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Author(s): S. Coval, J. C. Smith and Simon Coval

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THE FOUNDATIONS OF PROPERTY AND PROPERTY LAW

S. COVAL,* J. C. SMITH† AND SIMON COVAL‡

EXPLICIT rights and freedoms such as those of thought, assembly, life, liberty and security of person occur in constitutional charters because they are activities and states which are necessary for any successful action. It is through the protection of its necessary conditions that freedom of action is itself protected. Moreover, without the inference that freedom of action is the basic value being protected we cannot justify the above rights and freedoms. If we accept this hypothesis about the justificatory structure of constitutions it provides us with a test of the completeness of the list of explicit rights and freedoms. We argue that no charter could justifiably include the usual explicit rights and freedoms and not include the right of the individual to property since the latter is no less a condition of free action than are the former.

In the course of amplifying the efficacy of this hypothesis about the foundation of property rights we demonstrate its relations, briefly, to a major historical theory of property and apply it to two well-known and one current case from the legal literature and offer some remarks on the relations between property, contract and tort law. Throughout the argument attention is paid to how the concept of property and property law would be shaped by a closer reference to their justification.

The concept of property seems anomalous in its company in that while all other constitutional or basic rights are rights of equality, the right to property implies the right to inequality. But if the other basic rights are linked to property through a single justification—rest upon the same foundation—then equality is similarly linked to inequality. To understand this linkage is to see that the concept of property, far from being an anomaly among basic rights, is rather a necessary contributor to a common enterprise.

* Philosophy Department, University of British Columbia
† Law School, University of British Columbia
‡ Law School, University of Toronto

I

The concept of action holds implication for what lies at the centre of our values. It goes to our essential nature as purposive beings and is related by implicature to all other important concepts which define individuality for us:[1] choice, responsibility and excuse. Indeed the notion of freedom or liberty itself is understood only in connection with action. There is broad philosophical agreement that the commission of an act, upon analysis which cannot be detailed here,[2] yields, as constitutive elements, at least the following: desires, wants, needs (in short—goals); true beliefs; reckoning; intention; and physical effectiveness. Obviously these elements of an action will be convertible into features of agency in the form of basic abilities and capacities of actors.

As agents, then, we are sentient (desires, needs), epistemic (true beliefs and reckoning), purposive (goals and intention) and physically effective entities. These abilities and capacities define our nature, and such grand concepts as happiness and freedom, dignity and respect, cannot be understood without such terms of agency. We may encapsulate the above by saying that we are essentially purposive, epistemological and physical entities.

Although constitutions tend to guarantee explicitly freedom of thought, the press, assembly and expression; freedom of choice; and freedom of movement; they tend to leave implicit the freedom to act. But, as we have seen, the connection between the above explicitly guaranteed freedoms and the freedom to act is that the latter implies the former. The explicitly guaranteed freedoms are just protections of the exercise of the basic abilities of agency: epistemic, purposive and physical. They are the protection therefore of the constitutive conditions of action. It is, furthermore, important to emphasise that if we do not find the generic sources of value among these constitutive features of action we shall not find them elsewhere.[3] We shall assume then that when constitutions contain the above explicit guarantees they are likewise committed to the protection of action or agency (which is to say, to the freedom of action) since the protection of action is the implicans of those explicit freedoms.

[1] Some writers, see R. Dworkin, for example, *Taking Rights Seriously*, Harvard University Press, (1977) at p. 267, refuse to connect the constitutionally explicit rights to the basic freedom of action. In denying the clear and natural relation between the two, such writers lack a convincing justification for the constitutionally explicit rights. Dworkin's tortuous attempts to supply the reason why we include the rights we do in constitutions and not others is well discussed by H. L. A. Hart, "Between Utility and Rights" (1979) 79 *Columbia Law Review* 828.

[2] See S. C. Coval and J. C. Smith, *Law and Its Presuppositions; Actions, Agents and Rules*, Routledge & Kegan Paul (1986), Chaps. 1 and 3, and Donald Davidson, "Agency," in *Essays on Actions and Events*, Clarendon Press (1980), p. 43.

[3] Alan Gewirth, *Reason and Morality*, U. of Chicago Press (1978).

It should also be the case that all legal systems which contain agency as a basic value, expressed either constitutionally or otherwise, are committed to the protection of implications of action whether or not they are actually cited. For some legal systems, property is in this position of being either uncited for protection but implied by the same basic value of agency which subtends explicitly cited rights, or of being unrecognised as implied by the same basic value as those considerations which are often its competitors in adjudication.

II

Bentham taught us the purpose of rights—they are devices which produce the furtherance and protection of certain goals by means of rules which specify duties of non-interference or duties of positive performance. Freedoms give us rights of non-interference and we may say, along with Bentham, that rights, and therefore freedoms, being the artefacts they are do not exist in the state of nature unless compacts exist there also. Further, if our freedoms are meant to be distributed equally, then the rights which protect them cannot be absolute since absolute freedom for some may entail less freedom for others. Thus each freedom will be subject to a *ceteris paribus* (c.p.) condition,[4] an illustration of which occurs in section IV where we consider some hard cases. What we may say now about the nature of the (c.p.) subject condition is that when we identify a freedom as protectable by a right, *other things being equal*, we have identified a basic *argument* or value in the legal system. This does not mean that there are not other arguments or values in the system with which it may at times conflict. It is, however, the task of a paper on foundations to establish the presuppositions or support of such arguments or rights and, accordingly, to point the way to adjudication among rights when they conflict. This we do in section IV, but our primary purpose is to excogitate the presuppositions or justifications of property rights.

Without the right to freedom of action[5] we could, of course, still act, still be teleological creatures in the state of nature, as it were. With the *right* to freedom of action we become agents who can more fully employ our teleological, or goal-oriented, natures (c.p.). *The extension and protection of agency thus constitutes the justification of the right of non-interference.*

An action, we have seen, is an event which has as some of its constituents our beliefs, goals and intentions. The action itself actually may consist only of those psychological items above. A teleological

[4] Coval and Smith, *supra*, note 2 at Chap. 5.
[5] We intend no difference between "the right to freedom of action" and "the right to action."

system, or an agent, has goals which are part of the cause of the events he has produced by acting. Those events produced are for the purpose of satisfying their cause. Thus through the use of our bodies, under the control of our agency, we produce those events which satisfy our goals. We cannot, therefore, protect action without protecting those events which are means to its success. If we have a right of non-interference with respect to action then that entails that *we have a right of non-interference with respect to that part of the world which is used to satisfy the reason for the action.*[6]

That part of the world to be protected with a right of non-interference is identified then by reference to its functional role in an action or set of actions, namely its function as a means in the satisfaction of the reason for action. We may therefore refer to the view herein being argued for as a *functional theory of property*. It is contrastable with descriptive theories of property in which it is claimed that property rights are extendible only to objects which have certain features. We return to this distinction in section V.

A clarification is in order here. When one speaks of the reason for an action one means the cognitive motive or "rationalisation"[7] of an action, which includes needs, wants and desires. These motives to action work in connection with beliefs, intentions and reckoning of consequences. When we act successfully we produce events which satisfy the cognitive motive of the action. The events which culminate in satisfaction are themselves related respectively as means and ends. Thus the secret papers are released in order to embarrass the government. But the embarrassment of the government, which might be thought of as the goal of the action, is itself intended in order to satisfy the desire that this event occur. The occurrence of this event has no value, cannot be a goal, without the desire for it. We may then speak of all events which are intentionally produced from a cognitive motive *as being means to the satisfaction of that motive*. That is the teleological pattern of an action. For the purpose of applying action theory to the foundations of property theory we shall employ the relationship between: (1) the motive and intention, and (2) the means used in the action toward the satisfaction of motive. We now return to the argument.

The right of non-interference (c.p.) which protects that part of the world intended as means for the satisfaction of the motive of the action just is the proprietary right we have to that part of the world; it

[6] In spite of this fundamental connection between property and action, John Rawls holds, "Of course, liberties not on the list, for example, the right to own certain kinds of property (*e.g.*, means of production), and freedom of contract as understood by the doctrine of laissez-faire, are not basic; and so they are not protected by the priority of the first principle:" in P. Laslett and J. Fishkin, *Philosophy, Politics and Society Fifth Series*, Yale University Press (1979), at p. 7.

[7] See "Action, Reasons and Causes," in Davidson, *supra*, note 5 at p. 3.

constitutes ownership of that part of the world. Bentham saw the same justificatory relationship between agency and property. He wrote, "a man's being and well-being, his happiness and his security; in a word, his pleasures and his immunity from pains, are all dependent, more or less, in the first place, upon his *own person*; in the next place, upon the *exterior objects* that surround him. . . . Now in as far as a man is in a way to derive either happiness or security from any object which belongs to the class of *things*, such thing is said to be that person's *property*, or at least he is said to have a property or an *interest* therein. . . ."[8]

This right of non-interference with action and therefore with its functional components—its means and goals—implies that there is much more that is property than our immediate intuitions may suggest. Property rights, or rights of non-interference, may be held in anything which functions as means in an action. Additionally, these rights of non-interference may run a temporal gamut, from the momentary to the life of the agent or telelogical being. The functional relationship between the means and its action will determine the duration of the right, as well as the identity of the objects or events over which it is exercisable. We shall now look at some examples of how both the object and duration of a proprietary right are determined by reference to their function as means in an action.

We begin with what is closest to our agency, our bodies. So long as psycho-kinesis is not possible and we are not capable of engaging the world directly, with our pure agency as it were, our bodies are necessary means for the success of each and every action, and therefore require rights of non-interference whatever our goals may be. Other means for the satisfaction of goals are not necessary for each and every one of our actions. Vessels are necessary for sailing, food for sustenance of the body, but neither, although food is close, is necessary for each and every action as is the body. Some means and goals will be continuous and/or dispositional. Therefore both the means adopted for the satisfaction of these continuous goals, as well as the goals, must have continuous protection from interference (c.p.). We may have rights of non-interference and, therefore, ownership for the duration which is compatible with the satisfaction of the goal. Our goal-oriented nature, our agency, or our ability to act, the protection of which justifies the right of non-interference, necessarily determines the relevant duration of that right of proprietariness.

Some of our goals are satisfiable by means of a relatively short course of events. We will then have rights of non-interference (c.p.) over the means necessary to the satisfaction of goals only for the time

[8] Jeremy Bentham, *The Principles of Morals and Legislation*, Hafner Publishing Co. Inc. (1948), at p. 209.

these means are required. If we choose to walk to the library then not only do we have a right of non-interference (c.p.) with our bodies, but also, for a time, with our path to the library (c.p.). The particular spaces on that path which we choose are each in turn our property for the length of time they are each needed to get us to the library. Or the place upon which we stand while waiting for the bus is (c.p.) our property for that time.

The particular means one employs in order to satisfy one's ends will determine which objects one's rights of non-interference may cover. Thus if we are itinerant gatherers of food, or hunters, our property rights will range over objects and events which will differ from those which clearers and cultivators of land will be entitled to have protected even though both groups may have served their ends in the identical space.

The view of property as functional in action shows us not only which objects and over what duration our rights of non-interference (c.p.) are sovereign but over which uses these rights hold sway. Actually, with a functional theory of property, the role of physical objects drops out of the centre of the explanatory picture,[9] and is replaced by sets of actions or intentional uses. Where previously we spoke of owning objects, *tout court*, we may now speak of the right of non-interference with all of the conceivable actions one may perform with respect to that object (c.p.).

With the functional theory of property we are armed to slice a physical object into as many functional parts as are mutually compatible. The same object, space, or resource may often function as means for a wide range of compatible actions. Since these compatibilities exist, we must go to the intentional description of the agent's action in order to determine which use(s) his property rights may cover. Land used as means for the production of food should not, on its own, entitle the user to a right of non-interference with the land's mineral uses unless incompatibility exists.

It is the compatibility of multiple and varied uses of the ocean which lies behind the principle of the freedom of the seas in international law,[10] and explains how the law ascertains what part of the airspace above a piece of land the owner of the land can claim the right to exclusive possession of, and what part may be used by way of

[9] C. B. Macpherson in "Liberal-Democracy and Property," in *Property: Mainstream and Critical Positions*, ed. C. B. Macpherson, University of Toronto Press (1978), at p. 199 sees this, although his reasons do not reach in our directions. New forms of property such as those described by C. A. Reich, "The New Property," (1964) 73 *Yale Law Journal* 733, can be viewed as new possibilities of means, or means which previously had not been granted protection from interference but now are receiving it.

[10] This thesis is implicit in Myres S. McDougal and William T. Burke, *The Public Order of the Oceans, A Contemporary International Law of the Sea*, Yale University Press (1962).

passage for air travel.[11] It is because the use of a piece of land for agricultural purposes is not necessarily incompatible with another person's use of the same land to cross in order to have access to an adjoining piece of land, or a third party's use of the land by removing oil from it that the law can recognise one person as the owner of the land, another as the owner of an easement over the land, and another as owning the mineral rights to the land. This does not mean that we cannot have the equivalent of ownership *tout court*, or that that is undesirable. It does however mean that with a functional theory we can make the finest of distinctions regarding proprietariness and maintain a full respect for the free agency of the individual.

In fact, the more the law facilitates the multiple use of the same object or resource as means in as many and varied actions as are compatible with each other, the greater will be the possibility for action for people in general. The law thus extends agency by protecting greater possibilities for action through the capacity to give legal recognition to specific kinds of uses as property. Since land is the resource which is most capable of a wide variety of multiple uses, it is in this area of property where we find the greatest proliferation of proprietary alternatives.

Thus the law allows the complete bundle of rights which would include all possible means, or ownership *tout court*, to be divided up on the plane of time into estates; divided as between rights of enjoyment and rights of control as trusts; and individual means to be separated as *profits à prendre* or easements.[12] Any of these can also be co-owned, thus allowing cooperative means such as tenants in common or joint tenancies, or through more complex relationships such as partnerships or corporations. These complex sets of legal practices allow us to extend our agency, or the potential for action, by permitting us to enter into transactions regarding specific kinds of means on a selective basis, in a way which would not be conceptually possible if the concept of property were limited to physical objects only.

In order to make clear, then, the functional extent of one's property rights, we need a description of the agent's action which not only displays its intention, or goal, such as the gaining of food, *but one which displays the means intentionally adopted to that end.* Since intentions, however, are private and inaccessible, practices which deal in actions must employ what H. L. A. Hart called "rules of recognition."[13] Such rules cite certain public, datable events, the

[11] See J. G. Fleming, *The Law of Torts* (6th Edition, The Law Book Company Limited, 1983), at p. 43.
[12] See J. C. Smith, *Legal Obligation*, University of London, The Athlone Press (1976), at pp. 213–227.
[13] H. L. A. Hart, *The Concept of Law*, Oxford University Press (1961), at p. 97.

invocation of which by an agent entails the rights and duties of the practice. Some rules of recognition of the fact that an agent has acted with an intention that an object function as means in his action are: a formal ceremony such as a declaration, the filing of a land claim, blazing, and occupation.[14] These acts which are by rule deemed to be constitutive, and therefore the external implication of the way in which an object figures in an action, are not to be confused with or taken merely as indications or evidence of the intention and its action. In the absence of actions which intentionally satisfy rules of recognition we must use the ordinary actions of agents to infer the rights of non-interference.

Agents do not, however, have rights of non-interference in means or goals of actions they may intend but have not yet acted upon. What is achieved by proprietariness is an increased likelihood of the success of an action through the protection (c.p.) of the means the agent has intended in order to achieve the end of an actual action. Where agents have goals not yet acted upon, no actions exist to receive the protection of proprietariness. Goals, as opposed to action, are protected (c.p.) only by rights to freedom of choice.

Goals or desires, wants, needs, have the right (c.p.) to be acted upon but then that is to protect our ability to choose to act. Where we have acted, however, means exist which have the right (c.p.) to protection. Were we to protect means to the satisfaction of our goals, where action on them has not occurred, we would not be protecting action but guaranteeing satisfaction. These two are not equivalent.

III

The Lockean concept of "labour" has deservedly played an important role in theories of justification of property. The "mixing" of one's "labour" with an object (or event), X, is a necessary and sufficient condition of, or constitutes (c.p.) the justification of, ownership of X, according to Locke.

[14] One of the longest lasting and vigorously argued disputes in international law has been as to whether mere discovery and a symbolic act of appropriation is sufficient to acquire title to new lands, or whether effective occupation is a necessary condition. See for example A. S. Keller, O. J. Lissitzn, and F. J. Mann, *Creation of Rights of Sovereignty Through Symbolic Acts 1400–1800*, Columbia University Press (1938); F. A. F. Van Der Heydte, "Discovery, Symbolic Annexation and Virtual Effectiveness in International Law" (1935) 29 *American Journal of International Law* 448; B. Orent and P. Reinsch, "Sovereignty Over Islands in the Pacific" (1941) 35 *American Journal of International Law* 443; J. Goebel, *The Struggle for the Falkland Islands, A Study in Legal and Diplomatic History*, Kennikut Press (1927), at p. 70. This issue is easily resolved when a functional view is taken of property. Discovery is the initial step in establishing particular lands as means. Symbolic acts such as the planting of a flag and a public proclamation announce the fact that the discoverers have begun the process of establishing means. If effective occupation does not follow within a reasonable time, it can be concluded that the newly discovered lands are no longer serving as means. It is the continuity between symbolic appropriation and effective occupation which is critical in resolving such claims and counter-claims.

The fundamental difficulty with Locke's view is that it does not give us a theory of justification of ownership; instead we are given a theory of the extension of ownership. The former is a theory of the justifiability of owning anything at all, of ownership itself; the latter is a theory of how, presuming ownership, of one's body, for example, we can argue to the ownership of new objects of new rights of non-interference. The closest Locke comes to a theory of ownership itself is in his remarks on the intuitivity of the ownership of one's body.

> Though the earth and all inferior creatures be common to all men, yet every man has a property in his own person; this nobody has any right to but himself. The labour of his body and the work of his hands we may say properly are his. Whatever, then, he removes out of the state that nature has provided and left it in, he has mixed *his* labour with, and jointed it to something that is *his own* and thereby makes it his property.[15] (our italics)

Even, however, if we allow Locke's presumption of the justified ownership of one's body, his theory of the extension of ownership is unsatisfactory. Even "mixing" what we own with what we do not is insufficient to justify the extension of ownership. This is Robert Nozick's point against Locke.[16] Nozick's argument used the counter-example of pouring a can of his tomato soup, with each of its molecules marked, into the ocean. Since on Locke's account "mixing" what one owns with what one does not gives one ownership of the latter, Nozick should own that part of the ocean throughout which the marked soup molecules have diffused. This is meant to be a *reductio ad absurdum* of Locke's claim that "mixing" and "labour" are sufficient for a theory of the extension of ownership. It appears that Locke's view failed to justify both ownership itself and also its extension. We have already argued our view of the justification of ownership itself based on the necessity of rights of non-interference to the area of free action (c.p.). Although the efficacy of Locke's idea of "labour," resting as it does on "ownership" and "mixing," is insufficient as it stands for a theory of the extension of ownership, its relevance seems nevertheless to remain.

In our view labour is a means; we labour in order to achieve something; labour presupposes a teleological pattern. To say that someone labours is to describe his action with reference to certain of the means the agent employs in gaining the satisfaction of the goal of the action. Labour, then, must be that part of the means of an action in which the body of the agent figures. This makes labour central and

[15] John Locke, *Of Civil Government, Second Treatise*, Henry Regnery Company (1955), Chap. 5, p. 22 (no. 27).
[16] Robert Nozick, *Anarchy, State and Utopia*, Basic Books Inc. (1974), Chap. 7.

necessary for each and every action. Labour, the agent's use of his body for action, is always the first step in the fulfilment of the satisfaction of an act. It therefore requires protection if we are to protect action. This is why, as we argued in section II, we have ownership of or rights of non-interference with our bodies.

Those means which are causally subsequent to labour in a teleological process are equally necessary to protect. Wherever the body is under the control of the agent and is intentionally involved in a causal process then the intentional effects of those bodily events are equally means. This captures the role of the Lockean metaphor of "mixing one's labour" in the extension of ownership. Whatever our body causes, *i.e.*, "mixes with," as *further* means toward the completion of an action is thereby to be equally protected, that is, owned, since it is equally means.

This way of viewing the role of labour allows Nozick's criticism of Locke to be answered. If Nozick pours his tomato soup into the ocean simply because he likes to empty cans, then even though he has "mixed" what he owns with what he does not, ownership of that or any part of the ocean is not required in order to protect his action because the ocean, not being part of the intentional description of the action, is not means at all in that action. His labour, which is pouring the soup out of the can, *is* the intentional means to the emptying of the can, which was the goal of the action. That means, therefore, requires protection (c.p.).

If, however, pouring his soup into the ocean is part of the means of an action in which the soup's diffusion throughout all or some of the ocean is part of the means to its goal, then that diffusion would deserve/require protection (c.p.). Suppose the diffused soup were capable of causing valuable mineral nodules to rise to the surface and Nozick wants the nodules in order to sell them. On our view, the action of the tomato soup upon the ocean bed is part of the means to the end of Nozick's action and he, therefore, would have rights of non-interference (c.p.) to that means.

These examples show that the description of an action in terms of its motive and intention as well as the means intended for its achievement is essential to the determination of which objects, which uses, and over what time, rights of non-interference are to be extended. We can anticipate that many problems in the determination of ownership will be due to difficulties which we encounter in the establishment of the proper intentional description of the relevant action.

IV

A theory of justification of property rights should identify the basic value which is being furthered by that practice. It should also lead us to the basic conditions which determine when a property right is in place. On our view the justification of the rights of property resides in its enhancement of the freedom to act. Without property rights we are radically diminished as agents. This justification leads us to the conditions which determine when a property right exists. The condition which identifies the existence of the property relation is the use of something as means in the satisfaction of an action. This "means test" is directly implied by the above justification. Jurists will be unable to address hard cases in property unless they are armed with both the justificatory antecedent to property rights and the identifying conditions implied by those antecedents.

Faced with hard cases, in which it is difficult to tell whether the circumstances entail the existence of a property right, resolution is possible only by going back to the justification of that right. If the circumstances are those which further the value protected by the right then these circumstances will entail that a property right exists. We may put the above in our terms by saying that when, as in hard cases, it is difficult to tell whether circumstances entail the existence of a property right we must return to the question of whether the circumstances include means to an action.

We will now turn to two of the "hardest" of hard cases involving the question of property rights: *International News Service* v. *Associated Press*[17] in the Supreme Court of the United States (we will refer to it as *I.N.S.*) and *Victoria Park Racing and Recreation Grounds Co. Ltd.* v. *Taylor*[18] in the High Court of Australia (we will refer to it as *Victoria Park*). Lacking a justificatory theory, judges have turned either to a positivistic approach or to a policy of arresting unethical behaviour. We will show the shortcomings of both of these approaches and put forward a decision based on our terms. Moreover, we shall argue that when some jurists have given their reasons for the application or denial of the concept of property they have implicitly recognised the same considerations for which we argue.

To briefly state the facts of each case, *I.N.S.* involved the I.N.S. copying A.P.'s news reports from bulletin boards and early editions of A.P.'s member-newspapers in the Eastern United States and selling them to its Western customers. A.P. claimed an injunction, *inter alia*, against this copying. In *Victoria Park*, Taylor had built a watchtower on his property in order to watch and broadcast the horseraces being

[17] 248 U.S. 215, 63 L.Ed. 211 (1918).
[18] (1937) 58 C.L.R. 479.

run by Victoria Park on their land. The plaintiff desired an injunction against the broadcasting as it caused some people not to pay admission to see the races who otherwise would have. We find it useful in this connection to examine the judgments of Brandeis J. and Pitney J. in *I.N.S.* and Latham C.J. and Dixon J. in *Victoria Park*.

Brandeis J., dissenting in *I.N.S.*,[19] held that the only legal arguments to be made for the existence of property rights are those from precedent and other already-existing law. He excluded from these arguments any general principle of justification for property rights. Brandeis J. did find the attribute of property to be contained in certain incorporeal productions but not in news matters. Incorporeal productions are mental acts which include knowledge and other mental creations. Property rights have been statutorily created in patent law for certain types of discoveries and inventions. Also, the English common law has endowed literary, dramatic, musical and other artistic creations with the attribute of property. According to Brandeis J., the general rule of law, however, is that such incorporeal productions do not have the attribute of property but are "free as the air."

According to Brandeis J., there is one more special pocket of proprietary protection in the incorporeal. Knowledge and information will have the attribute of property when a wrongful method is involved in their acquisition or use. Thus we find Brandeis J. positivistically accepting these pockets of incorporeal property while denying any general justification or condition for property. With respect to corporeal property, however, Brandeis J. allows an implicit justification which we claim is capable of covering property in general. We defer the argument for this until the discussion of Pitney J.'s majority judgment.

Latham C.J. and Dixon J. for the majority of the High Court of Australia in *Victoria Park* held a position identical to Brandeis J's. Latham C.J. found it conclusive that there existed no authority in English or Australian law to support the contention that if a person created an entertainment he could obtain protection from a court from others describing what they saw:[20]

> The court has not been referred to any authority in English law which supports the general contention that if a person chooses to organize an entertainment or to do anything else which other persons are able to see he has a right to obtain from a court an order that they shall not describe to anybody what they see.

[19] *Supra*, note 17 p. 248 (U.S.), 224 (L.Ed.).
[20] *Supra*, note 18 p. 496.

It followed for him that "a spectacle cannot be owned." Dixon J., again explicitly following Brandeis J. in *I.N.S.*, held:[21]

> Briefly, the answer is that it is not because the individual has by his efforts put himself in a position to obtain value for what he can give that his right to give it becomes protected by law and so assumes the exclusiveness of property, but because the intangible or incorporeal right he claims falls within a recognized category to which legal or equitable protection attaches.

As a consequence of their positivism, Brandeis J., Latham C.J. and Dixon J. see the law of property as pocketed with special senses of property. They have this fractured picture of the concept of property since their positivistic leanings prevent them from the examination of arguments which might have taken them back to first principles. These principles are the rights which exist antecedent to their recognition by precedent or statute. They are principles which must appear in any constitution which values freedom of action. Therefore, in hard cases the arguments must press back beyond precedent to those first principles to ensure that the basic considerations which laws on property are written to protect are addressed.

Pitney J. argued for the majority in *I.N.S.* that the case turned "upon the question of *unfair* competition in business" (our emphasis) and did not "depend upon any general right of property."[22] The question, for him, was not one of a general right of non-interference between A.P. and the public with respect to the news, but between A.P. and I.N.S. alone. He called such property rights residual and "quasi."[23]

Strikingly, however, when Pitney J. argued for the "unfairness" of the business activity of I.N.S. he employed a principle which goes, despite his earlier denial, to the general right of property we have argued for.

> In doing this, defendant, by its very act, (transmitting the news for commercial use) admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money and which is saleable by complainant for money, and that defendant, in appropriating it and selling it as its own, is endeavouring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant's members is appropriating to itself the harvest of those who have sown.[24]

We here witness Pitney J. protecting the means, namely the news material A.P. has gathered through its "organisation and the

[21] *Ibid.*, at p. 509.
[22] *Supra*, note 17, p. 235 (U.S.), 219 (L.Ed.).
[23] *Ibid.*
[24] *Ibid.*, pp. 239–240 (U.S.), 221 (L.Ed.).

expenditure of labour, skill and money." The gathered news material is A.P.'s means to its end of creating a product it can sell. Since this justification of what Pitney J. called a "quasi"-property right is identical to what we claim is a justification of the general property right, the distinction between *quasi* and *non-quasi* or between corporeal and incorporeal property collapses. In both cases it is clearly means to goals of actions which are being protected. It is irrelevant whether the means—the gathered news—which is owned by A.P. is appropriated or otherwise interfered with by a "business competitor." *The right of non-interference here is a general one.* There does of course exist the further question which concerns how this general right of non-interference in property fares in cases where it competes with other rights. We now turn to this matter.

Clearly all hard cases such as *I.N.S.* or *Victoria Park* will be those in which the central question is that of whose right is to dominate, and this will depend upon the particulars of each case. To say that Victoria Park has a property right (c.p.) in its means is just to say that this right is exercisable if and only if no other competing right dominates. This is what it means to apply the (c.p.) consideration.

If this is the nature of the argument which courts are faced with in hard cases then no effective argument can be made without recourse to the justificatory foundation of the right. Only if we understand what the right is armed to protect—the basic value involved—can we determine the consequences of allowing it to dominate or be dominated in a particular set of circumstances. This means that proper arguments cannot be made in hard cases in property without the *overt* use of a theory of justification for property rights.

This (c.p.) argument, which recognises basic *prima facie* rights on both sides, proceeds to determine, in the circumstances, which side's right is to dominate. When we write constitutions we include rights as if they were not in competition with one another. Nevertheless, it is implied that they are each written with the (c.p) implication. We could not do otherwise and have constitutions which were not the length of the combined contents of a law library. When these rights (c.p.) come to be used so that they are in conflict with others' rights (c.p.), it is then the task of the law to adjudicate in a case by case process.

We may now look at the effects of the application of our theory of the justification of property rights to *Victoria Park*. Basic *prima facie* right to action and means exist on both sides. Taylor, the defendant in *Victoria Park*, has the right to both view the world from his watchtower and describe to others what he may see. Viewing and describing are both general means to action in that they are important aspects of the epistemological process. We cannot have the extent of true beliefs which are necessary for each and any action without *their* protection

through rights. In addition, true beliefs may be desirable for their own sake, that is, themselves be goals.

Victoria Park, on the other hand, has the right to make as much money as they can from their spectacle (c.p.). This is their ultimate means to their goal—that for which they may want the money. There will also be sub-means to the ultimate means which V.P. employs, one of them being to make those who view the spectacle pay for that use.

This apparent conflict of rights of non-interference may be addressed only by reference to the impact upon the value at stake, namely, freedom of action. Each party's means are threatened by the other. In order to determine which means is more significant for action and therefore for basic rights we must obtain as precise a description as possible of the means intentionally employed and its goal. Suppose Taylor wants to watch and broadcast the V.P. spectacle, and to this end only he has built his watchtower. In this event he is not generally viewing or describing the world from his vantage point; he is watching and broadcasting Victoria Park's spectacle. We are therefore not dealing with a general epistemological means for action in the latter event. To deny Taylor the watching or broadcasting of the Victoria Park races is to diminish his freedom of action in a specific way; it is not to diminish his ability to act as one would were he denied the right to view the world generally or describe it to others. Most importantly, however, the events used as means by Taylor are subject to a prior claim of ownership—a prior act—by Victoria Park. It was Victoria Park which created the spectacle in order to gain its end. What Taylor wants then is the use of V.P.s means for his own ends. Were "other things equal," Taylor would have the right to that spectacle as means. But they are not equal just in that those means are already owned by V.P. They indeed exist only through its teleological efforts. If actions such as Taylor's are allowed, then rights of non-interference with *all* actions are undermined and the very extensions of freedom we hoped to gain through such protection, threatened.

The converse of this is, however, not true. Victoria Park does not use any of Taylor's means for its ends which are not already Victoria Park's. In addition, since it allows Taylor to view the spectacle and describe it, the one means to which Taylor can lay claim is undenied. This asymmetry shows how the protection of each side's goals would differently affect the underlying value of freedom of action.

We introduced in section II the relationship between (1) motive and intention, and (2) the means intentionally used toward the satisfaction of (1). The expansion of this relationship will now enable us to emphasise a general and important point concerning property theory. Suppose we think of an action as (at least) constituted by (1),

together with certain beliefs, reckonings and a certain efficacy of agency. Since, for our purposes, nothing really depends on where we make the cut between an action and its consequences, we may take the body's engagement with the world as the consequence of an action, and (1) together with beliefs, reckonings, and efficacy as fully constitutive of the entire action. The advantage of making the cut here is that we may then speak of the ownership of our bodies. The cut could, however, be made after the body's involvement without affecting the point of the argument. In (2), then, we include all those means used intentionally toward the satisfaction of (1). On our view, one has a right of non-interference to anything non-harmful in (2). *Anything* capable of a description in intentional or motivational terms may be a member of (2). Corporeality and incorporeality are therefore irrelevant as determinants of membership in (2) just because they are irrelevant to function: to whether something may be wanted or desired or intended by an agent. Nevertheless, the jurisprudence around property law seems to have followed just that irrelevant course. Jurists seem to have thought that the *non-intentional descriptions* of objects determined whether or not they could qualify as property. Thus, new candidates for membership into the area of property were judged by whether their non-intentional descriptions fitted those of objects already included as property. This is what Brandeis J. *et al.* were doing. But if freedom of action is at the root of property then all that is irrelevant. Only the fact of whether the object or event was used or produced as means is germane.

V

Contracting functions as means by allowing us to extend our agency through the obtainment of the actions of others as means toward our ends. Since contracts are means, and are thus functional, they can be viewed as property. Indeed, the law does provide rights of non-interference with contracts.

A recent complex set of commercial transactions which has brought the parties into litigation before the courts, and which we will discuss below, presents an excellent hard case to demonstrate the explanatory power of property as protection of means, as it applies to contract.

Pennzoil Co. entered into a series of negotiations with Getty Oil Co. for the sale of its shares to Pennzoil.[25] A consensus was reached between the parties on the major terms of the transaction, and all that remained for the parties was the drawing up and the formal signing of a

[25] See *The New York Times*, 11 December 1985, p. 1.

contract which would embody all the details. A press release was issued which reported the terms of the agreement which had been reached. At this point Texaco Inc. offered Getty Oil a higher price for the shares than that agreed upon between Getty and Pennzoil, with the result that the agreement between Getty and Pennzoil unravelled, and a contract was signed between Getty and Texaco. Pennzoil then sued Texaco for improperly luring Getty Oil away from the merger, and was awarded 10.53 billion dollars in damages, the largest award in the history of American civil litigation.

The entire case was made to turn on the single issue of whether or not Pennzoil had a binding legal contract with Getty Oil Co. It is difficult to see any good reason why such a huge amount of damages should turn on a purely technical treatment of this point. The formal or technical question of whether a contract had been consummated appears to have little relevance to any principle which could explain why Texaco should or should not be liable, since although the formal conditions of contract consummation may be sufficient to establish liability, they cannot be necessary. Here as in other hard cases we must free ourselves of the purely technical and start with first principles. Rules of recognition, such as the formal completion of contracts, are in place to establish the intentional means in actions; but in their absence, and particularly where processes of action are involved toward a final result, we must use the ordinary, non-formal actions of agents to infer what their rights of non-interference may consist in.

If the above set of facts is analysed from the perspective of property as the protection of means, it becomes clear that the issues raised here are very similar to those in *I.N.S.* and *Victoria Park*. Pennzoil spent time, effort, and money, to reach an agreement which would serve its goals. Through its efforts Getty Oil was persuaded to merge with another company through the sale of shares, and a price was fixed, a value established, and the news formally and intentionally released. *All this goes toward the establishment of the intentional description of these events and therefore their place as means*. By entering this set of events at this point, Texaco appropriated those means of Pennzoil in the same way that International News Service appropriated the means of Associated Press and Taylor appropriated the means of Victoria Park.

The difficult issue which this case actually raises, and which should have been faced, is at which point in the process of the negotiation of a contract does the right of non-interference take precedence over the right of other persons to compete in the bargaining process: when have means been properly established? This issue cannot be settled by asking, as the trial judge required, whether or not a binding contract existed, where the idea of a binding contract is treated entirely too

legalistically, that is, without reference to first principles. Matters which are relevant to whether or not the parties are contractually bound to each other by having met all the formal requirements of a contract are not necessarily relevant, but as we have seen, merely sufficient to the determination of whether a right of non-interference should be recognised.[26] The unfairness of Texaco's actions lies in its use of the efforts and labour of Pennzoil after it had persuaded Getty Oil to merge with them with only the final formalities left to occur. It is Texaco's appropriation of Pennzoil's established creation of means which makes the interference *at this point* in the negotiations between Getty and Pennzoil wrongful.

With property viewed as the protection of means we can more easily see the underlying unity of the entire civil side of the law: how property, contract, *and* tort may be seen as related to the underlying theme of the provision of protection and extension (c.p.) of (the freedom of) action. If property is a device used to protect means for action, whether it be the body, physical objects, or relationships with other people, then the concern of tort law may be seen to determine when wrongful interference has occurred. What constitutes wrongful interference will differ according to the nature of the means, the interest which it serves, and the nature of that interference. These factors in interaction determine how we group our torts or causes of action such as trespass to land, defamation, conversion, passing off, or negligence. The remainder of the civil side of the law is constituted by legal practices by which we are able to create means such as contracts, wills, trusts, estates in land, etc. which allow persons to extend their agency. These themselves, since they are means, are also protected from wrongful interference, and consequently are property. Thus the entire civil side of the law is focused on action, either by the protection of action from wrongful interference, or the extension of action by creating new possibilities, and therefore means, through legal practices.

We return to the main constitutional import of the argument. We held in Section I that the inclusion of basic rights and freedoms in constitutional charters was justified by their necessity for the success of any action of any agents. The furtherance of agency and action cannot proceed without rights of non-interference in those epistemological, teleological and physical features of actions and agents. This is to say that a right of non-interference in the means to the satisfaction of actions must occur if we value action. But that is necessarily to include an individual right to property: the right to inequality.

This argument, as we have seen, sets contract and tort law upon the

[26] See *Perry et al.* v. *Sindermann*, 408 U.S. 593, 33 L.Ed. 2d 570 (1972).

same foundation as property. Property law determines which means an individual agent has rights of non-interference with; contract law determines which means each individual has rights of non-interference with when individuals have acted jointly in the creation of the means; and tort law determines what constitutes an interference in means.

But the integration of these three areas of the law around the protections and furtherance (c.p.) of actions gives us another reason why we cannot separate the right to property from any of our other basic rights.[27]

[27] The Fifth Amendment of the Constitution of the United States provides that "No person . . . shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." The Fourteenth Amendment provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

S.7 of the Canadian Charter of Rights and Freedoms in Sch. B, Part 1 of the Constitution Act, 1982, as enacted by the Canada Act, 1982 (U.K.), c. 11 provides that, "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Dickson J. in *The Queen in Right of New Brunswick* v. *Fisherman's Wharf Ltd.* (1982) 135 D.L.R. (3d) 307 at 315, (New Brunswick C. of Q.B.) held that the phrase "right to . . . security of the person" in s.7, entails the right to security of property even though there is no mention in the Charter of a right to the protection of property. His judgment has come under criticism (see for example, G. J. Brandt, "Canadian Charter of Rights and Freedoms—Right to Property as an Extension of Personal Security" (1983) 61 *Canadian Bar Rev.*, 398), nor has it been followed by other courts (see for example *Re Worker's Compensation Board of Nova Scotia and Coastal Rentals* (1983) D.L.R. (4th) 564 at 566, (Sup. Ct. of Nova Scotia); *Re Becker and The Queen in Right of Alberta* (1983) 148 D.L.R. (3d) 539 (Alberta Ct. of A.).

The relevant passage in Dickson J.'s judgment can be taken to mean that since a right to security of the person must entail a right of non-interference, then it must extend beyond interfering with the mere body and include the means which is used in bodily action. Given that meaning, there is much merit in his conclusion that s.7 of the Charter "must be construed as comprising the right to enjoyment of property . . ." and his critics can be taken as having failed to meet his argument.