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Copr. W. Gordon
11/26/85 unpublished

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0.1 Introduction (pages 1 - 9)

1. Courts are giving new i/p rights for unclear reasons.

   1. Examples: stock averages, Boston Hockey, rt of publicity, The Nation

2. Unarticulated explanation: urge to reward creators

3. This article will take one, more well-developed reward theory and apply it to the doctrinal areas mentioned.

   1. Elucidations of the article's task

      1. Meaning of "natural rights": a type of argument, not a set of trumps over existing institutions

      2. Heuristic rather than programmatic goal: to illuminate

      3. Reason for the enterprise: need a systematic and coherent structure (Note: this should come earlier)

         1. Comparison with economics

         2. John Locke historically impt and complementary to eco

      4. A "second" (?) object: to introduce & survey the area

         1. The area is complex

         2. The area is unique

0.2 Locke: a very simple explanation, plus discussion of criterion

0.2.1 Locke's labor theory of property (pages 10 ff)

1. Locke's basic notion:making something useful

   1.1. A consensus minimum case

   1.2. American common law uses similar notion re unclaimed, wild things; ditto "finders".

2. Applicability of Locke's notion to i/p (page 14)

3. Limitations on Locke's property

   3.1. Common

   3.2. Proviso

      3.2.1. What the proviso is (insert from 31)

      3.2.2. Why it is important (page 15, n. 36) (This shd also contain a reference to the coming discussion of welfare criteria?)

0.2.2 Locke and Current Controversies over the social justice implications of Law & Eco

0.2.2.1 Welfare criteria

1. Explain: now a bit of recent history to place revival of the proviso in context

2. Proviso is like Pareto criteria (page 16 ff)

   2.1. "Modest"

   2.2. Avoiding interpersonal comparisons of utility

3. Paretan criteria have been rejected in favor of efficiency

   3.1. Nature of the "efficiency" criterion: flawed

      3.1.1. the goal: greater good as defined economically

      3.1.2. Failure to distinguish betw claims which shd be honored and those which shd not, either in terms of

"noli me tangere" or in terms of compensation. (page 21)

3.1.3. Economists say, "separate out the distributional issues", but this isn't likely to work. PLUS it overlooks entirely the possibility that "no touch", rather than compensation, should ever be appropriate. (pp 22-23)

4. The article will allow exploration of a limited no-harm criterion

O.2.2.2 The proviso as a no-harm criterion: Caveats (pp 24 ff)

1. The proviso has its own ethical complexities

1.1. The nature of the entitlement, which can't be outweighed by claims of social utility, is to be free to use if refraining from use wd make them worse off. To give a "trump" entitlement is a dangerous business.

1.2. Need to choose baseline: here it's the level of welfare the stranger would have in a world without the laborer's efforts.

1.3. Implications: economic arguments about the payoff of property rights wd become less relevant. (pp 25-26) (True?)

2. The Lockean proviso isn't fully equivalent to a no-harm criterion

2.1. Envy isn't included

2.2. Injuries through competition and other injuries aren't included

2.3. Only losses to the common is included

2.4. Also: There's really no way to avoid interpersonal comparisons of utility with their tendency toward error. We will need centralized administration and "objective" evaluation of harm because subjective indicators don't work: "consent" can't be relied on to show absence of harm and "no consent" can't be relied on to show there is harm.

2.5. Illustration of the "consent" arg and of the whole impact of the proviso: suit in a Lockean court.

0.2.3 Tangible and intangible property (pp 35 ff)

1. Difficult to apply Locke's theory to tangible property today

   1.1. Common

   1.2. Proviso

2. Easier for intellectual products

   2.1. Common

   2.2. Proviso

   2.3. (Maybe include here a discussion of the creative process that Fred highlighted in the red version? (Red p. 66?))

3. We have property in land, which is more questionable in Lockean terms. So a fortiori we shd have property in what the "noncontroversial" minimum case would provide.

0.3 General Applications: More intro (pp 40-41

1. The a fortiori argument can be criticized

2. Nevertheless, the poss'n cases suggest the labor theory notion isn't too foreign to our jurisprudence, and the labor theory has its own attractions

   2.1. As discussed: noncontroversial

   2.2. Hard to justify a no-property rule for i/p in a realm of property

3. To apply the labor theory, we need to:

   3.1. -define what "property" is in a general way

   3.2. -look more closely at whether i/p satisfies the common and the proviso as easily as seems

3.3. -deduce what forms more particularly property wd take in i/p systems: deduce "protectable subject matter" and what forms "rights to exclude" will take.

4. We will then look at particular doctrines and "solve" their problems

0.3.1 The nature of "property" (pages 42 ff)

1. Conceptual definition is important because "property" can mean many things and I want the reader to be clear about what I mean. And I want the reader to be careful, in reading, not to make the common error of carrying over assumptions about "property" from other contexts.

2. Hohfeld (pp 44 ff)

2.1. Definition of a right

2.2. Definition of a privilege

2.3. Illustrating "right" and "privilege": copying and entering (pg 45)

2.4. Brief discussion of policy and logical relations between rights and privileges (pg 46 and insert from 48)

2.5. Another illustration of the lack of logical relation betw having a privilege and having a right: the priv of nondisclosure. (pp 47- 49) (Maybe save this for later: do a discussion of unpublished works.)

2.5.1. How it works

2.5.2. When would it be enough, and when wd a right to exclude be necessary

0.3.2 Property rights and privileges in American law (pp 50 ff)

1. The complex we commonly know as "property" usually involves what rights and privileges.

1.1. Quoting from Ackerman: rights to exclude and privileges of use.

1.2. More controversial: RIGHTS of use.

1.2.1. Quoting from Holmes.

1.2.2. I'd argue the modern concept doesn't have this except for where there is almost complete extinguishment of use (the 'takings' cases) & when this is tied to physical restraint or destruction- not so impt for i/p.[1]

1.2.3. Our core case won't include rights of use?

1.2.4. We'll see when we get to applying Locke.

1.3. Rights and privileges aren't complete; there can be exceptions. Proportionality.

2. So our system involves rt to exclude & priv of use, and maybe some rts to use. Exceptions can be systemized. (54-55)

3. What about Locke- what system of property wd his notions support

0.3.2.1 Rights and privileges in a Lockean system

1. What Locke meant is far from clear; need to investigate what rts and privs (or powers) his theory wd support.

2. It supports:

2.1. (Unspecified) entitlement to exclude

2.2. (Unspecified) entitlement to consume

2.3. (Unspecified) entitlement of use without doing harm

3. Illustration: the argument from necessity. (p 59; also see note 131 later)

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1. But maybe it IS impt for i/p: the issue of whether competitive harm should be actionable, and the issue of whether a competitor's profits should be taken into account, is at least in part an issue of whether a creator's expected profit-making use of his creation is entitled to a right against interference.

4. The case isn't limited to cases of necessity.(Relev here??)

5. What are the nature of the entitlements?

5.1. Re consumption & harmless use, assume they are privileges. RIGHTS issues don't much arise re i/p (unlike real property: nuisance cases are classic instances of courts being concerned w whether the plaintiff owner has "rights" to use his prop free of the other neighbor's interference.)

5.2. Re exclusion, the question of whether there's a RIGHT as well as a priv of exclusion is very important. Illustration: why so key for us.

6. Examining the possibility of a "right" to exclude

6.1. What does Locke say?

6.1.1. Locke uses the term "rights" but he doesn't mean it in the Hohfeldian sense.

6.1.2. The arg from necessity doesn't justify a right (p. 63)

6.1.3. The proviso doesnt justify a right

6.1.4. Locke is concerned w "rightful" action at this stage- things one can do without running afoul of the law of nature. That is, with privileges.[2]

6.1.5. This is logical, that there would be no rights in a state of nature: rights imply governments. In addition, Locke seems to have envisaged only a limited claim over neighbors.

6.1.5.1. Only privilege of recapture. Others can, but need not, join you.

6.1.5.2. To impose duties on the community wd be to impose on their liberty (pp 65-66)

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2. (In fact, there are no duties either-- and where there are no duties, stricly speaking, there may seem to be no difference between an area of rightful (privileged) action and an area of wrongful action. However, even if a Nonpriv action isn't punished by the state- it gives neighbors JUSTIFIC for hurting you.)

6.1.6. Does this make sense? yes.

6.1.7. By itself, labor theory can't justify rights. Goverments may cause fear. use up the common, etc. (p 67, to be inserted earlier) You may be entitled to a thing- but not to force your brethren to come out fighting in defense of the thing. Laboring gives one no claim over others.[3]

7. Does that mean the labor theory CAN'T be used to generate legal rights, in the Hohfeldian sense? No: we can conceptualize a "delegation" model which captures the essence of the Lockean concerns. (Summarize here? It involves powers, duties, expansion of the proviso.)

8. Steps in the analysis.

8.1. Can anything justify rights? Locke's contractarian theory of govt (with property presented as a reason for the contract.)

8.2. There are probs w Locke's theory of course (sketch) which we won't go into.

8.3. The contractarian or other theory gives us a legit govt. Legit govt can take a variety of roles vis a vis property.

8.3.1. His model (maybe): we consent to govt in our net interest. Suggests that govt can do anything it wants- arrange property anyway it wants- so long as still in our net interest. If that's so, his contractarian model yields little in the way of specific guidance.

8.3.2. Inquiry into NET harms and benefits may what Locke had in mind, but it doesn't distinguish acceptable from nonacceptable rules

8.3.3. Maybe elaborate (Rawlsian). Or some rights--like those in nature.

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3. True? Doesn't labor give any claim to reward? Maybe, but only from those who benefit from the labor. Those paying for the enforcement may not be in the class of those who benefit.

8.3.4. We will do particularized rather than case-by-case inquiries. (page 70) As if a right to prop and an entitlement to be free of harm-causing exclusion.

8.3.5. Defense of that procedure.

8.3.5.1. Therefore, contractarian theory doesn't yield much info re property, if viewed as a net inquiry. Source of the net inquiry approach-- the J of Pol Sci articles out of Wisconsin.

8.3.5.2. Instead use rights approach- Rawlsian (what we we REALLY consent to under normatively relevant conditions?

or Locke's own property rights. The latter is an individualized inquiry.

8.3.6. maybe: without ownership it feels unfair? plus incentives?)

8.4. But even if we have a government, how could we be sure it wouldn't cause harm[4] by taking property from each person? The delegation theory- which involves expansion of the proviso-may give an answer (pages 70 ff)

8.5. Difficulties w delegation model, and solutions.

8.5.1. Problem. How to ensure that T costs are paid by those benefitted. (75-6) Solutions: maybe taxes. Stipulate.

8.5.2. Other problems. Right makes right. Reply: explain based on normative entitlement. (This explanation, at 76-77, is impt, shd be retained even if the thing it is explaining here gets junked.)

8.5.3. Other problems, too. eg Equal adminstration of the law. (Life isn't fair---- but law should be. (77) Translation: For the law to give privileges without specifying how they are to be used is a diff

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4. Need to address the issue of why, in the proviso, we're concerned only with a specific type of harm-- to the common-- while here we're concerned with something more general.

decision from giving rights, which are specific and involve state ACTION rather than inaction. We dont expect fairness in the way people use their privileges but we do in the way the govt gives rights.)[5] Solutions? Maybe, the rich paying more than their share in order to have a prop system. (79)

8.6. Stipulate: must bear costs. (p 75)

8.7. The Delegation notion helps us visualize what is meant.

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9. Summary (pp 80-81)

9.1. Satisfying common & proviso yeilds "property"

9.2. Prop includes priv to exclude

9.3. We will assume delegating the priv to exclude isn't wrongful & that a duty to act in return for pmt can be created.

9.4. Govt can be delgated the priv to exclude- and obligated to enforce.

9.5. When GOVT is privileged and obligated to exclude, there's no priv to enter. ("Rights" describe govt action)

9.6. Proviso must be redefined to cover these costs of exclusion.

9.7. There are many costs etc to govt other than the transaction costs of exclusion. We will assume decision has been made to have a govt,and that the govt is generally perceived as legit. (That needs to be handled on a basis other than labor, of course.) But once that decision is made, then way is clear.

9.8. Thus legal rights to exclude can come into being.

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5. Does this go better with the discussion of rights and privileges?

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0.3.2.2 Rights and privileges in intellectual products (82 ff)

1. Explanation of this section: seeing if the rights and privileges of property can apply to intangible things, and seeing if the Lockean preconditions of property can apply to intangible things.

2. Explanation of the physical differences bet read & tangible personal property, on the one hand, and intellectual products, on the other.

2.1. Inexhaustibility (Fred says: discuss further)

2.2. No one physical body altho there are physical embodiments

3. Legal consequences of these differences: since exclusion from any particular physical embodiment isn't the issue, a right to physical exclusion is beside the point. Instead, consider that a right to physical exclusion is ONE FORM OF a right to forbid use. So we'll turn to that more general right, which is applicable to i/p.

3.1. It's clear the right to forbid use shows up in our law. copyright, patent. (82-83)

3.2. It's a very hard question how broad the right to forbid use should go. It's the issue of how far we allow owners to charge for positive effects

3.2.1. To understand the issue, consider how it's handled in the more conventional areas of law : physical goods. For physical goods, physical boundaries give us some assistance in drawing boundary lines.[6]

3.2.2. Physical goods: far from certain law on the subject. Consider conversion & trespass to chattel. Actionable only if owner is made worse off; no need to trace benefits given. (True? need research) And compare Raven v Red Ash: restitutionary impulse isn't vanquished. Not fully resolved, cuz for phys goods

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6. Compare: greater duties in tort law to avoid phys harm than to avoid eco harm, with its explosive, domino potential.

we're not so concerned w tracing positive effects. Phys control in most instances gives the revenue needed for positive incentives.[7]

3.2.3. For phys goods, more concerned w negative than w positive effects. Harm done.

3.2.4. But for i/p goods, it's the converse concern. While there may be harm done , redressing that harm (pornography, Hitler speeches, devt of the atom bomb) is a complex q under first amendment & not a function of property law analogues.[8] And the sorts of things we're concerned with rarely cuase harm. So stipulste: priv of use so long as do no harm.

3.2.5. So relatively unconcerned w neg effects. What we are concerned with is positive effects.

3.2.6. Since physical control doesnt yield positive incentives, we're very concerned about tracing positive externalities.

3.2.7. Difficult q. To understand how difficult, consider the q of prox cause in negative externalities: how far do we trace. Same sort of issue.Policy. 86-87. But may be different sort of policy.

3.2.7.1. Can give it same sort of Calabresian treatment?

3.2.7.2. Is there a clear normative answer to how far the rt to forbid use shd extend? Maybe Locke yields one. (He does- later

.

3.2.8. Another possibility for deciding how far to trace the generation of positive externalities-- use utilitarian calculus?)

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7. Need to explain how economics has crept in here.

8. Except for competitive harm done a predecessor in the market?

3.3. Related to the q of how far to trace the positive effects of a creation, is the q of what IS the creation. No "boundaries" as w physical objects. Idea can exist as song., poem, play, movie. This is the issue of subject matter.

4. Whatever the rt to forbid use means precisely, here note change in emphasis .(87) As for subj matter, accept generality ("creation") for now.

5. Re these odd characteristics of property, Locke's preconditions can apply. In fact, we'll later find that the preconditions help us define the extent of exclusive rights to use, and subject matters.

6. But there are problems: it can be contended Locke shdn't apply here at all. (This discussion belongs elsewhere. The instant section is really mostly a discussion of technical issues of applicablity, while this issue is a substantive one of justification. But for now, continuing w present organization...) The arg from necessity doesn't apply where INexhaustible

6.1. NB if EXhaustible, which is how Fred sees it, then an arg from necessity MAY apply. Exclusivity can be impt to enjoyment of i/p. (88

.

7. And necess not always true for phys goods. (88)

8. And the arg from necc is flawed.

8.1. Note something interesting: the arg from necessity just says SOMEONE should eat- it doens't say WHO. So the arg from necessity doesn't distinguish owners from nonowners.

8.2. It's the desert claim of labor, coupled w incentive notions, which does the trick for Locke."

8.3. The basic underpinnings of the arg from necessity (reward & incentive

apply to i/p as well as phys prop."

9.).

10. Entitlements to harmless use applies ok to i/p

11. Entitlement to consume applies ok; but prob of destruction. (89)

0.3.2.3 Exceptions for Charity and Waste (90-91)

1. Intro:Now that we've seen the basic entitlement structure and applied it to i/p, we also need to look at two impt wrinkles, exceptions to the entitl structure. They turn out to be impt for i/p

2. Charity defined (90-91)

3. Wasted defined (91-92)

0.3.2.4 Applications of the exceptions

1. Charity

    1.1. Charity shows up in American law

    1.2. May help to resolve some i/p problems. (p 93, notes 195-6)

    1.3. Issue: how far to generalize. Is there an entitlement only to physical sustenance? What about emotional, intellectual? IE, do some things "belong" in the common. Like air. But of course, nothing is really ESSENTIAL to being human like air is to breathing. So any expansive view of charity here will involve tough choices about what shd be the nature of man etc. (We'll handle that below by saying that the harm proviso takes care of most of that- general ideas etc. May want to reconsider & handle under this rubric.)

2. Waste

    2.1. also an expandable concept.

    2.2. Locke, though, has limited view of waste. PUts certain q's into perspective. Is important for new technol issue

0.3.1.6 New Technologies (page 95)

1. Do property owners have an obligation to use and/or license their resources.

1.1. Issue arises often w new uses, technologies. Can an owner, used to the old ways of doing things, refuse to exploit/license the new technology.

1.2. Why might this happen?

1.2.1. Pages 97-98

1.2.2. management risk theory.

1.2.3. Also, economic. Check re patent - Adelman.

1.3. The issue of "waste" is relevant here.

1.4. Virtually any i/p exclusion involves some waste

1.4.1. Nonexhaustfibility. (96)

1.4.2. (But: incentive effects; not inexh; etc.)

1.4.3. Particularly wasteful where won't be eroding owner's market. (99)

1.5. Illustration: different results from different rules re waste. (99)

2. The q of INJURY is related to resolution of this issue. (100) If owners have a complete right of control, subject to no obligations of use, over all possible markets and forms of use, then that supports

- (1) giving them relief, such as injunction, regardless of whether there's harm to his existing interests (Rahl), and (maybe- this is harder--)

- (2) giving damages in the amount of the other guy's profits or, at least, in the amount of license fees.

3. Is the limited Lockean interpretation of "waste" defensable? (101). Here's the case for "yes":

3.1. the property owner costs mankind nothing (by stipulation)

3.2. the property owner greatly multiplies the value of what's in the common (by empirical guess)

3.3. Therefore even if you don't use it except to glory in it miser-like, you as human are getting about as much human satisfaction as it could have yielded without your claim, even if the rest of the world is nonlazy and nonmiserly. (102-103)

4. But there is evidence for an opposing view of Locke.

4.1. Locke assumed unused property wd be sold

4.2. He didn't expect useful things would lie around unused

5. Remember there are eco reasons not to force premature uses, some people say. (I think they exaggerate).

6. Also need to deal w the argument that a nonseller "values" the thing more than others do

6.1. The arg is misplaced. First, re "value". That person values what other offer him less than keeping the thing- and if he has a low marginal utility for money, then he'll keep the thing even tho max utility wd be achieved by a transfer... simply cuz what buyers offer is of low value to him.

7. Review of the two extreme positions: no obligation to use; complete obligation to use in a socially desirable manner, or efficiently.[9]

8. Reviewing the justifications of the two positions:

8.1. Locke wdnt put up w the incursion on liberty that the efficent-use-obligation would impose.

8.2. We don't like it either.(105)

8.3. And though it is akward to try to choose betw two extremes, and maybe one can conceive of a LIMITEd view of waste, slippery slope considerations may prevent us from

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9. The Epstein problem re good samaritans?

taking any other course.[10] (106)

0.3.1.7 No unlimited privilege of use (107)

1. Fulfilling the conditions of ownership gives one only a privilege to exclude, not to cause affirmative harm.

1.1. Logic

1.2. Example: a hiker may own a branch he picks, but have no rt to do harm with it

2. Locke himself seems to say: do no harm.

2.1. Should that be taken literally?

2.1.1. Does he really mean that? No- one can harm the thief, says Locke.

2.1.2. He therefore seems to prohibit only unjusified harm.

3. Do WE want to impose do-no-harm as a condition, regardless of Locke's position one way or the other?

3.1. In modern interdependent world, "do no harm" is virtually impossible. Much of our law is concerned with choosing between harms (reciprocity & Coase; nuisance law.)

3.2. And a "do no harm" rule is normatively undesirable. Should there always be an entitlement to the status quo? No. A useful anti-harm prohibition wd require a whole theory of what is justifiable harm (taking away a thieve's hoard) and what isn't. (Pareto O versus Kaldor Hicks)

4. If we don't want to prohibit all harm, but do think it might be appropriate to prohibit some, we might therefore take an agnostic position on the matter. Is that bad? Not for now.

4.1. In any event, even if we limited ourselves to do-no-harm cases, we could discuss meaningful range of things.

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10. Illustration: in duty-to-aid cases, the legisl sometimes creates a duty to rescue but only applicable to cases where rescues are easy. Courts by and large take all-or-nothing views.

4.2. So: reserve judgment on whether owners can do harmful things with their i/p (e.g., the invention of gunpowder, the speeches of Hitler).

5. But given Locke's key concern w harm & that property owners can use the state to keep others out, there should be one effect: If one does a harm which can be remedied by allowing access, access must be given. (this perhaps needs to be stressed more) (p 108)

0.3.1.8 Summary of Lockean rts and privs in i/p (page 109)

1. Defining "full" property rights: rt to exclude, rt to forbid use, priv to consume; priv to use without harming... all limited by charity and waste.

2. Transition

2.1. Now we turn to see if these "full" property rights withstand close scrutiny.

2.2. First we will look at conditions which at first caused no problems (common & the proviso) and see that they are more troublesome than appeared.

2.3. Then we will see how I/p might look if it remained faithful to the Lockean impulse, but took these difficulties into acct.

0.3.2 The common as a limitation: the problem of predecessors (page 111)

1. Use of only common resources is important:

1.1. Locke & American law.

1.2. This follows from the definition of property. If the resources you want to use are OWNED, you should ask permission first.

2. Do i/p creations really draw only on unowned resources?

2.1. The past must be used by virtually any creator.

2.2. The past should be used, if we are to progress & communicate.

3. This seems to suggest that if we adhere to the rule about the common, no new i/p could be made or owned (because it takes from what is already there, and Locke believes there shd be no taking from property owners.)(page 116)

4. Does this mean we need to revise our notions re the first creators' prop rights, or that no property in i/p creations is possible?

4.1. It could be argued that USING others' property shd be ok so long as the others aren't deprived.

4.1.1. This doesn't work. Pages 112-113

4.1.1.1. Even if the first owner loses nothing tangible, he still may lose opportunities to use his stuff.

4.1.1.2. And he certainly is losing the oppty to sell you his stuff.

4.1.1.3. And "rt not to use" is near the core of what's at issue -- it's what gives i/p rights value. To assume we should use a "takings" measure and get out of the "commons" difficulty that way, would be inappropriate.

4.1.1.4. Also, we want to reward first creators as well as later comers (if we care about desert, that is. If all we care about is incentives, we might want to distinguish between past events with no potential for affecting the future, and things still to be done. pages 115-6.

4.2. Or it might be argued that second creators can use, subject to a duty of accounting? This too is subject to the objection that one who fulfills Lockean conditions shd be entitled to EXCLUDE- but, since some comp is given for the lack of exclusion, maybe it's not quite as bad as the prior alternative, of measuring the first creator's dominion by what causes him physical deprivation..

4.3. It might alternatively be argued that, even if the first creators' rights embrace control over second creator's uses, second creators might not be barred from creation because they could persuade the first owners to CONSENT to usage.

4.3.1. But this might not always work: T costs etc may make markets fail.

4.3.2. If markets fail, then, we may have to choose between:

4.3.2.1. limiting first creators' rights or

4.3.2.2. forbidding second creators' activities or

4.3.2.3. restructuring markets through the legal system so they don't fail.

If new creations aren't forthcoming, general paralysis might result. This is bad. So if the "commons" problem is bad enough, we may have to consider revising property rights, revising Locke, restructuring markets. Are these things necessary? We'll see.

0.3.3 The proviso as a limitation(page 117)

1. Transition

1.1. While we're investigating the problems of the "common" more deeply, we also need to investigate the problems raised by the "proviso"

1.2. Recap the prior proviso discussion: at first blush, no problem.

1.3. But there may be problems here too.

2. First difficulty: finite number of i/p creations

2.1. I/p creations are not self-defining

2.2. The more general an idea, the less that's left for others

2.2.1. This is the converse of the "commons" problem:

2.2.2. Just as later comers are hampered by first comers' claims, first comers are hampered by the requirement that they leave "as good" for later comers.

2.2.3. Both problems are sides of the same coin: Locke wants to give property when no harm is done to

others' property or to the common. But if i/p is not infinite, then sometimes giving property to creator #1 will restrict the opportunities of creator #2.

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11. Does Locke yield no result when there is a conflict between #1 and #2? A stalemate where no one can use the common and it goes to waste, and all must refrain?

There are various ways of resolving the conflict. I suspect the results will be this: On the occasions when the interests of creators #1 and #2 are in conflict, neither can have property. Either both are subject to the will of the common- in that the common "remains" jointly owned by all-- or, as individuals, they have privileges only. The matter is more complex than that, however. What are they ways the interests or entitlements of #1 and #2 can conflict?

- The following are the variables which can come into conflict: (1) effects created by giving the first creator exclusion right and (2) effects created by giving that creator a privilege of use; (3) effects on the second creator's privileges of use, and (4) effects on that second creator's own exclusion rights. Parsing these out:

  * Giving an exclusion right to Creator #1 leaves Creator #2 with not as good to use: this is probably what the proviso had in mind.

  * Giving Creator #1 an exclusion right leaves creator #2 unable to have full property with an exclusion right--but he/she is able to USE this and other resources in a way that would satisfy the proviso (this one bears thinking about: the notion being that some things are not ownable)

  * Giving a privilege of use to Creator #1 may leave creator #2 with not as good to use IF creator #1 uses that privilege in a way that so debases the creation or the common that creator #2 is left with not as good to use.

  * Giving a privilege of use to Creator #1 may leave creator #2 with no ability to make property. (How could a privilege in Creator #1 which didn't destroy the resource, prevent creator #2 from making property? That

2.3. There's little "as good" as the idea of art

3. The more general the i/p creation, the more likely is rediscovery by others. So without creator #1, later creators might still have found the thing. Worse off. (120)

4. Related problem: simultaneous invention in science. (Use this to intro the "rt to use" dimension of the problem)(121)

4.1. A patent would foreclose the precise oppties invested in. Not "as good". Violates the proviso.

4.2. Wd the problem be solved by restricting the reach of legal remedies to only those duplicative second creations which COPY?

5. Will restricting the exclusive right to COPYING eliminate the proviso problem?

5.1. At first blush, yes: copyists benefit, after all.

5.2. But perhaps limiting the exclusive rights to copying won't eliminate the danger that property in i/products will make second comers worse off.

5.2.1. Once invented or discovered, intellectual products may be impossible for others not to use.

5.2.2. Since one can't know in advance what one is about to learn, copying may be unaviodable.

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depends on the way we set our 'rules' of property. If we stipulate that anyone who has a privilege of use has enough 'property' that no one else can get exclusion rights in the thing, then having a privilege is enough to bar later comers from full property. Which is a Hohfeldian tautology, and as such, just fine.

* However, if giving creator #1 a privilege to use itself violates the proviso, then does that mean #1 never gets even a privilege?

Note two possible connotations of THE COMMON: something jointly owned in the sense that all owners have a privilege of use, perhaps accompanied by a duty of accounting for profits... or something jointly owned in the sense that all owners must consent before any one of them uses the resource.

5.2.3. "Avoiding" a dangerous idea can be poison. (Cite Chev.?)

6. Even if we eliminate general i/products from eligibility from property, leaving limited i/ps which are arguably infinite in number, problems remain. (124-5)

6.1. Timing can be important.

6.2. Sometimes uniqueness itself is important. E.g., stock averages. For these things, worth is less importance than general agrrement, so monetary value of ownership may be more than owner deserves. So maybe no prop shd be given here. (Cf.,Data Max)

7. Transition: The stranger could focus in on the proviso and make various challenges.(127)

7.1. The notion of baseline is crucial to the proviso.

7.2. Locke says the baseline is what later comers' "industry could reach to" without the first appropriator having entered the scene.

7.3. The stranger might challenge this baseline.

0.3.3.1 The first challenge: doing harm versus not sharing benefits (128)

1. Stranger may argue that he's entitled to a world in which the laborer has labored.

2. In defending the Lockean baseline, various arguments will be proffered.

2.1. The stranger's argument is circular. (129)

2.2. The harm/benefit distinction will be proffered. Is this a meaningful category?

2.2.1. Two sides of same coin? (128)

2.2.2. Consider the difficulties of parsing misfeasance and nonfeasance.

2.2.3. This is another opportunity to do a reprise on how i/p is the converse of tort law.

2.2.4. But it has meaning (explain.) (130-131). The Friedman graphs.

2.3. The stranger's argument may suppose a world incapable of existing, because making strangers entitled to benefits might so erode creators' incentives that they might not create; there might be no benefits to share. (131)

2.4. Entitlement (132):

2.4.1. Individual liberty: not required to produce things for others, or to share what one does produce

2.4.2. The stranger gets a lot already. Strangers have an entitlement to the fruits of their own effort & the proviso guarantees that an earlier comer can't use property to restrict that privilege-to-act (133). And if there are claims of brotherhood- charity takes care of them.

2.4.3. No entitlement to "the fruits of another's pains." (133)[12]

3. Conclusion

3.1. Therefore, stranger should have no claim no benefits, except for subsistence charity claims.

3.2. Whether one can successfully distinguish benefits from harms (whether one can successfully imagine what "would have happened" if the producer hadn't been around) is a question of practicability to be discussed later. [13]

0.3.3.2 The second challenge: incentive effects (134)

1. Transition

1.1. Even if the strangers' claims are limited to case one type "harm", he has another claim to make:

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12. Consider putting the quote & discussion of page 133 into the start of this section, to make Locke's position on the entitlement issue very clear.

13. There are notes on this somewhere. Frances.

1.2. This other claim is that he's entitled to whatever the laborer "would have made anyway." Which involves an inquiry into what wd have been produced even if the laborer had no prop rts to look forward to.[14]

2. What is the nature of this claim?

2.1. How does it differ from our earlier assumptions? (135+)

2.1.1. The stranger argues he IS entitled to some benefit from another's pains-- those pains which would have been undertaken anyway.

2.1.2. The stranger focuses in on the lacuna between "liberty to produce" and "right to keep one's production"-- he points out it's quite different to order someone to produce (slavery), than it is to refuse to use state power to immunize the products someone makes from strangers' desires to share.

2.2. What does incentive effect mean? (136)

2.2.1. Some things won't be produced without the expectation of an exclusion right.

2.2.2. What are the dynamics? Dialogue example (136+) highlights these characteristics:

Product which is copyable
once used in the marketplace

VS. product which can be kept s
after it's sold and used.

Among copyable products:

Buyers and users who can't
be restrained by contracts

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14. For the laborer to have the motivation to make anything, I think he probably needs to have at minimum a privilege to use. That's consistent with my notion (contra Epstein) that the common allows privileged use. What the stranger's claim here consists of, is a claim to what wd have been produced without EXCLUSION RIGHTS.

(because users get free access without contracts (free riders), or because hard to verify non- compliance, or because buyers fear being excluded from something they'd have discovered themselves)

VS.

Buyers and users who can be restrained by contracts (significant lea time advantage for contrac parties, no noncompliance problems, no definition problems)

Monetary motives predominating VS nonmonetary motives

2.3. Results: some products will be made anyway (which? page 139-140: nonmonetary; secret); some won't. Stranger claims the former. Claims the legal regime shd be merely "priv of nondisclosure" except if exclusion rt is necc to production. (139)

2.4. If that's the right measure of "what wd happen anyway" then in fact he would be harmed if there were any legal protections in excess of the above, & the proviso wd be violated (142). (Explain re proviso)

2.5. The stranger's claim here is equiv to the eco claim re copyright: an entitlement to that p and q of product that'd be produced in a world without property rights. See pages 143-144 & eg note 304 (thanks to JLachman)

Locke's claim is diff. (142) This is an incorrect interp of the baseline and the proviso.

2.1. No one has a right to anothers pains-- regardless of the laborer's motivation for working, he has title to the products of his own work

2.2. Proudhon/Mill/Becker:"they were not bound to produce it"

2.3. The reason we all have claim to the common and to the proviso's protection is that Gd gave us all the common. No special ground of distinguishing my claim from yours. The case is quite diff re products of one's own labor. Locke

distinguishes people from other aspects of the natural world. We have no a priori claim on each other's labor- except perhaps a minimal one (of charity). "The Labout of his Body, and the Work of his Hands... are properly his." (Quote is from page 132.)

3. To sum up: Locke versus today's "conventional" perspective (145).

4. How choose between baselines?

4.1. As indicated above, Locke wd reject the strangers' view of the baseline and the proviso

4.2. But even if we didn't reject it-- even if the "eco" view were retained-- there are still "harms" on which Locke and the stranger would agree on.

5. Finessed harms.

5.1. We will be giving applications: Provide help re fair use, merchandising marks, rts of publicity.(146)

5.2. How does the "finesse" work?

5.2.1. Find instances where even stranger would concede he has no entitlement: i/products called forth by incentives. If the creators claims to even THESE products have lacunae, those (pro-stranger) lacunae are likely to be generally applicable to all cases.(146)

5.2.2. Testing the notion of the "finesse": among those class of things called forth by incentives, are there any cases where prop rts wd be limited? At first it looks like not:

5.2.3. Things produced in response to incentives can only make you better off.(147-8) (This is an important notion, which shd be highlighted.)

5.2.4. However, "more" isn't always "better". A new thing can make third parties worse off if it comes complete w property right exlcusions.

5.2.4.1. One of the key issues is advance warning. If you know what you're going to learn & can control ALL aspects of how it affects you,

then presumably you won't say yes except if it's a net benefit. But doesn't work that way. (Refer to prior discussion of "can't take info out for a test run." Also:)

5.2.4.2. Interrelated world. Externalities. If OTHERS buy, you may have to.(148)

5.2.4.3. If there is only one culture, one usually must use standard tools & educ to contribute. If the tools & educ are OWNED that gives priv parties control over life of the mind. That's a worse off condition, I'd argue. (149) Also, ideas have physical effects too which need access for refutation (150) (YOUNG WERTHER)

5.2.4.4. Prohibited ideas & fear. (Quote Chev.)

5.2.5. It mt be argued that new things won't make people worse off cuz users can always buy the licenses they need. (151) And if allowing prop rts gives net benefit (so they can pay for the licenses) there's no reason to complain. (152-3). Problems w this response:

5.2.5.1. Unverifiable empirical assumptions (154)

5.2.5.2. Given monopoly prob (e.g., I NEED my language!) lic fees may be too high- never a net benefit

5.2.5.3. What one thinks, how one talks, is Too much on the LIBERTY side. Should not be capable of being owned. Shdn't have to ask permission. (Similar: shouldn't have to ask permission to eat. CHARITY & the essentials of EMOTIONAL life.)

5.2.5.4. T costs(154) and other sorts of market failures.

5.2.5.5. "The new creator, assimilating from birth onwards the creations of others, may be blocked from the tools he needs to participate in his culture."

6. Summary: for Locke the proviso is satisfied cuz other atoms' situations go unchanged. But in an interralted world, after publication, there is CHANGE in the world.[15]

0.4 In search of prescription: refining the property concept (155)_____

1. Transitions and tantalizing hints

1.1. So far the discussion has suggested Locke won't provide complete property rights in all i/p. That in itself is important, to counteract judges remarkably expansive views of what kinds of rewards are appropriate for labor expended (155-6)

1.2. But the discussion hasn't gone so far as to indicate that Locke's principles generate NO TYPE of prop. Just not "full" prop at all times. We will now investigate what limitations etc might attend property-- what the Lockean form of property might be (156)

2. How the law might respond to the proviso:

2.1. There are characteristics which, if present re a given i/product, make it likely that ownership of that product is likely to violate the proviso. Those characteristics include products which:

2.1.1. Reveal their contents without sufficient prior warning (156, & ref back)

2.1.2. Have a unique value

2.1.3. Are of a sufficiently general nature to be useful to most persons operating within, and seeking to contribute to, a given culture

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15. Want to hook in the "pulication" angle here? The Nation, etc, why it's a hard case: not yet published, but the events in it have already affected the public consciousness.

2.1.4. Which are exchangeable only with difficulty

2.2. Do we indeed make these things unownable, either through excluding them from subject matter protection, or via case by case doctrines like fair use? (May want to do a section on caselaw here).

2.3. To be ownable in a Lockean system, the i/products should have the opposite characteristics:

2.3.1. Not unique; many varieties of the type are possible

2.3.2. Announces itself in advance as a thing which is owned

2.3.3. Announces its contents & effects in advance (157-8, n 131)(Consider Rothbard's contract approach here.)

2.3.4. Limited in importance, in that it's not key to participation in a culture

2.4. So: these i/products may be protectable.

2.4.1. Example: movie

2.4.2. Explain the example (160-1)

3. How the law might respond to the restriction that only "common" resources be used (161)

3.1. We were concerned that later comers, if unable to use owned prop, might be able to create nothing. As applied to our movie ex., much the movie-maker does depends on what came before. So is even our movie nonprotectable as property? Not necessarily--

3.2. The previous discussion has just suggested that the "common" may be more populated than it appeared, cuz ownership doesn't attach to all prior creations

3.2.1. Discussion of "general ideas" as an example of things which are mankind created but are in the common (161-162)(may want to include this earlier, as part of a discussion re the ownership of general ideas.)

3.3. Also, the "common" may be more populated than we thought, cuz sometimes owners don't claim everything they could. E.g., coprt owners often sell when they could retain more control if they leased. (162 and note 337)

3.4. Therefore, the movie might take only from the common, and be ownable.

0.4.1 Subject Matter: in general (163)

1. The above has generated a pattern which looks very much like the subject matter distinctions in copyright in US law (163-4; this should all be tied w the prior material & come earlier)

2. THe two sets are not identical

3. But the similarity suggests Locke may provide some thematic clarity for us

0.4.2 Exclusive rights: in general (164)

1. What forms of legal right (what shd count as infringement) for this sort of i/product?

2. Preliminary options:

2.1. Patent-like prohibitions: "Do not be identical?": already rejected.

2.2. Exclusive use prohibition; you can be identical if it happens by accident, but "Do not use"

0.4.3 Exploring a broad exclusive rt: the rt to capture benefits and to prohibit all unathorized enrichment.(165)

1. We said earlier that one of the core notions in i/p is a right to forbid use. "Use" is a flexible notion. Analogy: Like "entry" in trespass cases: does the tortfeasor who causes an explosion 'enter' his neighbor's land when the shock waves rock the neighbor from his sleep?[16]

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16. It's even more tricky than with physical entry. Viewed broadly, one "uses" anothers efforts whenever one draws benefit from those efforts. In an interdependent world like this one, we

2. What types of exclusive rts might there be[17]

2.1. Exclusive rt to all benefits (discussed here, 165+)

2.2. Do not copy (narrow)[18]

2.3. A variety of other specific prohibitions (do not perform etc)

2.4. Also, a different sort approach is possible, linked not to specific physical modes of use (copying, performing etc) but to scienter & circumstances: An intentionality rule linked to certian kinds of benefit-taking (n 346 on page 165)

3. Let's limit ourselves to polar cases here. Start with the broadest. A right to capture all benefits.

3.1. Why start ther? Since the creator brought it into the world, he shd be entitled to the benefits. Locke seems to say as much

3.2. What would it mean? Anyone who wants to draw benefit wd have to purchase permission (165-6)

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ordinarily aren't required to pay for ALL good things. we draw from others.

When are we required to pay? I'd suggest : (1) when t costs are low, when we're deliberate about it and could pay, etc. All the factors that Calabresi focused on in discussing circs when takings might & might not be req'd to be compensated. And (2) when our getting a benefit hurts the other guy. THen we're particularly likely to have to pay.

17. At some point- probably earlier than here, - I need to explain the general concept of exclusive right.

18. When discussing "do not copy" rules, remember to use a vivid illustration to show how narrow it is. A good example would probably be the old rule re visibly readable copies... and how, when non-visible copies, like phonogr records, came along which did the same function, the old definiton was obsolete. Another example might be the growth of control over derivative works; the gradual inclusion of rights over public performance; etc.

4. Although a "benefits awarded" test is attractive, it won't do. It fails the proviso test, even as to limited tpes of i/products.

4.1. Even in a case as simple as the movie example, how cd the owner set up conditions of entry that prohibit "giving away" ben? And if the customers can;'t be reqd to refrain from spreading benefit, how is the owner to reach all the third parties?

4.2. "Do not share benefit" is such a genra; mptopm tjat [ersnm agreeing to it is unlikley to be fully informed as to consequences. (Contract law) (167) LIkely to be worse off: violate the proviso

4.3. Even if contract could obvioate the proviso problem (168) the effects on third parties is intractibele. Get the ben AND OBLIG TO PAY without bargaining for it; may be worse off. (169)[19]

Giving creator control over all benefits conferred therefore seems inadvisable from the point of view of the proviso.

0.4.4 The exclusive right to copy (169)

1. The question is: are ther any rts which can be placed in the exclusive control of the creator without putting non-=bargained-for burdens on third parties?

2. Rights which are limited and definite may qualify- rights which control only DELIBERATE actions w some foreknowledge

2.1. e.g. if the law gave the creator an exclusive rt against copying his work, conditioned on some sort of demarkation and notice. (169)(demarcation & notice are discussed elsewhere.)

2.2. Copying is such a thing: something which is a valuable option (169-70) & which won't work to users' disadvantage

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19. It's not clear what I'm doing with this.

0.5 Interrelation betw subject matter and exclusive rights (170)_____

1. Before exploring "exclusive rts" further, address: why adopt a division betw sub matter & exclusive rts.

2. Cd be argued there shd be no division (171)

2.1. Growth in one can be compensated by shrinkage in the other. (E.g., worried that broad s.m will cause proviso problems? Give only very narrow exclusive rights over the broad s.m.)

2.2. So why be inflexibile when don't need to.

Resopnse

2.1. There iss some play in the two concepts (explain)(maybe use here the material on 172-3)

2.2. Placing the fluid into separate categroes is nevertheless desireable:

2.2.1. Administrability (171-2)

2.2.1.1. Consider the difficulty of suing a broad rule

2.2.1.2. Such a rule isn't a self-regulating market; wd require central admin

2.3. Also: subj matter & excl right are divisions which are used in contemporary law.

2.4. Any interactive system requires SOME form of statement

2.5. Flexibiility can ber reintoduced. THis is one of the functions of f/u.

0.5.1 Intent : an example of flexibility(175)

1. Fair Use makes some things privileged free uses, which otherwise wd have been infringements. But flexibility also works in the opposite directions. Bad intent can make some actions infringements which wd otherwise be just fine & danady. (175-6) (this is impt; go earlier?)

2. Should we make infringement, those delib uses where the sole motivation is to take advantage of the creator's efforts?[20]

3. Define that person (177-178)

4. RE the intentional stoaway, most of the reasons for limited subjemt matter drop away. (176-7)

> 4.1. His position isnt made worse off so he need to use this thing to stay even (if his position WERE so affected, we couldn't call him a "pure" bad actor.)
>
> 4.2. THe stowaway by definition is acting intentionally: he can choose to refraim from involvement if it would be harmful to him. He cvan take or not take, as he wishes.

Similarly, most of the reasons for limited exclusive rts drop away. Why not apply a broad definition of "use"?(177)

5. state an anti-stowaway rule: delib taking of benefit, motivated solely by desire to take free ride. (177-8)

6. Why is this impt? May explian giving crators limited ownerhsip riths, assertable only against stowaways, in ideas, themes and other generally-unprotectable products of the mind. Essentially: the reasons we leave these things unownable is for reasons that don't apply to the stowaway.

7. Now looking at the stowaway material in more detail.

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20. Remember, the stowaway might be someone already in the field who finds the newcomer taking away his business; so the stowaway feels he has to adapt to survive. Should this count? Much will depend on how I resolve the issue of competitive injury.

0.5.1.1 Products produced in response to property-right incentives (178)

1. If the product the stowaway uses came about only in reponse to property-right incentives, then it's paritcularly clear an ownership rt should operate against him (179)

2. Eliminate subj matter and excl rights restrictions

3. Locke: the stranger only has a rt to complain about losing the commons, not about losing another's pains (180): one purpose of the proviso for Locke was to distinguish stowaways from other sorts of strangers.

4. If a stowaway: then proviso satisfied.

5. All this may help to explain otherwise-mysterious references to intentionality in various cases (181 and n. 379)

6. That interests may be protected against some kinds of deprivations and not others, is no novelty. E.g., INS: "quasi-property"

7. There may be non-Lockean reasons for opposing this

7.1. First Amendment may say NO ONE can enforce ownership claims in ideas and facts, regardless of who's using them

7.2. Maybe ideas are a type of thing for which even quasi-ownership is not a fitting reward.

7.3. (183)

0.5.1.2 Products which wd have come into being regardless of property rights incentives. (184)

1. Since it's hard to distinguish i/products which need leal rts to bring them forth from those which do not, & since Locke's so concerned w avoiding harm, then maybe the legal rules shdn't embrace that distinction-- and anything which wd have to depend on incentive args to have "property" status shouldn't have it.(184)

2. Even if this is so, shd it make a diff re stowaways?

2.1. The Lockean position is defensible (much of my arg re baseline appears here, at 185-6)

2.2. What has covetous stranger done to deserve a priv of acess?

2.3. But COvetous stranger was one of the owners of the common which the creator used.

Possible midrange positions: his claim to use the product is weaker than that of the creator; make him cede to the creator whernever there is a conflict between uses(this may be impt: compt betw uses, etc.) (187, n 392)

3. The midrange positions don't answer the tough questions (where a free rider isn't hurting the orig owner) but it answers a lot of them.

4. Where there are no conflicts in use, why not allow free use?

4.1. When one can have one's cake and eat it, too, the arguments for leaving it in the cupboard begin to lose their appeal (189-90)(all this discussion should be incorporated into the WASTE section earlier.)

5. Another interest in the stowaay's favor: the people he's serving may have proviso protection. (190)

5.1. Counter arg: if he's selling to them, he can pay for what he uses

5.2. Rebuttal to the counter: the more he pays, the more he has to charge.

6. The anti-stowaway rule is consistent w our basic approach to Locke

Appendix AAppendix A

Property/tort relations in American common law

A.1 Nature of the enterprise here

1. Satellite overview of property/tort relations in American law

A.2 Rights_____

1. Property in the Amer4ican system generally means a right to exclude

2. The rights are limited by others' privileges to use.

   2.1. The privileges have a structure: extraordinary need or market failure

   2.2. The privileges bear a relation to Locke: extraordinary need ties with CHarity, and market failure with the proviso (tho not a utilitarian result.)[21] (196-7)

3. Altho privileges are possible when the above characteristics are present, there are no determinate answers for:

   3.1. unintentional invasions (query: didn't I just say otherwise, via the market failure principle?)

   3.2. interference without physical invasion.

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21. This may need some more thought.

3.3. Formerly: privileges to inflict untinetional or noninvasive harm was governed by reasonablenedss. Today, there's a tendency toward strict liability. (197)

A.3 Privileges

1. Property owners ordly have privileges of using their own property. (Not a trivial point: 197-8)

2. This priv is present, so long as prop owners don't invade the rights of others and so long as they inflict no more than de minimis harm. There is no general priv to do harm.

3. But since some harm is ineviatble, there are specific privs to do harm based on particular circs. (see reasonableness, above)

4. Principles so far:

4.1. Owner has p/f[22] right to exclude intentional invasions of his real property and intentional harmful use[23] of his personal prop. (194)

4.2. This p/f right tends to be limited when strangers can show an extraord strong need for the propr and/or some failure of the market system which wd ordly allow them to purchase what they need (194-5)

4.3. The owner has a p/f privilege to use his property (and, an p/f general privilege to act) (198)

4.4. The priv of use (and action) tends to be limited when the use causes harm to others

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22. P/f: prima facie. Translated here, roughly, as the kinds of entitlements one has if no one with an opposing interest comes forward. Whether the entitlement survives opposition depends on the kind of opposition that is raised.

23. Note re i/p: it's personal property, but, given inexhausitbility, limiting the owners' rights of control to only HARMFUL use can be dangerous. The Brace lectures.

4.5. Some harm-causing uses are privilged and some are not (199): the privileged ones give rise to what we call damnum absque injuria; the nonprivilged ones violate others' rights and give rise to successful lawsuits

A.4 Damnum Absque Injuria

1. DAI is the area where some actors may have privs to inflict harm and some victims may have no rt to be free from the harm inflicted on them (199)

2. Nature of the structure

2.1. THe above says how things are structured, but doesn't describe substnative impace

2.2. The breadth of the priv of use depends on how the legal system defines acitonable harm. Harm isn't self-defining. Actionable harm may include

physical damage\ governed by nuisance and tort

aesthetic disutilities\ governed by zoning

benefits not conferred\ governed by no-duty-to-aid-rule and its many and growing exceptions

2.3. How the legal system defines harm is crucial. E.g., if "failure to rende effic benefit" were to replace harm, then duty wd replace priv in virtually all spheres.[24] (200)

2.4. American law goberns much of the area of indirect and unintentional harm (the area left unspecified by my five principles) by case-by-case inquiries. A sixth principle wd specifgy the existence and content of that reasonableness inquiry; effic is the leading candidate, but not monolithic.

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24. IMPORTANT. Add this to the discussion of why Locke is right that the stranger shd have no entitlement to share benefits.

A.5 The propertied and the propertyless (201)

1. Prop owners and non-owners both lack any general priv to do harm

2. There are many impt diffs betw them.

2.1. Pro-propertyless person: he has some rt to subsistence (charity)(Ploof v Putnam)

2.2. Pro-propertied: More ABLE to do harm.

2.2.1. Some of the particular circumstances which privilege the doing of harm in Amer law may be applicable only to property use

2.2.2. THose w property have more power

2.2.3. Most of the harms which the propertyless can inflict are violate of the rt to exclude. Propertied are more lieklty to take advantage fo the twilight area of damum absque injuriea: harm without phys invasion

2.2.4. While neither group has a general priv to invade others' prop, its the propertyless who are most affected by the restriction

2.2.5. So: different real-wold liberties. (202 and n 415: sleeping under bridges)

A.6 Lockean rationale

1. Despite exceptions etc., property in Amer system defines a sphere

1.1. within which strangers need a special justification to enter, and,

1.2. within which, so long as the owner harms no one else, he will be left alone by the law.

2. Locke's concern was similar: to define a sphere of independence regarding which the covetous wd have no legitimate ground of complaint

3. The five principles of Amer law roughly correspond to the Lockean structure.

4. Locke yields little guidance on the inconsisten uses which do harm but which fail to invade rts. He proffers a general "no harm" rule but that's impossible . (Coasian reciprocity; but see the Epstein challenge to the notion that harm always goes two ways.) Here other analytic tools, like eco, must be used.

A.7 Eco Rationale (204)

1. Cal & Melamed: a summary

2. Proportionality (204): centralized admin is inconsistent w our notions of property. Maybe Locke's too, cuz of liberty incursions which a centralized system wd involve.

3. A rule defining Lockean property too generally (see above re subj matter/excl rt distinction) wd therefore be inconcistent w our notion of property.

4. If we want a self-regualting system, there may be errors in it. We'll have to make "rough cuts" like the above distinction into s/matt and excl rts. An institutional limitation. One issue will be : err in the direction of preventing violations of the proviso (so, deny property when in doubt) or err in the direction of rewarding creators (so, give property when in doubt.) Locke yields little on this institutional issue.

0.1 Miscellaneous

What rules govern the common?

Epstein seems to think that in a common, no one can do anything without full consent of all owners. But, on the contrary, I think we should take this approach: that like owners of a joint or common tenancy in American law, owners of a common can use freely, without need to account to others. (Except if they make a profit.)[25]

Liberty and Property

Locke's emphasis on liberty has another interesting side. If one has a privilege of use, that looks like complete liberty. But in fact the privilege may be unusable because others who have similar privileges may act in a manner which prevents the first party from exercising the privileges. "The rich and the poor are equally free to sleep under bridges." Locke guarantees at least a living (charity) so one can use one's liberty. An exclusion right also helps guarantee you the MEANS of enjoying the property.

Or, put more schematically: The issue of "what is liberty" is a tricky one, so let's break it down into some of its more obvious parts. First, there's freedom from state power. Second, there's freedom from other (non-state) sources of force. Third, there's freedom from other individuals non-force interferences with what you want to do. Fourth, there's freedom from natural world etc interferences with what you want to do.

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25. What does Locke say about this? Does Locke's emphasis on liberty suggest that Epstein's explanation of the rules governing a "common" is wrong?

Maybe have some research done on the American common law here. Is it true that one co-owner can use common property for his or her own consumption without a duty to account? Or will any particular co-owner need to "pay" his or her co-owners for his or her own usage? or just need to "pay" the others when use of the property yields profits garnered from third parties?

Everyone in Locke's system has the second freedom: people can't use force on each other except if justified by the need to redress breach of the natural law. And everyone in Locke's system has a part of the fourth freedom: if starving, one has an entitlement to charity -- this subsistence enables you to use your remaining freedoms.

An owner of privileges also has a freedom from state power in regard to those privileges. And an owner of full property rights (e.g., including an exclusion right) also has freedom from other individuals non-force interferences, at least when those interferences consist of ENTRY onto the property.

Thus there is a direct relation between property and liberty. To have full freedom of action (in a colloquial sense), one needs both lack of restraint, and resources. The richer one is, the freer one feels (other things being equal).

Terrell suggests that the liberty interests which focus on one particular resource can be better described as property.

In common speech, the closer we get to the "resources" side of the continuum, the odder it feels calling what's at issue liberty. Similarly, in 5th amendment takings law, the closer we get to the "activity" side (e.g., a law is passed saying that you can no longer mine gravel from your gravel pit, but you can keep title to it), the odder it feels calling what's at issue "property".

The jurisprudence of 5th amendment takings law demonstrates both that we're unwilling to completely accept "activity liberties" as equivalent to "resource interests"- and that sometimes we WILL accept them as equivalent. (Citations)

Locke's linkage of property and liberty: every Man has a Property in his own Person. Ch V, par.27