chron

4-20-84

Conceptual/Linguistic Analysis -Draft

Conceptually, what I'm interested in here is the extent to which the labels "tort" and "property" have utility. So I am interested in discovering also what these categories mean, how they can be used, and the danger in their misuse.

The key conceptual problem is that for many observers, one cannot have a right to tort redress unless one has a property right which has been infringed and, conversely, one who has a tort redress must have property.

The Calabresi & Melamed article tries to avoid this problem by avoiding the categories. At issue are "entitlements". Some entitlements can be bought and sold (ordinary property), some can be sold but not bought (privacy becomes publicity upon purchase), etc. C & M break the modes of protectng entitlements into three categories: liability, property, and inalienability rules. Loosely, an entitlement is protected by a liability rule if all you can collect for its infringement is objectively-determined damages. It is protected by a property rule if you can get an injunction against its infringement, an injunction being backed by state power and capable of costing the potential infringer much more than any "damage" award, both in terms of compliance costs and in terms of penalties for noncompliance.

There is an unreal aspect to the C & M framework. Nothing is ever completely protected by a property rule, for the state cannot watch us all at all times. At most, when our entitlement to life is infringed, the state may subject the infringer to capital punishment. C & M might explain this by saying that the high penalties "encourage" resort to the property system of consensual exchanges, even if they cannot guarantee that system's dominance for all transactions.

My thesis is: when in many many instances it's useful to protect an entitlement by any sort of rule, we start talking as if it is "property." That merely may create a presumption of protection. All lawyers know that protection for property is never as complete as what (the lawyers think) laymen think it is (This notion of popular thinking is :"It's my prop so I can do with it as I will.")

Where the reason a person gets protection is rare (that is, there are FEW rather than many instances of protection), we don't call the person protected a property owner. We say he's getting protection because giving him protection serves the general interest in some way. EG, trademark "owners" can sue for confusing

uses of their marks because consumers are thereby protected.

At some point, where the reasons for protection aggregate, the balance tips. The label changes. AND THE PARTICIPANTS' PERCEPTIONS CHANGE> they FEEL an entitlement to something that is property. And sometimes the shift occurs not because of the law, but because of some other event. (perhaps because the non-property thing has exchangeable value..).1

Is there any definable set of points where this shift <u>should</u> happen? Or is there any way to describe when it <u>does</u> happen?

What seems to be at issue is that at some point the instrumentalist view of the human being becomes an individualistic one. Perhaps it's an issue of reliance: if we give you protection for instrumentalist reasons (e.g. protect-the- consumer type reasons) eventually you come to rely on that protection and then, for all the usual instrumentalist reasons we usually like protec ting social reliance (eg Michelman's "demoralization costs"), we will start to protect you even if society isn't served. EG, eventually we'll come to protect the trademark even when consumer confusion isnt threatened.

If that's so, there may be nothing terrible in a tort right transmuting itself to a property right. Harriet P made a similar pt re the "exploitation" requirement/basis for the descendablity of publicity rights: expectations and reliance.2

---

1 Contrast Holmes in INS v AP).

2 If the only reason for allowing publicity rights to descend is reliance of the authors' dependents, why not condition the length of the right on EXPECTATIONS. That is, any existing contract will be allowed to be played out but no more . This might provide an answer to the interminable "how long" arguments..
Counterargument: may be twoo easy to circumvent by putting into one's contracts forever-extensions; or too excpensiv e in admin costs for cts to distinguish "real" contract durations from "manufactured" ones. All the virtues of simplicity weigh against. To the extent the term is made shorter, however, all the virtues of free use weigh in favor.

This q of whether to condition the "property" right on the happenstance of specific contracts & reliance may itself reintroduce the central question of "when shd existence of a rt divorce itself from the instrumental reasons which gave it birth." Is the limiting the rt only to where it's functional a bad thing in some way? Phillips asked that re my fair use article: doesnt the
(Footnote continued)

But intuitively, something more than reliance seems to be at issue. Some notion of what it means to be an individual, perhaps.3

So: an additional source of things that get to be called "property" may be things which, as social life changes, come to be necessary, to the freedom of action or etc., which we think are normatively appropriate conditions for life today. E G Reich's new property.4

2(continued)
property system erode if we always "objectively" judge whether the "owner" is treating the property "right" and take away his property when we think he isnt.

3 One key to this individualism may be the freedom to do some things that aren't in society's interest... defining the scope of "property" broadly may expand the "no questions asked" sphere to which property owners are entitled.

Again, measuring the extent of a right by its SOCIETAL justifications, and cutting it off when it stops serving society, may either restrict this sphere, or make it illusory. THis is the question Phillips asked about my fair use article: whether use of the societally-functional analysis would eventually destroy copyright.

4 The NATURE of these normative sources may vary. Part of the reason for giving property may be "you can buy it and sell it and use it better than anyone else, "better" being judged in societal terms." An example of such instrumentalism justification would by the Tragedy of the Commons myth promulgated by the economists. Another part of the reason may be, "you can have it and make your own decisions w regard to it because we think that to be human one should have an entitlement to a sphere in which it is proper to regard only one's own interests, and in our society this thing belongs in the sphere if you are to be able to have the freedom necessary to be human." Another part may be, "you can have it because you and only you should have it. and you should keep it. because having this is essential to what being human in our society is. "

The nature of what one can do with the property might depend, in a general way (by which I mean to distinguish my measure -the -extent -of -the -right -by -whether -it -serves -a -specific -purpose test) , on the type of justification that created it. Thus, one can't give legally sufficient consent to be murdered because the justification for having a right to life may lie in the third justification.

(Footnote continued)

Thus there are 2 possible sources of property already: expectation/reliance sources stemming from people-as-instruments, and individualistic sources stemming from concern with people-as-ends.

But there seems to be more.

In any event: do the above suggest perhaps that Felix Cohen and the other legal realists were incorrect in fulminating against "reification," whereby a trademark protected in tort eventually becomes treated as property cuz of courts' knee-jerk "if it's protected it's property" reactions? IS there something desirable or inevitable about the shift from "tort" to "property"? Is it a new language game, which we enter once conditions change? (The conditions identified above are: many instances of tort protection, and/or, normative judgment-- by whom? courts?--that "entitlement" is necessary.)

- - - - -

Other items:

1. May want to focus on the "tipping" phenomenon. That is, if something is protected instrumentally often enough, should at some point is be protected for its own sake? In other words: at some point, SHOULD tort rights become property rights.

2. Oe thing that clearly makes a difference to "property" definitions is an "object" to focus on; the more tangible, the better. Thus, if something is fixed in a tangible medium of expression (a filmed performaance), its easier to see as property than if it isn't (compare misappropriation; right of publicity. hard to know what the "prop" right consists of.) But where does this fit in? Maybe: the more tangible, the better a contribution it can make to the "sphere" . If not tangible & fuzzy in outline, then doesn't increase sense of security which may be part of that.

Unclear if tangibility enters directly into law, or into law

4(continued)

An analogy comes to mind. If one is given a "right of publicity" because of concerns about privacy being essential to humanity, that suggests nonassignability and nondescendability. Or maybe allowing only such assignability etc as are justified independently, as by reliance, the way people could use rdinary contract law to get around substantive limits (e g waiving privacy) generating rt of publicity.) If one is given the entitlement because one is the "best" buyer and seller for instrumentalist efficiency reasons (e.g. incentives), then maybe it shouldn't be.

via its importance to lay people. (The controversy over Ackerman's version of the lay conceptions-- see Alexander.)