Preliminary Draft

Do Not Quote Without Permission

**OWNERSHIP AND POSSESSION**

**Thomas W. Merrill**

**Introduction**

 One of the enduring mysteries about property is why the law protects both ownership and possession. In a pre-modern world, with low rates of literacy and no formal method of registering titles, one can understand why the law would protect possession. In such a world there may be no concept of property beyond the understanding that persons should respect possessory rights established by others. It is less clear why possession should be protected once property comes to be understood as ownership. Ownership and possession will commonly overlap, and protecting ownership will also protect possession. Nevertheless, even in the most sophisticated legal systems, where ownership is protected by digital records and title registries, possession continues to be legally protected independently of ownership. The objective of this paper is to offer an explanation for the persistence of this dual nature of property law, whereby the law protects both ownership and possession.

 The thesis advanced is that ownership and possession are addressed to different audiences of property, and information costs explain why different concepts are employed with different audiences. One audience consists of the mass of persons who navigate daily through a world filled with property. The objective of these persons is to avoid interfering with the things that belong to others. Possession is the concept used for this task. We can tell at a glance based on physical cues what things are possessed by others, and our ability to draw these rapid inferences makes possession a low-cost tool well suited to processing the relevant information about large numbers of persons and objects.

 Another audience consists of persons interested in engaging in exchange of property rights. Here the task is to determine whether the parties have the relevant rights, and that no third party has a superior claim that could undermine the value of the exchange. Ownership is the concept used for this task. Establishing ownership entails an investigation of the chain of title, which is a more costly exercise than discerning possession. Given the small number of parties interested in any exchange and the high stakes in assuring that the relevant rights exist, it is efficient for the participants interested in exchange to incur these higher costs. Ownership is much too costly, however, for everyday purposes of differentiating between mine and thine. This explains why the law persists in protecting possession independently of ownership.

1. **How Possession Differs From Ownership**

Before trying to explain why the law protects both ownership and possession, it is necessary to clarify what is meant by these concepts. Anglo-American literature is dominated by skepticism about whether either term has a common core of meaning (Harris, Reisman). I do not agree with this assumption. Both concepts do far too much work in ordinary discourse as well as law to be empty placeholders for some kind of unarticulated interest-balancing exercise. It is of course true that there will be disputes over which of two persons has a better claim to be “in possession” in many contexts. And it is also true that the prerogatives of “ownership” will differ from one society to another, and even from one type of asset to another (Merrill 2012). But disagreements about application of a concept do not mean that the concept is itself empty. Nor do differences in the full specification of rights associated with a concept mean that the concept lacks a core of meaning common to all variations.

 With respect to possession, if we look back to earlier scholarship, roughly speaking before the rise of American Legal Realism, we find broad agreement about the meaning of possession. Here I refer to German legal scholars like Savigny and Ihering, to English commentators like Blackstone and Maitland, and to Americans like Holmes. For these classical commentators, possession refers to a particular relationship between a natural person and a thing. That relationship consists of the person establishing control over the thing, and behaving in such a way that others recognize that he or she intends to maintain control over the thing for the indefinite future. Control here means the ability to exclude others from the thing. To be in possession of a thing is to acquire enough control to exclude others, and thereafter to signal to others an intention to continue excluding others from the thing (Restatement § 7).

Establishing control and evincing an intention to maintain control entail communication (Rose; Smith 1117-22). As Carol Rose puts, it possession “looks like a kind of speech, with the audience composed of all others who might be interested in claiming the object in question” (Rose 14). Consequently, the precise actions that establish possession will turn on local custom, at least to a degree. Perhaps the most famous illustration of this is the nineteenth century whaling industry, where different whaling communities followed different conventions in determining when a particular whaling boat had secured possession over a particular whale (Ellickson 1989). Still, while the communicative acts may differ from one community to another, the conceptual understanding of possession – control and intent to maintain control – appears to be relatively constant.

Respect for possession established by others is a widespread norm in human societies. Often this is a social or informal norm (Ellickson 1991). Those who respect the norm are rewarded with approval, esteem, and trust; those who violate the norm are punished with disapproval, withholding of trust, and retaliation. I strongly suspect (although I cannot prove) that all or virtually all human groups recognize the norm of respecting possession established by others. Thus, one does not need to have a formal legal system to have possession. Nevertheless, human societies that have formal legal systems also commonly protect possession as a matter of law. These legal systems may adopt independent criteria for identifying acts of possession, or may borrow social or customary understandings of possession, or they may use some combination of legal and customary identifications of possession.

Ownership, broadly speaking, refers to the legal right to control a thing, or if you will, the legal right to exclude others from a thing (Merrill 1998; Penner). Superficially, this sounds a lot like possession. Both possession and ownership refer to control of things, in the sense of excluding others from things. But in fact there are important differences. Possession requires that a person perform acts that are understood to constitute *actual* control over a thing. Ownership does not require actual control; one can be an owner of a thing without ever having been in actual control at all. Similarly, possession requires that a person communicate an *intention* to remain in control over a thing for the indefinite future. Again, no such intention is required of an owner; one can be an owner of a thing and intend never to be in actual control of the thing. In short, one can be a possessor without being an owner, and one can be an owner without being a possessor, although being an owner ordinarily entails the right to determine who will be the possessor. To be sure, owners of things will commonly designate themselves to be the possessor. To the extent they do, ownership and possession will coincide. But this is not invariably true.

Two further generalizations about ownership and its relationship to possession seem clear. Possession, or respect for possession, as previously noted, can be either a social norm or a legally protected right. Ownership, in contrast, exists only within the context of a formal legal system. When ownership is contested, the conflict must be resolved by duly constituted authorities charged with the resolution of legal disputes. There may be a social norm of respecting ownership. If so, it is most likely an aspect of a more general social norm supporting respect for the law.

It is also clear that ownership, where it exists, trumps possession, even legally protected possession. Owners can oust possessors who do not have their permission to occupy or use a thing (although they may have to get a court order to do so). Owners can also transfer possession of things temporarily to others, as through bailment or lease, and then regain (or retransfer) possession of the thing at a later time.

I will have more to say later about the ways in which ownership differs from ownership – differences relevant to an information cost theory of why the law protects both ownership and possession. But first it is necessary to establish that the law does in fact protect possession, separately and independently of its protection of ownership.

1. **How the Law Protects Possession Independently of Ownership**

Given modern skepticism about whether concepts like possession and ownership have any core meaning, and given that ownership and possession commonly overlap, it is necessary to recite some of the ways in which modern legal systems protect possession independently of ownership. What follows is not intended to be an exhaustive treatment of the subject, but only to provide enough examples to demonstrate the point.

The law of finders provides a particularly striking illustration. A lost object is typically something of value from which the owner has unintentionally relinquished possession. We discern that something is lost, as opposed to abandoned, by observing physical cues about the value of the object and where it is found. A wallet filled with money on a shop floor, a watch on the counter in a rest room, a cell phone in the back seat of a taxi – all are presumed to be lost. An old wallet in a trash bin, or a frayed barcalounger at curb side, are presumed to be abandoned. An object that is abandoned has no owner and is generally free for the taking by the first possessor. Lost objects present a more interesting situation. Here the owner of the object continues to be regarded as owner. But the finder is recognized as having rights of possession independent of the owner. Although legal systems differ in the details, the finder as possessor is generally deemed to have rights in the object superior to all the world save the true owner. The finder, for example, is protected by both criminal law and tort law against unwanted takings of the object by a third party (Armory v. Delamirie). This is a clear instance of the law protecting possession independently of ownership.

The law of bailment provides another illustration. A bailment is a temporary transfer of possession of an object from an owner (the bailor) to another (the bailee), typically for a particular purpose. Bailments can be gratuitous or based on contractual consideration. Examples range from borrowing a bicycle from a friend to taking a computer to a shop for repairs. What is significant for present purposes is that the law gives the bailee, as the party in possession, rights against interference with the object by third parties, independent of the rights of the owner. Specifically, the bailee can use self help to repel takings or damage to the object, and can sue in tort for conversion or damage to the object, holding any recoveries for the benefit of the owner (The Winkfield). Here again we see an example of the law protecting possession independently of ownership.

A third example is the differential treatment of defense of possession versus recovery of possession. An owner or any person in possession of land or chattels is allowed to use self help to defend possession against intrusions or takings by strangers, including the use of reasonable force. In contrast, an owner seeking to recover property that is in possession of another is much more constrained. In many states, owners of real property must obtain a judicial judgment in order to recover possession, giving the party in possession an opportunity to raise any defenses that may exist that would defeat the attempt to take possession (Berg v. Wiley). Even where self help repossession is permitted, as under the UCC for recovery of personal property subject to a security interest, it is universally limited to “peaceable” methods (Williams v. Ford Motor Co.). Force, reasonable or not, is forbidden. Here we see a systemic preference for possession, even when set in opposition to ownership.

A final example concerns the major forms of criminal and tort liability that protect interests in property. The law of larceny, for example, originally applied to unlawful takings of objects from the possession of another. Thus, for example, larceny applied to robbery and theft, but not to embezzlement or conversion by a bailee, because the object in these latter cases was in the possession of someone else when it was taken. It took many years, and many acts of legislation and creative judicial interpretation, to extend larceny to cover unlawful deprivations of ownership that did not entail direct takings from possession (Fletcher). Similar stories can be told about the torts of trespass and conversion. Both torts originally applied to violations interfering with possession. Only over time were they gradually extended to apply also to ownership, often through the fiction that the owner is in “constructive possession” of the property subject to the intrusion. The point is that each of these forms of legal protection was originally linked to deprivation of possession, and still today each is available to any party who is deprived of possession. Protection of ownership has been only gradually (and even today incompletely) extended to owners not in possession. Insofar as there remains a gap, the law protects possession independently of ownership.

In sum, we see many examples where the law differentiates between possession and ownership, confirming that these concepts remain distinct and have continuing operational significance. We also see that the law not infrequently extends protection to possession independent of ownership, or extends greater protection to possession than ownership. This has long been regarded as a puzzle in need of explanation.

1. **Previous Explanations for the Protection of Possession**

The mystery of what I have called the dual nature of property law – its protection of both ownership and possession – has been remarked upon by many esteemed commentators. As Pollock and Maitland put it, “Why should law, when it has on its hands the difficult work of protecting ownership and other rights in things, prepare puzzles for itself by undertaking to protect something that is not ownership, something that will from time to time come into sharp collision with ownership?” (Pollock and Maitland 40). A variety of explanations have been offered for this puzzle. These explanations are not necessarily wrong. But they are incomplete, and they make it difficult to account for the enduring protection of possession, especially in the face of significant reductions in the costs of protecting ownership associated with the digitalization of information and the proliferation of registries of rights.

 The first explanation is that possession is valued for its own sake, independently of ownership. One could express this in terms of personhood (Radin). Things that are possessed are often very close to the possessor, both physically and psychologically. People are wrapped up in the things they possess. Thus, an attack on possession is felt as an attack on the person. To deprive a person of possession is a kind of assault, and so the law protects possession just as it protects the person from assault. Modern psychological experiments involving the endowment effect suggest that persons place an independent value on possession. College students given physical possession of a coffee mug consistently demand more to give up the mug than they would offer to pay another to obtain ownership of the same mug. If the preference for possession is hard wired in human psychology, perhaps this is sufficient to explain why the law protects possession independently of ownership.

Clearly, there is something to the idea that people become attached to the things they possess. But people are also attached to what they own. Quite often, ownership and possession coincide, so by protecting ownership the law will also protect possession. Indeed, since ownership includes the right to transfer possession, as by bailment or lease, protecting ownership covers a wider swathe of situations than protecting possession alone. In order to justify legal protection of possession as such, based on personhood or psychological attachment, it is necessary to show that there is a significant set of circumstances in which persons have possession, to which they are strongly attached, but do not have ownership. There are unquestionably such cases – adverse possessors and finders immediately come to mind. But in order to provide legal protection to possession apart from ownership, we may also have to protect various bad faith possessors like squatters and thieves. It is not clear that the welfare tradeoff here – greater protection for good faith possessors who are not owners versus greater immunity for bad faith possessors who are not owners – is positive on net (Helmholz). At the very least, the net gains seem too weak to justify a general and universal practice of protecting possession independently of ownership.

 Nor does the importance of the rule of first possession in establishing original rights to resources support a general practice of protecting possession independently of ownership (Epstein). First possession applies in contexts where resources are unowned or abandoned; consequently, the first possessor becomes the owner once the resource is reduced to possession. In effect, we zip directly from possession to ownership; there is no need for an intermediate stop in the form of legally protected possession separate from ownership. A similar point can be made about adverse possession. Here too possession plays a critical role, but the role it plays is in establishing ownership. One day before the statute of limitations runs, the owner can oust the adverse possessor; one day after, the possessor becomes the owner, and can oust the previous owner. Again, the law zips directly from possession to ownership, without pausing to recognize legally-protected possession as such.

The second explanation, which is to some extent derivative of the first, is that the law protects possession “for the better maintenance of peace and quiet” (Pollock and Maitland 41). If possession is valued for its own sake, as a kind of extension of the person, then an attack on possession will be perceived as an attack on the person. Thus, the argument runs, the law protects possession in order to deter these attacks (LaFave). For the same reason, an attack on possession will commonly elicit a defensive response, which may itself be violent. By protecting possession, the law discourages this kind of aggressive self help. As one famous case puts it, “Any other rule would lead to an endless series of unlawful seizures and reprisals in every case where property had once passed out of the possession of the rightful owner” (Anderson v. Gouldberg).

There is also something to this explanation. But it is not clear why the deterrent effect of the law would not be nearly as great if the law protected only ownership. After all, most things worth invading or stealing are owned, and the subset that are currently in the possession of someone who is not an owner do not ordinarily advertise themselves as such. When a thief enters a car park, some of the cars will be owned, some rented, some leased, some borrowed from friends, and occasionally one or more may have been previously stolen. But the thief is not likely to differentiate among potential targets according to the ownership status of the vehicle (Penner). All are owned by somebody, and it will be a felony to steal any one of them. This will be true without regard to whether the law protects only ownership, or also protects possession independently of ownership.

Probably the greatest protection against unwanted loss of possession is the privilege to engage in self help, whether of the purely defensive variety, such as installing locks or alarms, or the more aggressive form, such as using reasonable force to resist dispossession. Owners clearly have the privilege of exercising self help to protect their property. The question, again, is whether it is also necessary to give those who have possession but not ownership the same privilege, in order to discourage disruptions of possession. Perhaps it is in some contexts. One can imagine that rates of theft might increase at pawn shops or coat check counters if mere possession of goods did not permit the owners of such venues to use self help to deter takings. Outside these specialized contexts, however, thieves are not likely to differentiate between owners in possession and possessors without ownership. From a deterrence perspective, giving possessors the right to engage in self help, independently of ownership, will not add greatly to the deterrent effect of allowing only owners to engage in self help. In any event, even if there is a sound reason for allowing bailees to use self help to protect possession, this takes us only part way toward giving full legal protection to possession. For that we need a more robust explanation.

A third explanation is that the law protects possession as a kind of surrogate for the protection of ownership. “To prove ownership is difficult, to prove possession comparatively easy” (Pollock and Maitland 42). Thus, by protecting possession, the law reduces the costs of protecting ownership, and thus strengthens the rights of owners. One consequence of this is that the law must occasionally protect wrongful possession, even at the expense of ownership. On balance, however, owners are better off with the law protecting possession. This explanation is often conjoined with an account of the English doctrine of relativity of title. Judicial disputes over rights to things take the form of a bilateral contest between two parties. The court will ask which of the two has the better claim; it will not inquire who has a right good against the world. Ownership will trump possession, but prior possession will trump subsequent possession. Thus, if A is an owner, A need only prove prior possession to defeat B; A need not prove ownership, which will be more difficult. This also means that B can defeat C, if C comes into possession after B; and C and defeat D who comes after C, and so forth. But, the argument goes, the As of the world are generally better off under this system than they would be if the law protected only ownership. After all, A can trump any of the subsequent possessors, B, C or D, simply by showing that A was in possession before any of them.

The surrogate protection explanation is ingenious and, I think, largely persuasive on its own terms. The problem with the explanation, as it has been formulated, is that it is incomplete. The explanation focuses narrowly on one aspect of the information cost problem: the cost of assembling information about ownership to present to a court in a contest between an owner and a rival claimant. It is plausible that requiring proof of possession rather than ownership allows such disputes to be resolved at lower cost, especially in a world in which there is no registry of rights and proof of ownership requires the examination of multiple documents contained in diverse places. As I shall argue, however, the information cost problem extends much further than judicial disputes. The disparity of information costs affects not just parties to lawsuits, but all persons as they attempt to navigate their way through the everyday world filled with objects claimed by others. As such, my main criticism of the surrogate protection explanation is that it does not go far enough.

1. **Possession in the Material World**

As a prelude to developing a more general information cost theory of why the law protects both possession and ownership, it is important to take note of some further differences between ownership and possession – differences which have not been widely recognized in the relevant literature. Collectively, these additional differences suggest that possession and ownership operate in different dimensions of social life, which I will describe in terms of their being addressed to different “audiences” of property.

One further and significant point of difference concerns the range of interests covered by ownership as opposed to possession. Ownership applies to a very broad range of things that have scarcity value. Ownership obviously applies to land and interests in land such as easements and leases, as well as to all kinds of personal property like cars, boats, and clothing. In addition, however, ownership extends to a variety of intangible rights, including future interests, security interests, beneficial interests in trust, intellectual property interests, choses in action, bank accounts, and shares of stock in corporations. At the margins, there are debates about where ownership ends and contract begins (Merrill and Smith 2001). But both in ordinary discourse and law, it is common to speak of ownership of mortgages or patents or shares of stock.

Possession, in contrast, applies to a narrower range of interests. Possession is limited to tangible objects, i.e., things that have physical dimensions. One can possess real property like land and buildings, movable things like cars, clothing, and computers, and even wild animals that have been trapped or killed. One can also possess fugacious materials like water, oil, and gas, provided they have been captured and secured in some kind of containment. But one cannot possess intangible rights, such as future interests, security interests, intellectual property rights, bank account balances, or shares of stock in a corporation. I recognize that most of the intangible rights subject to ownership were originally (and sometimes still are today) embodied in some kind of deed, certificate or passbook, and that it is possible to speak of someone being in possession of one of these pieces of paper. But this only proves the point. A piece of paper is capable of being possessed; an intangible right, even one evidenced by a piece of paper, is not capable of being possessed.

The tangibility limitation is also reflected in the law of adverse possession. As one would expect of a doctrine grounded in possession, adverse possession applies only to interests in tangible property. One can obtain title by adverse possession to land or chattels, and one can obtain by prescription an affirmative easement in the land of another. It is even possible to obtain a prescriptive right to commit a nuisance on the land of another, at least one that entails the invasion of visible particles or sound waves. But one cannot adversely possess a future interest, security interest, intellectual property right, or share of stock in a corporation. The limitation of possession to tangible objects will play an important part in my information-cost explanation for why the law protects possession independent of ownership.

A second point of difference concerns the nature of the evidence relied upon in establishing ownership and possession. Claims of ownership are generally established by documentary and testamentary evidence about specific transactions involving things. Ownership of land and buildings is established by deeds. Ownership of movables is established by bills of sale, wills, or oral testimony about gifts. Ownership of intellectual property rights like patents is established by registries of patents maintained by the patent office, and so forth. Indeed, with the exception of certain important situations in which possession can ripen into ownership, such as the rule of first possession or adverse possession, all claims of ownership are established by evidence of transactions, including both private transactions and transactions with the state.

Claims of possession, in contrast, are established by engaging physically observable acts. This is well known with respect to wild animals, where possession is established by acts that qualify as “capture” of the animal (Pierson v Post). But possession of land is also established by engaging in physical acts, like living on the land, cultivating it, or improving it, that are understood as reflecting a claim to be in control over access to and use of the land (Rose). The same holds with respect to possession of tangible personal property, where claims of possession are frequently established by affixing one’s name to the object, or keeping the object in a place like one’s home or office where it is understood that the possessor exercises control.

A third point of difference concerns the duration of interests. Rights of ownership typically have a substantial and often indefinite duration. In the case of absolute ownership or what the Anglo-Americans call the fee simple, ownership has a potentially infinite duration. Even in the case of time-limited ownership interests like easements or leases for a term of years, ownership rights can endure well beyond the lifetime of any given owner. This means, among other things, that rights of ownership can be inherited and, of course, can ordinarily be transferred by sale or gift.

 Possession, at least insofar as it is recognized by social norms, is usufructuary, meaning it endures only as long as the person in possession maintains the relevant intention to control the resource. Thus, possession cannot be inherited. Possession can be transferred, but only in the limited sense that a person in possession can agree to relinquish possession of a thing and put another in position to assert possession of the thing; if, however, the transferee fails to establish the required degree of control or to manifest an intention to maintain control, the claim of possession will lapse. To maintain possession over time, the possessor must, to use an old expression, “keep his flag flying.”

A fourth point of difference concerns who may assert the relevant claim. Ownership can be claimed by natural persons either singly or concurrently, as when multiple persons own property as tenants in common or joint tenants. Ownership can also be claimed by artificial persons, such as trusts, partnerships, corporations, and even the state itself.

Possession can be asserted only by natural persons. A corporation, trust, partnership, or governmental body cannot be said to be in possession of any particular thing. It is possible to speak of a small number of closely related persons being in possession of some thing, such as a married couple or a family. But in order for this to make sense, it is necessary for all members of the unit to be actively engaged in exercising control over the thing. If, for example, a brother and sister own land as tenants in common, but only the sister lives on and manages the land, one would say the sister is in possession of the land, but the brother is “out of possession.”

In short, ownership exists in a world of lawyers, court houses, legally-significant documents, and title registries. Possession exists in a physical world of tangible objects and of natural persons who are physically engaged with these tangible objects. These important differences provide the material for a general explanation of why the law protects possession independently of ownership.

1. **Possession, Ownership, and the Audiences of Property**

Property has a variety of audiences, and the law of property changes coloration in response to the circumstances of different audiences (Merrill 2011). In considering the puzzle presented by the law’s dual protection of ownership and possession, two audiences in particular are critical. The first audience inhabits the everyday world, where large numbers of people navigate daily among thousands of objects and face the problem of differentiating the objects they control from the ones subject to the control of others. The basic objective of those in this audience – assuming they are well socialized – is to avoid interfering with the rights of others. The second audience is much smaller, and consists of persons interested in engaging in exchange of rights to particular things. A core objective of this audience is ensuring that they get what they have paid for, and that no third party will emerge claiming to have a superior right sometime after the exchange is complete (Arrunada).

My thesis is that the first audience – persons navigating through the everyday world – is guided by the concept of possession. The second audience – persons interested in engaging in exchange of rights – is guided by the concept of ownership. The objectives of these two audiences require different sorts of information. Persons navigating through the everyday world need information about what things have been claimed by others. Possession works well in the in this context because it employs a very low-cost informational rule that is easily learned and followed by large masses of people. In contrast, persons interested in exchange need information about the capacity of particular persons to transfer rights to particular things. This requires an investigation of the chain of title, a task to which ownership is devoted. As such, ownership entails a much more complex and costly informational rule than possession. The smaller size of the relevant audience, and the much larger stakes in ascertaining the rights to particular things, mean that the audience interested in exchange can tolerate a significantly larger informational burden – a burden that could not be sustained by the audience interested only in navigating through the everyday world.

 The audience that navigates on a daily basis through the everyday world can be called the audience of strangers. By stranger, I mean any person who has no legitimate interest in a thing other than to avoid interfering with it. This is the attitude of most of us with regard to most of the things we encounter on a routine basis. Consider how most people respond to all the suitcases being wheeled by others through an airport, or to the sea of cars parked in a public parking garage. Strangers in this specialized sense thus can include acquaintances and even friends, so long as we have no interest in their things other than avoiding a conflict over them. As we navigate our way through life, we encounter vast numbers of things of value as to which we have no personal, contractual, familial, or neighborly relationship. The owners of these objects are strangers to us, in the relevant sense, and their identities and the circumstances of their ownership are irrelevant to our purposes (Penner). All we need to know about these things is “belong to other” so we can steer clear interfering with them. Similarly, the things we call our own are exposed on a daily basis to a variety of other persons, some closely related to us, but many of them also strangers in the relevant sense. These strangers likewise have no need to know who we are or the circumstances of our holding these items. All they need to know is “belong to other” so that they too can steer clear of interfering with our things.

The audience interested in engaging in an exchange of rights can be called potential transactors. By potential transactor I mean anyone who has an interest in purchasing, selling, leasing, or borrowing against any particular thing. Thus, potential transactors are not just buyers and sellers, but include secured lenders, insurers, judgment creditors, asset securitization bundlers, and any others who have an interest in engaging in an exchange of rights with respect to things, broadly conceived.

In singling out strangers and potential transactions, I do not mean to suggest that there are no other important audiences of property. One could also consider the audience of persons who share a resource (e.g., family members sharing a home), the audience of persons who have an explicit contractual agreement about the use of a thing, the audience of neighbors, and the audience of the government. For present purposes, however, we can ignore these other audiences. All we need to explain the persistence of legal protection for possession independently of ownership is to understand the audience of strangers, and to contrast it to the audience of potential transactors.

By far the largest audience of property is the audience of strangers. If differentiating between mine and thine required information about the ownership of each thing we encounter in life, the informational burden would be overwhelming. Suppose we cross paths with 1000 different strangers each day, each of whom has 100 objects, subject to six different types of status in law (e.g., owner, co-owner, lessee, agent, bailee, trust beneficiary). Knowing the ownership of each thing would entail the need to call upon 600,000 separate bits of information. Perhaps in some futuristic world every object could have an implanted transponder and every person could have a scanning device linked to a computer with massive data processing capacity. But even in such a world, it would be necessary to process and comprehend the information generated. Some shorthand would surely be developed, such as beeping a message to us equivalent to “belong to other” so as to allow us to steer clear of interfering with the things as to which we have no relationship or interest.

We do not need to develop such a computer, because we already have the concept of possession. The concept of possession allows us to navigate in a world filled with objects of value that belong to strangers without suffering from information overload. Possession applies to tangible objects and the fact of possession is communicated by physically observable facts about these objects. Usually the significance of these facts can be inferred at a glance. In virtually all times and places, an enclosed dwelling where people sleep is understood to be possessed by others; a suitcase is understood to contain objects possessed by others. To be sure, the observable acts that communicate possession will vary somewhat from one culture to another. Blazing tress will be recognized as establishing a claim to a hunting territory in one culture, marking boundaries with cairns will be recognized as communicating such a claim in another, and so forth. But this culturally-specific knowledge is adsorbed at an early age and requires no special sophistication or study. As a rule, newcomers to any particular community can pick up on these cues fairly quickly.

The audience of potential transactors is far more limited and has much more intensive interest in particular attributes of things. Suppose I have a 2012 BWM that I list for sale on craigslist.com. I am a potential transactor, as are any persons who are interested in buying a 2012 BMW who happen to see the listing and are considering whether to contact me about a possible transaction. This audience of potential transactors will want to obtain much more information about the vehicle than would be of interest to a stranger. Potential transactors will want to know whether the listing party has good title to the car, whether there are co-owners who must agree to any transaction, whether the car is subject to a security interest, whether the registration and applicable tax obligations are up to date, and so forth. In short, the audience of potential transactors will want to obtain much more information than any stranger would care to gather.

In order to communicate the information needed to sustain the social practice of engaging in exchange, we need a more refined concept than possession: we need ownership. Ownership means that the putative seller has the capacity to transfer to the putative buyer the legal right to control the object as against all other persons in the relevant community. The fundamental axiom of ownership is *nemo dat quod non habet* – one cannot convey that which he does not have. Thus, to engage in exchange, we need to have information about the chain of title. In modern societies, this information is found in documents – deeds, bills of sale, financing agreements, registration papers. In traditional societies, it may be based on symbolic markings or testimony of persons who have witnessed ceremonies in which the relevant rights have been exchanged (Ellickson and Thorland). The concept of ownership thus requires, at a minimum, the ability to engage in symbolic manipulation, separate and apart from understanding the cues conveyed by the physical facts that communicate possession.

Although the information about ownership cannot be found in physically observable facts, the burden of gathering and processing the additional information demanded by potential transactors is not so great as to defeat all possibility of engaging in transactions. For one thing, there are only a limited number of persons in the audience of potential transactors, each of whom has relatively high stakes in completing a transaction. Moreover, the forms of ownership are significantly standardized, which reduces information costs (Merrill and Smith 2000). A registry of rights, if one exists, will further reduce information costs, allowing potential transactors to ascertain whether there are any outstanding security interests in the property. An experienced buyer will want to obtain this information for her own protection. If the purchase is to be financed, the lending agency will insist on this additional information for its protection.

Of course, possession is not entirely irrelevant to exchange. To return to the BWM, if the car is in another state, this will be a complicating factor in completing any transaction, because potential purchasers will want to inspect the vehicle. But possession is not inevitably required. If the purchaser is satisfied with photographic evidence, and can have the car inspected by a mechanic in the other state, the transaction may go forward even if the seller is not in possession.

 Once we understand that property has these two important audiences -- the audience of strangers and the audience of potential transactors -- we can see that possession and ownership constitute distinct rules operating in different social settings within the universe of property law. The concept of possession is a vital tool that allows people to navigate through the everyday world without interfering with the rights of others. Each person continually observes the objects around them and can tell at a glance based on physical cues whether they are possessed or not possessed. If moderately well socialized, these individuals will then conduct themselves in such a way as to avoid interfering with the objects that are possessed.

The concept of ownership is a vital tool that allows people to engage in exchanges of rights to things. Ownership signifies the legal right to control an asset against all the world. In order to provide assurance that the parties to an exchange have such rights, it will be necessary to conclude (to a satisfactory degree of confidence) that all relevant rights to a thing have been accounted for. This will entail at the very least a rudimentary chain of title (e.g., a bill of sale) or, with respect to more durable and valuable assets like land, a more complete investigation of the chain of title or reference to a registry of rights. In these more complex transactions, it may be necessary to consult a lawyer or the equivalent specialist, such as a notary public or a Land Registration Office.

The additional costs of determining ownership are sustainable for the audience of potential transactors, because they are small in number and have high per capita stakes in completing any exchange of rights. But these costs are far too high to serve as a workable device for allowing masses of people to navigate through the world of owned things without interfering with the property of others. In order to allow the audience of strangers to function in daily life without undue conflict and discord, we need a simple concept that can be grasped instantaneously by observing physical cues about the world. We need possession.

This analysis of the functional significance of possession and ownership does necessarily answer the question why the law protects possession independently of ownership. We can now see that possession is critical to social ordering. But recall that possession operates both as a social norm and as a legally protected right. Why not leave the enforcement of possession entirely to social norms, reserving the force of the law for the protection of ownership? After all, as previously observed, possession and ownership commonly coincide, and protecting ownership will, derivatively, protect possession to a significant degree. We have also seen that strangers, in the specialized sense of the word, will commonly not be able to differentiate between things that are owned and things that are only possessed. So limiting the law to enforcement of ownership would go a significant way toward protecting possession.

Part of the answer has been supplied by the traditional explanations for why the law protects possession independently of ownership: Possession is valued for its own sake; failure to afford legal protection to possession might lead to breaches of the peace, at least in selective contexts such as bailments; and enforcing possession reduces the legal costs of proving ownership in court. We can now offer two more general explanations.

First, even if possession is protected by a social norm, the law quite often and properly reinforces important social norms. By enforcing possession independently of ownership, the law underscores the importance of respecting possession. Indeed, if the law were to ignore possession, and leave its enforcement solely to social norms, this might send the message that respect for possession is simply a matter of convention or courtesy, which might sap it of much of its strength as a norm (Merrill and Smith 2007).

Second, absent legal enforcement of possession, individuals would increase their demand for evidence confirming ownership. This is a more general implication of the insight that it is easier to prove possession than ownership. When the law protects possession, documentation of ownership is unnecessary in cases involving strangers; one need only to show possession. One can thus be casual about retaining receipts for bicycles and computers, safe in the knowledge that the law will protect possession of these items against third parties who steal or damage them. If the law protected only ownership but not possession, individuals would likely devote significantly more time and resources to retaining documentary evidence establishing ownership. Relatedly, individuals would likely invest more in self help measures to protect possessions that lacked good documentation of ownership. Thus, the cost differential that favors possession over ownership would affect not only the cost of legal proceedings (the point previously found in the literature), but would also affect private behavior in ways that would at least partially nullify the cost advantages of possession.

An analogy, admittedly imperfect, would be a proposal to limit legal enforcement of contracts to those embodied in writing, leaving oral contracts to be enforced by social norms. Over time, failure to provide legal redress for breach of oral contracts could lead to a more opportunistic view of oral obligations. It might even erode the social norm that one should perform contracts more generally. It is also plausible that failure to enforce oral contracts would lead people to insist on written contracts in circumstances where they would previously have been content with an oral agreement. This would entail an increase in transaction costs in many circumstances and would constitute a deadweight loss for society. Similarly, failure to offer legal protection for possession could erode the social norm favoring possession, and could lead to increased social expenditures documenting ownership, another a deadweight loss.

**VI. The Interaction of Ownership and Possession**

Because ownership and possession often coincide, and because the law protects both ownership and possession, these two sets of legal rules will often interact. At least some of these interactions reinforce the information cost explanation for why the law protects both ownership and possession.

One interesting form of interaction is found in the procedure for completing a valid exchange of property rights. Historically, in order to consummate a sale of land, one had to engage in a ceremony called livery of seisin. This entailed having the buyer and seller appear together on the land and, in the presence of witnesses, having the seller hand a clod of dirt or a twig to the buyer. The ceremony was obviously a symbolic enactment of the transfer of possession. This made sense at a time when people living in the community were mostly illiterate and documentary evidence of transfers was privately held. Members of the community could readily comprehend the idea of possession being transferred from one party to another; the idea of a transfer of ownership may have been harder to grasp. By combining a symbolic transfer of possession with the transfer of ownership, the security of the exchange was significantly enhanced.

Today, the necessity of conjoining transfer of ownership with transfer of possession lives on in the form of the requirement that a valid transfer of property requires delivery, either of the thing itself or of a deed that memorializes the exchange. The delivery requirement is enforced most strongly in the law of gifts. A valid gift, either *inter vivos* or *causa mortis*, requires both intent to make a gift and delivery of the item by the donor to the recipient, either literally or in some symbolic form (such as handing over the keys to a car). In effect, the law requires that there be a transfer of possession in order to establish a valid transfer of ownership. Commentators have been puzzled by this, although in family settings where documentary formalities are not routinely observed, the transfer of possession may provide vital evidence that gift was in fact intended (Irons v. Smallpiece). Even in a transfer of property by deed, the law requires that the deed be delivered in order to establish a valid exchange of rights. Here the evidentiary value is more dubious. There are, however, not an insignificant number of cases in which deeds are made out and signed and then left in a desk drawer, which makes the transfer revocable at the option of the transferor. The delivery requirement – requiring a transfer of possession of the deed – reduces the potential for future dispute in these circumstances.

We can now see that there is an information cost explanation for the vestigial requirement of delivery of possession in conjunction with a transfer of ownership. The transfer of possession supplements or acts as a substitute for the documentary record otherwise needed to memorialize a transfer of ownership, and does so in a low cost way designed to communicate information to participants and observers who may not be willing or able to assimilate the information reflected in a documentary record. Transfer of possession is in this sense a backstopping mechanism, and helps reduce the incidence of error or misunderstanding at low cost.

Another interaction is found in the law of security interests, where it has long been understood that one way to memorialize a security interest is to transfer possession of the collateral to the creditor. This was originally called a “gage,” hence the origins of the term mortgage. The borrower would transfer possession of property to the lender. If the loan was repaid the property would be returned; if not, the lender would seize and keep the collateral. The practice lives on in pawn shops, and transfer of possession is still recognized by the UCC as a valid method of establishing a security interest in personal property.

Security interests are invisible. In a world without recording acts or title registration, transfer of possession, which is very visible, is a logical way of memorializing the fact that the property is being used as collateral for a loan. The transfer of possession also solves the problem of ostensible ownership which arises when someone holds property subject to one or more undisclosed liens. This can act as a deceit on third parties, who advance credit to the owner on the assumption that the property is unencumbered.

Again we see the informational function of possession. Possession serves as a substitute for title recordation or registration, and continues to perform this function in contexts where systems of recordation or registration do not exist or are incomplete (Baird and Jackson).

 A third important interaction is the law of adverse possession. As previously noted, adverse possession does not protect possession as such. Instead, it reverses ownership from the title holder to the possessor once the statute of limitations on an action to recover possession of the property runs and other conditions (open and notorious, continuous, under a claim of right, etc.) are met. As a result, ownership always dominates possession in the law of adverse possession, but the running of the statute causes the identity of the owner to flip. Still, adverse possession is a striking example of the interaction between ownership and possession, and one that underscores the continuing importance of possession in property law.

Adverse possession furthers a number of functions (Merrill 1985), but one rationale for the doctrine is that it allows for corrections of mistakes in the paper record that defines ownership. If the title papers describe an ownership that does not conform to actual possession as it exists on the ground, adverse possession allows the title papers to be reformed by judicial judgment to reflect the actual practice and expectations of the parties. It is noteworthy in this regard that adverse possession operates outside of, and trumps, title as established by the recording act or system of title registration. The most meticulous examination of title by title examiners cannot correct deviations between the paper record and facts on the ground (Mugaas v. Smith). Thus, purchasers must always do a physical inspection of the property – looking for possession not sanctioned by the state of the title – in addition to searching the title.

 The rectification role of adverse possession again reinforces the information cost explanation for the persistence of legal protection of possession. Adverse possession is not cheap; it usually requires a judicial judgment, which means litigation, and the doctrine itself imposes a number of conditions such as the passage of significant time which must be satisfied in addition to showing possession. But by drawing on the concept of possession, the doctrine reduces the costs of correcting mistakes in the documentary record, and does so in a way that conforms to the perceptions about ownership in the everyday world. Observed physical facts provide the basis for the correction of title, which allows for errors to be corrected at less cost than virtually any other approach that could be imagined.

**Conclusion**

We started with a puzzle: why does the law of property protect possession independently of ownership? The explanation offered here is that the concept of possession communicates information at a lower cost than does the concept of ownership. Possession is established by observed facts in the physical world. Ownership requires an investigation of the chain of title. The lower information cost burden associated with possession performs a vital role in allowing the mass of persons to navigate in the everyday world of property without interfering with the rights of others. It also performs a number of important supplemental roles in communicating information about ownership itself. Once again, we see the value of the information cost perspective in understanding the structure of property law.

**References**

Arrunada, Benito, Institutional Foundations of Impersonal Exchange (2012).

Baird, Douglas & Jackson, Thomas, Information, Uncertainty, and the Transfer of Property, 13 J. Legal Stud. 299 (1984).

Ellickson, Robert C., A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry, 5 J. L. Econ. & Org. 83 (1989).

Ellickson, Robert C., Order Without Law: How Neighbors Settle Disputes (1991).

Ellickson, Robert C. and Thorland, Charles Dia., Ancient Land Law: Mesootamia, Egypt, Israel, 71 Chi.-Kent L. Rev. 321 (1995).

Epstein, Richard A., Possession as the Root of Title, 13 Ga. L. Rev. 1221 (1979).

Fletcher, George, Metamorphosis of the Larceny, 89 Harv. L. Rev. 469.

Harris, D.R., The Concept of Possession in English Law, in Oxford Essays in Jurisprudence (A.G. Guest ed. 1961).

Helmholz, Richard, Adverse Possession and Subjective Intent, 61 Wash. U. L. Q. 65 (1983).

LaFave, Wayne R., Criminal Law (4th ed. 2003).

Merrill, Thomas W., Property Rules, Liability Rules, and Adverse Possession, 79 Nw. U. L. Rev. 1123 (1985).

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

Merrill, Thomas W., The Property Strategy, 160 U. Penn. L. Rev. 2061 (2012).

Merrill, Thomas W., The Property Prism, 8 Econ. J. Watch 247 (2011).

Merrill, Thomas W. and Smith, Henry E., Optimal Standardization in the Law of Property: The Numerus Clausus Principle, 110 Yale L. J. 1 (2000).

Merrill, Thomas W. and Smith, Henry E., The Property/Contract Interface, 101 Colum. L. Rev. 773 (2001).

Merrill, Thomas W. and Smith, Henry E., The Morality of Property, 48 Wm & Mary l. Rev. 1849 (2007).

Penner, J.E., The Idea of Property in Law (1997).

Pollock, Frederick, and Maitland, Frederick William, The History of English Law, vol II (1895).

Radin, Margaret Jane, Property and Personhoood, 34 Stan. L. Rev. 957 (1982).

Restatement (First) of Property (1936).

Reisman, David, Jr., Possession and the Law of Finders, 52 Harv. L. Rev. 1105 (1939).

Rose, Carol M., Property and Persuasion (1994).

Smith, Henry E., The Language of Property: Form, Context, and Audience, 55 Stan. L. Rev. 1105 (2003).