

1 General Conclusion

The burden of the first part of this paper has been to suggest that tort law provides us no self-justifying notion of "wrongs" by which we can allocate rights and duties. The burden of the second part of this paper has been to suggest that contract law's notion of "consent" is similarly unable to provide justification for any particular system of rights. How would one go about constructing a theory by which to evaluate whether a given property system could be justified? A full answer to that question is surely outside the scope of this paper, but some basic points can and should be made here.

First, specification of goals. The number of goals which a property system can serve are large but finite. Property can be viewed as a noninstrumentalist reward for individual desert,²³ an instrumentalist device for increasing some vision of the net social product,²⁴ or xxx.

Second, ordering of goals. The various goals which a property system can serve are at times mutually inconsistent. The desire to give property owners independence in how they

23. As intimated earlier, see page `xpageref[kant]`, desert theories can take a multitude of forms.

24. Social product is in turn subject to definition in a multitude of ways. A Posnerian economist would speak of the "maximization of value"; a believer in aristocracy might speak of the "centralization of value"; a believer in equality might speak of equality.

manage their property, for example, will naturally war with a desire to control those owners who are exhibiting poor stewardship. Principles for choosing between those goals when they conflict would need to be developed.²⁵

Third, allocation of initial rights pursuant to the goals.

Fourth, structuring of the system's operation once it becomes ongoing. Some goals can be best achieved by central governmental monitoring, others by decentralized owners making independent decisions, others by a mix. This is a "process" decision. Today the common-law system generally consists of deference to independent property owners as quasi-sovereigns, coupled with a power of state intrusion in exigent circumstances. Whether or not such a system should be maintained, replaced with a system of no government restraints at all, or with some other alternative, would need to be decided.

Some basic principles might profitably be suggested here, as examples of a starting place. First, that when a valuable resource is created by one person without using others' resources or otherwise doing harm to others in the process of creation, that the creator of the resource should be privileged to use it in any fashion that does no harm. Second, if the value he brings into the world is great enough to cover the costs of excluding

25. But see TRAGIC CHOICES, suggesting that some choices should not be made.

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third parties, and if excluding them does them no harm, then he
should also have a right to exclude. Third, that such rights
should be limited by some principle of charity or extreme public
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need, and by an avoidance of economic waste. Fourth, in cases
where a valuable resource is created but exclusion would cause
some harm to third parties, or where modes of use would cause
harm, then those negatively affected should have a prima facie
right against harm, capable of being rebutted either by a showing
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that the affected interest was itself a harm-causing entity, ;
by a showing that allowing the harm to go unremedied would go to
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the long-term best interest of all affected , or by other
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principles which I will here have to leave unspecified.

The tentative principles set forth above are based on
certain simple normative choices: in favor of rewarding benefits
created, preventing harms, and achieving some level of economic
well being for all persons. In terms of conceptual structure,

26. For a discussion of how someone might be excluded from using
a resource and yet not be harmed, see Gordon,
27. For an extended discussion of the impact which a prohibition
against waste can have, see Gordon, *supra* [xref\[gordon\]foot1](#)
(arguing that owners who are unable to sell copyright
licenses because of market failure should in designated
circumstances be required to let the desired uses go forward,
either through compulsory licenses or fair use.)
28. See Sax, CITE; nuisance law.
29. See Michelman's classic article on Takings in the Harvard Law
Review (CITE)
30. For fuller discussion, See Gordon, Toward a Unified Theory of
Intellectual Property Law (draft manuscript)

some such choices about property rights have to be made before one has a measure by which to evaluate the moral status of any particular tort or contract action.