

Singer, THE LEGAL RIGHTS DEBATE IN ANALYTICAL JURISPRUDENCE FROM BETHAM TO HOHFELD, 1982 WISC L REV 975.

TO

The Singer article usefully lays out a history of the ^{pre-}Hohfeldian developments, focusing on the classical jurists' belief that "privileges" were ordinarily accompanied by "duties" on the part of third parties not to interfere with them. In fact, of course, ^{liberties} ~~privileges~~ often exist without duties ~~w~~(that's what distinguishes "privileges" from "rights"), and there can be ~~in~~ liberties capable of interfering with each other. That is, party X and Party Y can both have privileges to compete in the marketplace; X may be more successful, and in his success may draw all of Y's custom away from him, eventually preventing Y from exercising the privilege. Y cannot use the legal system to prevent this.

The economic realm is the area in which these sorts of privileges are most obviously to be found; it is in the economic realm that the evidence of "damnum absque injuria" began ^{most obviously see 1032} to accumulate, leading Holmes, Salmond and others to ~~xxxx~~ recognize that the legal system did sometimes allow persons to inflict harm on others. While this may seem a self-obvious proposition ^{today}, the ~~classisists~~ ^{not only} and the SIC UTERE TUO maxim seemed blind to it; Singer argues that they ~~thought~~ there were actions which affected only the actor and that these self-regarding actions should be protected by legal rights, but also thought that there was no significant ~~xx~~ category ~~xx~~ of actions which DIDNT affect only the actor (that caused harm) and which nevertheless were permitted. He says they were blind to the fact that the legal system didn't protect against all harms of X against Y, or to the possibility that all self-regarding actions weren't safe from invasion by others tending to their own business.

Re the post-classisists, who escaped the preceding errors re privileges & rts, There seems to have been an argument (Holmes representing one side, and Salmond the other,) as to whether the basic principle or ground rule of the legal system should be, all persons have privileges to act freely (including the imposition of harm on others) except where the law intervenes to set up rights and duties ~~±~~ (the Salmond position) or whether the imposition of harm is p-f actionable, unless the re is a privilege (the Holmes position).

(Holmes and Salmond were agreed in recognizing a conflict between desirable freedoms

SINGER p.2

and the harms they cause- Singer argued that the classisists blinded themselves to the ~~ut~~ conflict. The way to mediate the the conflict? case by case policy analysis; a rejection of conceptualization. *see 1016 for def.*

*Salmond
1052*

Getting back to the area of conflict betw Holmes and Salmond over a "background" question of whether Prima Facie to favor liberty or security:

1. does the question has meaning as more than a procedural matter, or is it merly something like a burden of proof, capable of making a great deal of difference in only uncertain cases? Or, given the importance of making decision in those very cases which are uncertain, is the issue important even IF merely procedural? ~~Note~~: the crits would probably argue that given the general indeterminacy of policy judgments, the nature of the background presumption"s effect would not depend on procedural niceties.
2. The question is parallel to the basic queston about background presumptions in I/P law: do we generally favor free use and liberty (the Sears/Compco position), or do we generally favor protection? Is the background assumption in the course of changing? D wd Sears/compco, addressing as it did an area where protectiona MIGHT be a good idea (namely, nonfunctional product ~~sh~~ and speaking too broadly and giving to little credence to pro-prot policies, shapes),/hasten the demise of the anti-protectionist presumption?

Ideas:

- Note that even if I decide there's "damage" in a case, it still may be approp to make it D Absque I.
- Note that I may be creating a NEW background presumption (and perhaps should say ^{intentional} so): that there shd be no presumption(of p-f tort type)against t/the causing of GSTEKEEPER type damage , even if there is one generally. Where ther aare "prop" rights, we don't deal w presumpins-- those are cases where cts have decided to allow that type of dam to count.
- Note I'm part of a trend away from conceptualism if I reject anything following from prop label (of course, my positin on conceptual anal favors it to some extent, for

singer p 3

quite functional reasons. Case by case anal may be a bit less prone to error than category error-- or prone to diff sorts of error-- but it elads to less predicabilty.) see 1017

-If I am secruie I have more liberty that I would insecure, but there is nevertheless a distinciton between liberty and security. 1023.