

BUILDING THE CATHEDRAL AS SANCTUARY: RECOGNIZING ACTION AS THE BASIS OF PROPERTY

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ON JULY 20, 2009 A 41 YEAR OLD LOBSTERMAN from the island of Matinicus was shot in the neck over a property dispute.¹ The islanders, like many Northeastern Lobstermen, have a property regime in place that is enforced by a series of acts against lobster traps that violate the rules, from simple marking of traps and intimidation of the violator to near total destruction of traps or boats.² The local fishermen had developed a system to control the waters to protect against the open access problem of overfishing but because the state law refuses to recognize the system challengers are encouraged to try to fish in waters without permission from the locals. As one marine colonel said, “We don’t let them do their cowboy thing.”³ The shooting is related to a long standing dispute about which a non-islander brought pending conspiracy charges against a number of Matinicus residents, on the theory that the group planned destruction of his invasive traps.⁴ Further complicating the story, the plaintiff in the conspiracy case alleges that the group of residents had conspired with State enforcement to enforce the property scheme, despite being recognized as unlawful.⁵ If such a violent escalation is to be avoided, what property regime should be supported, and how can this result be generalized?

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¹ Clarke Canfield, *Lobster Wars Rock Remote Maine Island*, Associated Press, Sept. 4, 2009, available at www.breitbart.com/article.php?id=D9AGKHNO0.

² *Id.*, and see generally JAMES M. ACHESON, *THE LOBSTER GANGS OF MAINE* (Univ. Press of New England 1988).

³ Canfield, *Lobster Wars*.

⁴ *Ames v. Dep't of Marine Res. Comm'r*, 256 F.R.D. 22 at 23 (2009) (granting four of five motions for a more definitive statement of allegation of involvement in any conspiracy).

⁵ *Id.* at 23.

I. Introduction

The sole value of law is justice, and thus property law should only admit those property regimes that minimize coercion among the parties with conflicting claims. The goal of minimizing coercion is the real aim of actors seeking justice, as the ideal for justice is a state of zero coercion amongst actors (in property law as well as law generally) though this ideal may not always be entirely realizable. Because determinations of coercion are subjective (i.e. one reasonable observer may disagree with another over what actions are coercive and which actions may be more or less coercive than others), property law and its enforcement must be voluntarily supported else itself be coercive and unjust. Property law then should be limited to reducing coercive action in property conflicts, with costs of enforcement absorbed by the actors involved in the conflict and those voluntarily supporting such enforcement measures.

By developing a theory of property based on purposeful action, a simple construction of the qualities of property emerge and coercive action is quickly shown to be the equivalent of making a property claim in the will of another. This equivalency gives the observable measure by which conflicting property claims can be judged by any actor seeking to provide justice, whether party to the conflict or an exterior observer. Before analysis of the consequences of such a framework, historical notions of property are explored in terms of the action theory of property to delineate how and why they agree or disagree. Most accepted bases of property do indeed relate to the interaction of some actor and the physical world, and the differences in the conclusions of these theories from the action theory of property are few, but they can be clearly explained as the introduction of some form of coercion in the historical theory.

Some important historical theories remain valid as tools of calculation for individual property owners, or courts sitting in equity to balance the competing values each party wishes to preserve in the property. Other property theories may need to be supplanted for being necessarily faulty in its base assumptions, though even these may be saved by a reformulation that takes account of action, coercion, or subjective valuations.

With these comparisons in mind, the normative foundation for accepting the action theory of property begins to take shape. Because the theory gives a workable explanation of property in any context and allows fixed definitions of concepts such as value of property and justice which aide in analysis of property conflicts, it should be favored over decision making tools that look to only calculations of narrowly defined costs or make unfounded assumptions about the behavior of individuals or groups of

actors. While balancing the ideal of no coercive action in the world with the realistic environment of action, the measure of net-coercion in a conflict gives information on how to act in response to property claims of other actors. Presuming that the minimization of this measure is the goal of law as provider of justice, property law is then only consistent if its enforcement adds no net coercion to conflicts. This consistency is explored to highlight the generalization that the action theory of property binds property law to voluntary enforcement, at least for actors external to any given conflict.

Accepting this action theory of property also dictates a number of corollaries about property law, property claims, and the enforcement of just property regimes. These corollaries will be supported with both the analytical framework of action as well as empirical observations of successful and lasting property regimes that minimize the use of coercion, and contentious property regimes that rely on an observable amount of unnecessary coercion. With these practical applications identified, some property regimes will be suggested to promote solutions to current or potential problems, and a final argument will be made that minimally coercive property regimes are not only theoretically demanded by notions of justice but are also the most evolutionarily fit solutions, burdening those who support property regimes that are unsustainable and benefiting those who support regimes that are focused on long-term stability.

II. The Praxeology of Property

“To every action there is always opposed an equal reaction.”⁶

Property is the object (either ends or means) of meaningful action, and as such is determined by the subjective values of each actor. Viewed in this light any non-definitional discussion about property relates to resolving conflicting claims of actors. But before any conflict can be analyzed, the nature of claims and property must be understood.

By the broad definition of property as an object to some verb it might appear that any notion of property is completely arbitrary, and can take any form. However, there are still some basic qualities that anything properly called property must possess. First, an object must be purposefully changed by an actor and the property claim is strictly contained in, but not identical to, this change.⁷ This prevents property from being completely imaginary

⁶ ISSAC NEWTON, PRINCIPIA 12 (STEPHEN HAWKING ED., DANIEL ADEE TRANS., Running Press 2002) (1687), *available at* books.google.com/books?id=mLAG5EUZqQC&pg=PA12.

⁷ This object need not be tangible or fixed. A property claim in a diversion or damming of a stream of water can exist without action being taken changing the initial

conceptions or undiscovered remote lands or any *ad coelum* realty claims; any actor's property must be a proper consequence of her own actions, including trade for access to another's property.⁸ This quality also limits property to that which an actor understands of the consequences of his action. For example, an actor who first routinely picked fruit from an apple tree may claim a property in the fruit from the tree, and grant access to others to that fruit as any other property. But if this actor was ignorant of the fact that seeds he discarded could grow more trees and some discarded seeds did indeed start to grow, he then could have no property claim in the new orchard until he somehow purposefully acted upon it.

Second, property must be viewed to the claimant as satisfying some future desire, or interest. An expected consequence to action is not property in itself, as one would not normally claim that footprints left in the woods are the property of the hiker. Of course if the hiker intends to track her own path later, to find her way either back out or back in on a later trip, the footprints become valued, and could be considered property. This second quality of property invites questions about the difficulties of externalities, where there is an effect of some actor's behavior on another actor. These externalities must be presented to their cause, and only after the actor is aware of such effects of their own action will these be considered their property.⁹ After knowing that action leads to secondary consequences an actor can begin to value what course of action to take to control those consequences, creating property.¹⁰

The most recent examples suggest the third necessary quality of property, namely that the physical change to the world giving rise to the

source of the water. This is accomplished by creating a single physical change that itself regularly and perpetually changes the dynamic system, creating a claim in the continued flow for as long as the regular use is expected to continue. See *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 23–24 (1885) (recognizing the right of first establishers of mills to enjoin others from later changing the flow so that established use requirements could not continue). Further, the change in the object may be as insignificant as having been observed.

⁸ See, e.g., David Bear, Comment, *Establishing a Moral Duty to Obey the Law Through a Jurisprudence of Law and Economics*, 34 Fla. St. U.L. Rev. 491, 540 n. 206 (2007) (noting the strict interpretation of "homesteading" implicit in Walter Block's eminent domain objection. Article, *Walter Block & Richard Epstein Debate on Eminent Domain*, 1 NYU J.L. & Liberty 1144 (2005)).

⁹ This is not to excuse harm to one actor caused by another, only to exclude unforeseeable results from being considered property. Liability should be found for consequences unforeseen when the judge of such liability finds the consequence to have been reasonably foreseeable, such as the case for negligent or reckless action.

¹⁰ The classic example of bargaining to continue to pollute illustrates a case of property in what was once just an unintended consequence, the pollutant.

future value must allow the actor some element of control to the actor making a property claim. Explicitly, property must be viewed as controllable at least to the extent that the intended future value is preserved. The power to control greatly limits what can be considered property, but gives the link between technological power and varying property claims.¹¹ Usually manifesting as the near absolute right to exclude, the quality of controlling the future value of property may be as little as governing public use property to protect owner's intended benefit and limit costs.¹²

For property to have any meaning it necessarily possesses each of these three qualities, to exclude any one is to negate the premise of purposeful action. These qualities are also sufficient to define property: the result of action taken with purpose to reach some future goal is to create some definite object for which the actor will need to expend costs to control in order to reach that future goal. That definite object is property. If there is a question as to whether something is property, the investigator must ask first if an actor purposefully changed it, then if that actor has an expectation of future value from that object, and finally if the actor has the means to control it to ensure the future value. Note that there is no explicit limitation on the scarcity of anything required for it to be considered as property; the only realistic boundaries to property are implied by being limited in power to affect physical change, limited to finite magnitudes by time and the conditions of the actor.¹³ So is a tree property? Only if an actor has somehow already made physical alterations to the tree, is expecting some value from the tree, and is able to control the tree to ensure that value (i.e. by fencing it in from others, by pruning lower branches to dissuade foragers from taking fruit, by spraying for insects, by being able to collect fruit or firewood before it rots, etc.). Some trees then are property while others of the same type are not. What about a pencil? Being a manmade object, the first quality is necessarily satisfied. However there is not necessarily any actor that expects future value from the pencil. After it has been produced it may have been intentionally discarded so that no future value is expected, or lost or placed out of reach so that control has been lost even if the actor still desires the value from the

¹¹ For example, the technology of domestication allowed the recognition of property in livestock, the technology of orbital rocket science allowed the recognition of property in satellite orbits, and the technology of recombinant genomics allowed the recognition of property in gene sequences.

¹² Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. Legal Stud. S453 (2002) (analyzing where on the spectrum of exclusion and governance certain property regimes do and should lie when the costs of the controls are accounted).

¹³ HANS-HERMANN HOPPE, A THEORY OF SOCIALISM AND CAPITALISM 19 (Kluwer Academic Publishers 1989), available at www.scribd.com/doc/14554305.

object. So some manmade objects are property but only if there is some actor relative to which the other two qualities are present. To ask whether any particular thing is property is an incomplete question without identifying whether an actor satisfies these conditions relative to it.

Finally, before the conception of property becomes too cut and dried, one issue of the qualities of property must be addressed before conflicts between property claims are discussed. The problem is that the causal link between an actor and a property claim and the causal link of control over the outcome are subjective observations, along with the valuation of the desired outcome itself. For instance, deciding how much effect a new idea has had on the world is central to the debate on the extensiveness and form of IP law, independent of any conflicting claims over the portended property.¹⁴ Subjective observations of the causal link of control to maintain future value also lead to contentions over whether to acknowledge property, notably in the areas of land and resource management where regulators view the power of an actor to be insufficient or inadequate to control the resources claimed as his property. A more lighthearted example of property defined by subjective beliefs about causation is the existence of manufactured “lucky rabbits’ feet”—because the holder expects the future benefit of good luck for merely maintaining possession, he was willing to trade some cost to acquire the object, and some cost in keeping it for the benefit of this “luck” effect.

Adding more actors to the hypothetical system illuminates the need for property as being the ability to maintain a claim in the face of possible conflict with another actor. When two or more actors have conflicting property claims (i.e. when each actor knows that realizing his intended value necessarily conflicts with some other actors’ goals) a strategic game is the real result, and looking to Game Theory may give some valuable insight if the assumptions of any model appropriately describe real behavior. The typical delineation in most studies of this nature is over whether one actor *cooperates* with the others to maximize a collective return or *defects* to try to earn a higher personal subjective return while counting on the others to mostly cooperate.¹⁵ Instead of making a distinction based on an assumption of observable value of different outcomes to particular actors, the guiding distinction in the action theory of property is whether the action chosen by an actor in making a property claim is coercive. Coercive action is that which does not allow another actor to choose his course of action freely but forces

¹⁴ Namely the questions of independent developers of ideas being bound by the whim of a prior developer and distinguishing influenced material from derivative material.

¹⁵ See e.g. Carol M. Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 Duke L.J. 1, 4 (1991).

the actor to consent to the first actor's will.¹⁶ Because the assumption of known and comparable values between actors is hardly ever realistic, an observer can rarely conclude that a decision by any actor to cooperate or defect was the correct or incorrect choice to reach the actor's most valued end.¹⁷ While this prisoner's dilemma analysis does allow the behavioral scientist to make predictions about some real behaviors, the real value of the framework is to isolate equilibrium solutions in clearly defined situations.¹⁸ These solutions give the set(s) of combined course of actions of each actor in a system that assumes known and interpersonally comparable valuations of outcomes in which each actor is better off acting according to this course than to defect from it.¹⁹ It thus a valuable tool when used by an actor within a system to decide his course of action when he can not otherwise be sure of the course of action of others.²⁰

Like most other aspects of purposeful action, whether a property regime was the result of coercion or mutual agreement is a subjective determination. Some actions manifest voluntary agreements very clearly, but none are absolutely objectively coercion-free.²¹ Whether any substantial coercion was used and whether the consent of an actor was sufficiently voluntary are questions that do not admit objective solutions, ultimately it is only the parties to a property regime who know if they intended to force an outcome or agreed under duress. Of course this leads to situations where a party may sign contracts considered by many to be unconscionable, but who

¹⁶ FRANZ OPPENHEIMER, *THE STATE: ITS HISTORY AND DEVELOPMENT VIEWED SOCIOLOGICALLY* 24–25 (John M Gitterman trans., B.W. Huebsch 1922) (1914) (Distinguishing the choice as “political” or “economic” means, if forced or free, respectively) *available at* oll.libertyfund.org/title/1662.

¹⁷ Indeed, the values of an actor at any particular time may only be gleaned from observing action. LUDWIG VON MISES, *HUMAN ACTION* 17–21 (Ludwig Von Mises Inst. Scholars ed. 1998) (1949) *available at* mises.org/books/splitfiles/humanactionscholarsplit1.pdf.

¹⁸ See Herbert Hovenkamp, *Rationality in Law & Economics*, 60 *Geo. Wash. L. Rev.* 293, 312–13 (1992) (showing that real legal and market transactions hardly ever can be represented by non-cooperative games of this type, but the equilibria are nonetheless valuable in predicting some results when assumptions are reasonably met).

¹⁹ *Id.* at 312

²⁰ *Id.* at 313 (reasoning that these non-cooperative game structures are more appropriate when the number of actors is large or when cooperative behavior cannot be enforced).

²¹ For example, by hanging a shingle visible to passers indicating in a common language that one acts as a doctor, restaurateur, printer, web developer, or blacksmith, the actor is manifesting an agreement to bargain for the provision of his services to all who may see the sign. The actor may have been coerced into hanging such a sign, however, or he may have a different subjective purpose for hanging a sign than inviting all comers.

is to judge the fairness of such a contract but the parties themselves?²² The actor coerced into a course of action must object by appealing to the use of defensive coercion to illustrate that his consent is not voluntary; purely tacit consent to coercive action is equivalent to voluntary agreement to an observer.²³ The threat of this appeal may allow a weaker actor to induce a stronger one to remain in a voluntary bargaining position, alleviating any worry that an actor's superior mightness should make him proverbially right.²⁴

To illustrate the subjectivity of using coercion in gaining a solution, let us assume that the only property claim at issue between two parties is exclusion from a spatial location. This can be represented formally by assuming that actor A has a claim defined by some border that he wishes not be crossed by anyone. Actor B, meanwhile, has established a claim to property on either side of this border, and wishes to violate A's rule of exclusion (at least once) to gain the future value from the property on the opposite side of A's border.²⁵ By not allowing B to realize the value of his property A may be said to have coerced B, but to maintain his claim, B must coerce A to not realize the value of his property. Assuming each actor is stubborn, and neither will relinquish their claim nor has the power to coerce the other (A makes it impossible for B to cross the border or B incessantly attempts to cross the border), only an addition of a third actor could, through its own subjective determinations, add enough power to either actor's efforts to resolve the situation. This fact encourages each actor to impress additional parties to add support to their efforts, based on whether they view the balance of the strength of A's claim against the amount of coercion needed to ultimately repel B, or B's claim against the amount of coercion needed to earn A's consent to cross as needed as the course of action necessary to earn the most valued outcome to the party.

²² Part IV, *infra*, answers this question

²³ This is not to suggest that observers will be less likely to consider the result unjust, as a third party may understand that the tacit consent itself has been coerced.

²⁴ The appeal may take the form of argument, self-defense, or soliciting the help of a third party to more effectively argue or provide defense on your behalf.

²⁵ This situation can be applied to issues from the theoretical "hostile encirclement", to what response should be taken to unapproved immigration. See Frank Van Dun, *Freedom and Property: Where they Conflict*, in PROPERTY, FREEDOM & SOCIETY, ESSAYS IN HONOR OF HANS-HERMANN HOPPE 223 (Jörg Guido Hülsmann & Stephan Kinsella, eds., 2009) available at mises.org/books/property_freedom_society_kinsella.pdf (coining the quoted term), and Stephan Kinsella, "The Blockean Provisio," *Mises Economics Blog*, blog.mises.org/archives/007127.asp (Sept. 11, 2007) (discussing variations of and possible solutions to such property conflicts).

The question of what property regime should result in any dispute is only answered by parties interested in the resulting claim. Any actor that A or B cannot convince will not be adding any power to force a result, so the costs of enforcing the regime will entirely rest on the parties with a property interest in the regime.²⁶ This does not insulate the side winning the conflict to use indiscriminate levels of coercion in establishing and maintaining their regime, as this coercion is as susceptible to subjective judgment as was the coercion originally in the system, and is subject to an identical analysis. Thus, in systems where one or more person is compelled to use force, the subjective measurement an observer makes is of the *net coercion* (i.e. that amount of coercion above what the observer would consider to be needed).²⁷

However, it is generally observable if one party's course of action may have been different but for the actions taken by another. Examining the qualities of coercive action taken to secure a property claim, it is easily seen that such action is equivalent to a property claim in another actor's will.²⁸ The coercive action first, by definition, makes some change in the subverted actor's will by altering the chosen course of action. The future value that the coercive party seeks to receive from the coerced party is the continued obedience to the property regime, and the control exerted to realize this value is any continued coercion used to secure the obedience. In a simple example, if two actors are engaged in a conflict over a single indivisible piece of property, and one actor binds the other forcefully to a fixed spot so that he may alone enjoy the property, he has made a property claim in the will (and indeed body) of the bound actor. Because the future state of an actor's will is neither easily, nor entirely controllable by another, the costs to those enforcing the coercion are typically large, and the probability of failure to realize the intended goals is high. Thus when a property regime relies on coercive means of enforcement, there is typically a high degree of accountability and surveillance to try to counterbalance those costs and risks, with disproportionate punishment of dissenters.

Tragic examples of a property regime obviously enforced by coercion are those of coercive prohibitions on goods and services. The actor seeking to prohibit others from making property claims over an object, or from

²⁶ The property interest arises by virtue of their physical support of one of the original actors, ability to add effectiveness to the attempt at control, and value placed on seeing the original actor win the conflict.

²⁷ This is evident in the wide support of the right to self defense to repel coercion.

²⁸ This leaves open the question as to whether one actor has a property claim in their own will, as the individual has not obviously created change in its own will. However each actor would have a property claim in its own physical body as being altered by the actor, controlled by the actor, and returning an expected future value.

taking some action to catalyze the voluntarily exchange of an object is necessarily making a property claim in the actor's will, as there is no conflicting claim made to the ownership of the underlying object. It follows further that some actors in such a coercive system can be counted on to break the prohibitions, and will act in a way contrary to the prohibition. In a voluntary system, excommunication until some mutually agreed upon damages are paid might be the result of such un-agreed to conduct.²⁹ The result expected in a coercive property system is more coercion: imprisonment and punitive damages that the enforcers base on the manifested values of the party responsible for the net-coercion. Further, the use of coercion to enforce a regime subjectively excuses the use of coercion to some of those who flout a regime, creating a correlation between those banned behaviors that are otherwise non-violent and explicitly violent action.³⁰

A less obvious case of a property claim in people is the enforcement of marriage restrictions. These coercive regulations prohibit social recognition of some actors freely forming a mutual agreement about the structure of property ownership amongst themselves, historically and presently forbidding such formalizations of interclass, interracial, inter-religion, same-sex, and polygamous relationships. The unique problems that arise in such prohibitions may be easy to formally deny because of the marginality of the people seeking such relationships in the eyes of lawmakers. While some actors will consent to the coercive prohibitions and avoid such relationships that they otherwise would have sought to establish, many actors will nevertheless consider themselves functionally married. In these functional marriages, there are often property conflicts either between actors as family or on dissolution of the marriage. In either case, the resolution of the conflict may be drastically altered by the formal status of the actors in the eyes of the state.³¹

For the lawyer the most relevant coercive property claim is the intervention in a property conflict of others to force a certain result. This is the position of positive (property) law. On the theory that there can be only

²⁹ See, e.g. MURRAY ROTHBARD, FOR A NEW LIBERTY 275–90 (1973) (outlining, among other things, the possibility of non-state justice agencies) *available at* mises.org/books/newliberty.pdf.

³⁰ This reaction is evident in the organized crime that surrounded the alcohol trade during prohibition that was both enriched by embracing the black market and forced any disputes over the underlying property out of civilized courts and into the justice system supported by such organized crime, namely retributive violence.

³¹ The mere existence of a difference between behaviors of actors in community and separate property states illustrates this point, but allowing the extension of these and other benefits typically reserved for state recognized spouses to broader relationships would have even more dramatic effects on the claims to and use of property.

a single arbiter of law in a given territory, the state as lawmaker seeks to make a single rule to apply to all situations between the actors under its jurisdiction. Absent voluntarily agreeing to provide equitable arbitration by the parties to a property conflict, altering the outcome of it is a necessarily coercive action on the actors themselves as property, in that the intervener acted to influence, control, and gain value from certain actions of others without their consent. This type of property claim on others is certainly considered the preferable course of action by those enforcing it, but what of the subjective considerations of those being prohibited from resolving their property conflict according to their own values or of other observers who disagree either the general or specific application of force to reach these ends? The departure from the course of action that would have been taken according to voluntary agreements is impossible to measure in even the simplest hypothetical situation.³² This realization of the potential imposition and costs of a system of laws enforced by coercion introduces the language of justice, which is the subjective determination that any net coercion used in a property conflict was necessary as meeting some valued goal, and will be further developed in section IV below.

III. Orthodoxy and the Action Theory

As theoreticians have formulated property rules and hypothesized various strategies and qualities that commonly or typically have arisen to solve property conflicts, different aspects of property have taken the fore. In making a formulation of property that is unambiguously linked to purposeful action, many of these prior formulations are revealed as being a theory of some particular quality of property and are absorbable into this framework with few or otherwise superficial changes.

Locke formulated a labor theory of value and hit on one aspect of property, but was more concerned with deriving a theory of pricing and exchange and conflated subjective value with imparted value.³³ Merely adding labor to the world does not create property, though it is a necessary condition of such. Nor does labor give value to an object, but instead labor is invested on the expectation that the result will be subjectively valued higher (by the actor herself, either in direct consumption, capital investment, or trade value) than the subjective labor costs.³⁴ The homesteading principle

³² See Frederic Bastiat, *That Which Is Seen, and that Which Is not Seen* (1850), bastiat.org/en/twisatwins.html.

³³ JOHN LOCKE, SECOND TREATISE ON GOVERNMENT § 27 (1690) available at history.hanover.edu/courses/excerpts/111locke1.html.

³⁴ CARL MENGER, PRINCIPLES OF ECONOMICS 114–15 (James Dingwall & Bert F. Hoselitz trans., Inst. for Humane Stud. 1976) (1871).

derived from the labor theory does manage to conform to the action theory of property, as it envelopes the concepts of future value and maintaining control in addition to merely altering the world, as any property claimed in homesteading must have been done so to benefit the actor with some subjective value.

Bentham attempted to expand the notions of property by allowing the state free reign in defining rights and the validity of claims, arguing that the legislature has the authority to define what is property, how property may be used, and who may decide the outcome of particular conflicts.³⁵ This notion does not conflict with the action theory of property in general, although this is the first mention of a state as lawgiver that has arisen in the discussion of the action theory of property, and needs clarification. Certainly any single actor or group of voluntarily associated actors are free to define subjectively what actions constitute creating, controlling, and benefitting from property, and must themselves absorb the costs of enacting this definition, either to defend their own property or to change the property claims of other actors to conform. According to the action theory of property there is yet no problem in this formulation, as there has been no coercion used to enforce a property regime. The problem with this arbitrary-state property definition is not that it can vary as the opinions of the lawmakers (in fact this may be a positive aspect when we are concerned with finding the most sustainable or beneficial regime), but that the legislature of a state is neither a voluntary association nor a cost closed system. This means that in any given territory all people subject to the state are sharing the costs of enforcement of a property regime regardless of their support for it or if they are external to any given conflict. If either of these are the case, then a coercion has been added to any given system, and must be rejected on its face as being more than minimally coercive.

In a categorization of the social nature of property Hohfeld proposed a matching and opposing set of “jural relations” between parties with respect to property.³⁶ These relations are also not inconsistent with the action theory of property, and even help to analyze the solutions of particular conflicts between actors. Unfortunately Hohfeld’s system does not help us resolve property conflicts (except perhaps by suggesting typical solutions), when an actor claims that it has no duty to another, or has rights superior to the other. The action theory offers at least a standard by which potential conflicts can be resolved in attempting to minimize or eliminate coercion amongst the conflicting actors. After this conflict has been resolved the

³⁵ JEREMY BENTHAM, A THEORY OF LEGISLATION 145 (1804).

³⁶ Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L.J. 710 (1917).

actors may be compared to each other according to Hohfeldian relations to describe the liabilities, rights, no-rights, etc, that each actor in a generally settled regime may have, but while conflict is present different points of view will claim that there are varied relations amongst the actors. The action theory of property is more concerned with the dynamic decision making processes between conflicting actors than merely categorizing the known solution typology.

More recent property theories are more focused on the conflicts about property than just classifying or defining parts of property regimes, identifying and contrasting certain costs in various stages of property disputes. For instance, the costs of controlling a property claim have been analyzed in a societal setting by Rose, arguing that possession is a means of communicating to the world a property claim and that proper recognition of a property claim is based on whether an act has sufficiently communicated this claim to an observer.³⁷ This analysis dovetails nicely with the action theory of property but suggests that there is a singular objective rule that must be enforced globally by suggesting that those who disagree or cannot understand the communicative symbols chosen by the law to be “out of luck”.³⁸ In this framework then there is no way to decide which communicative standards will win in a property conflict. Some relevant world might agree with either side of such a conflict, and each may believe the communicative standards used by their side are superior. Henry E. Smith acknowledges some of these limitations while also pointing out that communicating your property claims to others also involves varied costs depending on how specific the communication is, and to how many people it is being broadcast.³⁹ Both then use this cost factor as the determinative factor in how the singular law should create or enforce property claims to facilitate the most efficient solution to general disputes.⁴⁰

The action theory of property benefits from these analytical insights, but limits them as merely tools for actors within a system to be used to decide whether to make or defend any particular property claim based on whether they are able to absorb the costs of the necessary communication relative to the audience which may present conflicting claims. This explains why open possession is typically enough to communicate a superior property claim, as it communicates in a nonverbal manner that the actor who possesses will be able to win a physical battle for future control because the

³⁷ Carol M. Rose, *Possession as the Origin of Property*, 52 U. Chi. L. Rev. 73, 76 (1985).

³⁸ *Id.* at 83.

³⁹ Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 Stan. L. Rev. 1105, 1108 (2002).

⁴⁰ *Id.* at 1112.

challenger must wrest it from his possession. This calculation is particular to each and every actor, both the communicator and any observer, and thus a property regime that can be agreed upon by some actors may be unintelligible to others. For this reason communication costs are very important for an actor to determine if he will be able to realize the future value from the property, and if that value is subjectively worth more than the costs required. To claim that a single rule of which types, forms, and breadth of communications is most effective in reducing these costs overlooks the subjective nature of the costs and benefits of property and the communication itself, while actively coercing those who wish to make a property claim communicate more than they might otherwise.

While the communicative analyses are focused on the initial acquisition of property balanced against the possible intrusion of other actors, Merrill's right of exclusivity analysis focuses on the costs of actually controlling the property to realize the intended value against any intrusion from another actor and argues that the ability to exclude is the primary factor in determining property rights.⁴¹ The aspect of exclusion with respect to property is shown to be primal and ubiquitous, but ultimately there is recognition that some property claims are valid despite the reality that exclusion is not present. These exceptions to the general rule are explained by Henry E. Smith by introducing an alternative to exclusivity in the ability to govern what other actors may do with the non-excludable property.⁴² This well developed analysis by Smith directly supports the action theory of property in recognizing that exclusion is often the most efficient way to guarantee value to an actor, but sometimes the end value is still realizable if the costs of exclusion are too great to justify and some other means of control of the property exists whose enforcement costs are worth the effort.

In the theory of law and economics as promoted by Richard Posner and others, the notion of efficiency is promoted as the primary factor on which property rules should be decided.⁴³ Examples about where the monetary costs and benefits of contrasting property solutions differ abound, however the conclusion that is drawn that a state must enforce this solution overlooks nonmonetary value that actors may have and any costs involved in enforcing this solution by external actors. For example, in the commonly used situation of a property dispute over the use of trains that may throw

⁴¹ Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev 730 (1998).

⁴² Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights* 31 J. Legal Stud. S453 (June 2002).

⁴³ RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1998), *reprinted in* PERSPECTIVES ON PROPERTY LAW at 54 (Robert C. Ellickson, Carol M. Rose, and Bruce A. Ackerman eds., 3rd ed. 2002)

sparks onto adjacent property and the adjacent property owners, Posner suggests that the law should only care about creating incentives for using resources efficiently, so that transaction costs do not prohibit such a theoretical solution from coming about.⁴⁴ While this goal is admirable, the assumptions that must be made to effectuate any such plan are too numerous to overcome, particularly to claim that the subjective values of each actor can be known *a priori* or that allocating the costs of entitling some actors with superior property claims to the state will not result in the same detrimental errors as actors enforcing their own claims. The action theory of property values such an efficiency analysis of differing solutions to conflicts over property only as far as individual actors may wish to support one claimant or another to help maximize their own perception of efficiency.

A less formal theory of law and property has been developed by libertarian theorists taking as a fundamental axiom the principal of nonaggression, from which the inviolability of private property rights can be extrapolated.⁴⁵ This formulation represents a lofty and laudable ideal, but overlooks the aspect of subjectivity in the definition of property and the corresponding definition of aggression. The action theory of property is closely aligned with this liberty-preserving formulation because the definition of aggression is the initiation of force, which is most necessarily a creation of net-coercion. In fact, some libertarian theorists have wrestled with the difference between coercion and aggression, but a measure of net-coercion was not forthcoming.⁴⁶ The benefit of adopting the action theory of property, and its measure of net coercion is that the libertarian theory may remain intact, while admitting solutions to such problems outlined above where the aggressor is not clearly defined, or when the action taken may be indeterminate in its forcefulness. Without taking a practical approach of trying to minimizing coercion, the libertarian theorist remains an idealist with a theory that is simply inapplicable to a non ideal world.

All of the above notions of law and property have critics, yet they have all found fervent supporters and broad applicability in theory and practice. The action theory of property helps to illustrate those aspects of each that are merits and those that are flaws, notably where coercive action is taken or advised to an extent greater than the existing coercion to resolve conflicts or enforce property regimes.

⁴⁴ *Id.* at 57

⁴⁵ Hans-Hermann Hoppe, *The Ethics and Economics of Private Property* 2–6 (2004) available at mises.org/etexts/hoppe5.pdf.

⁴⁶ See, e.g., Stephan Kinsella, “The Problem With ‘Coercion’” (2009), www.stephankinsella.com/2009/08/07/the-problem-with-coercion/.

IV. Jurisprudence and Justice: Implications for Property Law

When an actor observes net coercion in a conflict, he may make the judgment to intervene to defend the integrity of the coerced party, but this itself a coercive act.⁴⁷ Similarly, if an actor observes net coercion in the imposition by another actor into a conflict, this next generation observer can only take coercive action to correct the observed injustice. Thus any judgment applied by a party with or without an interest in the property in conflict is itself subject to judgment by all observers, including those parties already with an interest in the conflict. Because this vicious cycle of judgment could lead to exorbitant costs for an ever growing number of parties, any judgment should be tempered to a maximum effect of negating the observed net coercion. While other observers may not agree with the result of one actor's determination of justice, any actor purporting to intervene for any reason aside from decreasing net coercion is not seeking justice at all, but some other value.

The policy of the "Full Faith and Credit" clause of the United States Constitution reflects the worry about exorbitant costs of sequential judgment, mandating that judicial proceedings be mutually respected between States.⁴⁸ While it is doubtful that the Framers made the argument that the costs of allowing multiple judgments in a given property conflict were not worth reducing the risk of perception of erroneous results, it was certainly argued that the most local courts were the best judges of which results the actors in a conflict would consider to be just.⁴⁹

Judgments of acceptable levels of unrequited net coercion are necessarily based on subjective values, and thus enforcement costs of a property regime should lie with those who voluntarily agree with the judgment to intervene. The coercion of nonparties to help bear the costs of intervention not only should be abhorred as a property claim in the coerced actors, but also as an inhibition on the judgment of the coercive actor as to whether intervention is necessary.⁵⁰ This implies that the solution to any

⁴⁷ Note that by limiting the exercise of justice by to responding to the observed actions of others, an actor can only justly be interfered with when an act of coercion is imminent or has actually occurred.

⁴⁸ U.S. CONST. art. 4 § 1.

⁴⁹ See The Federalist No. 42 (James Madison) *available at* www.constitution.org/fed/federa42.htm (noting that the U.S. Constitution's version of the clause is "a very convenient instrument of justice" and could be "particularly beneficial on the borders of contiguous States, where the effects liable to justice may be suddenly and secretly translated").

⁵⁰ When an actor can expect to externalize costs he is more likely to engage in riskier actions. See Eric D. Beal, *Posner and Moral Hazard*, 7 Conn. Ins. L.J. 81, 89 (2000)

property conflict is generally best solved by the actors with an interest in the property, as long as the parties maintain an ideal of using only just coercion, and the best external arbitrator will be the one which is most intimate with the details of a conflict and the actors involved.⁵¹ If an actor still judges intervention to be necessary after the implementation of this solution, using coercion on any actor aside from those benefitting from the net coercion would be unjust as creating net coercion where there was none before. Because an actor promoting justice in a property conflict must be prepared to be judged itself as a creation of net coercion, the justice seeker sees a benefit in being sure the result is correct in the eyes of potential observers. This incentive is lost if coercion on those who may not support the action is adopted as a means to absorb the costs of the action, perpetuating and amplifying injustice.

As a corollary to the result that an actor that values justice should not coerce support for its results, multiple determinations of justice in any property conflict should not impose a net coercion on each other. If agency A observes net coercion in a situation, and B does not, B is limited by consideration of justice in its actions to defending the amount coercion used by A, which A has limited to its observation of the level of net coercion. Thus justice agency B can take no coercive action against A until A's coercion can be observed.⁵² This allows for competing notions of justice to be applied by actors in different conflicts, and for actors with similar subjective interpretations of coercion to formalize specific rules of justice as amongst themselves according to their common values.

A second corollary to this internalization of the costs of judgment to those claiming a benefit from the enforcement of a property rule is the explicit result that the costs of secondary effects of action itself should be forced onto the actors causing such effects. This can be seen by analyzing a situation where some secondary effects cause some cost on an otherwise external group of actors. As far as the affected party see the effects as a burden and acts accordingly rather than a boon there is bound to be some observer who subjectively recognizes this as net coercion and seeks justice for the coerced party. And because this justice is best served by assigning all costs of a property regime to the interested parties in a way that reduces net coercion, the initial external effects should be assigned back to their source. This result follows in any system where the externalities are subjectively

⁵¹ See *Pierson v. Post*, 3 Cai. 175, 180 (N.Y. Sup. Ct. 1805) (J. Livingston, dissenting) (concluding that sportsmen arbitrators “would have had no difficulty in coming to a prompt and correct conclusion” due to their proximity to the issue).

⁵² This notion is present in the judicial standing requirement of actual or imminent harm.

viewed as a cost and not a benefit, and as controllable by the specific actors in a system, either individually or collectively, and therefore is a rather broad result about the management of property regimes with very few assumptions.

This second corollary agrees with other results in analyzing property regimes, both theoretical and practical. The economic tools of collective efficiency quickly give this result from a different point of view, arguing that the cause of external costs are generally in the best position to prevent those costs from occurring, and should then do so to preserve aggregate efficiency. In practice most legal systems treat pollution and nuisance largely as liabilities to their source, usually only tempering this rule when the value in the harmful action to others beyond the actor mitigates the coercive element of their actions by creating corresponding benefits.⁵³

In the current development of intellectual property law there are many subjective determinations being made, including, *inter alia*, whether any legal protection spurs creation,⁵⁴ how much protection to give to best spur creation,⁵⁵ for how long to extend the protection given, and what factors determine what deserves protection.⁵⁶ But what is rarely questioned is if the resultant system is coercive toward any party, or if that coercion is justifiable. According to the principles above, a number of rules could exist side by side for creators and consumers to choose between, enriching those systems that better meet the values of the actors with an interest in the property.⁵⁷ Further, by restricting the costs of enforcement of the different rule sets to the enforcers and supporters of those rules, those that do not satisfy the values which they claim to represent will lose supporters to agencies better providing satisfaction, and those agencies using coercive means of enforcing their judgments will have added costs of judgments against it.

⁵³ This is simply the factor of “social benefit” that is taken into account when passing judgment on such action with a recognition that these benefits are subjective to each affected party.

⁵⁴ Thomas Jefferson recognized that nations which differed from the English patent model “are as fruitful as England in new and useful devices,” questioning the benefits of granting such monopolies on inventions for the goal of spurring development. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *in* THE WRITINGS OF THOMAS JEFFERSON 334 (Albert Ellery Bergh ed. 1907).

⁵⁵ *Id.* at 335 (describing the difficulties of establishing general rules as a patent board member).

⁵⁶ The degree to which characters, settings, or plots are unique or novel, or the degree to which inventions are nonobvious, useful, or similar to other inventions are such factors that may determine how much protection any idea will receive.

⁵⁷ In the development of the Creative Commons a variety of copyright options are available to authors including free use with citation only or reciprocal citation agreements. Creative Commons Licenses Descriptions, creativecommons.org/about/licenses/ (last visited Dec. 1, 2009).

A similar application of the action theory of property may be made to problems of the commons (or conversely the anti-commons), where it is usually argued that the actors within a property system lack either the power or the incentive to completely control the property (conversely, lack the power to overcome a mass of conflicting claims to the underlying property) and thus it is the position of the state to rectify these situations through law. The situation may be a sad reality that the actors within a system must be weary of creating when using such property, and outside observers are welcome to lend support in enacting some governance system to control the misuse of resources but there should be no coercion on actors external to this system in the form of forced support. If support were forced onto a population without a voluntary interest in the open-access property, the rules that are enacted will not be alterable according to the values of the interested parties and may cause more harm than simply allowing the resource to be depleted. In problems of the anti-commons, which typically take the form of holdouts blocking potential actions regarding the property, the action theory of property again suggests that support from any external actor should be voluntary, either to help the holdouts retain possession or the actors seeking to gain the consent of the holdout. To require a single rule that forces the support of one side of a conflict is to add coercion where none was before, and even if the solution supported can be argued to be more efficient, it is unjust.

Based on the qualities of some types of property, a single rule set may be expected to win favor to resolve conflicts, due to the homogeneity of value expected from the object across actors, or properties of the control that can be exerted over the object. Another factor influencing the emergence of a single rule set is the actors of the system valuing uniformity of laws, generally seen as reducing costs by eliminating uncertainty of which rule may apply to an actor.⁵⁸ In conflicts over other types of property or in other situations, the costs of mediating any conflicts between justice agencies may be outweighed by the benefits to the supporters of those agencies of having diverse options of different rule sets. Current corporate law illustrates a system of competing rule sets that work to the benefits of parties seeking unique and varied rules of property to meet varied values.⁵⁹ No matter the type of property, however, no specific number of justice agencies or competing rule sets should be proscribed to bind all, as doing so would be a property claim in the justice agencies, and the resulting negative aspects of

⁵⁸ See, e.g., the communicative costs analyzed by Rose, note 37, *supra*.

⁵⁹ The low cost of selecting under which State to incorporate burdens the different States to compete for adherents, approximating a free market for binding but voluntary law.

such claims should be apparent based on the above derived general aspects of coercive action.

V. Conclusion

After developing a theory of property, the situation on Matinicus island may be better understood, and some suggestion of a just solution may become clear. The action of local state authorities and the court system to deny a property regime enforced by the islanders itself is coercion, and only justified to the extent that it acts to reduce net coercion in a way that burdens only those involved in the conflict and those actors seeking to enforce their regime with costs of enforcement. It is easily seen that a counsel of voluntary membership that can control the fishing waters with their own resources, even if some coercion is used to manage the resource, is just only to the extent that any coercion used in management is limited to the amount necessary to counteract expected imposed costs from other actors (i.e. that the net coercion is minimal). Departing from this system to use an enforcer who passes costs onto the entire population of Maine to uphold decisions of the counsel both adds to the net coercion within the system, and also adds a new coercion on actors external to the system. The reaction of the State of Maine's police force and court system further adds costs and injustices, while explicitly detracting from the establishment of a stable property regime.

The action theory of property simultaneously allows for an expansive and customizable definition of those objects which may be considered property and puts meaningful limits on what types of claims and actions can be considered just. While a number of corollaries and applications were explained here, the full extent of the implications of the definition of just property claims and action is unbounded. Any real or potential conflict may be analyzed with the notion of justice as derived from the action based definition of property, and the results may be unique for each of the infinitude of subjective value sets of any actor or conflicting actors. The resulting qualitative calculations are useful as a guide for any actor within a conflict, or for passing judgment about conflicts between other actors. As long as the assumptions about the values of actors are accurate, the action theory of property will distinguish the exact object that is claimed as property, and will offer a solution for those seeking to reduce coercion.

Liberty and property are intractably linked as the real action and real result, respectively, of the freewill of an actor. Any attempt to deny an actor a claim to either by a net-coercion is a denial of that freewill and will cause further conflict with those who observe such injustice. These coercions define the spectrum that is bounded on one extreme by a setting of utopian

peace and the on the other extreme by the offense to humanity that is chattel slavery. Allowing interested actors to voluntarily enforce property (and liberty) regimes is the only inherently peaceful and the most just social system. Most other systemic solutions to questions of property, justice, and law accept the use of net coercion to meet some subjective values and will often attempt to excuse this by pronouncing their value system as objective or simply hiding the coercive nature of the suggestion by attributing enforcement costs of the solution to the state. By classifying action according to its subjective level of coercion, any net coercion in a system is immediately recognized as an evil, which may nevertheless be necessary in resolving some difficult conflicts. Taking notice of this evil as the basis of justice will allow the evolution of more peaceful and efficient property regimes, as long as the actors within such regime value peace and efficiency.