down quite quickly, and the issue of justification is even more complex. While we are able to specify one source of a wrongdoer's duty not to steal, the source of the state's duties must inevitably rest on questions of jurisprudential and political theory beyond our current scope. In the analysis which follows, I assume that a state may contract to give enforcement aid, and that such contract is binding. What force makes it binding, beyond a basic sense of fairness (which is the basis Locke uses, see note ___, infra), is not analyzed here.

128. Even after Hohfeld, the term right continues to be generally used to indicate any nonspecified entitlement, e.g., see the title of this Article, where the familiar term "Natural Rights" is used in its customary manner to embrace a wide range of entitlements.

129. Look for a moment at the argument from necessity. Slightly reformulated, its steps are simply these: (1) People need to drink water in order not to die of thirst, and wear clothing in order not to freeze, and eat the fruit of the land in order not to starve. (2) Under the law of nature everyone has an entitlement to survival. Therefore, (3) this drinking, wearing, and other appropriation must be permitted by the law of nature. Since (4) only one person can drink, wear, or eat the resources, the appropriation will also cause exclusion. (5) Since the appropriation is not wrongful, the exclusion is also not wrongful. Therefore (6) the law of nature permits exclusion and (7) one has a right to exclude others from these things one is using, at least to the extent that the appropriation and exclusion does not hurt the other people.

Look closely at steps (5) through (7). In those steps it seems that a right to exclude has been mysteriously born from a rightful (not wrongful and privileged) exclusion. No justification for that birth appears.

entitlement to survival[130] and survival requires food, then some ingestion may be rightful. Similarly, most readers would probably agree that if the proviso is satisfied, one may rightfully appropriate. But an action can be rightful (not wrongful) under natural law, without constituting a **right**. The action may simply be **privileged**. Only through confusing rights with privileges (both terms used here in the Hohfeldian sense) might the above arguments, taken by themselves, appear to generate a right to have the legal system exclude strangers on the owner's behalf.[131]

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130. Locke clearly believes that all men have an entitlement to survival, which, inter alia, "trumps" property entitlements. See the discussion of Charity, infra at ___. Tully considers this entitlement itself a form of property; however, since the resources so taken can be used for one purpose only (survival) I find use of the `property" term a misnomer. See TULLY, A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS DETRACTORS, at ___.

131. Tully suggests that Locke was primarily concerned with what appropriations might be "not wrongful", and was not concerned with property as we know it. J. TULLY, A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES at ___.

Rights to exclude

One must separately address the issue of what claims a property owner has on his bretheren to help him exclude strangers from his property and retrieve stolen goods. Locke takes no explicit stand on this. By implication, however, the following appears to be his view: that the community has the privilege of pursuing and punishing the offender, and returning the property to its owner,[132] but that the community has has no duty to do so.

> [H]e who hath received any damage has, besides the right of punishment common to him with other men, a particular right to seek reparation from him that has done it; and any other person, who finds it just, may also join with him that is injured and assist him in recovering from the offender so much as may make satisfaction for the harm he has suffered.

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132. Locke writes:

> And if any one in the state of nature may punish another for any evil he has done, every one may do so; for in that state of nature, perfect equality where naturally there is no superiority or jurisdiction of one over another, what any may do in prosecution of that law, every one must needs have a right to do.
>
> ...

LOCKE, Ch. II, par. 7.

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This unwillingness to give victims a right to community assistance against wrongdoers is not surprising, given the primacy Locke gives to liberty. He would properly be reluctant to force community members to bend their wills to someone else's purposes, even a purpose of redressing and punishing an offense against the law of nature.[134] And if the community has no duty,[135] the owner has no right, at least in Hohfeldian

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133. That other persons have no duty to act on behalf of the wronged owner is suggested, inter alia, by the use of the word "may" in the above. LOCKE, Ch. II, par. 10 (emphasis added).

134. If every person in the state of nature had a **duty** to pursue wrongdoers, then everyone's liberty would be severely constrained, and they would be harmed. In Locke's system, one had complete liberty so long as one did no harm (subject to the obligation to save others' lives if they were imperiled), and one had at least a presumptive right to be free of the harm that might be done by one's fellows. (CITES) Therefore a duty of enforcement would run up against two basic Lockean assumptions.

It is possible that even in the state of nature an owner might have some moral entitlement to the aid of his neighbors. Thus, persons whose aid is being sought in the effort to catch a thief, will react differently to an argument that the pursuer had a privilege to keep the stolen thing which he merely wasn't strong enough to utilize effectively, than to an argument that the pursuer had a claim of right to have the community aid him in enforcing exclusion. The most obvious basis for a claim of right is contractual agreement, by the persons with the duty of enforcement, to be so bound (this is the basis discussed in the text, below); whether there is any other sort of basis for a claim of right to community aid will not be explored here.

135. See note , supra. (I argue there that each Hohfeldian right has two correlative duties-- one against the government for enforcement and one against the wrongdoer. If either duty

sense of that word.[136]

Does this mean the Lockean theory is incapable of supporting a right to exclude? Consider the following argument: As has been already suggested, if a laborer creates something which would not otherwise have existed and he or she causes no harm[137] to others by excluding them from it, then exclusion seems not wrongful. If the cost and effort of excluding others is borne by the creator, then, he or she seems to be privileged to so exclude. If the laborer asks other agents[138] to do the exclusion, and bears the costs of exclusion, it would seem consistent with Locke's position to allow the laborer to so motivate these others to exercise their privileges of acting against the wrongdoer by paying them for their efforts. We might call this a "delegation" of power. And a neighbor who, because the proviso is satisfied, has no justification to complain about an exclusion, would seem to have no greater justification to complain if the exclusion is accomplished by the property owner's agents rather than by the

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is lacking, what remains is not a Hohfeldian right.)

136. See the discussion of Hohfeldian terminology at ___, supra.

137. "Harm" is defined in the Article at ___.

138. See the discussion of who bears the transaction costs of enforcement in the Article at ___

property owner himself. If the entity to which the delegation is made is the community or a government, and if the delegation is binding, (and Locke believes most promises in the state of nature are binding)[139], the privilege then begins to grow into a right.[140] For when the neighbor enters the laborer's enclosure or takes his product, the owner could then call on the government or community to obtain redress for him.

Disagreements could of course be raised about how a legal system should ensure that the transaction costs of enforcement are paid solely by those who benefit from the system. (To force the nonbenefitted to pay would harm them, which is inconsistent with the spirit of the proviso.) A wide range of competing and complementary possibilities exist, such as taxation keyed to property ownership (e.g., real estate tax;

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139. Locke suggests that most contracts (which would include the delegation I suggest here) would be binding under the law of nature. E.g.,"The promises and bargains ... between the two men in the desert island... are binding to them, though they are perfectly in a state of nature in reference to one another; for truth and keeping of faith belongs to men as men, and not as members of society." LOCKE, Ch. 2, par. 14.

140. This is a complex matter, about which much argument is possible. Some few of the ramifications are discussed below. See ___. However, as discussed at note , supra, delving into them in any depth at this time would require such lengthy treatment as to overbalance the rest of the discussion. It may be suggested, however, that Locke's general contractarian arguments re the origins and legitimacy of government provide a partial response.

auto licensing tax), and "user fees" to be paid when particular enforcement actions are sought (e.g., court costs, filing fees.) Similarly, tracing the beneficiaries of enforcement will not be simple; any individual enforcement action might benefit many property owners, because of deterrent effect on potential criminals,[141] and it could be difficult to assess which property owner should pay how much.

While investigating these possiblities in depth would take us too far afield, it seems plausible that some suitable scheme for allocating administrative costs might be developed. Given current income tax and property tax rates, for example, most property owners today would seem to be bearing their enforcement costs, albeit indirectly. For the sake of simplicity, the Article will simply stipulate, without specifying further, that the governmental costs of enforcing property rights should be borne in such a manner as to give the covetous and contentious stranger no ground for complaint. To the extent that this stipulation did not match reality, of course, the system of rights so generated would be vulnerable.

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141. This observation may take care of a related problem, to wit: the problem that limiting enforcement to persons capable of paying for it would mean that all property rights are not "equal" before the law. If all enforcement actions had "external" effects on noninvolved property owners, then the richest owners might be willing to subsidize an enforcement system available to all. See___.

Problems with the delegation model

In the above delegation scenario, this transmutation of privilege into right depends, inter alia, on whether or not the property claimant has real world power (e.g., cash to cover the costs of enforcement) which he can then give to the community or government. It therefore raises two related problems: first, it looks like a version of "might makes right", and second, it assumes unequal administration of the laws, for only those owners who can pay receive enforcement.[142]

As for the first problem, "might makes right" does not exactly describe the operative dynamic. For real world power only becomes important under the above schema if one has a privilege to exercise it. Whether or not one has such a privilege is decided by normative (not power) criteria. Thus, for example, a privilege to appropriate resources for onesself, and thus exclude others, arises in the Lockean system of natural law only if one satisfies the proviso, or if one needs

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142. If to obtain enforcement the owner needs to use his or her own resources, then only some persons would have a "right" against the wrongdoer, namely, (a) those who owned property worth more than the cost of catching the thief, and (b) those persons with other resources which they were willing to expend on catching the thief even if the expenditure were greater than the value of the property stolen.

some essential resource to survive.[143] Without an applicable privilege (which Locke derives from considerations of what he views as natural justice), there is nothing to delegate to the governmental entity.

The second problem, regarding unequal administration of the laws, is more troubling. To paraphrase Jimmy Carter, most in our culture know that "Life isn't fair," but believe the law should be. The voluminous literature on "state action" provides some useful insights on the many ways in which individual action is different from governmental action; among other things, the greater powers which government has makes a high degree of regularity and fairness crucially important.[144] For a laboring creator who has satisfied the proviso to be unable to have the government exclude free-riders, while another creator has that ability, seems inconsistent with many

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143. The latter entitlement is discussed under the topic, "Charity", at ___, infra. Tully calls the entitlement to subsistence a species of property, to be "distinguished from 'property in' some thing which a person 'comes to have' in the process of individuation of the common gift." TULLY, A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES AT 3 (1980) (citations omitted.)

144. See (cites.) Americans seem to expect and desire a greater degree of fairness from government and law, than from our compatriots' willful exercises of their various privileges.

fundamental notions of equal protection;[145] and even if allowing cost/benefit considerations to shape enforcement patterns were tolerable to contemporary American society,[146] being treated differently by the law seems like a harm of which the proviso should take account. Yet to charge one person for enforcement desired by others is also to inflict a harm on him or her.

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145. If enforcement depends on the owner's resources, then the laborer will spend those resources only when he or she believes it is "worth it." If the owner takes a short-term view of his or her welfare, then only those enforcement actions which cost less than the losses they prevent will be undertaken. (Under a narrow cost-benefit point of view, only those enforcement actions which are cost-justified should be accomplished.) If the owner takes a long-term view of his or her welfare, then enforcement actions will be undertaken even if they are not individually cost-justified, so long as they add more to the owner's general security under the property system than they cost. (From a long-range cost-benefit point of view, this might be seen as the appropriate course of behavior.) But in either event, the owner's decisions will depend on the type of resources at stake and the owner's other resources.

(Compare act and rule utilitarianism?)

146. It is clear that our society tolerates <u>some</u> such shaping, particularly where the issue is allocating enforcement efforts in proportion to the worth of the property at stake; the police will spend more time on a bank robbery where thousands of dollars are stolen, for example, than they will on the theft of a bicycle, and most observers treat this as appropriate. Observers in our society are less tolerant of allocating enforcement efforts in accord with the wealth level of those seeking protection. But of course, the latter practice occurs, and the reason is not simply that the poor are more likely to own bicycles than banks. See (articles on systematic discrimination by municipalities against ghetto areas.)

There is at least a possibility that inequality of enforcement might not arise. Were the only options equal enforcement on the one hand, or no legal rights on the other, then richer property owners might offer subsidies to cover the poorer owners' enforcement costs in order to ensure that a system of property rights could come into effect. Further, spottiness of enforcement would undermine all property by decreasing theives' perceived expectations of being caught and punished,[147] which might further encourage wealthy owners to subsidize protection for poorer owners, or to encourage owners generally to subsidize costly protection for not-very-valuable property. Also note the possibility that, to the extent that all people might want the law to act without respect of persons, perhaps even nonowners would be willing to subsidize a property-enforcement system. But all this is speculation.

One more dimension of the delegation "story" should be recognized before we continue: a new set of issues is raised by

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147. In the abstract a society might compensate for a decreased chance of capture by drastically increasing penalties for those few who are caught and punished, and obtain a satisfactory amount of deterrence by such a method. If this course of action were taken, then spotty enforcement might not reduce deterrence. However, the Eighth Amendment suggests that our society might be unwilling to take this course. Many of the same considerations which militate against property owners having unequal access to justice militate even more strongly against drastically unequal punishment of wrongdoers. (See the discussion of punishment proportionality at note ___, supra.)

delegating to a centralized entity the resources (physical or monetary) to employ violence. For example, a neighbor may legitimately fear that an entity with great resources might misuse the resources, not only against criminals, but also against innocent persons, in an effort to aggrandize itself.[148] Fear of centralized strength might be more worthy than "envy"[149] of being counted into the no-harm calculus. If so, then except in the presence of unanimous consent or other indicator that no harm is caused by the centralization, it could be argued that persons in the state of nature should have no power[150] to delegate their privileges of using violence, no

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148. The same might be said of private individuals who amass wealth. As noted ___, Locke assumed this problem away, but it remains worthy of consideration.

149. See ___, supra

150. Hohfeld uses the term "power" to indicate a person's ability to change his own and others' legal relations. W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS at 50-63 (1923). That is the sense in which the word is being used here. In American law, most owners have the "power" to make gifts and transfer resources, thus creating new legal relations in the recipient. Similarly, if one can contract, one has a "power" to impose contractual duties. The person who is subject to the "power" has a "liability."

In the context of ordinary American common law, to say that a laborer had the power to delegate his physical resources to an agent, and the power contractually to obligate that agent to enforce the laborer's exclusion entitlements, would be to change only the legal position of the principal and the agent. No one else would have a "liability" subjecting him to the contract. But the Hohfeldian distinctions tend to collapse when the government's enforcement activity is treated as just

power to transfer their resources for that purpose, and no power to create rights and **duties** of enforcement in each other by contract. Otherwise they may create fear, and thus harm their neighbors.

In short, it could be argued that one needs a theory of government in order to have a theory of how morally-based privileges can relate to governmentally-enforced rights. Such an objection would be well taken. Locke himself presents nothing so crude as the delegation notion; instead, he sets out an entire theory of government,[151] explaining how men who seek "the preservation of their Property" "willingly give up every one his single power of punishing to be exercised... by such Rules as the Community, or those authorised by them to that purpose, shall agree on."[152] We could potentially address Locke's theory of government, the role which consent plays in

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another subject for contract. For note this: if the delegation is made to the government, then not only is the government now obligated to act to effect the owner's desires to exclude, but the person who wants to enter and use the delegator's property also has a new legal position. He now has a "duty" to refrain from entering and using-- for a Hohfeldian duty indicates what is punishable by the government.

151. Exploring Locke's theory of government is clearly beyond the scope of this Article. For good introductions to the subject, see (cites).

152. LOCKE. Ch. IX, par. 127. Note that Locke seems to assume that in civil society, all violations of property rights will be enforced. See id. at 126.

it, and its relation to modern political theory. Any such task would drown our primary concern, however.

But we are not paralyzed by our inability to perform the entire task. Locke is being used here not in a vacuum, but as a guide within a system where most of the fundamental decisions have already (if temporarily) been made. We have a government and sets of legal rights, with the centralization of strength and resources which that entails. In that context, if we accept Locke's conclusion that exclusion can be not wrongful once the proviso is satisfied, then taking the additional step of allowing exclusion to be effected by a central entity is not outrageous,[153] and will lead us to enough interesting insights that the insecurity of the transition should perhaps be left for another day.

There is another reason for continuing despite the lack of a full development of Locke's political theory here. If one assumes, as many Readers will, that the American government is legitimate, and that a wide variety of laws might be adopted by that government without exceeding its legitimate authority[154],

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153. To identify a morally permissible or desirable step, and then to recommend that the government take that step by enacting it into law, is a common form of argument today.

154. Cite (Pitkin?)

then something narrower than a theory of legitimacy may be needed to guide us in our search for "rules" of intellectual property law. And in fact, one would be hard put to find a commentator suggesting that any of the doctrines, which are the matters of current controversy in intellectual property law, could be legitimately resolved by a legitimate government only in one particular way. Similarly, if we asked whether the costs which a given law would impose on an individual would be less than or greater than the benefits which the individual derives from the system of laws, we would probably find that most intellectual property doctrines would be beneficial under such a calculus- as would their opposites be. But those general questions into legitimacy and benefit do not define our concern. Instead, we will be asking if any particular rule of law, as applied in any particular situation, itself fulfills the proviso-- and, when it does not, we will re-tailor the law to do so. Such a process of individualized inquiry is not without precedent,[155] and the delegation notion sketched above attempts to make vivid the possibility of making such individualized inquiries even where the action of a centralized entity is involved. Thus, the delegation approach, while incomplete, has some heuristic force to assist us in developing

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155. See, e.g., Becker's interpretation of Lockean desert theory in PROPERTY LAW at ___.

property rights, in the Hohfeldian sense, and has the additional virtue of reminding us of the difficulties involved whenever one would require a government to act. Those attendant difficulties may prove a useful caution to those who would push the courts to move quickly in assisting creators to exclude the public.

Summary of discussion of Lockean rights and privileges

In sum, then, if one satisfies Locke's version of the proviso, then one hurts no one by excluding them. If one is able to exclude, one is privileged to do so. If one wishes to delegate one's privilege to certain members of the community or to a government, along with the means (money, physical and human resources) of enforcing that privilege, we will assume arguendo that such delegation is also not wrongful, and that such delegation in turn will create a duty in those to whom the delegation is made. By such means, a "right" of exclusion can be born. If one redefines satisfaction of the proviso so that it requires not only that the common be unaffected, but also that the costs of enforcement do not dent the pockets of the nonconsenting, then satisfying the proviso protects strangers from being harmed either by a privilege, or by a right, to exclude. Satisfying the proviso thus would generate generate "property" with a right to exclude, in addition to the

privileges of consumption and harmless use. Thus it would seem that once labor is added and the proviso[156] is met, the owner then may charge any covetous stranger for entry, and property such as we know it has emerged.

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156. Reference to the proviso henceforth will include the broadening redefinition just made.

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0.3.3.4 Rights and privileges in intellectual products

It is necessary to examine how the entitlements which make up tangible property rights, previously outlined, might apply in the case of intellectual products. Products such as songs and ideas cannot be consumed in the usual sense, for they are inexhaustible,[147] and they have no physical bodies from which exclusion is possible.[148]

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146. Reference to the proviso henceforth will include the broadening redefinition just made.

147. Note it is the intangible good which is nonexhaustible (e.g., a song). Any of that good's tangible manifestations (e.g., a tape recording or plastic disk) can of course be worn out.

148. The condition of "nonexhaustibility," and the problems of enforcing property rights which arise from the absence of a finite physical store of goods which one can guard, present particular legal and economic issues. The set of problems raised are usually studied under the rubric, "public goods".

Although a right to physical exclusion is a concept which is hard to apply to intangible goods, there is a similar concept which lies near the center of most concepts of intellectual property: a right to forbid use. The proprietor of a copyright, for example, has a right to forbid copying and other uses of his work.[149] He earns royalties precisely because others' ability to use his work depends on his giving permission.[150] As for patents, "The heart of [the patentee's] legal monopoly is the right to invoke the State's power to

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See the discussion of public goods, infra at ___.

149. See, e.g., 17 U.S.C.A. section 106 (1978):

> [T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
>
> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work...

150. Copyists' need for permission can arise because of a right against copying, or because of a privilege against nondisclosure (see above at note and accompanying text). Copyists also can sometimes reap other sorts of advantages from having a creator's permission. For example, neither copyright nor a privilege of nondisclosure poses significant barriers to copying an out-of-copyright novel which is fully available to the public in old editions. Nevertheless, the novel might still earn the author some royalties if a new publisher wants to advertise truthfully that a particular edition is "authorized." (Under current law, sellers have a duty to avoid using misleading advertisements. See, e.g., Lanham act section 43(a).)

prevent others from utilizing his discovery without his consent."[151]

As with tangible property, the owner of intellectual property in the United States does not always have an unlimited right to veto others' uses of his creation.[152] In fact, his

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151. SCM Corp. v. Xerox Corporation, ___ F.2d ___, 209 USPQ 889 at 899 (2nd Cir. 1981) quoting from Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. at 135, 161 USPQ at 591, which in turn cited Crown Die & Tool Co. V. Nye Tool & Machine Works, 261 U.S. 24 (1923); Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U.S. 405 (1908).

152. See, e.g., 17 U.S.C. sections 107 et seq; Seltzer.

Among other things, the number of "liability rule" qualifications on the exclusive rights of copyright owners is quite high, largely as a result of legislative compromises between creators seeking rights over new technological uses, and users seeking freedom to employ the newly developed technologies on creative works. Thus, for example, as the result of a legislative compromise following the invention of phonograph records, any singing group today who is willing to pay a statutorily-set licensing fee can record a song once its composers have put out a record containing it, regardless of whether the composers would prefer to limit the recordings to performers of their own choice.

See, e.g., 17 U.S.C.A. 115 (compulsory license for phonorecords). This first compulsory license has an unusual history, in that one company, Apollo Music, might have come to possess a virtual monopoly over all phonograph records were it not for the license scheme. (See Copyright Study Number ___.) Later adoptions of the compulsory license were adopted despite the absence of such exigencies. For some further examples, see 17 U.S.C.A. section 111 and House Report at ___(compulsory license for secondary transmissions by cable systems), 17 U.S.C.A. section 116 and House Report at ___ (compulsory license for jukeboxes); also consider the discussion of compulsory licenses in the Second Supplementary Report of the Register of Copyrights at ___ (typography).

right of control is much less than that exercised by the owner of tangible property.[153] As with tangible products, however, the paradigmatic case of the "property" concept is where the owner can use his property without asking permission, and anyone else who wants to use the property must obtain the owner's permission to do so.[154]

The vagueness of the "use" concept admittedly creates difficulties, both for intangible and tangible property.[155] At

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One concern with extending the legislative compromise of the compulsory license to the judicial arena, is the fear that it will eventually erode the entire copyright system. See the discussion of slippery slope and erosion problems at ___, infra.

153. The nature of the right of control will vary with the type of intellectual property. Thus, a patent proprietor can enjoin any duplication of his invention, while a copyright proprietor can only enjoin duplications of his work which actually copied from his work. For another example: trademark proprietors can enjoin defendants from using their marks only when consumer confusion is present, while copyright proprietors can enjoin copying of their work even if the copyist accurately credits the source of what has been borrowed.

154. The latter is evidenced, inter alia, by the way plaintiffs who seek damages, or seek to enjoin uses of their creations, will try to argue that their creations are "property" as if the label were a justification for their prevailing against persons who have used their property without permission. See Callman (cite); see Cohen, supra note .

155. The law of tangible property, which at least has physical entry and physical manipulation to use as rule-of-thumb boundaries for the owner's right of control, still seems swayed by judges' desires to give producers of benefit some reward for benefits conferred. See certain restitution cases (e.g. - cites).

its broadest, a "use" is made whenever a benefit is taken advantage of.[156] The problem of defining use here is a mirror-image of the line-drawing difficulty encountered in defining proximate cause in tort law, when courts need to decide which of a myriad of causes-in-fact should constitute legal (proximate) cause. (For causation, of course, the question is how far the generation of negative effects should be traced for the purpose of making the generator pay for damage done; here the question is how far the generation of positive effects should be traced for the purpose of paying the generator for value produced. And as with tort law, the question of "what is the cause of what"[157] will be resolved not by physics but by policy.) As we will see, applying the proviso to particular situations will give a narrower and more definite shape to the notion of "use."[158] For now, what needs to be noted is the general shift in emphasis, from the control over physical exclusion which lies at the center of the tangible property notion, to control over modes of use.

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156. (Re "taken advantage of": I may want to discuss issues of consciousness and intentionality here, both as to theories of responsibility and as to theories of incentive.)

157. CALABRESI, THE COST OF ACCIDENTS (1977) at 133-134.

158. The issue of how the "use" criterion might be constrained in intellectual property law is discussed at some length below. See ___, infra.

Turning to the set of entitlements arising from Locke's theory,[159] inquiries into whether someone has used material in the common to create something of value, and whether "enough, and as good" is left, both inquiries remain as applicable to evaluating whether there should be a "right to forbid use" as to whether there should be a "right to exclude". The property privilege of harmless use does not pose particular analytic complexities re intangible products, and appears as applicable to intellectual as to tangible goods. As for the privilege of consumption, it does not seem particularly relevant to intellectual products, since intellectual products can be reused an infinite number of times without being consumed. One note of possible interest, however: if once the proviso is satisfied, a property owner can "consume" his property, then a creator might also have a similar privilege of destroying what he has created, free of state interference.[160]

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159. See ___, supra.

160. The issue of whether a creator has a privilege to destroy his own creations-- slash his paintings, burn his drafts, direct his executor to destroy all manuscripts -- arises occasionally. (Incidentally, I do not mean to raise here the issue of inheritance; it may well be that, as many commentators have suggested, Locke's system generates rights of exclusion but no powers of transfer. (Nozick). The "executor" example was chosen simply because it is probably the most commonly arising instance of author-desired destruction.) The above analysis may indicate that the creators are so privileged. On the other hand, Locke suggests that persons have no privilege to destroy living creatures (Ch. II, par. 6), and he may

It might be argued that Locke's argument from necessity (outlined above)[161] renders intangible products incapable of being property. Intellectual products like ideas and songs can be used by many people simultaneously, so there is no need[162] to exclude in order to use. However, as also noted above, the argument is not key to Locke's theory. His basic argument--that one is entitled to keep for one's self those things which one has, at no cost to anyone else, brought into the world--applies equally well to intangible and tangible products. In addition, many intellectual products will not be made without exclusion rights,[163] so that exclusion may be as important to

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believe the same applies to nonliving things.

Whatever position Locke might take on the general issue of whether destruction of non-living things is permissible, the line between "use" and "destruction" is a wavery one. Several modern artists have made art out of mutilation or destruction of physical things or prior art works. Consider the dadaist who pounded a nail into the flat surface of his iron: the iron certainly became useless for ironing shirts, but museums were enriched. Similarly, an artist may feel he is serving an important value for himself by destroying lesser examples of his work, and that he would be harmed by being forced to keep everything he produced. (Consider, in this regard, the effect an anti-destruction rule could have on writer's block.)

This matter is discussed further when the issue of "waste" is analyzed, infra at ___.

161. See note , supra.

162. See note , supra, and accompanying text.

163. (Need to discuss "free rider" problems here, and work through a no-rights purchase scenario to make the issue vivid

their enjoyment as to the enjoyment of tangible products.[164]

0.3.3.5 Exceptions: "Charity" and "Waste"

Of the three attributes of property ownership which Locke's system generates (the right to exclude and to forbid use, the privilege to use without harm, and the privilege to consume), we find that Locke posits two exceptions: "charity" and "waste."

First, Locke argues that if an owner has more than he needs for survival, and another person is starving, he who hungers may have a privilege or right to take from the owner what he needs.[165] Locke here and elsewhere exhibits a belief

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for the reader.)

164. Also note the argument from necessity is inapplicable not only to intangible goods, but also to the many sorts of tangible goods which can be shared, such as houses and other buildings. Even clothing may be shared over time, with e.g., day shifts and night shifts sharing the same wardrobe. Locke does not separate out these goods. (Cite to Liebowitz's discussion of parallels between intellectual products and durable goods.) This suggests Locke did not mean the argument from necessity as a strict line of justification, but rather as an example of a particularly clear case of justifiable exclusion.

165. In the FIRST TREATISE, Locke writes:

> But we know God hath not left one Man so to the Mercy of another, that he may starve him if he please... he has given his needy Brother a Right to the Surplusage of his Goods... so Charity gives every Man a Title to so much out of another's Plenty, as

that all persons have a right or privilege to obtain sustenance, and the entitlement to sustenance "trumps" an owners right to exclude.[166] A rough equivalent to such an entitlement does seem to operate in American law.[167] In the intellectual product field the question of sustaining life may arise in rare instances where some life-saving medical secret is the topic at hand.[168]

> will keep him from extream want, where he has no means to subsist otherwise.

Locke excerpted in V. HELD, PROPERTY PROFITS AND ECONOMIC JUSTICE at 23, par. 42 of the First Treatise (emphasis and spelling in original).

Note the several ambiguities here: whether the "needy Brother" was seen as having a **privilege** to take what he needs (which might involve a bit of chaos) or a **right** and Title to what he needs which is enforceable through the legal system (more tidy but more difficult for the needy to employ), is unclear. In any event, Locke did seem to indicate the person in need of bare sustenance had more than a mere **privilege** to <u>request</u> charity.

166. (Discuss here that the right to sustenance is not identical to what the proviso requires be kept in the common, despite Macpherson's interesting arguments to the contrary.)

167. In the American system, one has a limited **right** to obtain sustenance (and perhaps medical aid) through the legal system's welfare bureaucracy, but one seems to have a **privilege** of self-help only in situations of (1) sudden emergency where (2) official assistance is unavailable. Thus, consider the contours of the "necessity" privilege of tort law (Ploof v. Putman; Vincent v. Lake Erie); the privilege of self-defense in criminal law.

168. The <u>Paper Bag</u> (vitamin D) and <u>City of Milwaukee</u> (health) patent cases.

Second, Locke suggests that one who wastes his produce and other goods loses any claim to property in them.[169] This notion of "waste" involves the useless perishing of the property, and seems to be quite limited. There is no prohibited waste so long as nothing spoils.[170] If the products of one's labor are durable[171] or can be exchanged for durable goods[172], Locke

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169. He writes:

> Before the Appropriation of Land, he who gathered as much of the wild Fruit, killed, caught, or tamed, as many of the Beasts as he could; he that to employed his Pains about any of the spontaneous Products of Nature, as any way to alter them, from the state which Nature put them in, by placing any of his Labour on them, did thereby acquire a Property in them: But if they perished... if the Fruits rotted, or the Venison putrified, before he could spend it, he offended against the common Law of Nature, and was liable to be punished... for he had no Right, farther than his Use...
>
> The same measures governed the Possession of Land too... if either the Grass of his Inclosure rotted on the Ground, or the Fruit of his planting perished without gathering... this part of the Earth, notwithstanding his Inclosure, was still to be looked on as Waste, and might be the Possession of any other.

Locke, Ch. V, par. 37 (emphasis altered.).

170. "...he wasted not the common stock, destroyed no part of the portion of the goods that belonged to others, so long as nothing perished uselessly in his hands." Locke, Ch. V, par. 46.

171. Thus, Locke writes, "Again, if he would give his nuts for a piece of metal, pleased with its colour, or exchange his sheep for shells, or wool for a sparkling pebble or a diamond, and keep those by him all his life, he invaded not the rights

assumes there can be no waste. Locke thus seems to have only a limited notion that property owners should serve as stewards of the social good,[173] possibly because he does not award property

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of others; he might heap as much of these durable things as he pleased; the exceeding of the bound of his just Property not lying in the largeness of his Possession, but the perishing of any thing uselessly in it." LOCKE, Ch. 5, par. 46 (emphasis altered.)

Note, however, that durable goods which are left unused are "wasted" in some sense, and opportunities for use, once bypassed, are destroyed forever. Locke does not consider this aspect of the matter.

Between the notion of "you are an island, use or waste as you will" and the notion of "exert yourself as to waste nothing", lies the apparent midground of Locke's do-not-let-perish criterion: so long as the owner makes some use of the resources, however minimal, his property claim will be respected. While it may be hard to defend Locke's particular stopping point between owner-as-island and owner-as-servant, it seems desirable to choose some such point. (Discuss Schauer's sorites argument .)

172. The "Invention of Money" thus gave men the opportunity to enlarge their possessions. LOCKE, Ch. V., Par. 48.

If one did have "large" possessions, one might be subject to the claims of charity, see note __ supra. However, such claims could only be asserted by those in need of bare sustenance and, so long as the community entitled to claim charity is limited to a group of persons generally above the subsistence level, would not generally invalidate property. (Re: the choice of applicable community, this Article assumes that the class of "strangers" whose complaints can defeat property is composed of members of the same nation-state as the laborer. For a discussion critical of such asumptions, see, e.g., ROBINSON, ECONOMIC PHILOSOPHY (1962) at 126- ___.)

173. Much of what we would today characterize as utilitarian concerns with social welfare are common to Locke's views as well, because of the relation between Locke's theological views and his concerns for human welfare. "God has given us all things richly... To Enjoy." Ch. V, par. 31. (Discuss

except after the rest of mankind is protected by the proviso.

0.3.3.6 New technologies and other novel modes of using an intellectual product

The "waste" exception might seem to have little importance for intellectual products, since intellectual products are unlikely to perish if left unused. However, it does serve as a qualification on the privilege to destroy discussed

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briefly.) (Also: Reuben book.) Nevertheless, the property owner seems to satisfy all social claims for Locke by fulfilling the proviso, avoiding waste, and giving charity--beyond that, he is free to use his property inefficiently and refuse to share its benefits.

Contrast here the "law and economics" views explicated by Calabresi and Melamed, Property Rules, Liability Rules and Inalienability: One View of the Cathedral, HARV L REV , explored in the Appendix below. The model put forth by Calabresi and Melamed suggests that the law gives deference to the property owner's desires to exclude only because such deference leads to a socially useful market system and, when the market breaks down, the owner's property may be forfeited so that it can be used in a socially desirable manner.

Incidentally, though Calabresi and Melamed's seminal article stated the economic view powerfully, their article did not purport to describe economics as embracing the whole of the legal reality. Thus their subtitle, "One View of the Cathedral": a single painter may create a dozen canvases showing the different faces of a cathedral and still not capture the whole. Nevertheless, they seemed to see economics as having more normative import than did, e.g., Arthur Leff. See Leff, Economic Analysis of Law: Some Realism About Nominalism, 60 VA.L.REV. 451 (1974 (Even Leff seemed to come to respect the partial explanatory power of economics. See Leff, Law And, 87 YALE L.J. 989 (1978).

earlier.[174] More importantly the Lockean position on waste focuses one's attention on whether a property owner has any particular duties or obligations to use his property which he must fulfill in order to preserve the right to exclude others from it.[175]

Since intellectual products are nonexhaustible, more than one person can use such a product at the same time. Many of us can read the same novel (admittedly in separate physical

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174. One might argue that there should be no privilege to destroy, on the ground that destruction is different from consumption in that it involves waste, or one might argue that the privilege to destroy remains, on the ground that if the creator gains a sense of satisfaction or security from destroying his work, that is arguably different from the useless perishing and spoilage of Locke's examples. See ___, infra, on the issue of motives that "count" as a use, and motives that do not.

175. It is awkward to use the Hohfeldian concept of **duties** here since we have not specified if others can use the legal system to force the owner not to waste or misuse, and since penalty for breaching the obligation has a "cap" on it potentially dependent upon other persons' exercise of privilege. (Violation of an obligation of the sort discussed in the text would cause the owner to forfeit his right of exclusion, but he would not go to jail or be liable for damages, or lose his privilege of use. Whether he lost anything would depend on whether other people took advantage of his loss of exclusion rights.) In Hohfeldian terms, it might be preferable to view waste as a **power**- a power of disentitling onesself of property and of entitling others to new privileges of use. See HOHFELD at ___.

The words duty or obligation will be used in the colloquial rather than Hohfeldian sense when they appear in connection with an obligation to avoid misuse or waste.

embodiments) and sing the same song (admittedly with different vocal cords) without "using up" the creation. Thus, any exclusion arguably wastes an opportunity of use. Persons who wish to use owned creations (e.g., scholars who wish to make photocopies, cable companies which wish to transmit remote TV signals to their subscribers, inventors who wish to make improvements on existing patents, home viewers of TV who wish to make videorecordings, entrepreneurs who have unusual uses for mathematical formulae in mind, or just ordinary copyists who want free use)[176] commonly argue that, since the creations are nonexhaustible, it would be socially wasteful to prohibit their usage.[177] Locke's refusal to recognize any waste except that which results from spoilage can therefore be crucial to a variety of intellectual property disputes.

The creators of new products sometimes do not wish to allow any exploitation of a new technology or mode of use. When strangers seek to license a creation, to copy it or to use it to produce a new product,[178] the owner sometimes refuses

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176. Give case cites for each, and briefly explain how this issue is crucial to both fair use and mispropriation law. Cite Rahl on the latter point, along with Dow and Data Max.

177. (Supplement this discussion with material from b:artechn on disk 20.)

178. New products might include an improvement on the owner's invention strangers wish to manufacture, or an innovative form

even though there is no apparent inconsistency between what the potential licensees want to do with the property and what the owner plans to do with the property.[179] If the licensing would not have impaired the owner's own markets or his own anticipated use of the creation,[180] then the refusal to license is particularly wasteful (using the word in its colloquial sense) even if the intellectual product does not perish. If owners have an obligation to sell or use, enforceable at peril of losing their property rights, then persons seeking such licenses will not be infringers if they make use of the owner's creation after the owners both refuse to sell licenses and refuse to exploit the market

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of futures contract and into which strangers want to incorporate some reference to the owners stock average, or an arrangement which a stranger wishes to do of the owners music, or a parody which a comedian wishes to make of the owner's movie. (Case cites.)

(Also briefly discuss the issue of whether competition between the parties should be a prerequisite for "unfair competition" suits. The McClure article may be helpful here.)

179. Discuss the reputation issue here. (Holt, Dow Jones, etc. Also the cases collected re: the reputational strain in recent copyright cases.) Discuss the relation between libel and intellectual property law. (Include Bose here.)

180. (Discuss the "use" which the miser may have in maintaining his pile of shiny things, which the author may have in not allowing his work to be changed or mocked, which the stock average creator might have in not having his average associated with speculative ventures; consider RL's point about making differential value judgments, and the limitation of p/o, clear at this juncture.)

themselves.[181] If owners merely have an obligation to avoid letting resources perish, then such persons are indeed infringers.

The issue of waste also helps to illuminate the controversies surrounding the question of whether plaintiffs need prove "injury", and what counts as injury, in copyright and misappropriation law. If someone with a new technology is making possible new uses of previously created works, he will often argue that the the copyright proprietors of those works cannot claim infringement, since without the new technology that market of new uses would have been unavailable to the copyright proprietors.[182] A similar argument is made concerning the issue of whether plaintiff need be in competition with defendant if he is to succeed in bringing a misappropriation action.[183] Essentially such arguments amount to a claim that losing the potential license fees, which the user could have paid to use the works, should not constitute

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181. (Discuss author-disfavored works.)

182. (Explain and give cites. Also consider here Feinberg's admission at page 35 that violation of rights is not always accompanied by harm to interests.)

183. (Explain, with cites.)

actionable harm.[184] Locke's position on waste seems to indicate that an owner's right to exclude is not impaired even if he leaves his property largely unused; it would be inconsistent with this position to suggest that the owner need prove harm to his existing interests and markets in order to restrain users from employing what he has created. That position would seem to further indicate that even if a Lockean owner could anticipate receiving no revenues because of market failure,[185] he could enjoin the defendant's use.

A refusal to require owners to avoid all conceivable forms of waste, and merely requiring them not to let the resources perish, is defensible. "[H]e who appropriates land to himself by his labour," in a way which satisfies the proviso "does not lessen but increase[s] the common stock of mankind."[186] Therefore mankind will be hard put to justify a claim based on

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184. For works still to be created or not fully developed, such arguments are wrongheaded from an economic point of view; they overlook the desirability for incentive purposes of having the monetary value of an intellectual product reflect any increase in its value to society. (See Gordon, supra note __, discussing the "circularity" argument of the Williams and Wilkins court.

185. An argument in favor of giving free use when market failure precludes licensing, was presented in Gordon, supra note __. Whether the economic or the Lockean view should prevail in the context of the American copyright statute is further discussed at ___, infra.

186. LOCKE, Ch. V, par. 37.

how the increase so generated is, or is not, used.

Further, Locke assumes that the laborer/appropriator adds not merely some value over what was in the common, but greatly multiplies the value:

> I think it will be but a very modest Computation to say, that of the Products of the Earth useful to the life of man nine-tenths are the effects of labour: nay, if we will rightly estimate things as they come to our use, and cast up the several expenses about them, what in them is purely owing to Nature, and what to labour, we shall find, that in most of them ninety nine-one hundredths are wholly to be put on the account of labour.
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Therefore an owner could be much less than perfectly efficient in his use, and still draw from the resource as much as value as it would have generated had it been left unappropriated.[188] If all he does is look at his durable goods and glory in their plenitude, those feelings of satisfaction may be as much "value" as would have generated by those goods in the common.[189]

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187. LOCKE, chapter V., par. 40 (emphasis altered); also see par. 37.

188. Given Locke's 99-to-1 ratio, this is true even if one ignores Locke's position that satisfaction of the proviso means that the value of the common which the appropriator takes is as "nothing", see supra at ___.

189. Different feelings have different importance in the Lockean system. Envy does not "count" as making something

If the goods are being "used" as much as they would have been in the common, the appropriation itself causes no waste.[190] If the owner allows the goods to perish, however, then even the one-hundredth of their value which would have been present in the "common" may disappear from the world. For all these reasons (entitlement to keep what one has created at no cost to others; the possibility that even a lazy user of

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worse off; if it did, nothing could satisfy the proviso, for the very existence of a covetous stranger would mean he was being made worse off. (Becker). See page ___, supra.

It is less than clear what other subjective emotional values would "count" for Locke. As speculated above, see note ___ supra, envy may not "count" because it is a sinful emotion. Perhaps an owner who excluded others simply because of the "sin of pride" might, by a similar view, be wasting. An owner who exluded for reasons of aesthetic satisfaction (e.g.,his pleasure from looking at the pretty pebbles, see note , above) would not under that view, be wasting.

The analysis in this Article, too, excludes envy. (See page ___, supra). Additional such value judgments could be made. Note that in doing so, however, we would depart further from a "pure" no-harm criterion.

Note for purposes of comparison, that in applying the consumer sovereignty assumption of economics (explain), one never goes beyond an owner's refusal to sell to inquire into his motives. (Posner quote.)

190. Admittedly, once the appropriation happens and labor is applied, new products will be generated. Some of the products might not be used as efficiently as possible. In that event it is only new "benefits" which are being wasted-not the material from the common. While Locke seems to be concerned with both types of waste, it is easier to defend an obligation on the owner to preserve a common than to preserve what additional things he has produced.

property enjoys the common resources at least as much as would have been possible in nature; etc.) Locke's position here has internal coherence and some normative attraction.

Although this view is possibly coherent, evidence for an opposing interpretation of Locke exists. It is not fully clear that Locke believed property owners' rights to exclude would be unaffected so long as the property did not perish or spoil. For example, Locke writes that the owner had "no Right, farther than his use",[191] suggesting a broader principle of waste. Similarly, in his examples of what an owner can hoard up without "wasting," Locke cites diamonds, money, and pretty pebbles.[192] Diamonds and the like are almost useless when it comes to serving as the raw material for further productive labor.[193] Locke gives no example saying it is acceptable to pile up <u>useful</u> durable things like clothes and tools and leave them unused. Further, he appears to anticipate that any property which the owner doesn't use will be traded to others who will use it.[194]

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191. See Locke's position as quoted in note .

192. See note ___ supra.

193. At least in Locke's time, diamond drill bits were unknown.

194.

He that gathered a hundred bushels of acorns or

We thus have two radically opposed views of waste. Under one, the view initially discussed, the owner of intellectual property is immune from virtually any claim, other than charity, which strangers might make. Under the second view, the owner must exploit his property to the fullest, or stand to lose it.

Overall, the initial interpretation seems preferable. Locke's insistence that durable goods are incapable of being wasted seems a strongly held position (despite the odd sorts of durable goods he chose for his examples), and it has internal consistency. Most importantly, the postition has strong claims to being normatively acceptable, given that the owner has (by definition) created the product at no cost to others.[195] Also,

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> apples, had thereby a Property in them... He was only to look that he used them before they spoiled; else he took more than his share, and roob'd others. And indeed it was f oolish thing, as well as dishonest, to hoard up more than he could make use of. If he gave away a part to any body else, so that it perished not uselessly in his Possession, these he also made use of.

LOCKE, Ch. V, par. 46 (emphasis deleted)

195. (Of course, if the property owner were given his rights regardless of whether he satisfied the proviso, then the argument for more expansive duties of ownership is much stronger.

(If copyright owners in this country satisfy the proviso, then my arguments in (cite) are misplaced.See note , supra, and the discussion of fair use, below at ___.

if an owner had an obligation to use the property to its maximimum or forfeit it, he would be doing wrong (breaking the law of nature) whenever he did not use his property in a perfectly desirable fashion. Under such a view, the owner would have an obligation of use, and precious few liberties at all. This seems undesirable. While the law takes a position short of such a broad duty, any rule against inefficient usage provokes difficult slippery slope problems . Where one should stop, short of such a rule of overall duty, is a difficult matter.[196] As Frederick Schauer has warned, where there are behavioral pressures the slope will be steepest. The pressures to expand the categories of waste from those who wish to use other peoples' creations will certainly be strong and could well lead to adoption of such an extreme duty. Locke's midground position (waste is permitted as long as the property does not perish) may be a stable stopping point.[197]

To sum up the exceptions which emerge from the foregoing: except where the stranger's life would be threatened, or where the product would perish if not used, the rights to exclude and

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196. Cite to forthcoming piece. Also see note , supra.

197. If it is not a stable stopping point, it would probably be preferable from a utilitarian viewpoint to eliminate the exception for waste altogether, rather than expanding the exception.

to forbid use would seem to be complete in a Lockean system.

0.3.3.7 No unlimited privilege of use

It will be recalled that I contended the Lockean owner's privilege of use extended only to harmless uses, to be consistent with the apparent goal of the proviso to protect third parties from being harmed by property.[198] Satisfying the proviso only works to keep the appropriation harmless, and has no effect on the use to which the resources are put. Thus, although the covetous stranger has no complaint if an industrious hiker cuts one branch in a forest of branches and

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198. It might be argued that I have limited the privilege of use unduly. It could be argued that the privilege of use should be unlimited, as follows: in the state of nature one has an ability to use resources and products to injure one's neighbors; this ability is not dependent on whether one has property in the resources so used; therefore giving "property" does not make the person harmed worse off than he would have been in the state of nature; and giving property should not reduce the "natural" privilege to do harm. However, such an argument begins with a doubtful premise. In Locke's system, one was not privileged to do all that was in one's physical power; a privilege of harm was not at all "natural" for, as he wrote, "no one ought to harm another..." LOCKE, Ch. II, Par. 6. Nor is this point of view unusual; "might makes right" has never been thought a reliable ethical guide.

Additionally, there is nothing about laboring to provide one's self with resources which would seem to entitle the laborer to a privilege to inflict harm on others. Even if one produces value for others, it is easily arguable that such producer should not be privileged to inflict harm without the consent of the persons to be negatively affected.

uses it as his staff, so long as "enough, and as good" branches are left on the trees, the stranger certainly might have ground for complaint if the hiker uses the branch to hit him.

Whether one has a privilege to harm needs to be drawn from principles other than merely laboring on common resources and fulfilling the proviso. A claim to property in itself therefore neither entitles the owner to do harm, nor so disentitles him.[199] Under Locke, the owner's propensity to do harm with his appropriated resources has, I would contend, only one impact on the arguments to be considered here: if one does a harm with one's creation which can be remedied by allowing access to the created product, then exclusivity would violate the proviso.[200] Therefore, when the appropriation and use of intellectual property causes harm which access can remedy, no property rights should arise to bar that particular access.[201]

Our discussion will yield meaningful results, even if we limit our attention to the entitlements which can be generated

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199. But the existence of property can indirectly endow an owner with great power to do harm. See the discussion of "The propertied and the propertyless," in the Appendix below.

200. (Need to discuss Becker's contrary postition here.)

201. See the discussion of fair use at ___, infra and of merchandising marks and other "totems and binders of culture", at ___ infra.

under a no-harm condition. It is the right to exclude and forbid use, which in itself might not make nonowners worse off than they otherwise would have been, which enables an owner to draw revenues from those who seek to enter or use his property, and which is at issue in most intellectual property cases.

0.3.3.8 Summary of Lockean rights and privileges in intellectual products

Locke appears to assume that "property" involves three entitlements: a right to exclude and to forbid use, a privilege to consume, and a privilege to use without harming. These entitlements, limited by exceptions for "charity" and "waste", describe what will hereinafter be referred to as "full" property rights. We will now return to examining how the Lockean criteria- labor on the common and the proviso-- would impact on the "natural rights" which the creators of intellectual products might legitimately claim in the Lockean system. As we will find, applying the Lockean criteria to intellectual products generates additional limitations.[202]

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202. As an end result we may find that "natural rights of property" are remarkably similar to today's intellectual property rights, with residual differences which remain quite significant.

0.3.3.9 ...

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