

The Elements of Possession

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Abstract

Property rights in the New Institutional Economics correspond variously to factio possession, legal possession, and ownership. This paper offers a bottom-up account of possession that builds on salience based-accounts of conventions and on the NIE approach to property rights. Possession is a first cut at a legal ontology in an overall modular architecture of property. The legal ontology divides the world up into persons and things, and establishes associations between persons and things. These associations will be in the interest of use, and so possession will usually require stylized duties of abstention on the part of other potential users. Depending on the nature of the group, the resources, and the universe of possible uses, duties of abstention can be implemented through norms of exclusion or governance of particular uses. What counts as a “thing” emerges from a combination of possession and accession, and so these aspects of property form a basic module, which serves as a basic default regime that can be displaced by more refined rules of title and governance. Possessory customs tend to be formalized into law, and yet for reasons of information cost, basic notions of possession retain their importance in many, especially informal, contexts. From the basic modular architecture many of the puzzling features of possession receive an explanation.

Introduction

Possession is both mundane and mysterious. The notion of possession governs most people’s relation to most things most of the time. From seats at a theater to the clothes on one’s back, possession and its stability are a basic fact of life – or one of the most sorely missed aspects of social order. And yet the role possession plays – or should play – in the law has puzzled people for centuries. Philosophers controversially invoke some notion of possession in justifying property in the first place. Modern legal systems assign an important role for possession, but the variety of manifestations of possession within and across legal systems makes it seem unpromising to search for a unified explanation of possession. The reasons for protecting possession today and for preferring

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it sometimes to related notions like ownership have tied jurists and commentators in knots.

Nevertheless, there is a common set of elements to possession. In this chapter, I will show that a well-designed theory can capture not only these elements but how they combine to produce the details and differences that come under the heading of “possession.”

I argue that possession serves as a first cut at legal ontology in an overall modular architecture of property. Without needing to be deeply metaphysical, a theory of a legal system needs to define its elements and their relations: what are legal actors, legal things, legal relations, and the like? This basic furniture matters greatly to how and whether law serves its purposes. Any system of legal relations, whether informal or formal, needs to manage the set of possible actions that people might take with respect to resources, because those actions will often come into conflict. To capture the benefits of coordinating patterns of use, the world needs to be divided up into persons and things, and associations between persons and things need to be established. These associations will be in the interest of use, and so possession will usually require duties of abstention on the part of other potential users. Depending on the nature of the group, the resources, and the universe of possible uses, this abstention can be implemented through norms of exclusion or governance of particular uses.

Basic possession involves persons, things, and a connection between the former and the latter that gives the possessor rights against a group of others. Norms of possession emerge from a combination of psychological salience and economic function. “Salience” refers to anything that makes a feature of a situation prominent and attention-grabbing. The notion of salience has been developed as a basis for actors to select among possible strategies in a game, leading to conventions, including those of possession (Sugden 1986; see also Schelling 1960; Sugden 2011; Alberti, Sugden, and Tsutsui 2012). Salience makes certain choices focal, as where people in New York who cannot communicate would choose to meet at the information booth in Grand Central Station at noon (Schelling 1960: 55 n.1, 56). When it comes to possession, basic notions of control and nearness, as well as more artificial markings, all break the symmetry of claimants to a thing, making one person a good candidate for possessor. As I will argue, notions of control and nearness have efficiency implications: as Barzel (1997) has shown, all else equal we should expect actors maximizing the returns from assets to recognize greater residual claims in those who have the ability to affect the mean return from the asset. In the simple situations governed by basic possession, such persons are likely to be those near to and in “control” of the things in question. Rules of possession themselves can also be evaluated for their efficiency (see, e.g., Lueck 1995; Posner 2000). When it comes to basic de facto possession especially – our starting point in the following – salience and economic function reinforce each other. Which attributes are bundled together and count as a thing is a matter of salience and background knowledge, which respond in part to what is useful. Defining thinghood is the task of the principle of accession and its associated doctrines. For example, fixtures like buildings are deemed part of the real estate they stand on. And very uncontroversially, the legs of a chair are part of the chair.

Further, who should be taken to be in control of this collection is determined likewise by salience and economic usefulness. Sometimes the two questions, thinghood and possessory claims, are determined at the same time, most prominently in first possession. Possession and the principle of accession are closely related and work in tandem.

Possession thus occupies a unique place in property law. Concepts reflect considerations of informational economy and for this reason tend to be modular, in that they are made of components that interact as wholes with each other in stylized ways. A legal system is easier to use and to modify if its basic constituents are modular, thus making possible a system of great complexity and usefulness. (Smith 2012a; see also Simon 1981; Baldwin and Clark 2000; Langlois 2002). In property law, this modularity of concepts comes in through the *things* that are the subject of property (Smith 2012b). What counts as a thing emerges from a combination of possession and accession and makes these aspects of property a basic module, which serves as a basic default regime that can be displaced by more refined rules of title and governance. From this basic architecture many of the puzzling features of possession receive an explanation.

Possession is linked to other concepts in formal property law in a process of formalization and accretion of new rules. First, general norms of possession are in rem. They avail against others generally. The definition of a thing helps in this respect. The more the thing is depersonalized, the easier it is for impersonal duty bearers to process the duty. The more impersonal a thing is, the easier it is to alienate, which brings the thing more into the prototypical status of owned thing. Perhaps the biggest difference between possession and ownership is the protection of the one without the other – protecting nonowner possessors or owners not in possession – and the greater durability of ownership claims. Here too, the formalized thing tends to make the shift from possession to ownership easier.

Nevertheless, possession is a cheap way to get us most of what we want from ownership. Thus, possession is not merely an artifact of the process of full-blown ownership coming about. Possession can be a quick and rough way to establish ownership. It also governs everyday life, where custom retains its importance, and law can benefit greatly by piggybacking on widespread custom, and if necessary, raw notions of salience themselves. Moreover, possession retains its character as the general rule, so possession is the solution whenever it is not worthwhile to add a more specific formal rule on top of it. Thus, possession tends to be important where the individual stakes are low, and the situation is repeated. For this reason, possession retains its close association with customs and informal norms as well as the notions of salience that they rest upon. The system of property concepts achieves coordination of use while responding to constraints of information cost, and possessory notions serve as the low-cost general default.

The Chapter begins in Part I with an account of possession as a social norm. As developed by Hume (1739–40), Sugden (1986), and Friedman (1994), conventions of possession emerge based on salience and focal points, which rest in turn on a combination of hard-wired perception and practical reasoning. I extend this salience-

based account by breaking the possessed thing down into valued attributes as in Barzel's (1997) theory of property rights in the New Institutional Economics. Possession both secures use and announces rights to others by defining things in such a way that those who can most affect the mean return from a collection of valued attributes – the emergent thing – are assigned possessory rights. Possession is a social fact but is well suited to becoming the basic module of the system of property law. As possession becomes more legal, it tends to become more formal because it has to reach a more widespread and impersonal audience. True to its origins, this aspect of possession is in rem. Customs like the *pedis possessio* in mining illustrate this development from custom to law. Part II shows how the law builds upon de facto possession. The modular theory captures the relation of possession to ownership. I hypothesize that the common law emphasizes possession more than does the civil law because possession is a stand-in for the thing. The common law did not delineate things with as great a precision as the civil law, and more recently the notion of property as a law of things has fallen even further out of favor. Talk of possession and more recently the great emphasis in some quarters on the right to exclude are not wrong but are incomplete. Possessory notions are partial substitutes for directly specifying things in property law. Part III shows how possession fits in the modular architecture of property. As the most general default regime, it is easily displaced by more refined rules based on title. Possession is also closely associated with exclusion regimes which likewise give way to governance strategies in certain high-stakes contexts. The hierarchy of defaults (also known as the specific-over-general principle) and the consequent layering of legal regimes capture the fact that possession applies in a disparate set of circumstances without a unifying thread (it applies “otherwise” or “elsewhere”). Possession remains the cheap and rough way to deal with objects in everyday life, with a characteristic gravitational pull. In this, it is like the principle of *nemo dat quod non habet* (“one cannot give that which one does not have”), which likewise is displaced over much of its original domain by good faith purchaser rules. Like the competition between *nemo dat* and good faith purchaser rules, we expect the specific rules based on title and governance of use to be close cases at the margin, in comparison to the general default of possession. Finally, the chapter draws some conclusions about the place of possession in property.

I. Possession and the Basic Conventions of Property

Possession is a de facto relation between persons by way of things, or put differently, it is a relation of a person to a thing communicating a priority of use-decisions by that person to other persons with a duty to respect those choices. In this Part, I offer an economic account of de facto possession that serves as a plug-in concept that the law employs with modification in more rarefied contexts. I concentrate on the common law for now, but will offer some comparisons to civil law.¹ I will draw on

¹ [Chang chapter in this Volume] adopts the modular framework to offer an insightful treatment of civil law based on a very minimal module for possession – actual physical control – which then allows the rest of civil law to be captured simply by adding on other elements for adverse possession, leases, etc. The account here is within the same framework and relies on salience and Barzel-style grouping of attributes to do the basic work. It is an empirical question whether this dovetails always with what one would call physical control, and I will take up some examples in the literature (such as North Sea oil and pocketbooks on sidewalks) that leave some room for doubt on this score.

several strands of property theory that take de facto possession seriously, including those of Hume, Sugden, and Barzel. What emerges is a modular theory of de facto, and eventually de jure, property.

The basic relationship between persons and things is de facto possession, which is captured in Hume's and Sugden's accounts of how possessory conventions are rooted in salience. Hume (1739-40: 484-501) offers a theory of property that is meant as a thin justification, in that it justifies the overall practice of property without making strong moral claims for the justice of individual acts of acquisition. He notes that without some version of mutual respect for possession there would be social chaos. Without any top-down direction, people could see from experience that allowing current possessors to remain undisturbed in their possession would help prevent this chaos. For Hume a convention is a regularity of behavior that people generally expect and prefer to see respected, compared to the alternatives (see also Lewis 1969). And implicit in Hume's account is the idea that no other convention would have the salience needed to align peoples' expectations in the needed fashion. Further, he gives a more micro version of how salience and conventions establish who possesses what, which draw on widespread notions about nearness and control.

Sugden (2004 [1986]) gives this Humean account a modern interpretation in terms of game theory. The game involved is often taken, especially on evolutionary accounts, to be a repeated Hawk-Dove game, in which for each player it is best to fight when the other yields but worst when both fight. Under plausible circumstances, the equilibrium chosen, as a result of salience and long-term convenience involves widespread adoption of the "bourgeois" strategy, in which non-possessors defer to possessors (Maynard Smith 1982:95-105; Krier 2009:154). Whether Hawk-Dove is the best model and what degree of conflict and coordination characterize the problem (for criticisms, see [Rose chapter this Volume]) are matters we need not decide here. In general, with multiple equilibria, salience can help people converge on matching strategies. (This is true for pure coordination, such as which side to drive on, and for games with some degree of conflict, as long as the benefits of coordination outweigh the distributional issues). Thus, if someone is on a plot of land, that is a close connection, closer than anyone else's. Sugden shows that nearness plays a large role in salience and the formation of conventions. (Most dramatically, he illustrates a pure coordination game in which subjects would be asked to join a black circle to one of a group of dispersed white circles, and told they will be given a monetary reward for converging on the same white circle as a partner. In Humean fashion the nearest circle is the most salient. (Sugden (2004 [1986]):98.) To be salient, the piece of information should be easily accessible and not subject to multiple interpretations. To each according to his need would not work so well on this score. More recently, Sugden and others have elaborated on the sources of salience, and have shown how mutual advantage can be a source of salience (Sugden 2011). Interestingly, this more recent work draws on evolutionary game theory and models of similarity-based learning, which in turn build on Hume's theory of induction (Alberti, Sugden, and Tsutsui 2012).

Locke's theory of property is often taken as more ambitious, especially on the interpretation that his account grounds claims of property in desert for labor (Locke 1689: 287–302). Nevertheless, as Rose (1985:78–80) argues, the type of labor involved should announce itself to others in a clear fashion. At this point one is inevitably reminded of Robert Nozick's famous (and supposedly) devastating hypothetical about mixing a can of tomato juice in the ocean: why doesn't this establish my claim over the ocean rather than constitute an abandonment of my tomato juice (Nozick 1974:174–75; see also Waldron 1983:43)? What if I include in the can a radioactive tracer element in it so that the mixing of the tomato juice with the ocean's waters can be tracked? As Eric Claeys (2013) and others have recently argued, Locke is not best taken as saying that any labor will do. Only productive labor can ground an original claim to property (see also Mossoff 2002), and the mixing of the tomato juice contributes to no one's self-preservation or advantage of life on their reconstruction of Locke's objective standard. Nevertheless, we might ask why productively laboring on something does not give one a mere lien on the resource (Epstein 1979:1222–23), or the right to trace the value of one's contribution? Why do we recognize rights to exclude from things?

Possession and thinghood are closely related. In the emerging convention, we have to decide exactly what chunk of stuff constitutes the thing over which the person has possession. From the point of view of salience, this has to rely on widely shared background knowledge and a shared tendency to see certain associations as prominent. When I take a fish from the ocean I get possession (and ownership) of the fish, not of the entire stock of fish, not of the ocean, the planet, or the universe. Why?

The simplest answer may be that to a large extent the practical proto-legal ontology here tracks general everyday ontology. We know what a fish and a chair are. But this does not get us all the way, particularly when we can conceive of the part of something as a thing and things as parts of larger things.² Savigny (1848:192) gives an example of the arm of a statue. Unless it is detached, we do not think of the arm as a separate object of possession or ownership (see also Penner 1997).

Here it may be impossible to completely separate out salience from utility. Thus, what is a thing depends in part on the problem one is solving. With plots of land, there may be common knowledge of how much land one person can work such that production in a close-knit community is maximized. I return to one such example from mining shortly. What strikes a typical member of a group as salient may relate sometimes to effective use.

² German law is very detailed on the question both of how to define a legal thing and their components (see Rixecker and Säcker 2012: § 90 (*Begriff der Sache*, “concept of a thing”), § 93 (*Wesentliche Bestandteile einer Sache*, “integral components of a thing,” setting forth which components of a thing are not separable enough to be the subject of legal rights), § 95 (*Wesentliche Bestandteile eines Grundstücks oder Gebäudes*, “integral components of a parcel of land or a building”), § 96 (*Rechte als Bestandteile eines Grundstücks*, “rights as components of a parcel of land”), § 97 (*Zubehör*, “accessories)). On accessories in European law, see Swinnen 2012.

Consider how first possession would work if it responded primarily to economic considerations. Yoram Barzel (1997) hypothesizes that transacting parties will arrange things so that a person will have more control over a collection of attributes, the more that person can affect the mean return from the asset. In Barzel's theory, economic resources are analyzed into valued attributes over which people transact. For example, an apple is characterized by size, taste, color, texture, and land features soil nutrients, support for buildings, terrain, and so on. When it is not cost-effective to capture value through property rights, an attribute will be left in the "public domain." Barzel gives the example of parking lots in suburban shopping malls and salt in restaurants as resources that are not separately metered and which people can, within a certain range, appropriate from themselves. It is not worth it to the owner of the mall or the restaurant to charge separately for the parking spot or the salt. Moreover, consumption of the parking spot or the salt is, again within a certain range, complementary to shopping and eating at the restaurant, thus providing a benefit to the owner.

Barzel's theory is about transacting over property rights and, on a more macro scale, about transitions between one set or regime of property rights to another. Barzel disclaims any attempt at accounting for the start of a system. He likens the beginning of property to a Big Bang, and his theory is about developments from then on. This is understandable because for Barzel and for New Institutional Economics, "property rights" are very general. Barzel (1997:3) defines a "property right" as "the individual's ability, in expected terms, to consume the good (or the services of the asset) directly or to consume it indirectly through exchange" (emphasis omitted). This is consistent with other well-known definitions.³ Nevertheless, using this very capacious definition, we can adapt his theory to possession, and even first possession.

Consider what the Hume/Sugden theory of (first) possession and accession would look like, if, along with Barzel, we break resources into their valued attributes. Now the question is: what collection of attributes should a person be deemed to have a right to use without interference, or, more robustly, to control by excluding others? The theory of possession based on salience has been worked out in detail elsewhere, especially in Sugden (2004[1986]), but let me add some amendments that make it compatible with theories of possession that are more oriented to the law of possession. If we stick to possession as a pre-legal or extra-legal fact, the phenomenon is not a simple one, but it is much more tractable than the notion of possession writ large, especially as expressed in the law of possession. I will argue later that the law takes basic de facto possessory concepts and adds to them, formalizing them in a process of further modularization. If, for now, we stick to basic possession, as most clearly demonstrated in custom and among

³ For an especially influential definition among economists, see Alchian (1965:818) ("By a system of property rights I mean a method of assigning to particular individuals the 'authority' to select, for specific goods, any use from a nonprohibited class of uses."). See also Cheung (1970:67) ("An exclusive property right grants its owner a *limited* authority to make [decisions] on resource use so as to derive income therefrom."); Demsetz (1967:347) ("An owner expects the community to prevent others from interfering with his actions, provided that these actions are not prohibited in the specifications of his rights."); Eggertsson (1990:33) (stating that "[w]e refer to the rights of individuals to use resources as *property rights*" and quoting Alchian's definition).

children, we can see some patterns emerge. Saliency in this context is related to the desire to maintain mutual respect for possession, in Humean fashion. The signals thus have to be clear but they also have to be useful. Thus, Barzel's notion of choosing the person who has the most ability to affect the mean value of a thing can feed into the notion of saliency. Many facts that make the connection have to do with the nearness of a person and a thing, or the presence of a person on land. How far this is psychological and how far the control that such nearness affords makes that person especially suited to draw value out of it would be difficult to disentangle in many cases. Even the so-called "will" theories of possession, like that of Hegel, and the famous labor theory of Locke are not incompatible with saliency and practicality. Thus, for Hegel one acquires objects through possession by imposing one's will on them, but this will must be physically expressed, either by grasping, imposing form, or marking (Hegel 1820:§§51–58; Knowles 1983:49–51). Each of these methods makes the possessor special with respect to the resource both in terms of notice and usefulness.

Perhaps the most difficult question is whether possession can be started by mere nearness, without more. Some would say that control and an intent to control are necessary for possession (Savigny 1848). But some forms of marking may happen without a large amount of control. Customs of first possession lie along a sliding scale of how much control is required. For resources that might be dissipated by continued competition and where one person early on in the process can be designated the winner, we might expect a tendency to award possession without much control (Lueck 1995). Interestingly here the designation of the early winner is again a matter of comparative likelihood to win as well as psychological saliency. If a group's ongoing norms of mutual respect are more robust, then requirements of control and continuing control in defining possession can be relaxed. Consider Holmes's (1888:235) example of the child on the sidewalk who picks up a pocketbook with a "powerful ruffian" within equal reach and sight. Does the child possess the pocketbook? Surely the ruffian is stronger and would win a struggle. (Sugden (2004[1986]:91–92, 101–03) gives a similar example of North Sea Oil, the majority of which is owned by Norway despite its being much less powerful than the Soviet Union, which got none.) But in a society in which there is a lot of mutual forbearance we can say that the child's relation to the pocketbook is salient and easily generalizable – at least until the man takes it from the child. Saliency is a relative matter, and it also fits in a pattern of generalization: people are looking for patterns. In a Hobbesian state of nature, perhaps the ruffian would be deemed the possessor while in our society the child would. In modern society, the generalization that might make right is less prominent than who is closest or holding an object.

This consideration of the saliency of relations between persons and things raises the question of what a thing is. For our legal ontology we need a theory of what counts as a person and what as a thing, along with what connections there are between the former and the latter. Sometimes, in the simplest cases, the notion of a legal thing will track a thing from everyday ontology: chairs, foxes, and the like. More difficult will be situations in which the extent of a collection of attribute could come out one way or another: is an attached bookshelf part of a house or not? A pencil includes its attached eraser, but unattached erasers are separate things, unless they share some design features with

pencils (as in a desk set). The salience theory also addressed this question in terms of notions of the lesser going with the greater, known sometimes as accession. Here we have a similar process of salience and practicality in determining what goes with what, and which in turn is possessed by the possessor. Hume spends a great deal of attention on accession, as does Sugden. Again, the rules for the lesser going with the greater are interpreted psychologically as an association of ideas in Hume and as a selection of equilibria based on salience by Sugden. Thus, the Orkneys go with Britain and the calf with the mother cow, and not the other way around. In the doctrine of accession, labor must have a certain prominence in terms of transformation or relative value in order to entitle the good faith improver to keep the thing and pay damages.⁴ Now consider Locke again. To get from even productive labor to property rights, we need a notion of accession, as Locke seems to have realized, when he claimed that “labour makes the far greatest part of the value of things” (Locke 1689:297; see also Claeys 2013; Smith 2007:1767–68). Why does productive labor lead to exclusion rights, rather than merely to use rights, rights to the current flow of the resource (a profit-à-prendre), or a right to trace the contribution of labor with some sort of lien (Epstein 1979)? Here too, some combination of psychological salience and practical usefulness does the work. In the Humean process of mutual forbearance, the emergence of the possession convention goes in tandem with the emergence of accession conventions. And in general, first possession involves accession. (Or one might say vice versa. This is perhaps what Blackstone (1766:258) means when he says that one always takes ownership by occupancy – because he regards accession as part and parcel of the notion of occupancy.)⁵

In a hypothetical state of nature, we would have persons with varying strength and talents and a multitude of attributes that might be grouped together in various ways. On Barzel’s theory we might expect that people would be assigned a collection of attributes whose mean return they had a special ability to affect. We cannot say that this starting point is ideal: some people will be stronger than others. Some families or clan groups will be more powerful than others. And some will be lucky enough to be located near better resources. It would also be a mistake to think this is a world without property rights of any kind. People’s natural talents and opportunities mean that they will have the ability to consume some resources without interference. In Umbeck’s (1981:39) famous example for the capacious New Institutional Economics style definition of property rights, if

⁴ *Wetherbee v. Green*, 22 Mich. 311 (1871); see also Chang (2013); Merrill (2009); Newman (2009:86–93).

⁵ Even Merrill (2009:474–75), who treats accession as an acquisition principle that stands as an alternative to first possession, acknowledges that accession and first possession are closely related. Merrill asserts that accession only works when property rights exist, but this assumes that accession is limited to being an acquisition principle. Something like accession is what determines what a thing is, a possible object for possession (and ownership) in the first place (Newman 2009:86–93; Smith 2007). Interestingly, in his insightful theory of which chattels can be taken as up for grabs, Corriel (2013) lumps aspects of possession and accession together, using notions reminiscent of salience. For Corriel, whether an object can be acquired depends on how unique and identifying it is, whether it “nests” with other objects to send a strong signal together, and whether notice overrides what otherwise would be the signal. Thus, a five-dollar bill is fungible and nonidentifying and up for grabs, but in a private place or next to a driver’s license in a public place, it is not. Defaults that can be overridden by further nesting or notice are consistent with the theory of possession offered here.

someone is the only one who knows how to climb a tree, he has property rights (de facto, not de jure) in the coconuts. Umbeck based his theory of property rights on the ability to commit violence. This may be too narrow, and theorists of the formation of society disagree as to whether we should think of early arrangements, either the hypothetical ones of philosophers or the actual ones we can reconstruct, as coercive or more balanced. (Compare Moselle and Polak (2001) with Olson (1993).) Moreover, we will be most interested in those “property rights” that have gained legitimacy in the eyes of third parties. (See [Rose chapter this Volume].)

For our purposes, it makes sense to stick with description and explanation, with side glances in a normative direction. It is no accident that Hume’s theoretical justificatory account and Barzel’s economic explanation converge, and both accord with current basic customary norms and morality.⁶ Consider Friedman (1994) offers an account of property rights, in terms of Schelling points – equilibria that are chosen because of their uniqueness. (The uniqueness can be seen as resulting from salience, and Friedman (1994:2) notes the similarity to Sugden’s account.) Friedman argues that people will use Schelling points to contract out of the Hobbesian state of nature step by step, where previous contracting changes the Schelling points (Schelling 1960). Interestingly, Friedman argues that there is a convergence among a libertarian kind of morality, efficiency, and (roughly) the social orders that have evolved, because the contracting process that generates rights leads to all three – morality, efficiency, and social order. But, as Friedman notes, these norms are only “locally efficient.” This is true of the whaling norms discussed by Ellickson (1991): they were adopted to deal with conflict between two whaling crews meeting on the ocean, not in the interest of conserving whales. As we will see, some of Ellickson’s most arresting examples are possessory, and the Hume/Sugden theory elaborates on Schelling in showing how a convention could have emerged based on salience. In the process of contracting based on Schelling points, conventions will not be adopted because they are overall moral or efficient but because they serve the interests of the contracting parties, as Friedman argues. To this we might add that the morality is also a local one, corresponding to corrective justice and very local distributive justice, rather than societal distributive justice. Private law is easier to explain in corrective justice terms because it is local, in part for information cost reasons (Gold and Smith ms.). This is reflected in its hypothetical and perhaps actual history. Norms that have a local moral and practical appeal are scaled up. This scaling up involves a persistent focus on individual interaction horizontally. As in modular systems, one can build up a system of great complexity while still allowing the local simplicity of interaction of earlier stages of the system: we need only build on it. Perhaps the main difference between libertarians and statist is the degree to which they differ as to whether morality persists as we scale up. We need not resolve this debate here in order to pursue the information cost theory, which is mainly explanatory. That its more general module of possession accords with local morality and its more designed and refined

⁶ Hume insists that his theory of justice and property is based on psychology and not a sense of the public interest (Hume 1739–40:496, 502, 54 n.1), but when it comes to the rules of possession he does admit that “[w]e are said to be in possession of any thing, not only when we immediately touch it, but also when we are so situated with respect to it, as to have it in our power to use it; and may move, alter, or destroy it, according to our present pleasure or advantage” (Hume 1739–40:506).

modules reflect more global considerations is suggestive, but I am not making any foundational normative claims here.

In the next Parts, I will show how numerous features of possession can be explained on the modular information-cost account. Possession as a basic module makes sense of several of its striking features. Possession is the aspect of property that most resembles animal territoriality (see, e.g., Peterson 2011:156–72). It is also the one that children learn first (Friedman and Neary 2009). The modular structure of customary and legal concepts allow possessory concepts to play a simple and widespread role in the system. Possession remains close to its roots in biology, morality, and custom while interacting with more complex aspects of a modern legal system. The close association of possession with custom is both historically and functionally a result of the ability of close-knit groups to get on the same page as far as the nature of things and the connection of persons to things. Like all custom, the customs of possession tend to be formalized as they apply to larger and more impersonal groups.

A famous example of this process of formalizing custom as it becomes more general is the doctrine of the *pedis possessio*. Originally the *pedis possessio* was a custom among miners that allowed one who was working a “spot” to work it exclusively without interference from forcible, fraudulent, and clandestine intrusions, as long as he kept working the spot. What constituted a spot – a kind of “thing” – and what counted as continuous work were a matter of custom, and, in the context of a close-knit miners’ camp, a general understanding could easily arise (and change as needed with circumstances). As case law and then federal statutes grew up in mining, they borrowed heavily the substance of mining customs. As I have argued elsewhere, the process of custom becoming applicable to wider and more impersonal audiences leads those designing the law to strip the custom down, and make it more formal, in the sense of being less responsive to context (Smith 2009). The *pedis possessio* is a prime example. The General Mining Law of 1872 provides that mining claimants must satisfy requirements of both location and discovery, in order to have a valid unpatented mining claim (a property right less than a fee simple). These requirements are essential for rights against the United States.⁷ As for rights against other miners who might interfere with a claim, the legal doctrine of the *pedis possessio* allows such rights even if a claim has not yet been validly located. When courts adapted the custom, the boundary of the spot was deemed to be the boundary of the claim.⁸ By contrast, under the older custom, the boundary of a “spot” was not the entire claim but a fuzzy area one was considered to be working.⁹ The more formal boundary of the claim would be easier for outsiders to understand, commensurate with its more in rem aspect and its use in courts.

⁷ 30 U.S.C. § 23 (2000).

⁸ *Field v. Grey*, 25 P. 793, 794 (Ariz. 1881); *Miller v. Chrisman*, 73 P. 1083, 1086 (Cal. 1903), *aff’d*, 197 U.S. 313 (1905); see also Finberg (1982:1036).

⁹ *Union Oil v. Smith*, 249 U.S. 337 (1919). See, e.g., Forman, Dwyer, and Fox (1970).

Nor is this a matter of mere expansion: more recently courts have refused to expand the *pedis possessio* beyond the boundaries of a claim, despite the need in industries like uranium for much larger “spots” in the exploratory phase. There may be a custom in the uranium industry to extend the *pedis possessio* beyond the boundary of a single claim, but the Supreme Court has held that the *pedis possessio* does not extend to adjacent claims to the one being worked, and courts that have tried to extend the *pedis possessio* in this fashion have been severely criticized.¹⁰ The “test” adopted by a minority of courts for the expanded *pedis possessio* winds up being vague and unworkable, requiring the evaluation of claims for similar geology and reasonable size, discovery work under state law, an overall work program, diligent pursuit of the work program, and economic impracticability on the narrow version of *pedis possessio*.¹¹ The mainstream approach is to reject the wider *pedis possessio*, as in the well-known case of *Geomet Exploration, Limited v. Lucky Mc Uranium Corp.*,¹² and to limit the doctrine to the bounds of a claim. The “thing” – here the claim – does a lot of work.

Possession forms the link between de facto and de jure property rights. As I will argue, part of the problem besetting accounts of possession has been the attempt to derive all the legal manifestations of possession from first principles. This has been especially so in civil law countries, where Roman law was taken as a starting point, and concessions to practicality were made seemingly reluctantly. Even in the common law, forcing possession into rigid templates like the relativity of title and the older forms of the theft offenses have tied commentators in knots. Simpler would be to start with pre-legal possession and then ask how it is modified and stretched to form part of the law of property.¹³ As we will see, keeping possession pre-legal and based on salience, psychological and practical, allows us to explain many features of both possession and the social and legal architecture it fits into. By breaking things down into their constituent valued attributes, a Humean version of New Institutional Economics can explain how

¹⁰ MacGuire v. Sturgis, 347 F. Supp. 580 (D.C. Wyo. 1971); see also Continental Oil Co. v. Natrona Service, Inc., 588 F.2d 792, 798 (10th Cir. 1978).

¹¹ MacGuire v. Sturgis, 347 F. Supp. at 584.

¹² 601 P.2d 1339 (Ariz. 1979).

¹³ The germ of the theory sketched here can be found in Dernburg’s treatise on the Roman law Pandects (Justinian’s *Digest*, which in Germany was – and to some extent still is – treated as a way into the current law). As Dernburg argues, “Possession – *possessio* – is the actual control over valued things. Possession is not, as many suppose, law. It is rather a phenomenon that stands outside the law, even if laws are linked to it.” (All translations the author’s.) See also Pollock 1896:168. He makes the point that even if law were removed, possession would remain, because it is a “condition of securing human existence” (Dernburg 1900:1–2). In arch-Prussian fashion, Dernburg (1900:7) goes on to say that our actual distribution of goods must be “sacrosanct” as a condition of ordered coexistence. One need not go this far to recognize the importance of stability of possession. It features in Hume’s hypothetical history and justificatory theory. And widespread lack of respect for possession is a step toward social chaos. As in Hume’s account, for Dernburg (1900:6–7), “possession is the actual social order, the given allocation of valued objects. It directly affords the individual the tools for his activities, the means to satisfy his needs.” The salience theory coupled with the New Institutional Economics can do even better than does Dernburg’s account at showing how possession is linked up with the law.

property gets started. It also accounts for why things are important in the law of property and why property law draws on possession to a great extent.

II. The Generalization of Possession

De facto possession as accounted for on the modular theory forms a platform for successive layers of legal superstructure. In this Part, I show how the law regulates possession as a legal concept, starting with how the law secures possessory rights. The law affords greater durability to possession than it can achieve in pre-legal convention. I show how possession and ownership are related, through layering of the latter on the former. For extending possession beyond its roots, the notion of a thing is crucial, because it allows for the formalization needed in more in rem contexts, for greater durability, and for enhanced alienability.

In the modular architecture of property, possession is the basic module, in the sense of a regime connecting persons to objects for purposes of rights availing against others. As a module it needs to plug into the rest of property law in a defined way, such that much of the internal working of possession need not be relevant to duty bearers and enforcers, as long as it provides answers to a useful set of questions. The set of concepts in property is nearly decomposable in the sense of Simon (1981:210), because they group situations into clumps whose constituents intensively interact (internally), but which interact only weakly with other situation-clumps (externally). Formalizing them further takes this compartmentalization further. As we will see, the interaction of possession with other regimes is one of a general module (basic possession) being trumped by more specific ones (refined possession, title, ownership).

A. Extended Possession

As touched on above in the discussion of custom and the *pedis possessio*, the law adapts conventions of possession by making them more formal. What is salient to a close-knit group may or may not be salient to the larger society. Thus, when the law affords a legally enforceable possessory right, it does not merely adopt possessory customs wholesale and unaltered. The more the possessory notion has to govern a wide and impersonal set of duty bearers – the more it is classically in rem – the more possession has to be divorced from parts of its context (Merrill & Smith 2000, 2001a; Smith 2003). It is too much to expect non-local miners to know what a “spot” is for the *pedis possessio*, but the boundaries of a claim are relatively easy to process. Possession law, like all law, is a form of communication and as such faces a trade-off: one can communicate in an intensive way with a more intimate audience or in a less information-dense way with a more extensive audience (Smith 2003, 2013; Heylighen 1999:27, 49–53). In closer social contexts, much information can be left implicit, thereby making the amount of information per unit of communicative effort very high. This is true of what linguists call pragmatics: there are principles of conversation that allow one to infer (in a loose, defeasible way) from “It’s cold in here” a request to close the window (Grice 1989; Levinson 2000). In other words, for audiences that are more in rem – large and indefinite, and so unlikely to share as much background knowledge – the communication has to be

more formal in the sense of relatively invariant to content (Smith 2003). Formalism is a matter of degree, and we expect more formal communication to in rem audiences. When we move from de facto and customary possession to the law of possession, this formalization is part of the process.

Not all extra-legal possessory norms are particular. On the contrary, much of what goes under the heading of possession is very basic and not particular even to one society. Ellickson notes how striking it is that the most basic possessory norms are common across cultures, or rely on salience that often makes it possible for an outsider to interpret property signals (Ellickson 2011). Fences and the like are easy to process, and the use of broken furniture and other objects to mark shoveled snow spots after major snowstorms is but one (very prominent) example: even those from warm climates can guess what the claim is (Epstein 2002:528–33; Rose 1985:81). Again, it is a version of the possessory module here that is the most general, which allows it to reach the widest and most impersonal audiences. Law pushes this process further when necessary.

One key to formalizing possessory customs is the notion of a thing. As we saw above, possession and accession both involve – even give rise to – the notion of a thing: which attributes go with which, and are in turn associated with which person or persons. As possession binds more socially distant parties, it becomes more important for them to process the information about this duty *through the thing itself*. Thus “in rem” is not just etymologically “relating to a thing”: it is the thing that promotes the de-contextualization needed in order to extend norms of possession into legal norms (Smith 2012b).

Once the law recognizes a possessory right, it can specify some of the content. This is cost-effective as long as the marginal benefits of better tailoring of the possessory rights exceed the marginal costs of communication and foregone multiple use. One such dimension is duration. With more durable rights, one can leave a thing with no immediate control over it without losing the right to possess it. This legal durability is an extension of the process of making customary possession more durable: the miner’s customs allowed miners to leave to get supplies without losing rights under the *pedis possessio*. Thinghood makes the persistence of possession easier, so that possession can be maintained with less effort, also allowing more specialization. The thing makes processing by duty bearers less costly: it is easier for others to know what’s off limits even when the possessor is absent if they can rely on the boundaries of the thing to tell them the content of their duty.

First possession is an area of the law where custom plays an unusually large role. First possession as an acquisition principle basically latches onto a pre- or extra-legal social fact. Further, the custom as enforced by courts is a somewhat more formal version of the one that subgroups of society might employ among themselves. In the (somewhat artificial) classic of possession law, *Pierson v. Post*,¹⁴ this issue of communication is not

¹⁴ 3 Cai. R. 175 (N.Y. Sup. Ct. 1805). A recent outpouring of scholarship suggests that *Pierson* was artificial and unusual in many ways. See Berger (2006); Ernst (2009); Fernandez (2009a, b); McDowell (2007).

far from the surface (Rose 1985; Smith 2003). It may well be that hunters among themselves might recognize rights of one in hot pursuit of a fox. The question is whether non-hunters should be held to know this.

Whaling customs relied on background knowledge of whalers, but they also show a pattern of nested default rules, with more general ones being more formal and easier for non-experts to deal with. Two whaling crews meeting on the high seas can be presumed to know the customs of possession of whales. As Ellickson (1989, 1991) argues, these rules were good for managing the interaction of members of the community (whalers), but they might cause out-group externalities (and whales were indeed overhunted). Likewise, as Friedman (1994) notes, norms of possession are adopted for reasons that do not include their being good or efficient overall (see also Cosmides and Tooby 2006:187). Even here we arguably see nested default rules: under the “fast fish loose fish” rule, the whale belonged to the first one to harpoon it as long as the harpoon was attached to the whaler’s boat. By contrast the “first iron” rule gave the first harpooner exclusive rights as long as fresh pursuit continued. The “first iron” rule is further from the kind of salience that would appeal to non-whalers and it was adopted in high-stakes contexts, for sperm whales which were both valuable and especially dangerous. Indeed the “fast fish loose fish” rule appears to have been the general custom and “first iron” (and other rules like those for finback whales) a departure from it.

Adverse possession is another extension of possession, and it shows this process of formalization based on a thing. Because it competes with an existing claim of ownership, the salience required for ouster is greater than in other contexts (like liability for rent in co-ownership). Not just any possession will count; it must be open and notorious, actual, continuous and under a claim of right. The standard here is higher than the possession needed to be maintained by a rightful possessor, or a wrongful possessor against a subsequent wrongful possessor.

Adverse possession also is formalized in ways similar to the *pedis possessio*, but adverse possession is more complicated because of the owner’s pre-existing claim. The boundaries of a parcel do have a gravitational pull, but the adverse possessor’s claim and its relation to the boundaries is only part of the picture: the larger is the adverse possessor’s claim, the smaller is the original owner’s. In the case of a building encroachment, the salient rule is occupation of the footprint of the encroaching structure. When it comes to cultivation or other kinds of use, salience probably does make reference to the boundaries of a parcel, but with regard also to the owner’s activities and interests. Thus, if an adverse possessor is possessing a plot that the owner is partially occupying, the adverse possessor gets a minimal claim. An adverse possessor who is using a parcel of an absentee owner will probably not have a hard time establishing a claim over the whole parcel unless the use is quite confined to a part. If the adverse possessor is acting as a gatekeeper, the likely presumption is that possession is over the entire parcel. Use is very salient both in terms of the activities of the adverse possessor and the owner, which gives rise to criticisms that adverse possession has an anti-conservation bias built into it (Sprankling 1996:538–40). Finally, adverse possession is formalized beyond the physically salient facts on the ground. Having a defective deed to

the whole parcel makes it is easier to adversely possess an entire parcel by using a part of it. A parcel requires demarcation and so is more artificial than a chair or a pencil. In the case of land the legal thing is further from the thing furnished by pre-legal ontology. But again, the parcel as a legal thing, boosted here by some documentary evidence, does some important work.

The case of the wrongful possessor brings us to the topic of the relativity of title. This theory has enjoyed a vogue in the common law since the nineteenth century and is sometimes thought to be characteristic of the common law (Holmes 1881; Pollock and Wright 1888). The civil law, by contrast, emphasizes ownership and is more grudging about recognizing lesser rights (Chang and Smith 2012). In the next Part, I will use the modular theory to explain some of the differences between common and civil law in their approach to possession and ownership. For now, we can analyze relativity of title as one, but only one, solution to layering ownership on top of possession.

The essence of relativity of title is that the owner's better rights than everyone else are mimicked by a possessor's rights against those with later (or lesser) possessory rights. To be sure, in a possessory action the owner beats all others, and a possessor beats subsequent possessors (although there is some doubt as to whether a wrongful possessor beats a subsequent rightful possessor). Relativity of title goes a step further and identifies the content of the owner's right with the content of the lesser rights of the other possessors (if any). Most often this content is identified with the right to exclude, with "natural" extensions to rights to use and transfer (e.g. [Krier and Serkin chapter this Volume]; McFarlane 2008:146; [Merrill chapter this Volume]). The owner is simply the one with the best right to exclude. As Gordley and Mattei (1996) point out, one can recognize a possessory right without identifying the content of the right with ownership in this fashion. They further argue that relativity of title was invented in the nineteenth century, and is not a fully accurate picture of the common law. One main difference between possessory rights and ownership is durability. It is easier for possessors who have left actual physical control to lose their rights than it is for owners. Recall that ownership is a legal extension of possessory rights, here along the dimension of durability. Nothing in the theory rules out other extensions. Ownership rights are more likely to be subject to registries, which allow further distance between the state of title and visible facts on the ground. Title too is formal, in the sense of decontextualization.

B. Possession and Ownership

Why protect both possession and ownership, or even have two concepts at all? This has been a puzzle in both the common law and the civil law, although the reaction tends to be very different in the two systems. The modular theory of possession allows us to see where possession does and does not fit in the overall architecture of property. First of all, the customs of possession still operate most of the time ([Merrill chapter this Volume]). It would be too expensive and not worthwhile to have registries for objects like paper cups, shoes, and watches. Ordinary potential violators most often need not know anything about possible divergences between ownership and title in order to respect the modular package of rights. Keeping off – a message sent largely, but not entirely, by

the thing itself – is usually enough. Because this regime is already there, the law can piggyback on it, with some formalization around the edges as needed.

Even in the case of land, possession works most of the time. Getting permission (in order to avoid being a trespasser) usually involves asking the one in possession. This even extends to gaining access to land with permission of security guards, who have no property interest at all. Most of the time the stakes are low enough in seeking access so that we stick with the cheap solution of allowing the one in possession to give permission. One can accept a dinner invitation without consulting land records. For high stakes problems like building encroachments, more onerous requirements come into play: one must commission a survey, which is keyed to ownership rights and not possession.

Because it is more formalized, ownership can do better at many of things possession does, albeit at greater cost. Ownership is keyed to an even more formalized version of the thing than is possession, and so ownership rights are more easily alienable than are possessory rights. Yes, one person can hand over possession to another, but it is very difficult to know from a third-party perspective whether all the rights are being handed over, or whether possession is being given temporarily, or whether the possessor is giving mere permission to enter (a license). The problems here are so great that possession cannot serve to identify multiple unqualified in rem rights in the same thing (see [Arruñada chapter This Volume]; see also [Kelly chapter this Volume]). With ownership, the thing is depersonalized to a degree that one person can step in the shoes of another without much trouble for third parties (Smith 2012b:1710–11, 1724). Indeed, this process has inspired some to identify ownership as an office (Essert 2013; Katz 2010). No one argues that possession is an office. I have argued that the depersonalization of the relationship between owners and others made possible by thing-definition is what allows for alienability and the other features that make the notion of an office of “owner” attractive (Smith 2013:337–38). Ownership is different from and more formal than possession in this respect.

Being more formal than possession, ownership makes certain bailments easier, again at greater cost. The greater durability and formalization of ownership make it easier to give lesser possessory rights without the ambiguity of a possessor-to-possessor transfer. This feature of ownership comes at a cost: the ownership records that make transfers less ambiguous are costly. Think of the difference between an informal bailment of a coat at a coat check and the bailment of a fine painting. Ownership records are relevant to the latter but not the former. In between is a car at an auto repair shop: possession is usually enough, but in cases of doubt registration will need to be produced.¹⁵ Again there is a sliding scale of formality (and its attendant cost) from possession to ownership.

C. Solving the Mystery of Possession

¹⁵ The trouble that can be caused by non-owners contracting for repairs is well illustrated in *Tappenden v. Artus*, [1964] 2 Q.B. 185, [1963] 3 All E.R. 213 (Ct. App.).

Possession's role in property theory stems in part from the general lack of attention in the common law world, especially in the United States, to the thing over which property is defined. Rights to things are considered naïve and inaccurate (see, e.g., Cohen 1935:815, Grey 1980:69-70, 80). Because things are (on this view) out of the picture, and the notion of the relation between a person and a thing is downplayed (especially in American law), people invoke possession as the next best thing. Because possession thus implicitly assumes a notion of the thing, the thing is being smuggled in when what we really need is the thing itself.

The common law has long emphasized possession. The system of estates was built around present and future possession, and at its heart was the concept of seisin, which was close to the notion of possession. On the modular account, this approach may hang together because the possessory notions are doing the work of defining a thing for purposes of property.

Commentary in the common law has veered all over the lot on whether things are important to property, and possession has played a complementary role. The most influential commentator of modern times, William Blackstone (1766), employed a civilian inspired organization, with Volume 2 of his *Commentaries* devoted to "Of the Rights of Things." Adam Smith in his *Lectures on Jurisprudence* (1762–63:11) adopted a civilian-style distinction between real (or in rem) and personal (or in personam) rights, noting that "[w]e may observe that not only property but all other exclusive rights are real rights." More recently, the bundle of rights theory has downplayed things. The bundle picture of property comes in different versions, some of which emphasize a thin notion of the right to exclude (Cohen 1954; see also Mossoff 2011). More recently, many theorists, seeking to get beyond the vacuousness of the bundle theory and seeking a theme in property have emphasized the right to exclude or close variants (Merrill 1998).¹⁶ I agree that exclusion strategies are important as a unifying thread, and a very characteristic one, for property (Smith 2002; Smith 2005). Part of the reason for this is the importance of the thing to property, which has not been widely appreciated. One might say that the attention lavished on the right to exclude and on possession is a symptom of the lack of attention to the thing. Possession and the right to exclude are related to trespass which closely tracks the thing. Talking about trespass is a way of invoking things without having to do so explicitly.

The civil law, by contrast, defines ownership more directly, and spends a great deal of explicit effort defining things (Chang and Smith 2012). In a fashion reminiscent of the ontology of norms we sketched earlier, Roman law basically divided the world into persons, things, and actions (remedies). Property is the law of things, and this notion has persisted into the modern civil codes (Foster and Sule 2010:493; Yiannopoulos 2001:§§12, 15). [Chang chapter this Volume] shows how reducing possession to a minimum (he argues for physical control) allows possession to plug into the set of other concepts in civil law. The modular theory also allows the solution to older debates over why possession is protected in civil law, even though ownership is so elaborately defined

¹⁶ Penner (1997) is usually classified as an exclusion theorist, but, unlike most commentators, he equally emphasizes his separation thesis and thing definition.

(and defended as a concept). In both common and civil law, basic de facto possession is a modest but potentially far-reaching starting point. Common law extends it under the heading of possession, building up incrementally from basic possession itself through related possessory notions, to a version of ownership. In civil law, ownership appears quite distinct and distant from possession, which would seem to suggest that a module based on basic de facto possession does not play much role. Nevertheless, [Chang chapter this Volume] shows how defining a minimal basic module of possession based on control of a person over a thing would plug into the rest of the civil law of possession. The difference in the style of delineation of ownership and possession is an important difference between the civil and common law, even if it is functionally important only around the edges (Chang and Smith 2012). Ultimately, it is the architecture and its function that count, not the labels – “possession” or something else – that we attach to the modules.

III. The Persistence of Possession

Possession persists in importance because it is the basic module in a system of property. How it is expressed is not a matter simply of finding first principles – whether grounded in morals or efficiency – for defining “possession” as a legal matter. Rather, possession is a formalized version of possessory custom, which is the ultimate default regime for assigning things to persons. Built on top of possession are various other rules of property, which modify and override basic possession in situations in which actors, private and public, have found it worth their while to go beyond possession. These more refined regimes tend to be more consciously designed than basic possession, and they are layered on the basic module and trump it in specific environments. They tend to make disconnected refinements to basic things and so give many the impression that things as defined by basic possession and accession are no longer important – and that property itself is a disjointed grab bag (a bundle of rights, one might even say). Nevertheless, possession and things retain their importance in less “refined” contexts, where the basic default layer shows through. Because of this layering architecture of modular property, possession winds up being a heterogeneous category, one that governs in an “elsewhere” pattern – when nothing more specific applies.

A. Layering and the Modularity of Possession

Many of the most striking and difficult features of possession are easily captured on the modular theory of possession. Because possession is the most basic layer and the law employs it unless it is overridden by another part of the system, possession is close to its roots in custom. It is also a cheap and rough way to treat property questions on an on-going basis. Possession also has a gravitational pull corresponding to its status as the ultimate default regime within property.

Possession is the general default regime, with other rules layered on top of it.¹⁷ Much of what is layered on top of basic possession is a matter of law, but not all. In the

so-called “small property” market, property in Shenzhen, China changes hands despite its technically illegal status. Qiao (2014) analyzes this regime as resting on focal points, including an expectation of reform, which would represent an extension of the mechanism behind possession into the realm of alienability. Most of the familiar transition from possessory customs to the rest of property law is a matter of lawyering formal rules relating to title, which allows more complex forms of ownership to displace the basic possessory regime. Other displacing rules relate to use. Possession, because it is based closely on thing definition, is tightly bound up with exclusionary strategies. Where these prove inadequate, possession and possessory remedies – instantiations of the exclusion strategy – will give way to more refined rules and standards focusing in on particular uses, in a governance strategy (Smith 2002). These more refined devices in a governance strategy can take the forms of contracts, off-the-rack nuisance law, and zoning and other regulation. In the case of personal property, governance usually takes the form of contracts or beneficial interests layered on top of basic legal title.

Layering is the result of the specific-over-general principle. A rule whose description properly contains that of another rule will displace it. This is a widespread device in human language (Hayes 2009; Sag, Wasow, and Bender 2003; Smith 1996). For example, the *-ed* rule is the general way to form past tense in English, but more specific rules exist, such as the *-ing*, and *-ung* rule (*sing, sang, sung; ring, rang, rung*), and even more specific rules like *bring, brought* (Pinker 1999:13-19). The simplifying type of analogy works in the direction of the more general rules: verbs that used a subrule or were irregular adopted *-ed*, but generally not vice versa (*dive, dove*, came to alternate with *dive, dived*, in a process many verbs have completed, such as *help*). The *-ed* rule applies “elsewhere” in the highly diverse set of circumstances not falling under any other more specific rule. Human language grammar employs this device of specific-over-general pervasively, and the notion of nested defaults, or “default hierarchies,” was borrowed into linguistics from computer science (see, e.g. Holland et al. 1986:18–19; Dorigo 1991:221–22). Human knowledge, especially that built up inductively (like possession), can be organized into default hierarchies, in which “the rules that constitute a category do not provide a *definition* of the category. Instead they provide a set of expectations that are taken to be true only so long as they are not contradicted by more specific information. In the absence of additional information these ‘default’ expectations provide the best available sketch of the current situation” (Holland et al. 1986:18; citing Minsky 1975).¹⁷ For example, knowing that an animal is a bird produces a default expectation that it can fly, which can be overridden by more specific – for example, penguin-specific – information. A similar principle is well known in contract law, and it includes the system of default rules explored in the law and economics literature (Ayres

¹⁷ In a vaguely similar fashion, Heck (1930:§§1, 3) posits possession as a “provisional order” that is confirmed or overridden by a system of definite rights to things.

¹⁸ A set of categories is more modular if a subcategory only inherits its features from one path of supercategories (“single inheritance”). I leave open exactly how far modularity can be pushed in analyzing property concepts.

and Gertner 1989).¹⁹ A version of the specific-over-general principle also applies in statutory interpretation: if two provisions might apply, the more specific one trumps (Manning 2011:2012). The modular theory allows us to see that nested default rules are pervasive in many areas of law.

Like other basic general rules, possession exhibits an “elsewhere” pattern: possession is defined by not being anything else (Smith 2012a). That is, this most basic rule or regime applies in a disparate collection of scenarios, when nothing else does, like the *-ed* rule for past tense in English. Another example from property of nested defaults is the relationship of the principle of *nemo dat quod non habet* (“one cannot give that which one does not have”) to rules favoring good faith purchasers. In the case of property rights in transfer, the system is more simply described as *nemo dat* subject to exceptions like those for certain good faith purchasers, rather than taking some other rule as basic and capturing most of what we think of as *nemo dat* more directly. Levmore (1987) hypothesized that the different rules for good faith purchaser were close to each other in terms of their efficiency and that this was the reason for the variety of rules among systems in some situations involving good faith purchasers. (Other, clearer situations showed uniformity.) Here too we can analyze this pattern as layering, just as with possession. As I have argued elsewhere, *nemo dat* is the basic rule – and incidentally the one most easily integrated with the possessory regime (Smith 2013a). Rules favoring good faith purchasers are layered on top of this. The displacement can numerically be very pervasive, but the more basic rule still persists in an elsewhere pattern. The system is much easier to describe using *nemo dat* (like possession) as the basic rule and good faith purchaser as the more specific, trumping, default (along with other more specific rules). Also, we would predict that as a legal system breaks down, *nemo dat* (like possession) would remain longest. We should expect that children would learn *nemo dat* before rules like good faith purchaser. Also, like possession, *nemo dat* has a gravitational pull for situations not covered by the system. Finally, it is to be expected that at the edges of the more refined module, whether good faith purchaser or title rules, *nemo dat* versus good faith purchaser or possession versus title would be a close case, in the pattern that Levmore noticed.

The relationship between possession and more refined rules of title works similarly. Thus, we can protect actual possessors, but someone with title will beat a possessor. Explicit arrangements like landlord-tenant and estates and future interests can be built on the principle that present possession is not the last word. But absent any such overlay, possession still shines through. Thus, the search for a comprehensive principle for possession is a wild goose chase. Unlike ownership and other overlays, possession is most economically described as the ultimate default, leading to the “elsewhere” or “otherwise” pattern and the gravitational pull possession still exerts in close contexts. And because possession is the ultimate default, different systems will add more or fewer

¹⁹ *Smoot v. United States*, 237 U.S. 38, 42 (1915) (Holmes, J.) (“In general, specific or individual marks prevail over generic ones.”); *DCV Holdings, Inc. v. Conagra, Inc.*, 889 A.2d 954, 961 (Del. 2005) (“Specific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one.”).

overriding modules on top of possession. The addition of the last such overriding module should be a close case: modules will be added up to the point where marginal benefit no longer exceeds marginal cost. So at the margin, there will be close cases whether it is worthwhile to employ another module based on a more refined notion like title or to stick with basic possession.

As with *nemo dat*, whether to employ possession or some more refined rule relating to title is bound to be close, precisely because the more refined rule is layered on top of possession. Title rules have wider or narrower scope and can as a whole be added or subtracted from the system with possession picking up the slack. Thus, if the system is close to efficient whether through evolutionary pressures or by design, in those situations it will be close to the margin in terms of costs and benefits.

Before turning to other examples of layering, it is worth emphasizing what the specific-over-general principle and consequent layering do and do not mean. Being more basic does not mean superior, more important, and the like. (This point seems to escape the notice of many commentators. See, e.g., Alexander 2009; Dagan 2011:37-55.) If anything, within their domain, strategies of governance and rules relating to title reflect the importance of a problem, such that it calls for particular treatment. This particular treatment comes at a cost, so that the basic regime – possession, exclusion, and the things of property – does have some presumptive force. The more general default exerts a greater gravitational pull than do other rules. When it comes to property, possession promotes a general stability and mutual respect in Humean fashion, and correspondingly possession is associated with a very local but widespread form of morality (Merrill and Smith 2007). Again, this does not mean that possession and exclusion are morally superior to other forms of legal intervention. It does mean that they are more spontaneous and widespread, and they can be expected to predominate where numbers are high and the stakes of any given interaction are low.

It also bears emphasizing again that possession is operative in much of everyday life. This is not to say that possession is simple on some absolute metric, whatever that would mean. It may or may not be identifiable with the System 1 (S1) propounded by a variety of psychologists, in which people use simple and often virtually automatic heuristics, as opposed to System 2 (S2) which involves more reflection and sustained attention ([Serkin and Krier chapter This Volume]; see also Kahneman 2011). Whether there is one kind of S1 style implicit process in cognition is controversial to begin with (Evans 2008), and the cognition involved in possession may partake of multiple processes. Even basic notions about possession may partake of both S1 and S2 (to the extent those labels are valid), but the more basic de facto parts of possession do, nonetheless, draw on knowledge that is widely shared among members of society at large. This is particularly true of thing definition in many cases, as well as many relations of persons to those things. Possession is keyed to signals that are easily observed and processed (Corriel 2013), allowing for quick judgments. (It is also a default that can be overridden by more refined rules, in a fashion analogous to the way S2 sometimes overrides S1 in some models, at some cost in effort (Evans 2008:261–63, 271). As we saw above, considerations of value and efficiency do enter into what counts as salient. I

know not to take a newspaper from the newsstand but am free to take one from a train seat. Abandonment is the flip side of possession. In abandonment, control and intent work in reverse, and they draw on conventions fed by salience and practicality. Sometimes coordination can happen without a firm convention here too.

B. Elsewhere and the Layering Principle

From the specific-over-general principle and possession's status as the most general default regime, we can explain the characteristic patterns of possession. General defaults apply when nothing else does. Thus, unlike the subrules that displace them general defaults hang together mainly in what they are not. Within their large domain, they apply when nothing else does. It is simpler and more explanatory to capture the system by giving a succinct account of the subrules and letting the general one apply otherwise or "elsewhere" (see, e.g., Hayes 2009; Smith 1996; Smith 2012a). The set of situations covered by the general rule may be small, if it is displaced a lot, but with a large number of unrelated subrules (more specific defaults), the general rule will not be easily captured directly by trying to formulate these situations of application more directly. The general regime, here basic possession, also applies "otherwise" or "elsewhere" and tends to be the simpler and cheaper approach, albeit less effective where effectiveness depends on tailoring.

As we have seen, in a legal setting, the historically prior rule can be displaced a great deal, but it has an elsewhere pattern and gravitational pull. This is reminiscent of linguistic change in which analogical change tends toward the general rule (movement toward the *-ed* rule for past tense), but other processes create new specific rules (Smith 1996:221–58).²⁰ There is no necessary movement of the system in the direction of greater simplicity, but the specific-over-general architecture captures the way analogy works differently from some other processes. In the area of possession, we do see analogy working in favor of general norms (e.g. in hunting or mining), whereas new specific legal rules can arise out of some combination of adoption of custom and explicit law-making.

Possession is closely related to exclusion, especially when it is protected by trespass. Both possession and exclusion are general defaults that are cheap, rough and displaceable in important contexts, by rules of title and governance, respectively. Governance regimes give rise to multiple rights in the same asset, which are difficult to keep track of through possession alone ([Arruñada chapter this Volume]; Baird and Jackson 1984:303). Possession as a fact and then as a custom likely antedates the law, and the law of possession may well have developed before that of ownership (Pollock 1896:176). Like possession, in many cases, exclusion is the historically prior method of delineating property rights, and is supplemented and partially supplanted when it proves inadequate (Smith 2002; see also Rose 1991). If a governance rule – like a stint on the number of sheep or liability in nuisance for a particular activity – is dropped, say because

²⁰ For example, "grammaticalization" in natural language occurs when a lexical item like a verb can become a case- or tense-marker, as with the word *will* becoming the tense marker *-'ll* (Hopper and Traugott 2003).

it is no longer worthwhile, we fall back on possession and trespass in an exclusion strategy.

Further examples of specific-over-general abound in property law, and they are not unrelated to possession. One possible example would be open access and various kinds of property. Open access might be earlier and more general, although displaced very extensively by property (private, common, and public). As the literature building on Demsetz (1967) notes, property rights can be seen as the result of extra effort where extra effort is worthwhile; otherwise open access prevails. When horses became less valuable after the advent of cars, many horses were allowed to run wild (Anderson and Hill 1975:170–76; see also Haddock and Kiesling 2002). Or as Barzel (1997:16–32) would say, when attributes are not worth the effort at delineating property rights, they are left in what he calls the “public domain,” free to capture by anyone. Again, non-delineation of property rights is the ultimate default.

Another example of nested regimes is law versus equity. It might be surprising to invoke law versus equity, because civil law never had separate equity jurisdiction. Here by “equity” I mean a defined equitable decision making mode that reserves *ex post* discretion (possibly supplemented by prophylactic rules) to deal with opportunism, and, in more expansive versions, to fix problems of law owing to the law’s generality (Smith *ms.*). This decision making mode in its narrower and broader forms traces back to Aristotle, who defined equity (*epieikeia*) as an invocation of justice where law fails on account of its generality (Aristotle 1980 ed.:133). As such, it is present in civil law, in the form of interpretive approaches and the doctrine of abuse of right (Yiannopoulos 1994:1192–93). Aristotle’s formulation itself suggests that equity is more specific and trumps law only on occasion when there is really a compelling need for it.

The architectural theory of property with possession as a basic module suggests a different way to explain possession. As I mentioned earlier, the conventional approach to possession is either to look for coherent first principles or to evaluate rules of possession one by one in a functional light. Alternatively, from the earliest days of Legal Realism, commentators have voiced doubts that there is any unifying thread to possession (Bingham 1915:638; Shartel 1932:615). Law and economics carries on this skeptical tradition, and much of the current commentary on possession seeks to explain possession “rules” individually and separately, and asks if they are efficient or fair. For example, Posner (2000) evaluates different approaches to possession and first acquisition from the point of view of economic efficiency, especially using considerations of rent seeking. His aim is a functional explanation of the “contours” of possession. He criticizes earlier commentators like Savigny for only grudgingly considering function and argues that Holmes simply lacked the economic tools to get very far with a more functional approach. Posner contrasts his approach based on “social need” with earlier thinkers (and civilians) looking for an “inner logic” to possession (Posner 2000:551, 564, 566–67). The modular architecture of possession suggests that possession rules apply when something more specific should not, but the possession rules are not free standing. They are a very general system that benefits from its scope, rather than being a collection of disparate rules. As in modular systems generally, the system of concepts including possession may have an

“inner logic” in part for functional, even economic, reasons (Goldberg 2012:1652–58; Smith 2012a). These reasons have a lot to do with managing complexity through modularity.

Indeed, the “social need” is one that is widespread and basic. Posner (1976:601) once noted that the difference between Blackstone and his fierce critic Bentham was in part one of focus. Blackstone appeared complacent to Bentham because Blackstone was emphasizing the problem of basic social order, whereas Bentham was concerned with welfare – and so with more refined issues that need solving once basic order is achieved and more complex forms of social organization cry out for more complex solutions. It is easy to overlook that the refined parts of property are the apex of a pyramid of social order (Merrill and Smith 2001b), and possession forms a large part of this base. That possessory base is keyed to the things of property that we encounter and make use of conceptually all the time, but which legal theory tends to downplay and obscure. Possession is extended and partially displaced by the complex rules of property, tort, and contract that tend to receive attention from commentators. As Hume recognized, possession is a solution to one of the most basic problems of social order, and it is correspondingly easy to miss.

Conclusion

The key to understanding possession is that there is less and more than meets the eye. Possession proper is extremely basic and simple, and is part of the first cut at legal ontology. It involves the elements of private law – persons, things, and the relations between them. It uses the thing to mediate relations. Possession can be extended, especially through the further depersonalization made possible by thing definition, to notions like rights of possession and durable possession culminating in ownership. Possession is still used when it is all we need – a rough and ready system to handle numerous, low-stakes interactions. Its connection to custom continues its pervasive role. Possession is one of the most basic modules of property law.

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