

# Symposium

## Properties of Carol Rose: A Celebration

### Introduction: Property and Language, or, the Ghost of the Fifth Panel

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#### INTRODUCTION

It is gratifying, hugely flattering, and at the same time somewhat embarrassing to have to open a conference and then a symposium issue on one's own academic work. No doubt understanding this embarrassment, my colleague and good friend Ian Ayres suggested a way out: since the conference was named "The Properties of Carol Rose," I should take the occasion to talk about the various residences I have owned. A great idea, and I did indeed think about it, because as Ian knows, I have had good luck in that dimension, with more than my share of weird and interesting addresses.

But as intriguing as Ian's idea would have been, there was really another

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topic altogether that I thought I should address at the opening of the conference and now this symposium issue. That topic is the Missing Fifth Panel, or as I will sometimes call it in this Introduction, the Ghost Panel.

When in the fall of 2004, Dean Harold Koh first broached the idea for the conference preceding this Symposium, he appointed several of my colleagues to act as organizers—Reva Siegel, Henry Smith, and Kenji Yoshino—and a wonderful job they did, too. In preparation for a sequence of panels, the organizers asked me to think about the ways that my work might fall into large-ish categories. In response, I came up with the four panel subjects that actually took place at the conference, and that are reflected in this symposium issue. But I had a fifth panel too, and in fact, I thought of it as the first. That panel was to be called “Property and Language.” By this I meant language in a large sense, as a set of symbols, including the “languages” of art and narration and perhaps music as well, and I worked out some ideas about who the panelists might be, including most of the scholars who now have found a role in the other four.

But as time went along, it became clear that five panels would be just too many for a day’s conference. One had to go. The obvious one to go was Property and Language. It was just a bit too obscure, idiosyncratic, unconventional. . . . When the issue was broached, I agreed, of course, since the decision to cut back was entirely understandable as a practical matter and the other panels did in fact represent more standard areas of property scholarship.

But still, the downsizing was a bit jarring, in a very familiar way. The exploration of property and language is actually what I have often thought to be my central project as a legal scholar. The title of my book, *Property and Persuasion*,<sup>1</sup> even refers to that project. But alas, I have never managed to convince many people how important it is to think of property in connection with language in this larger sense of communication—speech, stories, visual clues, expressions generally. And so, when the “language” panel dropped out of the picture, my first thought was to moan and groan, to utter the woe-is-me lamentations of *Middlemarch*’s Casaubon, the scholar who has churned and scribbled to no great effect in the long run.<sup>2</sup>

But then, second thoughts took over. After all, what could be a better opportunity than to change all that and to open this symposium with the Ghost Panel—to bring it to life after all, directly at the beginning of this Symposium? Hence this Introduction is devoted to the central question that the Ghost Panel would have addressed: why *do* stories and pictures, texts and subtexts, matter in property law? My answer, in brief, will be

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1. CAROL M. ROSE, *PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP* (1994).

2. GEORGE ELIOT, *MIDDLEMARCH* (Modern Library 1984) (1871).

that they matter because contrary to what many might think, property is one of our most sociable of institutions. One person's property can only exist, by and large, because other people accept it. In turn, that social relationship of claim and recognition only exists because people are able to communicate their claims and because others understand and more or less agree to honor them. Language, in the broader sense of symbolism and communication, makes property possible. And what is if anything even more interesting, language in this broader sense also makes it possible for property and entitlements to change meaning over time.

### I. PROPERTY AS AN EXPRESSIVE ENDEAVOR

At this point I need to turn to a bit of autobiography. In my personal life, I have always been a little skittish about owning property, at least property of any tangible sort. The old cliché always seemed right to me: possessions weigh a person down, and I was interested in staying light.

Moreover, before I studied law, I was not particularly interested in property as a scholarly pursuit. I was an historian in my earlier academic life, and while I was interested in legal subjects at that time, I had no particular attraction to property law. In fact, I was far more interested in political and constitutional relationships in quite distant times and places, notably Continental Europe in the seventeenth, eighteenth, and early nineteenth centuries.<sup>3</sup>

Property only became interesting to me when I started to see it through the lens of legal study. The metaphor of "seeing" is deliberate: what attracted me in the first instance was property law's impact on the visible world. Indeed, property law looked to me like a language that directed the shapes of physical spaces. I went to law school at the University of Chicago, and in Chicago, one could take a tour through the downtown "Loop" area, or even simply walk out the door of any building, and see how the surrounding structures and streetscapes reflected property law. The visual contours of the city reflected decisions about property, both public and private.

One of my two property teachers at the University of Chicago was Allison Dunham, an early proponent of incorporating economic approaches into law.<sup>4</sup> Dunham also knew a great deal about the city, and he was full of stories about it. One of those stories recounted why

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3. I even wrote a few things in these areas, to wit, Carol M. Rose, *Empire and Territories at the End of the Old Reich*, in *THE OLD REICH: ESSAYS ON GERMAN POLITICAL INSTITUTIONS, 1495-1806*, at 59 (James A. Vann & Steven W. Rowan eds., 1974); *The Issue of Parliamentary Suffrage at the Frankfurt National Assembly, 1848-1849*, 5 *CENT. EUR. HIST.* 127 (1972).

4. The other was Owen Fiss, then teaching at Chicago, one of the truly inspirational teachers I have encountered, whose interest in the civil rights aspects of property law also much affected my entire class.

Chicago's downtown Loop adjoins an almost structure-free Grant Park, unfolding down from the building facades along Michigan Avenue and extending all the way to the shoreline of Lake Michigan itself. The reason was because in the later years of the nineteenth century, one of the Michigan Avenue property owners—A. Montgomery Ward, which is to say, *the* Montgomery Ward, founder of the mail-order and department store chain—claimed an easement for light and air across the landfill area to the east of his Michigan Avenue building. The area was then a jumble of railroad tracks, shanties, and junk heaps left over from the debris of the Chicago fire of 1871, and the city of Chicago planned any number of structures there, from power plants to post offices to museums. But it all became an open Grant Park because Ward defied the city, the press, and even his friends to block all construction except the Art Institute, a concession that he later thought a mistake. What property lawyers refer to as a “holdout” effectively shaped the park—a matter of considerable municipal annoyance at the time, but even more considerable applause later.<sup>5</sup>

And then there was the impact of zoning law, noticeable in Chicago, but even more noticeable in New York. Once you know the history of New York's zoning laws, you can tell why a building has the shape it does and roughly its age. The “Ziggurat” buildings were constructed under the 1916 ordinance, which called for a “light plane” to allow sunlight to come into the streets over skyscrapers that receded back in staircase form in the upper stories.<sup>6</sup> Buildings in a quite different style, the tall slim towers that are often set back in a plaza, derive largely from the era after the 1961 zoning changes; these changes attempted to relieve the boredom of wedding-cake building shapes and to introduce more open space and variety by allowing light to come around the sides of new buildings, rather than over the top.<sup>7</sup> But those structures, too, generated a reaction, and indeed a widespread dismay at the march of uninviting and inhumane tall towers set back in empty and windy plazas, effectively telling the public to keep out. And so one now finds arcades, fountains, and tables and chairs, all responding to yet another zoning change, Manhattan's new open space

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5. For Dunham's written account of this tale of recalcitrance and redemption, see Allison Dunham, *The Chicago Lake Front and A. Montgomery Ward*, WELFARE COUNCIL OF METRO. CHIC., PRESERVATION OF OPEN SPACE AREAS app. (1966), reprinted in UNIV. OF CHIC. REC., at 11 (Winter 1979).

6. Rodney L. Cobb, *Privately Owned Public Spaces: The New York City Experience*, 33 URB. LAW. 805, 807 (2001) (reviewing JEROLD S. KAYDEN, PUBLICLY OWNED PRIVATE SPACES (2000)); see also *id.* at 805-12 (giving a brief history of New York zoning's effects on building shapes and open spaces).

7. For the 1961 Zoning Resolution's effort to create more open space on the models of the then-revolutionary Lever House and Seagrams Building, both attractive towers set in plazas, see Norman Marcus, *New York City Zoning—1961-1991: Turning Back the Clock—But with an Up-to-the-Minute Social Agenda*, 19 FORDHAM URB. L. J. 707, 715 (1992) (describing motivations for change to more open buildings)

regulations of 1984, which attempted to bring some vitality and user-friendliness to the city's architectural amenities.<sup>8</sup>

It is not just the urban landscape that shows property law's visible imprint. A window seat on a flight across the country reveals the visual impact of the Land Ordinance of 1785, the first to decree the rectangular survey of the lands of the new United States.<sup>9</sup> Then, too, the peculiarities of the laws that govern property in water keep the water inside the riverbanks in the Eastern rivers, while encouraging its diversion outside the banks in the Western rivers—one reason why the rivers of the southwest are wrung dry during much of the year.<sup>10</sup>

All this visual imagery made me start to think that the proper study of property is communication, rhetoric, language. And indeed, once I began to teach property it became apparent to me that property's communicative aspects reflect a very ancient perception. Perhaps the most famous case in American property law is *Pierson v. Post*, an early-nineteenth-century New York case that concerned the acquisition of property in previously unowned things.<sup>11</sup> The thing in question was a fox pelt: Did it belong to the hunter who had been following it over a long chase? Or did it belong instead to the "saucy intruder" (as the dissenting judge Livingston called him) who had jumped out at the last minute and actually shot the beast? Judge Livingston's engaging and powerful dissent dwelt on the importance of incentivizing those who would hunt noxious animals, and of giving due regard to the customs of these sportsmen. But nevertheless, the court's majority, citing much venerable authority, decided that the fox went to the shooter. Why? Because by shooting the fox (or mortally wounding it) the shooter "manifests an unequivocal intention" to take animal and remove it from its wild and free former life. Mere pursuit was not enough; it did not give a clear enough "manifestation" to the world and would lead to "quarrels and litigation" among claimants.

Now, this is a very freighted understanding of the ways in which a

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8. NEW YORK, N.Y., ZONING RESOLUTION § 81-222 (1984). The history and purpose of these changes, including the role of the charming report by WILLIAM H. WHYTE, *THE SOCIAL LIFE OF SMALL URBAN SPACES* (1980) is briefly described by Samuel E. Poole, *Architectural Appearance Review: The Good, the Bad, and the Consensus Ugly*, 19 URB. LAW. 287, 303-04 (1987) (describing motivations to limit unused spaces and create more inviting architectural amenities).

9. An Ordinance for Ascertaining the Mode of Disposing of Lands in the Western Territory (May 20, 1785), 28 JOURNALS OF THE CONTINENTAL CONGRESS 375 (photo reprint 2005) (John C. Fitzpatrick ed., U.S. Gov't Printing Office 1933).

10. For a brief description of the differences between eastern and western water law, see CAROL M. ROSE, *Energy and Efficiency in the Realignment of Common Law Water Rights*, in PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP, *supra* note 1, at 163, 184-88. Another reason for the drying up of western rivers is the exploitation of groundwater resources. See ROBERT GLENNON, *WATER FOLLIES: GROUNDWATER PUMPING AND THE FATE OF AMERICA'S FRESH WATERS* 42-50 (2002) (describing the process using the example of the San Juan River of Tucson, Arizona).

11. *Pierson v. Post*, 3 Cai. 175 (N.Y. 1805).

person comes to own something. First, there is that business about killing the animal, or otherwise dominating it in order to own it. I will return to this, because this method of establishing property rights has major implications for environmental law. But second is the understanding that this original act of acquisition involves language; an act of acquisition, it seems, is a gesture that some relevant audience has to understand as a claim. Property begins in an action that speaks out, a “manifestation,” and a manifestation in broad and dramatic strokes, too—the broader and more dramatic as the scope of the intended audience expands toward the world at large.<sup>12</sup>

And third is another point: property begins in a social context. A manifestation to inform the world means that there is in fact an audience out there, and the audience has to “get it.” This, too, is a very freighted matter, because some audiences do not get it, given that there are quite a variety of cultural “worlds” in the larger world. The result is that any given property regime effectively privileges some speakers and audiences over others.<sup>13</sup> Stuart Banner, one of the conference participants, has amply illustrated this point in a series of fine works on the early history of English settlement in New Zealand, Australia, Hawai’i, and North America.<sup>14</sup> He has documented the ways in which the English understood the language of property as agriculture. Insofar as native peoples farmed, the English saw property, defined through crops, boundaries, fences. But insofar as native peoples did not farm, or did not farm in ways that resembled the English countryside, the English were much less likely to see property. In the most tragic case of all, they saw no property at all in native land uses in Australia, which the English viewed as up for grabs, terra nullius in the Latin phrase, land waiting to be reduced to property.<sup>15</sup>

Whatever language the Australian Aborigines were speaking, the English settlers did not get it, and they generally regarded themselves as

12. Blackstone also described the acquisition of property through first taking as a “declaration” that the taker “intends to appropriate the thing to his own use.” WILLIAM BLACKSTONE, 2 COMMENTARIES \*9; see also Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1115-25 (2003) (analyzing the relationship between the character of the communication and the size of the audience for property claims, noting broader strokes for larger audiences).

13. I developed these arguments more fully in *Property as the Origin of Title*, 52 U. CHI. L. REV. 73 (1985), also appearing with slight modifications as Chapter 1 of PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP, *supra* note 1, at 11. For a much more extensive consideration, see the work of my colleague Henry Smith, *supra* note 12.

14. STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER (2005); Stuart Banner, *Preparing to Be Colonized: Land Tenure and Legal Strategy in Nineteenth-Century Hawaii*, 39 LAW & SOC’Y REV. 273 (2005); Stuart Banner, *Why Terra Nullius? Anthropology and Property Law in Early Australia*, 23 LAW & HIST. REV. 95 (2005) [hereinafter Banner, *Why Terra Nullius?*]; Stuart Banner, *Conquest by Contract: Wealth Transfer and Land Market Structure in Colonial New Zealand*, 34 LAW & SOC’Y REV. 47 (2000); Stuart Banner, *Two Properties, One Land: Law and Space in Nineteenth-Century New Zealand*, 24 LAW & SOC. INQUIRY 807 (1999).

15. Banner, *Why Terra Nullius?*, *supra* note 14, at 100-04, 107-12.

simply taking unclaimed space. In a major shift in Australian jurisprudence in 1992, however, the Australian High Court concluded that the early settlers had misunderstood the claims underlying native land uses.<sup>16</sup> As Australian legislatures and courts have struggled with the reinstatement of Aboriginal rights to traditional uses, they have faced another issue: what evidence will now justify Aboriginal claims? Interestingly enough, one answer referred to language and communication: in assessing the validity of claims to native title, the courts initially were to look to a “spiritual connection” that Aborigines had to a land area, which apparently meant, among other things, “actively thinking about a place and talking about it,” according to one spokesperson.<sup>17</sup> Are there stories about this location? Are there Aboriginal names for it? Does it appear in songs and celebrations? Those were presumably among the questions to be asked. In the intervening years, nonaboriginal anxieties over the sweep of these claims has led to the amendment of the native title statute, such that a physical connection is now required for a claim. This change in turn has raised the ire of Aboriginal advocacy groups, however, who argue that spiritual connections to the land are extremely important to their constituents, and in effect that European settlers and their descendants need to be better listeners to the ways that connection is communicated.<sup>18</sup>

Simply the narrative and visual aspects of property undoubtedly draw many scholars into the field—it would have been enough for me, at least. I think it is fair to say that property scholars generally are people who like maps and pictures, all of which relate to the communicative and expressive aspects of property law. But beyond the aesthetic and tactile attractions of the field, there is another and more theoretical reason to focus on those expressive aspects. That reason is that the expressive character of property can help to bridge the gap between the humanities on the one hand, and law-and-economics scholarship on the other.

Let me backtrack here again for another bit of autobiography. My own career as a legal scholar has coincided with the ascendancy of economic thinking in the law. Though other disciplines have also been important

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16. *Mabo v. Queensland, II*, (1992) 175 C.L.R. 1, 33-34 (Austl.) (holding that English sovereignty was compatible with native title).

17. Gary D. Meyers & Sally Raine, *Australian Aboriginal Land Rights in Transition (Part II): The Legislative Response to the High Court's Native Title Decisions in Mabo v. Queensland and Wik v. Queensland*, 9 TULSA J. COMP. & INT'L L. 95, 124-26 (2001).

18. *Id.* at 125. For another account of the importance of stories in native claims, see Mary Kancewick, *Of Two Minds*, in *FROM THE ISLAND'S EDGE: A SITKA READER* 3, 6 (Carolyn Servid ed., 1995) (describing a hearing where a Tlingit elder made land claims based on stories of origins and connections, and ended with the remark, “You say this is your land. Where are your stories?”). See also Jennifer Wallace, *Shifting Ground in the Holy Land*, SMITHSONIAN MAG., May 2006, at 58, 64 (describing certain Israeli archaeologists' efforts to verify biblical stories, as well as Palestinians' skeptical view that biblical archaeology is being used to justify illegal settlement).

over the last generation or so, economics, together with such related fields as game theory, rational choice, and economics-oriented cognitive psychology, have all taken a very significant and even dominant position in modern legal studies. I knew little about economic thinking when I began to study law, but I quickly developed a somewhat peculiar relationship to this field. I was impressed that economics yielded a disciplined approach to many legal subjects, even though economists sometimes referred to self-interest so relentlessly as to appear coarse and overreaching. Even taking that distasteful fact into account, I was surprised to find that others in the humanities took stances that were persistently anti-economic, anti-market, and in a certain sense anti-property. It seemed to me that market activities were a quite interesting part of human endeavors, and clearly a matter of great importance to the way that people live their lives. Even more important, it seemed to me that there is a somewhat neglected but critical element of cooperation at the center of economic activities, something that I would have thought a matter of considerable interest to the humanities, and something that I tried to explore several times in my own work later on.<sup>19</sup> In short, I thought that people in the humanities had much to learn from the study of economic pursuits.

But I also thought that humanists had and continue to have much to offer back to the economists. Economists generally tend to accept preferences as simply given, or in the economic lingo, “exogenous,” and to refer most decisions to a kind of core of self-interest that aims to satisfy preferences as “exogenously” given. But where do people’s preferences come from? What makes people willing to suppress their own preferences sufficiently to work with others toward common ends? And perhaps most important, what makes people change their minds about preferences, and about working with others? What, in short, *persuades*? Those questions open the door to expressive issues—that is to say, to the humanities.

There are unquestionably many other legal areas in which the expressive possibilities are rich indeed—criminal law, for example.<sup>20</sup> But property approached in this way, as language and communication, opens up a particularly rich area of inquiry, because the expressive qualities of property are located squarely at the center of the intersection between

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19. E.g., Carol M. Rose, *Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges and (More Importantly) Vice Versa*, 44 FLA. L. REV. 295 (1992); Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37 (1990); Carol M. Rose, *Trust in the Mirror of Betrayal*, 75 B.U.L. REV. 531 (1995).

20. See, e.g., Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 594 (1996) (describing uses of criminal “shaming sanctions” in reinforcing norms of the larger society); cf. Toni Massaro, *The Meanings of Shame Implications for Legal Reform*, 3 PSYCHOL. PUB. POL’Y & L. 645, 693-99 (1997) (arguing that shaming sanctions’ effects are inconsistent). See generally Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996) (giving a wide variety of examples of law’s expressive characteristics).

economic and humanistic studies. Property, together with trade, make up the heart of the economic enterprise. Property ownership supposedly concentrates the costs and benefits of an owner's actions on the owner herself: she takes the reward for good planning and hard work, and she suffers the consequences of carelessness and sloth. Property also makes owners identifiable, so that people can organize trades instead of grabbing and fighting. These features of property enhance careful management of resources, peaceable and mutually beneficial activities, and ultimately, as Adam Smith put it, the wealth of nations. So far, so good. But why do people think they own what they do? Why do they think that other people own what they own, and why do they respect others' claims, even against their own self interest? What makes something look like an entitlement, and what makes people change their minds about entitlements? Those are all questions that hinge on communications and signals among people, and they form the core of my own theoretical interest in property as an expressive enterprise. That enterprise occupies a middle space between economics and the humanities, a space in which each discipline can cast light on the other.

Unfortunately, it is often a space that is passed over without observation, much less examination. Here is an example: there is another famous story in economics, again about the origins of property, but here it is about property taken as an entire institution rather than property in this or that thing (as in the *Pierson* case about the fox). There are a number of versions of the larger institutional story, including one by John Locke, another by William Blackstone, and more recently, one by Harold Demsetz.<sup>21</sup> In all these versions, the institution of property is explained as a kind of cost-benefit calculation: property regimes emerge when self-interested people figure out that it is worth it. This story appears again and again in property theory, with what appears to be a breathtaking obliviousness to the story's own expressive function.

In Demsetz's version, the chief example is the North American fur trade of the seventeenth and eighteenth centuries.<sup>22</sup> The story plays out in what are effectively two snapshots. The first snapshot is taken just before the beginning of the trade, when native American groups hunted fur-bearing animals for their own use. At this time the hunters had no particular concern for the locations where they hunted, since the animals were plentiful and since there was no need to worry about their conservation. Enter the Europeans, who wanted the furs for textiles: in the face of this huge jump in demand, native people began to hunt much more intensely,

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21. The connections between these authors and their property evolution story is developed in ROSE, *supra* note 1.

22. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 354-59 (1967).

leading to a decline in the animal population, and ultimately to the second snapshot. By this later time, Native Americans had established family plots for their own exclusive hunting use, each keeping some animal habitat as a kind of reproductive “bank” and moderating their hunting activities in order to maximize the economic yield. That is to say, according to this story, property rights had emerged when conditions had made it worth it to move beyond wide-open access to the animals—worth it in order to manage scarce resources and to encourage the proper level of activity.

But some property scholars have in effect said, hey, wait a minute. What happened between Snapshot 1 and Snapshot 2?<sup>23</sup> And well they might ask. How did a propertyless people understand property signals at all? For example, how did they understand the blazes on trees that families used to mark out their areas? Did they borrow those signals from a culture of property in some other resources, say, tools? Even if they *did* figure out the signals for a new kind of property, why did they pay any attention, when self-interest would dictate grabbing up the nicely-preserved animals in spite of the signals? One answer might be that they were afraid of those who had already staked claims, and no doubt this went some distance. But a property regime only works if most people do not have to guard their property most of the time or resort to violence to protect it. To be sure, some modicum of owner vigilance is required to keep a property regime functioning; otherwise, among other things, property claims would blur. But guarding and violence are expensive and wasteful, and they can drain away any gains—or indeed any meaning—from having property rights in the first place. That is to say, a property regime only works if the owners have managed to convince others not only that they should understand the claim but that they should accept it too. In the game theory lingo, the relevant audience tacitly agrees to play “dove” to the owner’s “hawk.”<sup>24</sup> But where did that initial understanding and agreement come from?

In effect, the oft-repeated cost-benefit account of property’s institutional origins is just a story, quite at odds with the presumption of self-interest with which it begins, quietly smoothing over the difficulties in an effort to persuade an audience that property regimes will come to the rescue when and where people need them. It is all the more striking that another famous story starts the same way but goes in the opposite direction, and rather

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23. See, e.g., Stuart Banner, *Transitions Between Property Regimes*, 31 J. LEGAL STUD. 359, 362 (2002) (noting the difficulties of moving from open access to property, and citing collective action problems in both scenarios); James E. Krier, *The Tragedy of the Commons, Part II*, 15 HARV. J.L. & PUB. POL’Y 325, 336-38 (1992) (criticizing Demsetz for failing to note that the commons problem is repeated in efforts to manage the commons).

24. See, e.g., Richard O. Zerbe, Jr. & C. Leigh Anderson, *Culture and Fairness in the Development of Institutions in the California Gold Fields*, 61 J. ECON. HIST. 114 (2001) (analyzing property as a “hawk/dove” game).

more convincingly, too, on the assumption of self-interested actors: This is the *Tragedy of the Commons*, as Garrett Hardin famously named it.<sup>25</sup> It tells a tale in which the actors inexorably fail to find ways to manage resources that are open to all. Here people do not understand and accept any signals, so that the resources that they all use fall to pieces. Who, after all, will take the lead in organizing a property regime, at a cost of time and effort to herself for the sake of others? Who will follow, at a cost of immediate gratification for the sake of a highly uncertain future apparent good? The cost-benefit property story as represented by Demsetz (and Locke and Blackstone before him) is a leap of optimism, and it effectively uses a narrative form to conceal the difficulties.

But of course this is something that stories can do. As narrative theorists have argued—beginning with Aristotle's *Rhetoric*—a story can persuade, preparing an audience for action.<sup>26</sup> The audience can believe that what is effectively a cooperative institution can emerge from simple comparisons of costs and benefits among self-interested actors, however much the theory of rational self-interest might reject this conclusion. Just so with this very famous tale of the origins of property as an institution: the economic argument falls back on a story.

And so, this is why, at the outset of this conference's planning, I thought there should be a fifth panel, or rather a first panel, on property and language. Property takes some persuading in order to happen at all.

But of course, the panel was not to be. And so, in the absence of the fifth panel itself, it seems appropriate to bring up a kind of next-best solution: to raise some issues that a ghost panelist, a member of the missing Fifth Panel, might have noted in the other four panels. If one thinks about the relationship of property to language, how might the broad issues of language appear in the four topics that actually make up this symposium—that is, commons, nature, takings, and exchange relationships?

That is the question to which I will devote the remainder of this introduction.

## II. FOUR PANELS IN THE LIGHT OF A (MISSING) FIFTH

How might the ghost panelists approach the topics of other panels? Here is a brief overview: with respect to the first two panels, commons and

25. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968). For an earlier but less felicitously named analytical presentation of the same commons issues, see H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 *J. POL. ECON.* 124 (1954) (analyzing commons problems in the example of overfishing).

26. ARISTOTLE, *THE RHETORIC*, 228-32 (1416b-1417b) (Lane Cooper trans., Appleton-Century-Crofts 1932) (describing the use of narrative in persuasion); DAVID CARR, *TIME, NARRATIVE, AND HISTORY* 24, 45-46, 57-65, 149-50 (1986) (connecting narration to a theory of action and community change).

nature, the ghost panelists will take up subjects that relate to the possibilities and difficulties in establishing what might be called “texts” of property—that is, signals, like killing the fox, that announce one’s claims and that are generally accepted as establishing or maintaining property rights. Both the commons and the environment confront property institutions with a major obstacle: in the inherited European property traditions, it is very difficult to find any kind of text that marks out property rights in either the commons or the environment. And of course, no text means no property—no claims can be made and none understood. This may be a good thing or a bad, but however one judges that issue, the very intractability of commons and environment makes these subjects all the more useful for exploring what it actually means to signal and understand a property claim.

With respect to the remaining two panels, takings and exchange relationships, our ghost panelists will concentrate on something quite different, what literary theorists would call “subtexts.” Takings issues and exchange relationships are rife with property utterances. No problem about property texts here: on the contrary, these areas are if anything overloaded with property talk. But on closer examination, one also finds in these areas a host of subtexts, among them many implicit messages about who gets to make property claims and who does not, along with the resulting questions of status anxiety. With respect to these panels, the ghost panelists are thus especially interested in locating and exploring not texts but subtexts—the communications that lie just behind the express texts.

### *A. Finding Property Texts: Commons and Nature*

#### *1. Property Texts in the Commons*

It is generally a tricky business to tell a story of property about the commons, but the trickiness varies, depending on what one means by the commons. To be more precise about the matter, what are called “commons-es” are actually two different kinds of institutions. One is a limited common property, where something is owned jointly and shared by a defined group of people; the other is an unlimited common resource, or as it is sometimes called, an “open access” resource.<sup>27</sup> In the garden variety case, a text of property normally signals that something is owned by someone in particular. But where things are designated as “commons,” they are not owned individually but rather owned in common with others,

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27. This distinction has been stressed especially by Elinor Ostrom, one of the most prolific recent theorists about resources held in common. See her *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 48 (1990) (distinguishing open-access resources from those managed by a group, which she calls common pool resources). See text at note 40 *infra*.

or not owned at all. As it turns out, though, property texts do actually show up regularly in connection with limited commons-es, where a defined group claims something jointly, even if the property signals they send sometimes seem rather unorthodox. Open access commons-es are a much more dicey matter, as we shall see. But let us deal with the easier case first, the limited common property.

*The Commons as Limited Common Property.* Is there a language through which groups of people can secure their joint rights in resources? The answer is, yes, sometimes. The common law tradition is not entirely friendly to group rights, particularly in the United States.<sup>28</sup> Nevertheless, groups lay claims to things quite frequently, sending out a great variety of signals of their claims even when those claims are extra-legal or even illegal. A recent Yale Law School graduate, Daniel Nazer, has written an article about the group property claims of surfers.<sup>29</sup> Apparently these claims are a well-known phenomenon among surfers, and they bear the name “localism.” Local surfers will let outsiders know very rapidly that they are not welcome, signaling their own exclusive claims through dirty looks, rude comments, and jostling, some of it pretty heavy-handed.<sup>30</sup>

The “localism” phenomenon in certain ways is not all that different from the group claims in a movie line: people in the line have a recognized time-limited claim to get their tickets, prioritized by the order of their arrival in line; line-breaking elicits dirty looks, muttering, and some chastisement. Jostling seems somewhat unlikely in a line for movies, but it would not be surprising in lines for especially highly valued or unique events, for example, World Series tickets or a rock concert.<sup>31</sup> The person who comes late is expected to see the line and to understand that the way to claim the resource is to take a place at the back.

Both surfers’ customs and the movie line have recognizably economic functions: localism prevents overcrowding in a limited resource, while the movie line provides an orderly way to allocate rights to another limited resource. Indeed the movie line allocates rights by giving the highest claim to those who value the resource most, at least insofar as value is roughly approximated by early arrival.

Notice that both these types of group claims announce a limited

28. See Carol M. Rose, *Common Property, Regulatory Property, and Environmental Protection: Comparing Community-Based Management to Tradable Environmental Allowances*, in *THE DRAMA OF THE COMMONS* 233, 251-53 (Elinor Ostrom et al. eds., 2002) (noting the anti-democratic or archaic character of some group rights and their rejection in American law).

29. Daniel Nazer, *The Tragicomedy of the Surfers’ Commons*, 9 *DEAKIN L. REV.* 655 (2004).

30. See, e.g., Paul McHugh, *Surfing’s Scary Wave: “Localism” Intensifying at Ocean Breaks*, *S.F. CHRON.*, May 15, 2003, at C11 (reporting on beating incident, far beyond normal practice of “vibing”—cursing at—strangers).

31. Bargain shopping also elicits this behavior. See, e.g., Fred Grimm, *Wilma Was a Wimp Compared to Black Friday*, *MIAMI HERALD*, Nov. 29, 2005, at B1 (reporting line-cutting violence in Orlando Wal-Mart laptop sale, other incidents of shopping violence).

common property, and they depend heavily on communication both for their formation and for their enforcement. It is important to notice too, however, that some of the signaling in group rights has a distinctly unattractive side: there is a considerable load of threatening symbolism in many group claims to entitlement. Many property scholars are familiar with the anthropologist James Acheson's fascinating studies of the lobster fishery in the vicinity of Monhegan Island, a small jewel of an island off the rocky coast of Maine.<sup>32</sup> The Monhegan lobstermen have worked out ways to police themselves so as to avoid overfishing among themselves, and even more important, to exclude outsiders from the island's fishery altogether. Until recently, the exclusion of outsider fishers was illegal under Maine law: fishing waters were supposed to be open to all on an equal basis. But the Monheganers kept outsiders at bay by a set of property-claiming texts that are picturesque but thuggish: marking coarse sexual symbols on outsiders' traps, or in more serious instances, cutting the buoys from the outsiders' traps to make the traps impossible to locate.<sup>33</sup> Gestures of this sort are representations of violence, and they are intended to be understood as a warning of worse to come in case of future trespass.

Similarly, some of my own recent work has focused on racially restrictive covenants in the first half of the twentieth century.<sup>34</sup> Even at a time when these covenants were legal and widespread in cities, the most sharply segregated white neighborhoods did not have them. They did not need them, because they used violence instead.<sup>35</sup> When a minority family rented or purchased a home in those neighborhoods, it was likely to find eggs and tomatoes thrown at its doors, racist signs painted on its walls, and occasionally a brick heaved through the window. This behavior too was a kind of representation of violence that leached over into actual violence, and it too was intended to convey the threat of much worse if the minority family did not leave. It sent a message of ownership: that the neighborhood belonged to the white residents, to the exclusion of all others.

Violent or symbolically violent messages of this sort are a particularly crude form of group property texts. Intimidating texts like these also illustrate that the law sometimes intervenes to *prevent* ownership and to prevent the symbols of ownership too. And with good reason: the symbolic gestures in a sense create an ownership claim that the larger

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32. JAMES M. ACHESON, *THE LOBSTER GANGS OF MAINE* (1988).

33. *Id.* at 48-49, 75.

34. Carol M. Rose, *The Story of Shelley v. Kraemer*, in *PROPERTY STORIES* 169 (Gerald Korngold & Andrew P. Morriss eds., 2004).

35. THOMAS PHILPOTT, *THE SLUM AND THE GHETTO: NEIGHBORHOOD DETERIORATION AND MIDDLE-CLASS REFORM, CHICAGO, 1880-1930*, at 198 (1978).

public rejects. Graffiti in public spaces operate in somewhat the same way and raise objections of the same sort, though of course less serious: they imply that someone is personally appropriating spaces and things that should be common to everyone.<sup>36</sup>

In fact, the greater the perpetrators' efforts to keep these symbolic gestures anonymous, and the more the gestures themselves slip into violence, the more marginal they become to the normal functioning of property. Anonymity disguises the messenger, signaling that—unlike most property—negotiations are not possible; violence betrays the messenger's knowledge that the claim of entitlement—again unlike most property—is not accepted by the larger community. Once again, property's usefulness springs from the legibility of the claim, and from the intended audience's understanding and acceptance; these features relieve the claimant from having to guard or use force to protect the claim, and they open the door to negotiation and trade. The sneak attack and the use of violence, on the other hand, strongly suggest that even the perpetrators know that beyond their own group, their claims are neither accepted nor acceptable in the larger community.

*Commons as Open Access.* Not all limited common property claims are as nasty as those of the racially exclusive neighborhood. Some are as productive as traditional community grazing areas or forests,<sup>37</sup> and others are as innocuous as the Bingo Club's regular Friday night use of the corner table at the Cup and Saucer Café. Moreover, modern legal instruments can help to guide limited common property arrangements into democratic decisionmaking institutions.<sup>38</sup> And in general, if these limited commons were not so useful and normally benevolent, they would not be so interesting—or they would only be interesting only to those who study pathologies.

But the second widespread understanding of the “commons” is often thought to be pathological under all circumstance. This is the wide-open and unlimited version of the commons, and it is especially familiar from Hardin's famous title, *The Tragedy of the Commons*.<sup>39</sup> Here no one has the right to exclude anyone else from the common resource. Elinor Ostrom, a distinguished political scientist and leading scholar of limited common property regimes, argues that it is a misnomer to use the word “commons”

36. See, e.g., CRAIG CASTLEMAN, GETTING UP: SUBWAY GRAFFITI IN NEW YORK 12, 25, 46-48 (1982) (describing the writer's sense both of public service and theft).

37. See, e.g., Arun Agrawal, *Rules, Rule Making, and Rule Breaking: Examining the Fit between Rule Systems and Resource Use*, in ELINOR OSTROM ET AL., RULES, GAMES, AND COMMON-POOL RESOURCES 267 (1994) (describing community-based forestry practices in India); Henry E. Smith, *Semicommon Property Rights and Scattering in the Open Fields*, 29 J. LEGAL STUD. 131 (2000) (describing medieval common fields).

38. See Hanoch Dagan & Michael Heller, *The Liberal Commons*, 110 YALE L.J. 549 (2001) (describing the potential for a modernized and liberalized limited commons).

39. Hardin, *supra* note 25.

for the open-access situations that Hardin described; in her view the “commons” often implies some constraint on access so that group management is possible—that is to say, resources held as “common property” really mean resources under group control.<sup>40</sup> Nevertheless, whether due to Hardin’s terminology or to sloppy usage over a longer period, we seem to be stuck with the word “commons” to mean open access too.

Hardin’s essay and much other property theory suggest that this kind of commons is headed for ruin. Where access to a resource is unlimited, no one has much incentive to invest in its maintenance, and everyone has an incentive to take as much and as quickly as possible, before others arrive and do likewise. The result, it is said, is decimation—nonrenewable resources (like mining areas or oil fields) are grabbed up too quickly, and renewable resources (like fisheries or forests) are gutted and trashed beyond repair. All this turns into one of the many arguments for property, as in Demsetz’s story of the evolution of property: once they are owned, formerly-open-access resources become subject to the owner’s careful management—careful because she takes the rewards of good husbandry and feels the pain of underinvestment or overuse.<sup>41</sup>

Nevertheless, in spite this familiar warning, there are some areas in which open access has been very persistent in our law. Roadways and navigable waterways are especially notable in this respect; these are physical locations that have historically been open to the public for purposes of navigation, transportation, and travel. Open access in roads and waterways does not escape property language, and they are often designated as belonging to the public, as in the term “public trust” that often designates these resources. This terminology implies a set of resources owned and managed by larger governments for the use of the entire public.

There are reasons why such resources are held open to all, even though public access causes physical wear and tear and entails regular repair. Roads and waterways are avenues of commerce and communication, and the more people use them, the better off we all are, since wider fields of commerce and interaction expand both the purse and the mind.<sup>42</sup> In the well-known saying, the more the merrier.

Over the last generation or so, there has been some argument for public access to physical locations other than transportation and communication

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40. Thomas Dietz et al., *The Drama of the Commons*, in *THE DRAMA OF THE COMMONS* 3, 11-12 (Elinor Ostrom et al. eds., 2002) (summarizing the critique of Hardin’s conception of “commons”).

41. Demsetz, *supra* note 22.

42. I explored some of these issues in Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986).

lanes, notably beach and recreation areas.<sup>43</sup> Even more expansive have been the arguments for an enlarged understanding of a public trust to cover environmentally sensitive resources.<sup>44</sup> Such subjects have generated much controversy over the meaning and uses of open access.<sup>45</sup> But even more recently, in the wake of a revolution in telecommunications, the open-access debate has swung quite sharply to another set of subjects altogether, involving not physical resources but rather intellectual ones. A whole new generation of scholars now argues that for the sake of greater creativity, information should be opened up to all, along with the major new means of conveying information, the Internet. This discussion takes the form of a set of multi-faceted attacks on conventional intellectual property—patent, trademark, copyright.<sup>46</sup>

Are there symbolic expressions of property in the wide open intellectual commons? In some ways there should not be. After all, the unlimited, wide-open-access commons is precisely defined by the *absence* of property. Such imagery as we have reflects this property-less-ness: cyberspace, for example. The word calls forth a kind of *2001: A Space Odyssey* image, with nameless, unclaimed stars and planets whooshing past as we traverse a limitless universe.<sup>47</sup>

Nevertheless, even cyberspace is likely to require some governance, and for that reason property imagery is likely to reappear. Larry Lessig, whose call to scale back property rights in copyright is a part of this symposium, elsewhere used Central Park and Broadway as analogies for the Internet<sup>48</sup>—that is to say, two kinds of public property. Another bit of

43. *Id.*, at 714-17, 779-81.

44. See, e.g., Alison Rieser, *Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory*, 15 HARV. ENVTL. L. REV. 393 (1991) (considering ecosystem preservation as public trust). The *locus classicus* of this literature is Joseph L. Sax, *The Public Trust in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) (arguing that the traditional doctrine extends to natural resources). I discussed some of the trends in subsequent public trust thinking in Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOL. L.Q. 351 (1998).

45. For some well-known sharp criticisms, see, for example, James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527 (1989); and Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986).

46. See, e.g., JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996) (criticizing undue proprietization of intellectual endeavors); Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 YALE L.J. 273 (2004) (same); Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698 (1998) (same); Lawrence Lessig, *The Architecture of Innovation*, 51 DUKE L.J. 1783 (2002) (same); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1 (2002) (same); Pamela Samuelson, *The Copyright Grab*, WIRED MAG., Jan. 1996, at 134 (same); see also Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873 (1997) (book review) (same, though criticizing Boyle).

47. 2001: A SPACE ODYSSEY (Metro-Goldwyn-Meyer, 1968).

48. Lawrence Lessig, *Commons and Code*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 405, 406 (1999). I (ahem!) used Central Park in this way earlier, in Carol M. Rose, *The Several Futures of*

property language is the now somewhat dated-sounding “Information Superhighway”; a highway is of course public property, at least in the usual case. And even though that terminology has fallen out of favor, it does serve as a reminder that cyberspace may have some connections to the traditional public trust properties, the roads and rivers of earlier commerce and communication.

Are there other symbolic presentations of cyberspace as property? Public property imagery, like parks and highways, seems the most likely candidate, perhaps interlaced with some private property. Though it may be a stretch, a recent review of an art history book about the frescos of Ambrogio Lorenzetti suggests some ideas. Lorenzetti was an artist of fourteenth-century Siena; the reviewer remarked that while most artists of heaven and hell gravitate towards hell as the more interesting visual location, Lorenzetti had a particular knack for depicting the good life. Indeed, the good life was just outside the window, in the streets of late medieval Siena, where one could find “bustling shops, circle dances, construction sites, farmers, [a] pet monkey, and [an] acrobatic cat,” all of which give this artist’s work “the incidental detail that usually gives Hell the visual advantage over Heaven’s orderly—and supremely monotonous—legions.”<sup>49</sup>

Lorenzetti’s picture of Siena might be a useful model for cyberspace. It would not be the Information Superhighway, which seems rather impersonal, like I-80 or I-95 as they pass through artificial green strips in the country and high-walled abutments in urban areas, but rather the city street. On this street there is public access but private property too. People stop to chat with one another and with the street vendors. They laugh at the pet monkey’s antics, drop into a shop and buy something, or have a seat and watch the other passers-by.

Lorenzetti’s Siena may well be the ideal that many people have for the Internet and information resources, a mixture of open access and private property. Of course, a streetscape also suggests a few of the problems that might be encountered there—pickpockets, for example—since the street is not really quite heaven. But this is not an example that I want to push too far in any case—after all, Siena seems a bit small by comparison with cyberspace. I merely want to suggest that even where the topic is the commons as wide-open access, a Fifth Panelist might well imagine some property texts—especially public property texts—and those could very

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*Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 154 (1998) (analogizing the Internet to Central Park after dark—risky but exciting). *But cf.* Julie Cohen, *Cyberspace as/and Space*, 107 COLUM. L. REV. (forthcoming 2007), available at <http://ssrn.com/abstract=898260> (extensively discussing and critiquing special metaphors for the Internet).

49. Ingrid Rowland, *What the Frescoes Said*, N.Y. REV. BOOKS, Oct. 20, 2005, at 35, 36 (book review).

possibly influence the way we think about appropriate legal regimes.

## 2. *Property Texts(?)*, Part 2: *Nature*

Moving on through the panels, what might a ghost Fifth Panelist have to say about property texts relating to the environment? Environmental subjects, like both versions of the commons, make property symbolism tricky to find. In fact, some scholars have argued that property is if anything antithetical to nature, and that the common law of property is inherently anti-environmental.<sup>50</sup> Why is this? The answer is not hard to find: it goes back to the *Pierson* case about ownership of the fox, and more generally, it goes back to the kinds of symbols that Anglo-American property law recognizes as conferring ownership. To own the fox, a person has to kill the fox, or to catch it in nets or a trap from which it cannot escape. That is the way that the claimant declares clearly to all the world (or at least the relevant part of it) his unequivocal intention to remove the unowned thing from the wild and to take it as his own. Contract language can be more refined and detailed, aimed as it is at one or a small numbers of recipients; but property language is aimed at a larger and unknown audience, and its gestures are necessarily rather ham-handed, Sarah Bernhardt rather than Rilke.

But if it takes large gestures of domination to acquire property in natural resources, it is hard to think that anyone can claim those resources without altering them from their natural state. This is a problem in rainforest areas, where even the laws may encourage claimants to clear off the natural vegetation in order to bolster their property rights.<sup>51</sup> It is a problem in the United States as well, for example in connection with water law in the west. The western states recognize that persons who divert water from a river may establish a permanent claim to the diverted water supply. Diverting water makes it possible to irrigate arable land at some distance from the river itself, but even more importantly, it is a visible claim to a certain amount of water. But these western “appropriative” water laws have had much more difficulty in accommodating so-called “instream” uses like fishing and habitat protection, precisely because the water

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50. See, e.g., John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519 (1996) [hereinafter Sprankling, *Antiwilderness Bias*] (arguing that American law favors exploitative uses over wilderness uses). See also John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 832-35 (1994) (describing the limited exploitation required for adverse possession of wilderness).

51. LEE J. ALSTON ET AL., TITLES, CONFLICT, AND LAND USE: THE DEVELOPMENT OF PROPERTY RIGHTS AND LAND REFORM ON THE AMAZON FRONTIER 57, 59 (1999) (noting clearing as a way to secure both informal and formal claims); Robert Mendelsohn, *Property Rights and Tropical Deforestation*, 46 OXFORD ECON. PAPERS 750, 751 (1994) (citing weak property rights and government recognition of “improvement” as incentives for deforestation); Robert Repetto, *Overview*, in PUBLIC POLICIES AND THE MISUSE OF FOREST RESOURCES 1,15-16 (Robert Repetto & Malcolm Gillis eds., 1988) (same).

remains in the stream and is not “marked” by any works for diversion, which would announce both the fact of the property claim and the amount claimed.<sup>52</sup> Groups like the Nature Conservancy have to face similar issues. It would undercut their purpose to undertake the nature-altering gestures ordinarily recognized in the common law as property claims, that is, acts like cutting trees and plowing fields; instead these groups have to rely on secondary symbols like deeds and recording systems, where paper documents signal ownership in official records, at some remove from the thing that is owned. These secondary symbols are all very well where records are in reasonable condition. But ownership of this sort is under constant threat in areas where records for land or water rights are poorly kept, and where the “audience” pays more attention to the land- or water-altering gestures of an intruder than the paper claims of an environmental owner.<sup>53</sup>

In short, environmental groups are often dedicated to passive uses of resources, and that is their problem. Our Anglo-American legal traditions do not have a dramatic symbolic vocabulary for passive uses, and this fact impedes the “writing” of property texts about natural resources, even where property could be useful—as for example in ownership of land or water for conservation purposes. Environmental subjects would thus give a Fifth Panelist an occasion to pinpoint the gestures that our inherited law recognizes for property—and particularly their limitations and need for supplementation.

There is another issue about texts that a ghost Fifth Panelist might well address in connection with the subject of property in nature. That issue revolves around texts of value or valuation. Because people cannot easily own environmental goods, like air or water or scenery, these goods do not appear directly in markets. But if markets do not signal their value, or do so only imperfectly, we have a hard time figuring out just what their value *is*. A ghost panelist might well want to inquire further about this problem of value: how can value be signaled for environmental goods? If the market will not do so, what will?

James Salzman has given a good deal of attention to this problem, writing especially extensively on what he and others call “ecosystem services.”<sup>54</sup> A wetland area preserves habitat for fish and wild animals; it

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52. For an example of the difficulties that instream use faces in appropriative systems, see *Idaho Dept. of Parks v. Idaho Dept. of Water Admin.*, 530 P.2d 924 (Idaho 1974) (permitting instream uses over objections).

53. See, e.g., Sprankling, *Antiwilderness Bias*, *supra* note 50, at 543-47 (noting favoritism to land users and “improvers” over formal title holders during the early settlement of the American west); *id.* at 573-74 (noting the continuation of doctrines that favor uses destructive to the wilderness).

54. See, e.g., James Salzman, *Creating Markets for Ecosystem Services: Notes from the Field*, 80 N.Y.U. L. REV. 870 (2005); James Salzman et al., *Protecting Ecosystem Services: Science, Economics, and Law*, 20 STAN. ENVTL. L.J. 309 (2001)

also calms storm surges, sponges up floodwaters, and decomposes waste matter. Insects and bats pollinate fruits, flowers and vegetables. These are valuable services, and just as important, their value can be measured against the cost of alternative methods of doing the same things. It is a very useful exercise to conduct these comparisons, because they remind us that environmental protection does have some values that are close to the market, whether or not they are the subject of direct payment or trade.

A Fifth Panelist, however, might also focus on methods of conveying value that engage symbolism or imagery. What might be some of these texts of value? Some could be visual, for example Ansel Adams's haunting pictures of Yosemite and other stunningly beautiful locations in the west. Before Adams was the mid-nineteenth-century painter Alfred Bierstadt, with his strikingly romantic and almost reverential landscapes.<sup>55</sup> Aldo Leopold told stories about the fish and the geese on his farm when the rivers rose,<sup>56</sup> while modern moviemakers devote full-length features to birds in flight. Some might be skeptical of some of these depictions, of course. Adams's Yosemite photos were empty of people, with no sign either of the tribal peoples who had once lived there or of the modern tourists who presumably might have ruined the mood.<sup>57</sup> Leopold seemed pretty confident that he understood the satisfaction of those honking geese. Those bird flight movies have an awful lot of soaring. Bierstadt's work looks hopelessly sappy to a modern eye. But even sappiness can help sometimes to raise issues of value. Though the details may be different, unquestionably the Sierra Club's coffee table books about autumn leaves serve in the twentieth century as Bierstadt's and others' paintings did in the nineteenth: they take a subject that looks empty and barren, and turn it into something alive and valuable.<sup>58</sup>

While space constrains any extensive discussion here, some member of the Ghost Panel might also raise a kind of environmental value text that is if anything the opposite of sappy, and that instead attempts to look hard-headed and tough-minded. This is something called "contingent valuation," which attempts to turn environmental issues into the language of cold cash. The contingent valuation specialist asks questions like this: "How much would you pay to go see a whale? How much would you pay

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55. For Bierstadt and other landscape artists of the American west, and their quasi-religious attitude toward nature, see BARBARA NOVAK, *NATURE AND CULTURE: AMERICAN LANDSCAPE AND PAINTING 1825-1875*, 150-56 (1980) (describing artists' sense that American landscape represented pure creation).

56. ALDO LEOPOLD, *A SAND COUNTY ALMANAC* 23-24 (1949).

57. See SIMON SCHAMA, *LANDSCAPE AND MEMORY* 7 (1995) (observing that the modern imagination of Yosemite is still Adams's and other artists' empty version).

58. See FINIS DUNAWAY, *NATURAL VISIONS: THE POWER OF IMAGES IN AMERICAN ENVIRONMENTAL REFORM* (2005).

simply to know that the whale exists out there in the ocean?”<sup>59</sup>

Contingent valuation gets attacked roundly, from both left and right. Some economists think that the whole enterprise is bogus, for a whole range of reasons: people are not really spending money, so they can say anything they please. Some of their answers depend on the order of the questions, e.g., it is hard to say you would pay only ten dollars for a whale’s existence, when you have already allowed that much for a puny little otter. Some other answers make no sense at all, as in one hundred dollars for one whale, and fifty dollars for ten whales. And so on.<sup>60</sup> On the other side, some environmentalists rail against the very idea that environmental values can be translated into money terms. No wonder, they say, that people don’t understand the question if a survey questioner asks how much they value a mountain.<sup>61</sup>

But a Ghost Panelist might not ask for so much precision or literalness. She might wonder whether contingent valuation is another symbolic method for staking a claim for environmental values. We do not have a very large symbolic or linguistic reservoir for expressing the value of things. But in a commercial society, market language is in that reservoir, and it is ever-present. “You look like a million bucks!” “You would have to pay me to go to that party!” We have to make the best of what we have, and market language is one of the things we do have. This kind of talk may indeed be jarring with respect to the good things of nature—the clouds, the animals and plants, the vistas. But perhaps the point is to be jarring, to wake up a shopping-mall society to the point that there are valuable things out there that are not part of a market. Language of this sort may change minds—in a certain way, just as those nature paintings and photographs change minds.

### *B. Sniffing Out the Subtexts: Takings and Exchanges*

The first two panels, on commons and nature, stretch our capacities to find texts that do some of the things property is supposed to do—that is, encourage a careful and orderly use of resources, and to serve as a marker for value. With takings issues, as with exchange issues, the communicative conundrums can be quite different. Here texts of property

59. For an overview of the pros and cons, see Paul R. Portney, *The Contingent Valuation Debate: Why Economists Should Care*, 8 J. ECON. PERSPECTIVES 3 (1994); Peter A. Diamond & Jerry A. Hausman, *Contingent Valuation: Is Some Number Better than No Number?*, 8 J. ECON. PERSPECTIVES 45 (1994) (unfavorable view); and W. Michael Hanemann, *Valuing the Environment Through Contingent Valuation*, 8 J. ECON. PERSPECTIVES 19 (1994) (favorable view).

60. See Diamond & Hausman, *supra* note 59 (detailing these and other critiques).

61. See MARK SAGOFF, *THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT* 83-84 (1988) (criticizing contingent valuation as out of line with ordinary valuation). But see Carol M. Rose, *Environmental Faust Succumbs to the Temptations of Economic Mephistopheles, or, Value by Any Other Name Is Preference*, 87 MICH. L. REV. 1631, 1634-36 (1989) (attempting to rescue contingent valuation).

abound. What is more interesting are the kinds of *subtexts* that these texts carry—the messages of who counts and who does not and why, and the anxieties that go along with those questions.

### 1. Takings.

When governments are accused of “taking” an owner’s property under the guise of regulation, property language bursts at the seams. Indeed, some might say that this is a locus in which there is altogether too much property talk. At least one language issue, though, is about the *subtexts* behind the property talk: that is, the question is not about the thing taken, but about what the governmental action conveys about the owner himself or herself. What the owner reads into the alleged taking may well be the subtext: You do not matter.

Here I need to make a slight excursion: the language of rights has come under some attack in the legal community, from the left because it is said that rights-language acts as a smokescreen to obscure the injustice of actual allocations of wealth and power, and from the right because rights-talk is said to harden lines and impede reasonable negotiations over important matters.<sup>62</sup> On the other hand, one defense of rights-talk is that the language of rights conveys the message that the rights-holder is a person who matters, a person whose decisions and opinions have to be taken seriously. For example, people dealing with battered women have tried to inculcate in their clients a sense that the clients are rights-holders, and that as rights-holders, they are entitled to be treated with respect.<sup>63</sup>

Property is a very tangible kind of right, especially when it attaches to tangibles like land, and thus property gives out a very tangible signal that the rights-holder does matter. E.M. Forster wrote a funny little essay on this topic, “My Wood,” in which he described his purchase of a piece of woodland and recounted the internal changes that the experience wrought on his psyche.<sup>64</sup> His first reaction, he reported, was that he felt more substantial, literally heavier. A freeholder, a man of substance, of course.

But Forster’s sensations are not entirely just a laughing matter. For example, in China, the government has allowed people to buy their apartments in the last few years, but it has also faced what was probably an unexpected political effect. Newly minted apartment owners feel “heavier” too. More specifically, they think that as owners, they have

62. See, e.g., MARY ANN GLENDON, *RIGHTS-TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991) (presenting a critique from a conservative perspective); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1382-94 (1984) (presenting a leftist critique).

63. See, e.g., Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women’s Movement*, 61 N.Y.U. L. REV. 589, 597-98, 611-12 (1986).

64. E.M. FORSTER, *My Wood*, in *ABINGER HARVEST AND ENGLAND’S PLEASANT LAND* 21 (1936).

something to say about city politics, and they have started grassroots organizations for that purpose, branching out to other cities and creating larger citizen networks.<sup>65</sup>

To come back to the takings issue, then, and to the subtext that an owner may read into cavalier treatment of his property: you don't matter. In the past, large-scale governmental expropriations have frequently targeted people who are classed as enemies, including expropriations here in the United States: Tories during the American Revolution, Native Americans on the frontier (in spite of nominal payment), citizens of Japanese origin in World War II.<sup>66</sup> More recently, expropriations have been very much a part of ethnic cleansings in Europe, as with the Jews in the 1930s, and more recently with the various ethnic groups of former Yugoslavia. Given the link between expropriation and enmity, it is not entirely surprising that people who think their property rights are taken also think that they are being treated as if they were expendable. Indeed, that can be the case even when the taking is compensated, as in the exercise of eminent domain, a subject of much furor in the recent past.<sup>67</sup> Money compensation may not be enough when you perceive that what you have lost is your dignity and your respect in the community.

On the other hand, there is a great deal of posturing about takings issues, and a fair number of overblown claims, for example from people who find that they cannot fill and subdivide their wetlands property when those actions contribute to flooding downstream. In such cases, owners claim a property right to do something that affects the neighbors or the public adversely.<sup>68</sup> Here property rights should be arrayed against property rights, but unfortunately, land is solid and relatively easy to understand as property—much easier to depict as property than are the diffuse neighborly and public resources like air and water and wildlife, even though the latter resources lie adjacent to land and are deeply affected by

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65. See Jonathan Kaufman, *New Crop of Protesters in Tiananmen Square: Restive Homeowners*, WALL ST. J., June 9, 2004, at A1 (describing a new homeowners' organization and its protests).

66. I explored several of these expropriations in Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1.

67. The case *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), in which the Supreme Court found that economic development could be a "public purpose" for purposes of eminent domain, has raised an unusual hue and cry that property rights are threatened. See, e.g., Avi Salzman & Laura Mansnerus, *For Homeowners, Frustration and Anger at Court Ruling*, N.Y. TIMES, June 24, 2005, at A20 (reporting on the reaction to *Kelo* and on planned legislative initiatives to limit eminent domain).

68. See, e.g., Vicki Been, *Lucas v. The Green Machine: Using the Takings Clause to Promote More Efficient Regulation?*, in PROPERTY STORIES, *supra* note 34, at 221, 223-24, 249-51 (2004) (noting a tendency to underregulate property owners even where their actions cause environmental harm); Richard J. Lazarus, *Restoring What's Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 721-36 (2000) (describing several Supreme Court Justices' tendencies to disregard environmental concerns in a number of cases, including some on property rights); see also Laura S. Underkuffler-Freund, *Takings and the Nature of Property*, 9 CANAD. J.L. & JURISPRUDENCE 161, 190 (1996) (noting the overblown rhetoric of property rights in the Supreme Court, in spite of the limited effect in fact).

land uses. The subtext of personal slight attaches especially strongly to individual property—and especially to landed property—and the danger is that *this* sense of slight may be so great as to eclipse a more rational conversation about the content of property rights, including land rights, in a changing environmental context.

Economists tell us that property rights regimes need to change in the face of changes in demand for resources.<sup>69</sup> In turn, this means that property law has to come to grips with the great touchiness of individual property rights. In keeping with a linguistic turn about property rights, I have been arguing for some time that we need a more robust language of “public rights” in the United States. In this country, the language of individual property is extremely well-developed, but as citizens, the rest of us could use a better vocabulary for expressing public claims.<sup>70</sup> My own view is that this kind of language was better developed in the nineteenth century, with more nuances and a more sharply defined sense of when and where public claims begin than we now enjoy.<sup>71</sup> A Fifth Panelist might well explore this question, asking where the language of public rights went and why, and how some recourse to it today might be recovered, now that public resources like water, air, and wildlife are so severely pressured. The subtext behind the eclipse of public-rights discourse is that the public does not matter, whereas a recovery of the texts of public rights could bolster the sense that public claims and decisions command respect along with private ones.

## 2. Gifts, Bargains, and Power

I mentioned earlier that for some people with takings claims, mere money compensation is not enough to satisfy. Are they the only ones with this attitude? This subject of money brings us to the fourth panel: gifts, bargains and power. As with takings issues, this general area of exchange relationships seldom falls short when it comes to texts of property. But again as with takings, a Fifth Panelist might be just as interested in the subtexts as in the texts of property.

But our Fifth Panelist would feel right at home here, because many others too have been interested in the subtexts of exchange relationships. One of the major intellectual subjects within exchange relationships is

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69. GARY LIBECAP, CONTRACTING FOR PROPERTY RIGHTS 1-2 (1989).

70. See, e.g., Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265 (1996); Carol M. Rose, *Environmental Lessons*, 27 LOY. L.A. L. REV. 1023, 1042-43 (1994); see also Victor Flatt, *This Land Is Your Land (Our Right to an Environment)*, 107 W. VA. L. REV. 1, 3-6 (2004) (arguing for a language of environmental rights properly to assess environmental values).

71. See, e.g., Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 CAL. L. REV. 217, 222-24 (1984) (describing nineteenth-century legal usage).

what Margaret Radin has called “commodification.”<sup>72</sup> It is also the subject on which the panelist Martha Ertman has just published a book.<sup>73</sup> The commodification question is this: What does it *mean* to say that something can be purchased for money, or purchased at all? What if the something is a kidney? What if it is the right to pollute (to use an environmental example)? What if it is sexual services, as in prostitution? What if it is a baby? What if it is free speech?

Michael Sandel states one major concern: it is that a market transaction will somehow undermine or corrupt the very thing exchanged.<sup>74</sup> Hence on one interpretation, we do not allow market transactions in certain kinds of goods, e.g. body parts. They may be *given* away, but not sold, because selling conveys a mistaken message and undermines the thing sold, encouraging, in this example, the sale of unhealthy organs or tissue. The exchange itself carries a self-contradictory subtext. The same can be said of the market treatment of sexual services: love for sale, in the old cliché. Here too the subtext contradicts the text, because love cannot be bought and sold and still be love. So goes the anti-commodification argument, or one of them.

But there are a number of problems with this view. One problem is that love *can* become part of an exchange relationship. Included in Martha Ertman’s new book is an essay by the political scientist Deborah Stone, who writes about paid caregivers and their relationships to their clients.<sup>75</sup> As Stone beautifully puts it, “love creeps in.”<sup>76</sup> Caregivers and their patients and their families come to care about one another deeply, despite the origins of their relationship in a commercial transaction, in which money payment is very much a part.

A second problem, of course, is that gifts themselves are not immune from the undermining subtext—far from it. Ralph Waldo Emerson’s famous essay on gifts argued that there is something domineering about giving gifts, and not everyone likes to receive them.<sup>77</sup> They put the recipient in the position of a debtor, and a lot of us do not like feeling like

72. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987); her more recent work on this subject is MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS* (1996). Another term for commodification is Igor Kopytoff’s “commoditization”; see his *The Cultural Biography of Things: Commoditization as Process*, in *THE SOCIAL LIFE OF THINGS: COMMODITIES IN CULTURAL PERSPECTIVE* 64 (Ariun Appadurai ed., 1986).

73. *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE* (Martha Ertman & Joan Williams eds., 2005).

74. Michael J. Sandel, *Markets, Morals, and Civic Life*, BULL. AM. ACAD. ARTS & SCI., 6, 8 (Summer 2005).

75. Deborah Stone, *For Love Nor Money: The Commodification of Care*, in *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE*, *supra* note 73, at 271.

76. *Id.* at 275.

77. Ralph Waldo Emerson, *Gifts*, in *THE COMPLETE ESSAYS AND OTHER WRITINGS OF RALPH WALDO EMERSON* 402, 403-04 (Brook Atkinson ed., 1940).

debtors, particularly to whomever it was who gave the gift. Many of us notice this unease at holidays. Holidays are full of jockeying for position about who is supposed to give what to whom and how much each is supposed to pay. Anthropologists are familiar with these patterns, and those who write about gift-exchange patterns often describe the intense web of mutual obligations that grow up around gift-giving.

But this leads to a third problem: by comparison with gift exchange (with all the exquisite nuances and obligatory overlays), market exchanges may seem quite liberating. Yes, yes, gift exchange is very deeply interpersonal and all that, but sometimes it can be nice just to deal with strangers. That will be twenty bucks, says the guy at the gas station. He may smile, but it is still twenty bucks. You may smile too as you hand him the Jackson, but you can drive away and never see him again. And that, for some, is just the way it should be. Who wants to have to have an intimate relationship with the gas station guy just to be able to drive around?

There is another subtext to market transactions that might have interested a Fifth Panelist, particularly since it is one that is somewhat neglected in the literature about commodification. It is easy to see the marketplace as a locus where money rules, and where the rich dominate the poor. But there are other aspects of the market that have a somewhat different political message, and that deserve some study in democratic theory. First, in a market transaction, the merchant is appealing to your voluntary consent rather than forcing you to do something or requiring you to defer to her superior status. Second, the merchant has to attempt to understand what you want; otherwise you will walk away and there will be no gains from trade, at least for her. Third, the merchant and the customer can sideline or bracket their differences in other areas, and instead they can simply concentrate on the subjects that are of mutual interest to them. These aspects of market transactions have some important parallels to the kind of behavior we need in the political sphere: voluntarism, a quest for mutual understanding, and the sidelining of unnecessary conflict while pursuing mutually beneficial goals.

Once again, we do not have very many linguistic or symbolic resources at hand for democratic politics, especially in a large and diverse nation where strangers have to make decisions together. But we do have market behavior. Despite excesses (and there certainly are some), market behavior is by and large decent and cooperative, even among strangers. Market transactions rest on a very thin set of norms at the outset—self-interest rightly understood—but markets can supply strangers with a conveyer belt to repeat exchanges and to denser and more affect-laden relationships. As Deborah Stone so felicitously puts it, love creeps in.

None of this is to say that market transactions are a perfect solution to democratic politics. This is clearly not the case. There are too many issues

of distribution and backlash, too many market failures, too many inbred hostilities from other sources. But the subtexts of property and trade do have some affinities with democratic politics, and we ought to be conscious of that fact, and not simply dismissive. We do not have enough models and symbols to throw out any without due perusal.

#### CONCLUSION

In all the subjects above, I have tried to sketch out a few areas where the ghost panelists of the Fifth Panel, on Property and Language, might have had something to say. They are also all areas where humanists have something to learn from economists, and vice versa. Small wonder that the subject of property and language bridges the gap between economics and the humanities! Property is both an economic institution of great power, but it is also a highly sociable institution, dependant on symbolic gestures that link claimants and audiences. It is unquestionably the case that those symbolic systems break down at times—gestures are too obscure, cultures are insufficiently shared, intended audiences do not or will not countenance the gestures they see, claimants and counterclaimants resort to force. It is undoubtedly the case, too, that there are normative questions whether some property gestures deserve recognition.

But in the end, all the panels raise these questions. Indeed, once that is recognized, perhaps we can lay the ghost of the Fifth Panel, and think that it was not so important after all, and that it can safely remain a ghost. In a sense, property and language are simply property itself.