Ownership is Nine-Tenths of Possession: How Disparate Conceptions of Ownership Influence Possession Doctrines

Martin Hirschprung, University of Pennsylvania Law School

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OWNERSHIP IS NINE-TENTHS OF POSSESSION: HOW DISPARATE CONCEPTIONS OF OWNERSHIP INFLUENCE POSSESSION DOCTRINES

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ABSTRACT

Possession is nine-tenths of ownership. And yet, the concept of possession remains woefully unclear in the law, thereby rendering the very idea of ownership too somewhat murky. This Article argues that there exists a reflexive relationship between possession and ownership, and that one's understanding of ownership and its incidents influence the very concept of possession, rather than vice-versa. The Article further argues that given this reality, the application of the concept of stewardship to question of possession can aid significantly in resolving some of the most important contemporary disputes regarding possession and ownership in society, such as disputes between museums and indigenous groups regarding cultural artifacts.

In order to demonstrate the relationship between one's conception of ownership and its attendant standard of possession, the Article contrasts different legal definitions of ownership with a religious model of ownership as stewardship to see how each leads to a different conception of possession. The effects of this reversal are observable in three doctrines related to possession; namely first possession, adverse possession, and deathbed bequests, which the Article then proceeds to unpack and analyze.
Ownership is Nine-Tenths of Possession

TABLE OF CONTENTS

Introduction: Possession and Property ........
I. Why Possession? ..........................
II. What is Possession? ......................
III. Possession for Indigenous Groups’ Cultural Properties ....
IV. Dominium ..............................
V. Stewardship ............................
VI. Stewardship and Religion ..............
VII. Stewardship and Jewish Law .........
VIII. First Possession ........................
IX. Adverse Possession ...................
X. Deathbed Bequests ........................
Conclusion ..............................
INTRODUCTION: POSSESSION AND PROPERTY

Understanding possession and its influence on the law is critical in providing a better insight into what property is and how it comes to be owned and controlled.

Possession stands at the root of the property law, as Carol Rose opines, “for the common law, possession or ‘occupancy’ is the origin of property”¹ and, “first possession is the root of title.”² An exploration into the meanings of these terms reveals both that property is defined in terms of possession and that possession, frustratingly enough, is defined in terms of property. The Merriam Webster dictionary definitions of Possess and Property are indicative of this cyclic state of affairs.³

“Possess: Etymology: Middle English, from Middle French possessor to have possession of, take possession of, from Latin possessus, past participle of possid re, from potis able, having the power +sed re to sit…1) a: to have and hold property as own; b: to have as an attribute, knowledge, or skill; 2) a: to take into one’s possession; b: to enter into and control firmly: dominate.⁴

Property: Etymology: Middle English proprête, from Anglo-French propreté, from Latin proprietat-, proprietias, from propius…2) a: something owned or possessed: specifically: a piece of real estate; b: the exclusive right to possess, enjoy and dispose of a thing: ownership; c: something to which a person has legal title.”⁵

This concomitant relationship has led many property law authorities to hold that possession is not just ancillary to property law but that it is instead the very foundation of what constitutes ownership.

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¹ Carol Rose, Possession as the Origin of Property, 52 U. Chi. L. Rev. 73, 74
² Id. at 75.
³ Although dictionary definitions are not authoritative, see L. Wittgenstein, Philosophical Investigations, (opening pages), they can be illustrative of a certain state of affairs.
Ownership is Nine-Tenths of Possession

One way to express this relationship is to say that property is defined by what objects are considered to be in one’s possession. In truth, the arguments for the role of possession are usually more sophisticated. For instance, one of the more prominent views on how ownership of property is formed is John Locke’s labor theory. The labor theory of property, otherwise known as the labor theory of appropriation or the labor theory of ownership, is a natural law theory that explains property as originally coming about from the exertion of labor upon natural resources. On its face, this theory does not implicate possession. However, the Lockean theory of property, once described as the “standard bourgeois theory” has been connected to possession in that it requires that one “have,” or possess his or her labor to mix with other things. Richard Epstein, for one, argues that for Locke, the reason that a person owns his or her body and thereby its labor is that he or she occupies or possesses it; thus, the labor theory effectively rests on a right established by possession.

Although the idea of possession is clearly important to property law, understandings of why possession is important and what actions constitute possession vary. As will be substantiated in the remainder of this paper, different conceptions of possession have been influenced by various understandings of what constitutes ownership. Therefore, this paper will suggest that the use of the stewardship conception of ownership for certain property types, such as indigenous cultural property, should and does affect the possession doctrines for these properties.

Additionally, this paper will establish that the Roman concept of possession is clearly important to property law, understandings of why possession is important and what actions constitute possession vary. As will be substantiated in the remainder of this paper, different conceptions of possession have been influenced by various understandings of what constitutes ownership. Therefore, this paper will suggest that the use of the stewardship conception of ownership for certain property types, such as indigenous cultural property, should and does affect the possession doctrines for these properties.


For how else does one “have” their labor to mix with other things?

Although it can be argued that people own themselves only through the common consent of mankind.


Admittedly, there are sources for the origins of ownership that do not involve possession, like the theory based on the concept of custom. Richard Epstein says that the doctrine of possession could be differentiated from a theory of property based on custom and common practice (Id. at 1224-26) because this theory posits that property exists merely as a construct created by society in order to enable a functional civilization, without at all implicating or requiring possession.
Ownership is Nine-Tenths of Possession

dominium is one that has enabled some legal doctrines to evolve in ways that reflect that underlying conception and that the Jewish law concept of stewardship has enabled similar legal doctrines to evolve in divergent ways.

The possession doctrines of Roman law seem to be borne out of a philosophical understanding of ownership as being directly related to the degree to which an individual exerts physical control over an object or piece of property. Alternatively, doctrines concerning possession within Jewish law seem to be rooted in the conception of ownership as the mere guarding of an object for a time. This paper will highlight this critical difference through the use of three examples of possession that are either based in Roman law and that decidedly reject the philosophy of stewardship, or that deal in Jewish law and reject the dominium conception.

Highlighting the contrast between Roman and Jewish law to develop the thesis that the ownership conception influences possession doctrines is particularly salient because of the relationship that exists between these two legal systems. As has been discussed many times in academic writings, the Roman and Jewish legal bodies share many similarities. Firstly, they developed adjacent to one another geographically and chronologically and it is likely that they had much reciprocal exposure and influenced one another at their earliest stages. And secondly, both are closed, text-based legal

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13 See e.g., Fitting In or Sticking Out: Constructs of the Relationship of Jewish and Roman law in the Nineteenth Century, in Jews, Antiquity, and the Nineteenth-Century Imagination (Hayim Lapin & Dale B. Martin eds., U. Press Md. 2003); (where he discusses the works of Shmuel Eisenstadt and the Jewish Law Society's reliance on Roman Law) Asher Gulak, Yesode ha-Mishpat ha-‘Ivri, vol. 1, Preface xi (Defus Universal 1913) (See also), and the following footnotes.

14 See Marshall J. Horowitz, Roman and Jewish Law, The Journal of the Academy for Jewish Religion, Vol.3 No.1, 2007 (Discussing how both were codified in the 5th Century BCE, and further chronological developments); See also Shmuel Eisenstadt, Corpus Iuris Civilis: Institutiones 18-19 (ha-Mishpat 1929) (In his view, during the first centuries CE, Jewish law was influenced by Roman law, and adopted some of its legal institutions, and this relationship was a reciprocal one).

Ownership is Nine-Tenths of Possession

systems that operate in similar fashions.¹⁶ For these reasons, the two systems have been used comparatively in order to highlight legal theories and in order to instruct the Common Law.¹⁷ Therefore, the differences in their possession doctrines are all the more striking and can easily be traced to their differing ownership conceptions.¹⁸

¹⁶ See Marshall J. Horowitz, Roman and Jewish Law, The Journal of the Academy for Jewish Religion, Vol.3 No.1, 2007 pg. 2-4 (He also notes certain differences between the two bodies of law).
¹⁷ See e.g. Suzanne Last Stone, IN PURSUIT OF THE COUNTER-TEXT: THE TURN TO THE JEWISH LEGAL MODEL IN CONTEMPORARY AMERICAN LEGAL THEORY, 106 Harv. L. Rev. 813; Neil W. Netanel and David Nimmer, Is Copyright Property: The Debate in Jewish Law, 12 Theoretical Inquiry of Law 241; See also generally the works of Michael Broyde and J. David Bleich.
¹⁸ Radzyner Ibid. when reviewing the discussion of the influence of Roman law on Jewish law discusses an argument that is germane to this paper. He quotes Rav Herzog who dismissed Asher Gulag’s theories and notes that,

“R. Herzog was not satisfied even where Gulak created a sharp distinction between Jewish and Roman law, as when he compared the Jewish concept of “Hazakah” (possession) to the Roman concept of possessio, with a categorical statement intended to explain the difference between the two:

. . . Roman law is the creation of the ruling power, and it therefore always attaches importance to the manifestation of power and confers its protection on that manifestation . . . . Jewish law, on the other hand, is the divinely ordained law in which there is no room for the worship of might, nor for its juridical protection, . . . and conceivably for this reason, there was no trenchant opposition or indignation in Jewish law to the use of force, which was of no consequence from the perspective of the law. . . .

In his criticism, R. Herzog wrote:

I share to the full the author’s sentiments in regard to the lofty ethical pedestal occupied by Hebrew law, but I cannot agree with his estimate of possessio from an ethical standpoint. As an intensely patriotic Jew I can hardly think of ancient Rome, to which we must attribute a large measure of the troubles and woes which still beset us, with a mind entirely free from prejudice, and yet I consider Gulak's estimate in this connection as altogether unfair.¹⁶⁹

R. Herzog criticizes Gulak’s approach over a number of pages, …. And he suggested a less sweeping distinction:

[O]ne may, indeed, discern a certain difference of attitude, but not of the kind which Gulak is trying to establish. Jewish law was likewise eager to maintain public peace and order, but it was not so ready as Roman law to enact sweeping measures by which the
Ownership is Nine-Tenths of Possession

In order to properly structure this argument, I first proceed to outline the differing theories that explain why possession is so vital to property law. Next, I describe some of the views on what constitutes possession. I then look at how the stewardship conception has been advocated in the conceptualization of certain properties and how this should affect their possession doctrines, which would resolve some of the legal disputes concerning these properties.

In order to demonstrate the relationship between possession and ownership conceptions, I turn to the Roman legal concept of dominium and explore how it relates to possession and the common law. I then contrast dominium with stewardship, which is best understood through its use within religion and Jewish law. Using the contrast between the Jewish notion of stewardship and the Roman concept of dominium, I then examine three distinct property law doctrines: first possession, adverse possession and deathbed bequest. Within these doctrines, which are essentially based in Roman law theory, the role of possession and what it entails is evident, especially when compared to Talmudic law. This paper will show that this role can be traced to different understandings of ownership.

I. WHY POSSESSION?

As stated, possession is integral to an understanding of property ownership. Different explanations have been offered to account for the normative value of possession as it influences an individual’s ownership of property.

For one, Richard Posner theorizes that the value of possession is based on economic efficiency. “Possession... tends to allocate rights of the individual would be sacrificed in the interests of the mass... Discipline belongs to the very essence of the Roman genius. Discipline carried to the uttermost limits was the secret of Rome's unparalleled military supremacy and likewise acted as a formative influence of the first order in the realm of law and civil government. Jewish law was not altogether devoid of a system of discipline, but it kept that system within certain limits and bounds. According to this paper’s thesis that possession doctrines are influenced by ownership conception, it may be suggested that the real difference between the Roman law of possessio and the Jewish law of Chazakah lie in the influence of dominium versus stewardship. In that a system that advocates dominium is necessarily based on the importance and protection of power, whereas a stewardship oriented system would be more open to fluidity and less rigid transfers of possession.
Ownership is Nine-Tenths of Possession

resources to those persons best able to use them productively, for they are the people most likely to be willing to incur the costs involved in possession. “19 Another explanation offered is that possession represents the most self-actualizing form of personhood in one’s property.20 This theory is commonly thought of as Hegelian because it is based on the understanding that property is an object infused with personhood, a thought espoused by the philosopher, G.W.F. Hegel. Margaret Jane Radin promulgates this view in many of her Law Review articles.21

Finally, Carol Rose opines that possession forms the basis of property ownership because of the value of communication through possession.22 Essentially, possession as a statement is the best form of notice of an individual’s ownership to the rest of the world. Once we understand why possession is so vital to the expression and manifestation of ownership, it becomes important to pinpoint what actions or words are necessary to create possession.

II. WHAT IS POSSESSION?

In the most basic sense of the word, to possess means to hold, as the source of the word23 is possidere: pos + sedere (to sit), meaning to sit upon a thing. Although a working legal definition must necessarily be enlarged beyond merely the physical holding of an object, any definition of possession must trace itself back to that root, i.e. possession as a form of control.

One’s characterization of possession depends on his or her understanding of the reason for possession’s prominence in property law. For instance, for Lockean, possession may be the act of Lockean labor invested into property. According to Rose, at first glance, possession could mistakenly be thought to mean the reward for useful labor. More true to her definition, however, is the interpretation that labor merely acts a form of speaking clearly and making one’s actions understood.24 Through acts of labor, notice of ownership occurs and possession is granted, rendering possession the act of creating notice. For other commentators who believe that

20 Like the example of a turtle owning its shell. See
21
22 See Carol Rose, Possession as the Origin of Property, 52 U. Chi. L. Rev. 73
23 As mentioned before ..
24 Id.
possession is a complicated socio-legal construction that contains a variety of attitudes towards land and ideals of human behavior, possession may merely be a legal construct made to fit whatever purposes the law finds suitable.\textsuperscript{25}

Although helpful in defining possession, mere theory may not be enough to create a conclusive legal position. However, it can be helpful in deciding what the practical legal definition should be. Possession is most assuredly identifiable on a sliding scale of physicality ranging from grasping an object to completely non-tangible acts, but for the sake of judicial expediency and uniformity in law, possession has come to be divided into groups of actions. To begin with, possession is split up between actual possession and legal or constructive possession, with constructive possession recognized as some form of legal fiction acting as a substitute for actual possession. In all cases\textsuperscript{26} the law has to decide what level of connection with the property constitutes possession. Even within constructive possession, however, it must be clearly delineated how far removed the act may be from actual possession in order to nevertheless satisfy the requirement.

From a philosophical angle, the different types of possession can also be analyzed using a Kantian approach. Kant separated all objects into two categories: the Noumenon and the Phenomenon.\textsuperscript{27} Noumenon refers to objects that are known without the senses while Phenomenon are objects known only through the senses. This distinction is useful when thinking about actual and constructive possession, with constructive possession existing as a Noumenon style of control, albeit accompanied by some signaling, and actual possession as a Phenomenological one.

Kant had his own approach towards property and possession. He felt that it is necessary to have intelligible possession in order to have a social contract that enables private property.\textsuperscript{28} In this, Kant was looking to discredit a Locke\textsuperscript{an} perspective on the formation of private property.\textsuperscript{29} However, Kant’s perspective is helpful in understanding possession regardless of the theory on the origin of property espoused.

\textsuperscript{26} In addition to relating to property law, possession can also be implicated in criminal law (possession of illegal substances) and the seizure of debts.
\textsuperscript{27} Howard Williams, Kant’s Concept of Property, Philosophical Quarterly Vol. 27, no. 106 32, 33 (1977).
\textsuperscript{29} Id. at 35.
Ownership is Nine-Tenths of Possession

Especially relevant to Kantian philosophy is the distinction I will show between the ownership models of dominium and stewardship, where dominium is related to control and operates on a Phenomenon modality while stewardship enables a more legalistic and Noumenon-type of possession.

Ultimately, there has been no clear consensus on the level of possession necessary for establishing ownership. As will be borne out in this paper, an individual system’s understanding of what ownership of property entails is influential in determining the amount of possession required. Therefore, for cultural and indigenous properties, for which some have advocated a stewardship conception of ownership, possession doctrines should be affected as well.

III. POSSESSION FOR CULTURAL AND INDIGENOUS PROPERTIES

As will be further discussed below, the stewardship conception of ownership has traditionally been used in the context of religious dictates and theology. More recently, some scholars have advocated for the use of stewardship for properties where the current physical property regime does not adequately function. Some examples discussed include authors’ and artists’ creations, cultural property, and properties with a strong environmental impact. The stewardship

31 Kristen A. Carpenter, Sonia K. Katyal, Angela R. Riley, In Defense of Property, 118 Yale Law Journal 1022()
32 See The Aspen Institute, The Stewardship Path to Sustainable Natural Systems 3-4 (1999) (discussing the concept of stewardship in ecological conservation); William J. Byron, Toward Stewardship: An Interim Ethic of Poverty, Power and Pollution (1975) (articulating the stewardship concept with respect to population control and poverty); Ethics of Consumption: The Good Life, Justice, and Global Stewardship (David A. Crocker & Toby Linden eds., 1998) [hereinafter Ethics of Consumption] (discussing the concept of stewardship in ecological conservation); Aldo Leopold, A Sand County Almanac and Sketches Here and There 201-26 (1949) (same); id. at viii-ix (“We abuse land because we regard it as a commodity belonging to us. When we see land as a community to which we belong, we may begin to use it with love and respect.... [T]hat land is to be loved and respected is an extension of ethics.”).
Ownership is Nine-Tenths of Possession

model of ownership has even been used in the corporate context.34 These scholars argue that the classic property ownership conception is associated with traditional rights of alienability, title and exclusion and tends to overlook the possibility of non-owners exercising custodial duties over tangible and intangible goods in the absence of title and possession.35 On the other hand, stewardship facilitates an understanding of resource protection that extends beyond the traditional ownership model and embodies a notion of mutual trusteeship.36 It also allows for a disaggregation of title, possession and exclusion.37 In doing so, it can reconfigure the rights of possession, use and production among non-owners as well as owners.

Stewardship as a means of defining ownership has been advocated as a potential method to reform copyright and the judicial applications of the Copyright Act by emphasizing the duties to the public that correlate to ownership rights.38 It has also been used to mediate between the US Government and Native American Tribes.39

Particularly in the area of transfers of ownership and possession, the concept of stewardship has had profound influence. Cultural scholars and tribal courts have agreed that the laws governing

34 See, e.g., Raymond W.Y. Kao, Stewardship-Based Economics (2007) (articulating stewardship as an alternative to ownership); Stewardship Across Boundaries (Richard L. Knight & Peter B. Landres eds., 1998) (collecting articles from property scholars on stewardship).
36 Id. at 1078.
37 Id. at 1080-82.
39 See generally R.C. Gordon-McCutchan, The Taos Indians and the Battle for Blue Lake (1991) (providing a detailed historical account of the return of Blue Lake to the Taos people) (When it restored trust title to Blue Lake, Congress also imposed several conditions, including that the Pueblo de Taos Indians shall use the lands for traditional purposes only, such as religious ceremonials, hunting and fishing, a source of water, forage for their domestic livestock, and wood, timber, and other natural resources for their personal use.... Except for such uses, the lands shall remain forever wild and shall be maintained as a wilderness.) Act of Dec. 15, 1970, Pub. L. No. 91-550, 84 Stat. 1437, 1438.
Ownership is Nine-Tenths of Possession

physical property have been ineffective for indigenous properties.\textsuperscript{40} In reaction, tribal courts have rejected the applicability of private property concepts with respect to the holding and transfer of cultural property.\textsuperscript{41} However, with regards to indigenous cultural properties the affects of the stewardship conception of ownership on their possession doctrines have not yet been fully explored or explained.

As will be evidenced below, this paper posits that the stewardship conception of ownership enables a more constructive form of possession doctrines than dominium does.\textsuperscript{42} For instance, NAGPRA, the Native American Grave Protection and Repatriation Act, is primarily concerned with reconfiguring custody and possession as opposed to reconfiguring title and ownership. Therefore, scholars understand NAGPRA as embodying the stewardship conception,\textsuperscript{43} because as opposed to within dominium where possession is fixed and rigid, within the stewardship conception, possession can be more loosely obtained or transferred.

The relationship between stewardship and possession can also be helpful in solving some of the unresolved issues concerning indigenous properties. As discussed by Cortelyou C. Kenney in “Reframing Indigenous Cultural Artifacts Disputes: An Intellectual Property Based Approach,” museums and indigenous groups fail to agree on who should have physical control of indigenous cultural artifacts.\textsuperscript{44} Current property doctrines lead to situations where indigenous groups are denied use rights for ceremonies of artifacts in the possession of museums.\textsuperscript{45} Opposing these uses, museums bitterly fight for, and usually win, the right to retain their possession over the artifacts.\textsuperscript{46}

Kenney proposes the integration of Intellectual Property law for cultural objects in order to address these concerns. However, some of

\textsuperscript{40} Cortelyou C. Kenney, Reframing Indigenous Cultural Artifacts Disputes: An Intellectual Property Based Approach, 28 Cardozo Arts and Entertainment L.J. 501, 516 ()

\textsuperscript{41} See, Cohen's Handbook of Federal Indian Law, supra note 168, §20.01(2), at 1232; see also Chilkat Indian Vill., IRA v. Johnson, 20 Indian L. Rep. 6127, 6137 (Chilkat Tribal Ct. 1993) (rejecting the Western concept of inheritance with respect to sacred artifacts)

\textsuperscript{42} See Carpenter at 1093.

\textsuperscript{43} 28 Cardozo Arts and Entertainment L.J. 501

\textsuperscript{44} Id. at

\textsuperscript{45} Id. at

\textsuperscript{46} Id. at
the disputes can more easily be resolved once constructive possession doctrines are adopted. For instance, under a stewardship conception, full control of an object is not necessary nor does it guarantee possession; therefore, although indigenous groups may currently not be in control of some of the objects, they could still be granted possession under a non formal transfer of possession doctrine in which the court would say that showing a cultural claim to an object is enough to grant use rights even without physical control. Conversely, museums would still be able to retain ownership once possession has been disaggregated from ownership. This compromise, which would ensure that both sides' needs are met, is only possible under a stewardship conception with the lack of formal possession doctrines, where physical control is not the arbiter of ownership.

In order to fully justify the advantage of stewardship’s possession doctrines over other means of ownership, it is necessary to contrast stewardship with the other theories. In the next section, this paper will explore and compare the two distinct forms of ownership conceptions discussed, namely dominium and stewardship.

IV. DOMINIUM

In order to prove the relationship between possession and ownership conceptions it is instructive to analyze the Roman legal concept of dominium and contrast it with stewardship over property, which is best understood through its conception within religion and Jewish law.

Alan Rodger claims, "It is well known that no ancient legal text contains a Roman definition of ownership."

This failure to define ownership may have resulted from the Romans' practical approach to theory, which is best exemplified by the fact that their legal texts immediately delve into the distinctions between different forms of property and the various legal rights in property.

Alan Rodger, Owners and Neighbors in Roman Law 1 (1972).


“ It is the same with the jurists in relation to the concept of ownership. They write a great deal about the modes in which it
Ownership is Nine-Tenths of Possession

A look to other Roman doctrines provides further insight into the Roman concept of ownership. Roman law did contain the concept of possession or *possessio* and the idea of dominium, or the right to control. Although the two concepts overlapped at times, it is important to be able to distinguish between them. Ulpian, in the Digest said, “Ownership has nothing in common with possession,”\(^{50}\) which is, in fact, a bit misleading because possession was actually an important component of ownership to them. It is even quite possible that the whole Roman concept of ownership grew out of the notion of possession,\(^{51}\) as stated in Justinian’s Digest, “The younger Nerva says that the ownership of things originate in natural possession, and that a relic thereof survives in the attitude to those things which are taken on land, sea, or in the air; for such things forthwith become the property of those who first take possession of them.”\(^ {52}\) Additionally, the Roman law concept of *usucapio*, one of the modes for acquiring dominium, has been described in the Digest as, “the acquisition of ownership by continued possession.”\(^{53}\)

In order to differentiate dominium from possession, it would be most accurate to say that possession was regarded essentially as physical control whereas ownership was the ultimate right-- the title may be acquired and transferred and lost, also about wrongs to and by owners. Indeed, either directly or indirectly, the law is overwhelmingly about the institution of private property. But there is no attempt expressly to articulate a concept of ownership. In particular, there is no attempt to explain and justify the phenomenon of ownership, as for instance there is in Grotius, Pufendorf, and Locke; no attempt to experiment in drawing new lines between private owners and the state, as in modern socialist writers, and no attempt to define, or delineate the essential characteristics of, ownership, as in modern analytical jurisprudence. On the contrary, ownership is taken for granted, continually in issue but undefined and unexamined.

“Another explanation for the lack of any definition of ownership is provided by Justinian’s Digest, which, under the heading of Various Rules of Early Law, provides that "every definition in civil law is dangerous; for it is rare for the possibility not to exist of its being overthrown."

Dig. 50.17.202 (Javolenus, Letters 11).

\(^{50}\) Commentary on the Edict. D.41.2.12.1

\(^{51}\) D. 41.2.1.1

\(^{52}\) D. 41.2.1.1

\(^{53}\) D. 41.3.3
Ownership is Nine-Tenths of Possession

to property.54 As it states in the Digest, “Possession is so styled. from ‘seat’ as it were ‘position,’ because there is a natural holding. by the person who stands on the thing.”55 Alternatively, dominium may be though of as a stand-in for ownership. Possession could be seen as true ownership56, which sometimes led to dominium as ownership by law. Possession was even recognized by law independently of whether the possession was lawfully obtained.57 As stated in the Digest, “It makes no difference in this interdict whether the possessor against others is just or unjust. For every kind of possessor has by the virtue of being a possessor more right than the nonpossessor.”58 The reason for this is because possession creates a presumption of ownership.59 As Ulpian stated in the Digest, “The outcome of a dispute over possession is simply this: that the judge makes an interim finding that one of the parties possesses; the result will be that the party defeated on the issue of possession will take on the role of plaintiff when the question of ownership is contested.”60

The Roman concept of dominium directum et utile61 implied absolute62 control of the property in its acquisition and in its

54 D. 41.2.1.pr.
55 D. 41.2.1.pr.
56 As recognized by the fact that regardless of whether one lost physical control, the fact of possession would be absolutely protected. A question may be raised that the Romans at times accepted possession by a non-owner and
57 See Inst. 4.15.4a. This was true with regard to the rest of the world, however in relation to the true owner, possession alone would not be protectable.
58 D. 43.17.2
59 This is found even in other legal systems. For example in the Halacha or Jewish code of law see. see also the French Civil Code (1804) Art. 2279: “en fait de meubles, la possession vaut titre” (in matters of movables, possession is equivalent to a title) and colloquially it is noted that “possession equals 9/10ths of the law.”
60 D. 41.2.35.

“In relation to the content, the word 'absolute' suggests that the Roman owner was free from restrictions in relation to the things which he owned, that he could do as he pleased. It also carried another overtone. It implies not only that observably his use was unrestricted but also that it was in some sense incapable of restriction. It should, however, be immediately obvious that no community could tolerate ownership literally unrestricted in its content. To take an extreme example, even a society which did not go to the length of forbidding citizens to own firearms could
Ownership is Nine-Tenths of Possession

possession. The civilian writers in the Middle Ages characterized it as “ius utendi, fruendi, abutendi,” or the right to use the thing, to have its fruits and to abuse it.  

The nature of dominium is oriented towards actual acts of control and occupation as opposed to giving weight to mere legal constructs. Because of the role of dominium in ownership of property, many of the Roman legal methods of acquisition and possession were related to the demonstration of control. As Boris Kozolchyk notes,

“Etymologically, many of the Roman legal methods for acquiring property were derived from the root capere (that which is taken by the hand), as in manucaptum, mancipium, usucapio, and occupatio. The latter of these acquisitions, occupation of land, was ‘original’ meaning that no conveyance by an intermediary was necessary to legitimize the acquirer’s right. The influence of taking by the hand was such that even in ‘derivative’ means of acquisition, such as in the formal transaction known as mancipatio, the buyer or acquirer appeared to take by a symbolic act of force. It was [in]… publication of Rudolph von Jhering's The Spirit of Roman Law that the role of the Roman conqueror’s possession became clear. If the God of the Pentateuch granted the Promised Land to the Jews, the Roman gods gave the Romans the sword and the lance to take the property they wanted.”

In fact, the early Romans were known as the “Quirites” meaning spearmen and it was through acts of war and occupation that the Roman legal system was spread.

And as Alan Watson said, “When Gaius describes the legis action

not allow owners to use their guns just as they please: a man could not conceivably justify shooting another by saying that he was merely using his own weapon.”

(See further in that article for the more detailed analysis).

66 In fact, the ‘Edictum Perpetuum, the edict of the praetor, formulating the vindicatio to assert a property claim contains an appeal to the law of the Quirites. See Otto Lenel’s reconstruction of the edict.
sacramento in rem\textsuperscript{68} he says that the rod which was laid on the object claimed represented a spear, the symbol of lawful ownership because the early Romans considered to be pre-eminently theirs what they took from the enemy. Thus, in Gaius’s view, in early times when these procedures were introduced, the instance par excellence of he acquisition of private property was what a man took from the enemy.”\textsuperscript{69}

Like possession, dominium influences not only acts of acquisition of property but also ownership uses and rights. Along with a dominium type of first possession comes the rights to use of the property that imply absolute control and capture.

With respect to owners’ use rights, the common law follows this conception very closely. As some theorists have noted, “The notion that property concerns the absolute rights of owners to do whatever they wish with their possessions has long influenced the development of property law, and it seems to continue to influence cultural property critics. Anglo-American property law springs from a vision of property as ‘that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.’ In more contemporary terms, Richard Pipes has surmised that ‘[p]roperty refers to the right of the owner or owners, formally acknowledged by public authority, both to exploit assets to the exclusion of everyone else and to dispose of them by sale or otherwise.’ These rights add to the perception that an owner enjoys a wide degree of autonomy over her property, enabling her to ‘us [e] it all up,’ or even to destroy her property, depending on the context.”\textsuperscript{70}

However, it should be noted that not everyone takes such an extreme view of the absolute control rights of property owners. For example, some claim that, “American law… has traditionally recognized many restrictions on rights of private property use. Indeed, as suggested by the ancient Roman maxims sic utere tuo ut alienum non laedas (literally “use your own property that you may not injure another's”)\textsuperscript{71}…. the conception of inviolable property rights as fundamental to American legal thought did not develop until later in American history. Indeed, … absolute protection of property rights was not as fundamental to the thinking of the American founding

\textsuperscript{68} Gaius 4:16
\textsuperscript{71} Jesse Dukeminier & James E. Krier, Property 744 (4th ed. 1994).
Ownership is Nine-Tenths of Possession

fathers as proponents of the modern property rights movement maintain. Early Republicans such as Benjamin Franklin felt that ownership of property was not a natural right and that private interests were therefore properly subordinated to the general good.72–73

Whereas dominium understands property as owned only when full control is exerted over it, the notion of stewardship offers another way to conceptualize ownership of property.

V. STEWARDSHIP

Stewardship of property connotes that possessors may not be the ultimate owners of property; rather, full ownership is invested in someone else, the so-called “true owner”. Many commentators use this conception to argue for limitations on the uses of property that are environmentally abusive or self-destructive actions.74 The concept of stewardship over property has also been used to with reference to certain types of property such as cultural artifacts or inviolable properties in order to highlight the lack of ownership by the possessors.75

The stewardship form of possession is an abstract concept and should not be confused with the legal concept of stewardship that is found within the doctrine of bailment. These two conceptions, although related, may not rightfully be compared.

The legal concept of stewardship with reference to bailments refers to the relationship in common law where physical possession of personal property, or chattel, is transferred from one person (the 'bailor') to another person (the 'bailee') who subsequently has possession of the property. It usually arises when a person gives property to someone else for safekeeping. Stewardship is used in this context to refer to the legal role of the bailee, in that he does not have ownership but does have possession, along with certain contracted rights and duties.76

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76 The distinction between the legal doctrine of stewardship and the abstract concept is evidenced when examining the elements that make up a bailment. Three elements, further explained below, are generally necessary for the existence of a bailment: delivery, acceptance, and consideration.
Ownership is Nine-Tenths of Possession

On the other hand, abstract stewardship is not understood as a form of contract between the owner and the possessor, but rather as a relationship not bound to specific contractual norms. One can become an abstract type of steward against one’s will and with no consideration provided by the true owner.

VI. STEWARDSHIP AND RELIGION

The stewardship conception of property has also been associated with a religious Weltanschauung. Given the a priori assumption that God owns all property, some have posited that religion considers man a steward of God’s property. For instance, Frank Alexander’s essay in Christianity and Law: An Introduction explores property law through the Christian framework of Creation, Fall, and Redemption. Property, as a part of God’s creation, is “very good” and we are called to be stewards of it. As expressed in Robert Cochran’s review of his essay, “Alexander draws a critique of Western property law from the doctrines of creation and fall: “[C]reation stands as a radical rejection of a concept of private property as Western law has come to know it.” American property law “affirms and reifies the legitimacy of [the] instinctual claims to ownership.” But, Alexander argues, law can be a

Actual possession of or control over property must be delivered to a bailee in order to create a bailment. The delivery of actual possession of an item allows the bailee to accomplish his or her duties toward the property without the interference of others. Control over property is not necessarily the same as physical custody of it; rather, it is a type of constructive delivery. The bailor gives the bailee the means of access to take custody of it, without its actual delivery. The law construes such action as the equivalent of the physical transfer of the item. The delivery of the keys to a safe-deposit box, for example, is constructive delivery of its contents. In order to create an abstract stewardship, actual or even constructive delivery is not always necessary. Another requisite to the creation of a bailment is the express or implied acceptance of possession of or control over the property by the bailee. A person cannot unwittingly become a bailee. Because a bailment is a contract, knowledge and acceptance of its terms are essential to its enforcement. Finally, the third element necessary for bailments is consideration or the exchange of something for value. Unlike the consideration required for most contracts, as long as one party gives up something of value, such action is regarded as good consideration. It is sufficient that the bailor suffer loss of use of the property by relinquishing its control to the bailee; in this way, the bailor has given up something of value—the immediate right to control the property. Abstract stewardship would not require either consideration or acceptance of the property.

77 206.
Ownership is Nine-Tenths of Possession

part of redemption. Legal limits on property use are “in a very small way, directly analogous to the theological premise that what we have, we have been given by God.” This view is expressed in the Jewish conception of stewardship of property, as well.

VII. STEWARDSHIP AND JEWISH LAW

Judaism also subscribes to the stewardship conception through its belief that God placed everything in this world at man’s disposal. However, along with the rights of use by man come responsibilities towards God, community and the property itself.

A prime example of the stewardship conception within Judaism is the law of the Jubilee year. The Torah states that at the end of every fiftieth year in a cycle established when the Jews entered the land of Israel, all sold property shall revert to its previous owners. The reason behind this was to illustrate to the people that the land truly belonged to God and that it was with His grace and permission that the people were able to temporarily own and utilize it.

Within Jewish property law, there are many instances in which the Rabbis work to construct laws with the understanding that full control of property should be qualified. This qualification is said to eradicate the destructive effects of an inordinate obsession with one’s private preserve which weakens the concern for others and creates excessive legal and psychological barriers between people. This can also be seen as an example of the Jewish law’s nature as a duty-based system, as opposed to rights-based. Either way, these qualifications stem from a stewardship conception of property.

Jewish property law not only restricted property use but also retained the power to transfer the rights of use from one individual to another using Hefker Bais Din, which refers to a judge’s ability to remove and transfer ownership of property at his or her own discretion. Commentators explain that the only reason that the courts have the power to alter ownership rights without using any

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79 Judaism and the Practice of Stewardship…GBOOKS, . However, 80
81 See Kirschnbaum, Equity in Jewish Law 189.
82 Gittin 36b
formal legal transfer methods is because in reality the property is never fully in the possession of the individual.\(^{84}\) Since the courts are charged with enforcing God’s Will and God is the ultimate owner of all property, the courts are able to act as proxy to carry out any transfer of property.

As will be pointed out,\(^{85}\) the stewardship conception can be distinguished from a dominium conception in that it allows for less actual and more legal forms of possession within the laws of property. This can be discerned through looking at three distinct legal doctrines and highlighting how the law, in each case, reflects a specific understanding of the concept of ownership. This will illustrate the importance of legal philosophies on the development of the law and how an understanding of ownership and possession is important in enabling certain property laws.

VIII. **FIRST POSSESSION**

I choose to begin my discussion of possession with the doctrine of first possession because the distinction between different concepts of ownership and its effect on possession can be starkly seen.

To analyze the doctrine of first possession it is instructive to look at the classic\(^{86}\) case of Pierson v. Post.\(^{87}\) Post was hunting a fox one day on an abandoned beach and almost had the beast in his gun’s sight when an interloper appeared, killed the fox and ran off with the carcass. The indignant Post sued the interloper for the value of the fox on the theory that his pursuit of the fox had established his property right to it. The majority disagreed and held that actual possession was necessary in order to establish ownership. They said that the discussion should be the “simple question of what acts amount to occupancy, applied to acquiring right to wild animals.”\(^{88}\)

To answer this question, they first turned to ancient Roman authorities. The majority quotes\(^{89}\) Justinian’s Institutes (lib. 2, tit. 1, sec. 13), and Fleta (lib. 3, ch. 2, p. 175), who adopt the principle that

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\(^{84}\) Some posit that the power of the courts come from the law that any local legal rules must be obeyed. See Rabbeinu Yonah Bava Basra 54b.

\(^{85}\) This case is a fixture in most property casebooks. See e.g. Thomas W. Merrill and Henry E. Smith, Property: Principles and Policies, ??? (Foundation Press 2007); Olin L. Browder et al., Basic Property Law, ??? (West Publishing Co., 5th ed. 1989);

\(^{87}\) 3 Cai. R. 175 (New York 1805)

\(^{88}\) Id. at 177.

\(^{89}\) Id.
Ownership is Nine-Tenths of Possession

pursuit alone vests no property or right in the huntsman and that even pursuit, accompanied with wounding, is equally ineffectual for that purpose, unless the animal be actually taken and that this same principle is recognized by Britton (lib. 2, ch. 1, p. 8). They then quote Puffendorf who "defines occupancy of beasts ferae natuæ, to be the actual corporeal possession of them, and Bynkershock is cited as coinciding in this definition...The foregoing authorities are decisive to show that mere pursuit gave Post no legal right to the fox, but that he became the property of Pierson, who intercepted and killed him."90

The Court concedes that,

"Barbeyrac, in his notes on Puffendorf, affirms that actual bodily seizure is not, in all cases, necessary to constitute possession of wild animals"91 and says that although the ancients required actual possession, in truth less should be sufficient to establish control. However, the court holds that “We are the more readily inclined to confine possession or occupancy of beasts ferae natuæ, within the limits prescribed by the learned authors above cited, for the sake of certainty, and preserving peace and order in society. If the first seeing, starting or pursuing such animals, without having so wounded, circumvented or ensnared them, so as to deprive them of their natural liberty, and subject them to the control of their pursuer, should afford the basis of actions against others for intercepting and killing them, it would prove a fertile source of quarrels and litigation."92

Although the dissent, in the person of Justice Livingston, argues eloquently for a more modern approach to the case,93 the rule that the court finally adopts is straight out of Roman law. Although first possession rules are common to a variety of legal schemes across the broadest range of cultures from Native American to African and from

90 Id. at 178.
91 Id.
92 Id. at 179.
93 This is a knotty point, and should have been submitted to the arbitration of sportsmen, without poring over Justinian, Fleta, Bracton, Puffendorf, Locke, Barbeyrac, or Blackstone" and “Whatever Justinian may have thought of the matter, it must be recollected that his code was compiled many hundred years ago, and it would be very hard indeed, at the distance of so many centuries, not to have a right to establish a rule for ourselves.”
Civil to Islamic law, the common law preference for laws of first possession may find their root, as do many other rules of the common law, in Roman law. The Roman law of first possession was formed by the concept of dominium and the idea that ownership rights go hand in hand with absolute and corporeal control and therefore the court required actual control. In order to illustrate the effect that the dominium conception has on the law we can compare the ruling in Pierson with a ruling found in Talmud on the matter of first possession.

The Talmud in Tractate Bava Basra records a similar case to Pierson within a discussion of business monopolies. The Talmud discusses a mill owner’s right to shut down a new mill that opens in the neighborhood that will cause a loss of revenue for an existing mill. “If a resident of a mavoi set up a mill for commercial purposes and then a fellow resident comes and sets up a mill next to his, the law is that the first one can stop the second one and say ‘You are cutting off my livelihood!’”

The Talmud attempts to prove this law from a previous ruling that forced the separation of fishing nets belonging to different fisherman from each other, “If a fisherman discovered the lair of a certain fish and spread his net between the fish and his lair other fisherman must distance their nets the amount that a fish swims in one

94 Richard A. Epstein, Property as a Fundamental Civil Right, 29 Cal. W. L. Rev. 187, 190 (1992). See Lueck, supra note 5, at 394, for a summary of the range of cultures that use first possession as a basis for acquiring property. For specific examples of cultures that use first possession as a basis for acquiring property, see Jacob H. Beekhuis, Civil Law, in 4 International Encyclopedia of Comparative Law: Property and Trust 3, 3-21 (Frederick H. Lawson et al. eds., 1973) (providing a historical progression of property rights in civil law); Karl N. Llewellyn & E. Adamson Hoebel, The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence 224-26 (5th ed. 1973) (showing that despite conflicting testimony, first possession principles appear to have existed in some Native American law, particularly in how the Cheyenne Tribes determined the property rights of horses found or taken during raids); K. Bentsi-Enchill, The Traditional Legal Systems of Africa, in 4 International Encyclopedia of Comparative Law: Property and Trust 68, 94-95 (Frederick H. Lawson et. al. eds., 1973) (noting that acquisition of property in African Tribes involved first possession or settlement).

95 See Joshua Getzler, Roman Ideas of Landownership, in Land Law: Themes and Perspectives 81, 81-83 (Susan Bright & John Dewar eds., 1998).

97 21b.

98 An alley surrounded by several courtyards leading into the street.

99 Id.
Ownership is Nine-Tenths of Possession

swell.”

This proves that we give rights to an existing business to retain its monopoly.

The Talmud responds, “Fish are different in that once they set their sights upon some food they will certainly swim to it.”

Therefore, if a fisherman sets up a trap with food in it near the lair of a fish, the fish is viewed as if it is already in his hands. If another fisherman would come and take the fish, it would be tantamount to taking it directly from the first fisherman and not comparable to the case of opening a competing mill in the same neighborhood.

Although there is some discussion concerning the exact meaning of the Talmud, the interpretation of Rashi, the most authoritative of all Talmudic commentators is that in a case most similar to Pierson v. Post, where we have two fisherman competing over the same fish, the fact that the first fisherman had expended effort and resources and was almost certain to catch the fish gives him the constructive possession necessary to be declared the true owner of the hunted fish.

In order to achieve first possession and subsequent ownership, the court in Pearson held that full control is required. Although the majority admits that actual control should not be required in order to achieve possession of the fox, when faced with a choice between stronger or weaker requirements of actual possession, the majority chooses to side with a more actual definition of possession even if that would reward “a saucy intruder.” The decision relied upon the Roman legal authorities quoted who had a more dominium-based

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100 Id.
101 Id.
102 Id.
103 Rabbi Shlomo Yitzchaki, glosses on the Talmud.
104 The Schottenstein Edition interlinear translation of the Talmud bases its English-language commentary primarily on Rashi, and describes his continuing importance as follows:

“It has been our policy throughout the Schottenstein Edition of the Talmud to give Rashi’s interpretation as the primary explanation of the Gemara. Since it is not possible in a work of this nature to do justice to all of the Rishonim, we have chosen to follow the commentary most learned by people, and the one studied first by virtually all Torah scholars. In this we have followed the ways of our teachers and the Torah masters of the last nine hundred years, who have assigned a pride of place to Rashi’s commentary and made it a point of departure for all other commentaries.”

105 Pierson at 181.
Ownership is Nine-Tenths of Possession

approach to possession and it is because of this that the court decided that actual control of the hunted animal was necessary. The Talmud, on the other hand, used the stewardship model of possession and therefore did not hold that actual possession was necessary at all. Because stewardship recognizes and enables ownership without full control or dominium, the Talmud was able to say that the fish was in possession of the fisherman who had expended the effort and was almost certain to capture the fish. The Talmud did distinguish between fish and other animals depending on the certainty of capture, merely chasing and hunting does not satisfy anyone’s definition of possession, but when there is certainty combined with expended effort, the animal belongs to the hunter. This difference of opinions results directly from the possessory conception and the divergence between dominium and stewardship.

XI. ADVERSE POSSESSION

Another example of how different legal theories of ownership and possession can enable the law to adopt certain positions can be found in the doctrine of adverse possession.

Generally speaking, adverse possession is when one occupies property not belonging to him or her and uses it for a specific amount of time, thereby gaining possession of the land. Today, all states recognize that when a legally protected and indefensible possessor satisfies the elements of adverse possession, he or she assumes ownership of the property.107 To acquire land through adverse possession, a possessor must prove a minimum of five elements, though some states require additional elements as part of an adverse possession claim.108 The basic elements are described as follows: First, the possession must be actual. There must be physical control and use of the disputed property for the duration of the entire statutory period. Second, the possession of the disputed tract must be hostile to other competing claims to the property. Third, that possession must be open and notorious, such that those individuals having competing claims to the property actually know or should have known of that possession.

107 See Unger v. Mooney, 63 Cal. 586, 595 (1883) (requiring taxes to be paid) or See, e.g., Sparks v. Douglas & Sparks Realty Co., 166 P. 285, 286 (Ariz. 1917) (recognizing color of title as an element of adverse possession).
Ownership is Nine-Tenths of Possession

Fourth, possession must be *exclusive*, such that others with competing claims to the property are wholly excluded from the property. Lastly, the possession must be *continuous*.¹⁰⁹

There are essentially three economic justifications¹¹⁰ for adverse possession, each of which will be explained further below. First, adverse possession encourages the beneficial use of property. Second, adverse possession tends to make the real estate markets more efficient. Finally, adverse possession protects the reliance interests accrued during the time of the adverse possessor's occupation of the property.

Adverse possession encourages property owners to put their land to productive use rather than allow the property to lie fallow. Putting property to use benefits the economy. Adverse possession has been heralded as “a wonderful example of reward to useful labor, at the expense of the sluggard.”¹¹¹

The second economic justification for adverse possession is that

¹⁰⁹ See e.g. Rodgers v. Thelkald, 80 S.W.3d 532, 534-35 (Mo. Ct. App. 2002)
¹¹⁰ The other justification for adverse possession rests on the morality of keeping land in the possession of the adverse possessor. In a letter to William James, Holmes wrote that the adverse possessor “shape[s] his roots to his surroundings, and when the roots have grown to a certain size, cannot be displaced without cutting at his life.”¹¹⁰ Property rights are based on more than formal documents; they are based also on expectations. Those expectations “grow from informal arrangements such as long-standing possession, a course of dealings, oral statements, informal understandings, personal relationships, social practices, and customs of trade.”¹¹⁰ The notion that long-standing possession creates an expectation of ownership is exactly the idea that justifies adverse possession. The moral argument justifying adverse possession views “long-standing possession” as equivalent to a written document of ownership. If those are viewed equally, then adverse possession places courts on the moral high ground by favoring the party that stands to lose the most, the adverse possessor. A ruling against the adverse possessor would result in the court “cutting at his life.”¹¹⁰
¹¹¹ Carol M. Rose, Property and Persuasion 15 (1994). Rather than looking at the results of adverse possession as penalizing true owners, proponents of adverse possession regard adverse possession as rewarding possessors for positive acts in cultivating land. Adverse possession often has the effect of reducing the valuable resources that are left idle for lengthy periods of time; it establishes procedures for productive users to gain ownership over unproductive users. Though this theory refuses to recognize that a productive use of property might be to let it remain unused until a later date, what remains is that adverse possession encourages people, whether true owners or adverse possessors, to use land and reap the valuable economic gains resulting therefrom.
Ownership is Nine-Tenths of Possession

it creates a more efficient and less costly real estate market. Again, adverse possession shows a preference for active possessors over passive owners.112 The passive (and presumably absentee) owner will be harder to negotiate with, if only because he will be harder to locate.

By transferring title to an adverse possessor, making him into a true owner, adverse possession increases market efficiency. One of the goals of adverse possession is to create certainty in the real estate market,113 which should equal more efficiency. Adverse possession reduces the “administration costs of establishing rightful ownership claims in the event of a delayed dispute about rightful ownership.”114 Adverse possession allows purchase prices to reflect land values rather than insurance against suits and costs of researching ownership.115

And thirdly, adverse possession protects the reliance interests accrued during the time of the adverse possessor's occupation of the property.

Aside from economic justifications, the histories of adverse possession and the common law were also influencing factors in the shaping of the doctrine. Specifically, the fact that the common law subscribed to the Roman concept of dominium enabled the law to privilege squatters’ rights over the rights of the previous landowners.

The origins of adverse possession are grounded in Roman law. The Roman doctrine of usucaption is considered the progenitor of the modern doctrines of adverse possession. Under Roman law, dominion signified legal sovereignty and ownership. Dominion was the most

113 JOSEPH WILLIAM SINGER, PROPERTY LAW 226 (3d ed. 2002).
114 COOTER & ULEN, LAW AND ECONOMICS 155 (1988)
115 The efficiency argument takes an additional form, one that closely relates to statute of limitations justifications. Recognizing adverse possession as a method of land transfer reduces “error costs” caused by using stale evidence in dispute resolution. This goes beyond looking simply at the adverse possessor versus the true owner. Adverse possession is a tool that has the effect of clearing up title for generations, for numerous buyers. Adverse possession requires a vision of the future. Ownership of land affects future buyers and the banks or other institutions that will advance funds for the purchase of that property. Individuals need to know who owns the property they wish to buy or for which they intend to provide a mortgage. Allowing adverse possession to effect a transfer both reduces search costs of investigating who holds title to property and aids in a system where recorded titles are incomplete indices of ownership.
indefinite and unrestricted right one could have over a thing and was the oldest recognized title. Dominion remained in the last to acquire it by recognized process until another through a similarly recognized process acquired it.

Possession was a separate concept, with distinctive legal consequences, though quite connected to dominion. If dominion represented legal sovereignty, possession was factual sovereignty. Through derivative possession, tenants, lenders, and easement beneficiaries acquired present possessory interests but certainly not in derogation of the ultimate rights of the owner. Over time, possession grew to be very connected to ownership and legal rules developed to protect the interests of possessors against interference from strangers and even out-of-possession owners. Roman law recognized that a possessor, one without dominion, which again, was the equivalent of ownership, could acquire dominion (legal ownership) based upon possession for a sufficiently long time.

Tracing the history of adverse possession leads to English law. The history of adverse possession in England can be dated back to the 12th century, when a landlord might assert his title under a proprietary action, and a squatter could assert his possessory rights under a possessory action. For the last five centuries, the law, instead of giving more protection to land owners, has been developing in favor of the squatters. This is due to the doctrine’s Roman foundation. Even in American jurisprudence, the courts have used a Roman foundation to justify adverse possession. At the turn of the twentieth century, the Supreme Court, with Justice Joseph McKenna authoring the opinions, took up the issue of adverse possession in the state of New Mexico. The first case was United States v. Chavez, in which the specific problem was whether Mexican law contained the rule of adverse possession prior to the cession of 1848 and, thus, whether the rule carried over to statehood. Chavez held that the principle of adverse possession came from "general jurisprudence, and is recognized in the Roman law and the codes founded thereon." While the opinion referred to very few American cases, Roman law appears to have been the basic principle directing the conclusion. Chavez was then used as the precedent in United States v. Pendell, although in this instance the court rested its opinion to a large degree on American cases that had been developed.

116 175 U.S. 509 (1899).
117 Id. at 520.
118 Id. at 523.
119 185 U.S. 189 (1902).
Ownership is Nine-Tenths of Possession

It is the Roman conception of dominium and its relation to possession that has resulted in the doctrine of adverse possession. A legal system that did not prescribe to dominium would not have developed in the same way. To indicate the influence of the dominium concept on adverse possession it is instructive to turn once again to Jewish law.

Jewish law also contains the doctrine of adverse possession called *chazakah*. On its surface, *chazakah* appears to be very similar to adverse possession. In fact, other than *chazakah* always requiring a mere three-year statute of limitations, the doctrines appear to be identical. Nonetheless, a deeper investigation reveals that they are, in fact, very different. Whereas adverse possession is a mechanism of land transfer, *chazakah* is not. First, *chazakah* is only permissibly raised in support of a claim of true ownership. Second, even if the adverse possessor successfully proves all of the elements of *chazakah*, *chazakah* only results in a presumption of ownership: it does not effectuate a land transfer by itself.

Unlike in adverse possession where meeting the requirements will result in the adverse possessor becoming the owner of the property, meeting the criteria of *chazakah* in a vacuum will not effectuate a change in ownership. To successfully argue that one owns land pursuant to a *chazakah* claim, a possessor must assert an additional claim with his *chazakah* argument. Even with this additional claim, *chazakah* will be recognized only as a proof of that companion claim of ownership. The companion claim must follow a specific formula to warrant *chazakah* as proof of ownership: The possessor must assert that he bought the property, at one time had the deed, but has since lost that deed.

The Mishnah provides as follows: “Any *chazakah* claim not accompanied by a claim [of ownership] is not a [valid] *chazakah*."

The Mishnah continues to explain how a *chazakah* claim actually works by describing how it does not work. If, when brought to court in an ejectment proceeding, the possessor asserts that he has met the elements of *chazakah* but acknowledges that he lived there “because no one ever said anything to [him],” he will be unsuccessful in his *chazakah* argument. In other words, if he claims that he met the elements of *chazakah* but that when he originally began living on the

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120 Bava Basra 3:3.
121 Id.
122 Id. See also Bava Basra 28b.
123 Id.
124 Id.
Ownership is Nine-Tenths of Possession

land he believed that it had been ownerless, the true owner would be successful in the litigation and the chazakah claim would fail.

If, however, the possessor claims both that he has met the elements of chazakah and that the original owner had sold him the land, but he has since lost the deed, the possessor will be successful. The Mishnah creates a dichotomy by identifying two types of chazakah claims: Those that are accompanied by a companion claim of true ownership and those without a companion claim, made by squatters. A claim of chazakah is only as strong as its companion claim.

The resulting doctrine is the conceptual antithesis of adverse possession. While adverse possession serves to remove ownership from the true owner and vest it in the adverse possessor, chazakah does no such thing. Rather, chazakah is merely proof of an independent claim of ownership. Due to the lack of the dominium concept in Jewish law, although the economic and moral justifications exist and are recognized, the mere act of squatting on the property would not be enough for the property to transfer.

X. DEATHBED BEQUESTS

The final doctrine I will examine is the law of donatio causa mortis, or deathbed bequests.

The laws of the donatio causa mortis are widely discussed in property law because they illustrate an interesting twist with reference to the laws of gift giving. As a rule, in order to effectuate any gift, a valid delivery of the gift is required. Scholars disagree about why there even is a requirement of delivery. The courts, in

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125 Id.
126 Id.
127 See e.g., Olin L. Browder et al., Basic Property Law, 712 (West Publishing Co., 5th ed. 1989); Grant S. Nelson et al., Contemporary Property, Pt. 1 Ch. 3 (West Group, 2nd ed. 2002); A. James Casner et al., Cases and Text on Property, 630 (Aspen Publishers, 5th ed. 2004).
128 This requirement was judicially developed and was not enacted through legislation. See eg. Howell v. Herald, 197 S.W. 3d 505 (Kentucky 2006); Richard R. Powell, Powell on Real Property, Vol. 15, Ch. 85 § 85.21 (Patrick J. Rohan Ed., Matthew Bender 1998) (listing the three requirements of an inter vivos gift; intent to make a gift, delivery of the gift and acceptance by the donee.)
129 Id. at 85.21[2]. The two principal schools of thought on the matter are the “Historical School” and the “Functional School”. The Historical School explained delivery as a remnant of the concept of seisen, the fact that the law did not allow
Ownership is Nine-Tenths of Possession

most cases of *inter vivos*, or lifetime gifts, have relaxed the formal requirement of manually handing over the object and have allowed other methods of delivery to be acceptable substitutes. However, for the *donatio causa mortis*, some courts adopt strict formalist tendencies and choose not to accept all substitutes. The case widely quoted to represent this trend is the case of *Foster v. Reiss*. This

any gifts without a transfer of possession. Since this theory considers delivery to be a mere historical relic, it does not consider delivery to be indispensible to the transfer of gifts. The Functional School explained delivery as a method of accomplishing various functional elements within a transfer of a gift, namely, it makes concrete to the donor the significance of the act being done, it is unequivocal to the witnesses present and it gives the donee prima facie evidence of a transfer. The Functional School also agrees that, should there be other ways to provide these functions, a formal delivery would not be necessary. As a general rule both schools are in agreement that manual tradition and possession should not be made an ends in themselves. The only issue under discussion is whether the requirement of delivery currently serves any purpose. In a broader sense, Professor Lon Fuller argued that all legal formalities merely serve as expressions of intent. See Lon L. Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799, 800-03 (1941). See also Philip Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 U. Ill. L. Rev. 341,354 (1926)(discussing reasons for delivery).

Although manual delivery has not been completely negated, the courts have accepted many substitutes such as constructive or even symbolic delivery. See eg. In re Estate of Piper, 676 S.W. 2d 897 (Mo. 1984) (while delivery may be actual, constructive or symbolic, there must be evidence to support the conclusion there was delivery); Gruen v. Gruen, 68 N.Y. 2d 48 (1986) (stressing that courts should apply delivery rules flexibly and in light of the policy behind the rule); Speelman v. Pascal, 10 N.Y. 2d 313 (1961) (upholding a delivery consisting of an informal letter); Williams Hospital v. Nisbet, 7 S.E. 2d 737 (Ga. 1940) (a gift evidenced by “ordinary writing” dispenses with the necessary delivery).

Additionally, the courts have not required delivery in certain cases such as when the donor and donee had joint possession; gifts of choses in action; gifts involving bulky objects and distant property; and transfer of a key to a receptacle. See A. C. H. Barlow, *Gifts Inter Vivos of Chose in Possession by Delivery of a Key*, 19 Mod. L. Rev. 394 (1956); W. Lewis Roberts, *The Necessity of Delivery in Making Gifts*, 32 W. Va. L. Rev. 313 (1926). See also Philip Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 U. Ill. L. Rev. 341,355 (1926)(stating that the existing case law supports the proposition that courts are accepting as substitutes for delivery, actions that satisfy the functional reasons behind delivery).

Ownership is Nine-Tenths of Possession

case concerned an elderly lady who, while on her deathbed, wrote an informal letter to her husband and instructed her caretaker that the note be delivered to him. The letter contained a list of various places where she had hidden money around her house and instructions of what to do with the money that was located in these places. It read as follows:

"My Dearest Papa:

In the kitchen, in the bottom of the cabinet, where the blue frying pan is, under the wine bottle, there is one hundred dollars. Alongside the bed in my bedroom, in the rear drawer of the small table in the corner of the drawer, where my stockings are, you will find about seventy-five dollars... The Building Loan book is yours, and the Bank book, and also the money that is here... God be with you. God shall watch your steps. Please look out for yourself that you do not go on the bad road. I cannot stay with you. My will is in the office of the former Lawyer Anekstein, and his successor has it. There you will find everything.

Your kissing, loving wife, Ethel Reiss"

Mrs. Reiss’ husband received the note and proceeded to take possession of the money. The donor never recovered from her illness and died shortly thereafter. The donor’s children from a previous marriage brought suit against the husband alleging that the money he had taken still belonged to their mother and consequently was theirs. One of the court’s main contentions was validating the gift because it was never formally delivered from the woman’s possession to the defendant. Rather, the donee unilaterally took the gifts after receiving the instructions that the money belongs to him. The Majority opinion of the Court was that the gift was not valid, even though the donor had seemingly intended for the donee to receive the gift and had clearly instructed him to take possession of the money; the Court held that since he did not receive the money manually from the donor, the gifts were not valid. In this case, the Court adopted a strict formalist approach with regards to the act of delivery.


132 See John J. Sciullo, Case Note, 17 U. Pitt. L. Rev. 105 (1955) (arguing that the court should have validated the gift because revealing the hidden location of gifts should suffice as a replacement for manual delivery).
Not all courts have agreed with the ruling of the Majority in Foster. In fact, many courts have explicitly held that even for deathbed bequests the donor’s intentions should be realized even without formal delivery. Although the current state of the law is not entirely conclusive in any one direction, there have been other cases that resulted in similar decisions to Foster by other courts. One such case is the decision reached by Superior Court in New Jersey in the case of In Re Estate of Link. The court held that merely stating an intention to give over engagement and wedding rings does not satisfy the delivery requirement for a donatio causa mortis.

133 See Begovich v. Kruljac, 38 Wyo. 365 (1928) (holding that “since the gift causa mortis does not come into the enjoyment of the donee till after the death of the donor... delivery can not be for the purpose of transferring possession and enjoyment... Hence while in gifts inter vivos delivery is one of the constituent elements thereof. It subserves but the purpose of evidence in gifts causa mortis.” The Court therefore allowed the gift to transfer even without the formal delivery since there was evidence of the intention of the donor.) See also Pushcash v. Dry Dock Savings Institution, 251 N.Y.S. 184 (1931). These rulings stand in stark contrast to the ruling in Foster.

There has been some strong criticism of the ruling in Foster, starting with the Dissent in Foster, written by Justice Jacobs and joined by two other Justices, including Justice Brennan, a future Supreme Court Justice. The Dissent argued that “here the donor’s wishes were freely and clearly expressed in a written instrument and the donee’s ensuing possession was admittedly bona fide; under these particular circumstances every consideration of public policy would seem to point towards upholding the gift.” The Dissent is quoted in the case of Whitney v. Canadian Bank of Commerce, 374 P.2d 441 (Or. 1962) where the Court upheld a donatio causa mortis that was not formally delivered. The Court in Whitney quotes many scholars who argue for a relaxing of formalist standards and some courts that had already begun to do so.

However, as recently as 2011 the decision in Foster was still quoted in court opinions. See Bhagat v. Bhagat, 2011 Westlaw 1529857 (N.J. Sup. Ct. 2011) (quoting the court in Foster and saying that “unless it is impossible or impractical, delivery of the object is required”) see also in Re Estate of Link, 746 A.2d 540 (N.J. Sup. Ct. 1999); Scherer v. Hyland, 75 N.J. 127 (1977).

134 See Schenker v. Moodhe, 175 Md 193, 200 (1938)(donor dying of contagious disease told donee to take donor’s keys, which were in the room; donee did not take physical possession and gift was invalidated) Keepers v. Fidelity Title and Deposit Co., 28 A. 585, (N.J. 1983) (delivery of a key was not considered enough of a delivery for a donatio causa mortis). See also W.E. Shipley, Annotation, Delivery as Essential to Gift of Tangible Chattels or Securities by Written Instrument, 48 A.L.R. 2d 1405 § 9 (1956).

Ownership is Nine-Tenths of Possession

mortis. Similarly, the court of appeals in Missouri\textsuperscript{136} and the Supreme Court of Virginia\textsuperscript{137} required strict formal delivery for deathbed bequests. All of these more recent decisions relied on some of the formulations and reasoning of the Foster court. However, there have been cases\textsuperscript{138} where the courts have been more willing to adopt a functionalist view of delivery and where they did not call for a strict fulfillment of this requirement. The Supreme Court of Virginia in the case of Brown \textit{v.} Metz\textsuperscript{139} held that “while delivery and acceptance must be shown to establish a gift causa mortis, we have not retreated to such a formalist approach” and that “in determining whether a gift causa mortis has occurred we are guided by principles of reason and common sense as applied to the facts of the case.”\textsuperscript{140} Although case law vacillates between formalist and functionalist approaches toward deathbed bequests, it seems that there is a clear reluctance to treat them as a regular type of gift.

The Halacha, or Jewish legal code, stands in sharp contrast to the Common Law approach regarding the \textit{donatio causa mortis}. An exploration of Halacha reveals an almost anti-formalist approach towards deathbed bequests. The Mishna\textsuperscript{141} in \textit{Bava Basra}\textsuperscript{142} discusses a \textit{deyathiqi}, which is the Greek term for a Will and Testament. The Talmud\textsuperscript{143} in \textit{Bava Metziah}\textsuperscript{144} explains that the \textit{Deyathiqi} is a gift that is given from the donor’s deathbed and is only activated by the donor’s death.\textsuperscript{145} Later, in the Talmudic period, a gift in contemplation of death was referred to as \textit{matnas schiv mera}. The

\begin{itemize}
  \item\textsuperscript{136} Merchants Bank \textit{v.} Donahue, 1992 Mo. App. 571 (holding that an intention to give over a check without valid delivery does not constitute delivery for a \textit{donatio causa mortis}).
  \item\textsuperscript{137} Woo \textit{v.} Smart, 442 S.E. 2d 690 (Va. 1994) (holding that a check does not constitute a valid delivery for a \textit{donatio causa mortis}).
  \item\textsuperscript{138} See eg. McCarton \textit{v.} Estate of Watson, 693 P.2d 192 (Co. of App. Washington 1984) (holding that intention to deliver a gift coupled with constructive delivery should be enough to validate a \textit{donatio causa mortis}).
  \item\textsuperscript{139} 393 S.E. 2d 402 (Va. 1990) (whether a key to a deposit box constitutes valid delivery).
  \item\textsuperscript{140} Id. at 404.
  \item\textsuperscript{141} Compendium of Rabbinic Doctrines- Redacted 220 CE
  \item\textsuperscript{142} 8:6 Literally “the last gate”. Tractate dealing with the laws of property disputes and contracts.
  \item\textsuperscript{143} Commentary on the Mishna- Published 500 CE
  \item\textsuperscript{144} 19a Literally “the middle gate”. Tractate dealing with Property Law.
  \item\textsuperscript{145} See Reuven Yaron, Gifts in Contemplation of Death in Jewish and Roman Law, 22-25(Oxford, Claredon Press 1960) (comparing the texts found in Ancient Greek Testaments to the texts of the ones mentioned in the Talmud).
\end{itemize}
Ownership is Nine-Tenths of Possession

donatio causa mortis found in the Talmud shares many similarities with the Common Law version; principally, they are similar with regard to the law that should the donor recover from his/her illness, the gift is retroactively invalidated. Where they differ is that the mtnas schiv mera transfers the gift by mere words alone—the act of oral communication effectuates the transaction. This stands in stark contrast to the general insistence within Talmudic Law on strict formalism. Generally, the transfer of possessions requires a kinyan, or an act of acquisition, in reference to which the Talmud almost always insists on strict formalism.

The Talmud explores the history and legal reasoning behind the lack of formalism in deathbed bequests. It concludes that the lack of a required formal delivery was a rabbinic enactment created out of fear that the donor “will lose his mind”. As occurs often in Talmudic commentaries, this nebulous statement is interpreted in four ways.

146 The Roman law also allowed the gift to be effectuated informally in certain circumstances, for example for soldiers, but the Talmudic version is always transferred through an informal delivery. See also ibid. n. 11. An additional difference is that the mtnas schiv mera must be a total disposition of the donor’s property. See Bava Basra 147b.

147 Whether the oral delivery is in place of an actual delivery of the gift or merely an entirely different way to effectuate a transfer is an interesting question. Should the oral bequest not be considered a form of delivery, it would explain the opinion that holds that a mtnas schiv mera can be effectuated even on the Sabbath (a time when traditional transactions are prohibited), see Bava Basra 154b. However, the Talmud only allows a mtnas schiv mera to work for objects that can be transferred through a standard delivery see Bava Basra 147b. That would seem to indicate that the oral delivery of the mtnas schiv merah is in place of the standard delivery of all gifts. Also compare the language the Sheiltos uses (Sheiltos 33) with the language of the Talmud. The language used by the Sheiltos (mtnas schiv mera doesn’t require a kinyan) would indicate a total lack of delivery for the mtnas schiv merah.

148 See Bava Basra 151a, 175a, Gittin 13a, and 15a.

149 See Yaron, supra at 34-36

150 Bava Basra 147b. At the beginning of the discussion, the Talmud attempts to find a Biblical origin for the mtnas schiv mera, possibly as a reaction to the Greek and Roman law that were extant at the time of the Talmud and to prove that there was a Jewish origin. See Yaron, supra at 19 (discussing how the concept of the mtnas schiv merah was taken from the Greeks); Id. at 47 (discussing the Egyptian dispositions in contemplation of death).

151 Rashbash (Rabbi Shmuel ben Meir c. 1085-1158 France) at Bava Basra 147b notes one explanation (also found in the Ramah [Rabbi Meir Abulafia c. 1170-1244 Spain] id.) that the Talmud means that should we not allow the transfer to go through, there is a possibility that the donor may die or be incapacitated before he is
Ownership is Nine-Tenths of Possession

The accepted explanation is that the Rabbis were concerned about the potential health effects on the donor, who is in a perilous state of terminal illness, should his wishes not be carried out. The rabbis avoided the fear of fraud found in the Common Law by requiring two witnesses to observe and testify to the bequest.

The distinctions found between the common law and Jewish law doctrines of the donatio causa mortis can be traced to their differences in theory concerning ownership. The theoretical standpoint of stewardship over property as opposed to full control allowed the Jewish law to formulate rules of transfer that did not require actual or even physical acts of transfer. This enabled the rabbis to decree that a dying donor can transfer property by verbal expression of his or her wishes alone.

Although the strength of this argument is weakened by the fact that the common law has also allowed less traditional forms of transfers for inter vivos gifts and that the Romans may also have allowed non-formalist gifts with reference to a donatio causa mortis, I posit that the stewardship conception played a significant role in the matnas schiv merah of Jewish law. That this is so, can be seen primarily because within the jurisprudence of Jewish inheritance able to complete a formal kinyan. The Rashbam was not satisfied with this explanation so he explains the Talmud to mean that the Rabbis were concerned of the potential health effects of stress on the donor should his wishes not be carried out. The Ramah also gives an alternative explanation and says that the labor of forcing the donor to complete a standard kinyan in addition to his oral command would be too oppressive and cause adverse health effects. Rabbeinu Gershom (Rabbi Gershom ben Yehuda c. 960-1040 Germany) id. posits a fourth possible interpretation and says that allowing the transfer through an oral command enables the donor to transfer his possession even on the Sabbath, a time when a kinyan is prohibited. See supra n. 23. This was done in order to ensure that a person would be able to transfer his possessions before he dies or is incapacitated.

It is not clear whether the commentators understood the Talmud to give serious health concern to the stress involved with not having one’s desire accomplished or did they mean that this will exacerbate the current illness and therefore lead to ill effects on the donor’s health? Rashbam ibid. seems to indicate that the overarching concern is the illness that the terminal patient is currently afflicted with. However, Rabbeinu Gershom ibid. says we are concerned about the pain of the stress caused by the desire not being carried out. It is unclear whether this difference of opinions would lead to different Halachic rulings in other cases see the discussion further.


See Yaron, supra at 63.
laws, a normative value is that the deceased person’s possessions belong to God. According to many of the commentators, individuals are not able to own possessions after they die; rather, the property reverts back to God and He dictates how it is to be further apportioned. This idea is used to explain why the wishes of a donor to apportion his or her estate in contradiction with the Torah’s mandates are not honored. Similarly, the fact that man is merely a steward over his property can explain the lack of formalism the rabbis adopted in the doctrine of deathbed bequests. Since the property reverts back to God at death, it is less necessary for the donor to exercise full transfer of possession.

Indeed, although there could be other motivations and reasons for why the rabbis set up the matnas schiv merah in this fashion, it does not preclude the possibility that the stewardship conception was an important dynamic in the formulation of this doctrine. And finally, because a doctrine operates in a certain way within the Roman legal system, does not necessarily rule out other foundations for that same law within different legal systems.

CONCLUSION

Baseline paradigms can significantly alter any resulting analysis or forthcoming law. Through the usage of Talmudic law for comparison, it is clear that different conceptions of ownership have impacted the formation of doctrines and legal rules. Depending on whether the underlying conception used is dominium or stewardship, the law changes dramatically. This idea and/or tool is fundamental for property scholars and judges to keep in mind when analyzing the affects of stewardship on indigenous cultural and other properties. A more constructive possession doctrine can have significant impact and can resolve some of the issues in artefacts disputes.