

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

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INTRODUCTION

The concept of possession is central to property law.¹ It is vital to establishing and providing evidence of ownership.² However, various actions can establish possession.³ In this paper, I argue that certain understandings of the ownership construct have broadened the possession

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1. See Carol Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 74 (1985) (finding that “[f]or the common law, *possession* or ‘occupancy’ is the origin of property”). See JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 339 (1990), for a discussion on David Hume’s view of the origins of property: property emerged from a kind of uneasy truce among *de facto* possessors, which then ripened into a convention recognizing a right of property in what had previously been held as mere possessions. See also FREDERICK POLLOCK & ROBERT SAMUEL WRIGHT, *AN ESSAY ON POSSESSION IN THE COMMON LAW* 5 (1888) (asserting that the word possession had “usurped . . . the name of Property” itself).

2. See, e.g., *Ray v. Beacon Hudson Mountain Corp.*, 666 N.E.2d 532, 535–36 (N.Y. 1996) (stating that actually occupying land is necessary to establish possession of the property adversely).

3. See *infra* Part II (discussing the meaning of possession).

doctrine to enable varying actions to establish possession.⁴ This concept contrasts with the conventional wisdom that possession doctrines influence ownership⁵ and not vice-versa.

This Article suggests that the stewardship concept—as modeled in indigenous property ownership—should, and does, affect possession doctrines. This analysis can aid in resolving current disputes over cultural artifacts and other types of property.⁶ Also, this Article establishes that Roman possession doctrines are borne out of a philosophical understanding of ownership directly related to the physical degree of control an individual exerts over property. Alternatively, Jewish possession doctrines are rooted in an ownership concept in which owners steward an object for a time. This Article highlights the differences in each approach. This Article uses three examples of possession that are either based in Roman law and reject the stewardship philosophy, or based in Jewish law and reject the dominium concept.

This Article begins by outlining the differing theories on why possession is vital to property law. Next, this Article describes some of the views about what acts constitute possession. Then, this Article looks at how the stewardship concept has been used to advocate for cultural properties, how this method would affect possession doctrines, and how it could resolve some of the legal disputes over these properties.

To demonstrate the relationship between possession and ownership, this Article turns to the Roman legal concept of dominium, and explores how it relates to possession and the common law. Thus, this Article

4. In a forthcoming book chapter, Carol Rose argues that it is the perception of legitimate title and not any physical actions that determine what the law considers possession. Carol M. Rose, *The Law Is Nine-Tenths of Possession: An Adage Turned on Its Head*, in POSSESSION (Yun-chien Chang ed.) (Forthcoming), <http://ssrn.com/abstract=2435329> (explaining that legal documentation typically establishes possession).

5. According to Rose, the old proverb is “possession is nine-tenths of the law.” *Id.* at 1. See also Amy Louise Erickson, *Possession – And the Other One-Tenth of the Law: Assessing Women’s Ownership and Economic Roles in Early Modern England*, 16 WOMEN’S HIST. REV. 369, 370 (2007) (discussing the origins of the adage). “[t]he phrase is generally said to have been inspired by a medieval English statute that long predated the usages that apparently began in the sixteenth century, namely the Forcible Entry and Detainer (FED) statute that outlawed the forcible ejection of anyone who was in peaceable possession of a property.” Rose, *supra* note 4, at 1. See, e.g., *Beddell v. Maitland*, 17 Ch.D. 174, 183 (1881) (asserting that even if a man is wrongfully in possession of a house it is a breach of the law for the rightful owner to enter forcefully); *In re Estate of Fiksdal*, 388 N.W.2d 133, 136 (S.D. 1986) (detailing where defendant cites adage and claims that the decedent’s jewelry was given to her and not part of the estate); *In re Estate of Brownlee*, 654 N.W.2d 206, 213 (S.D. 2002) (holding that evidence in probate proceeding was sufficient to support a finding that construction equipment was an ineffective gift); *Day v. Case Credit Corp.*, 2007 WL 604636, at *4 (E.D. Ark. Feb. 22, 2007) (discussing farmers who kept farm equipment rather than turning it over to dealers who defrauded them).

6. See *infra* Part III (discussing indigenous and cultural artifacts).

contrasts dominium with stewardship, which is best understood through its use in Christianity and Jewish law. Finally, using the contrast between the Jewish notion of stewardship and the Roman concept of dominium, this Article examines three distinct property law doctrines: first possession, adverse possession, and deathbed bequests. Within these doctrines, which are essentially based in Roman legal theory,⁷ possession's role and what it entails is evident, especially when compared to Talmudic law. This Article will show that possession's role can be traced to different understandings of ownership.

I. PROPERTY AND POSSESSION

Understanding possession and its influence on the law is an integral part of what property is, and how it is owned and controlled. Possession stands at the root of the property law. As Carol Rose opines, “[f]or the common law, *possession* or ‘occupancy’ is the origin of property,”⁸ and “first possession is the root of title.”⁹ An exploration into the meanings of these terms reveals that property is defined in terms of possession and that possession is defined in terms of property. The Merriam Webster dictionary definitions of *possess* and *property* indicate this cyclic state of affairs.¹⁰

Origin and Etymology of *possess*: Middle English, from Middle French *possesser* to have possession of, take possession of, from Latin *possessus*, past participle of *possidēre*, from *potis* able, having the power + *sedēre* to sit . . . 1: to have and hold as property: own . . . 2: to have as a characteristic of quality . . . 3: to enter into and control.¹¹

Origin and Etymology of *property*: Middle English *proprete*, from Anglo-French *propreté*, from Latin *proprietas*, *proprietas*, from *propius* own . . . 2 a: something owned or possessed; specifically : a piece of real estate b: the exclusive right to

7. See discussion *infra* Parts VI(A)–(C) (explaining first possession, adverse possession, and deathbed requests, respectively).

8. Rose, *supra* note 1, at 74.

9. *Id.* at 75.

10. Although dictionary definitions are not authoritative, see LUDWIG WITTEGENSTEIN, PHILOSOPHISCHE UNTERSUCHUNGEN [PHILOSOPHICAL INVESTIGATIONS], 93^e–94^e (G. E. M. Anscombe, trans., 2d ed. 1967), for a discussion on how they can be illustrative of a certain state of affairs. See also POLLOCK & WRIGHT, *supra* note 1, at 5 (discussing how the word possession has “usurped . . . the name of property” itself).

11. *Possess*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/possess> (last visited Nov. 22, 2016).

possess, enjoy and dispose of a thing : ownership c: something to which a person has legal title.¹²

This relationship has led many property law authorities to hold that possession is not ancillary to property law but rather fundamental to property ownership.¹³ One way to express this relationship is to say that objects in one's possession define property. In truth, the arguments for the role of possession are usually more sophisticated. For instance, one of the prominent views on how ownership of property is formed is John Locke's labor theory.¹⁴ 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 originating from the exertion of labor on natural resources.¹⁵ On its face, this theory does not implicate possession. However, the Lockean theory of property, once described as "the standard bourgeois theory,"¹⁶ requires that one *have* or possess his or her labor to mix with other things.¹⁷ Richard Epstein argues that for Locke, the reason a person owns his or her body and its labor is that he or she occupies or possesses it.¹⁸ Thus, the labor theory effectively rests on a right established by possession.¹⁹

Possession is integral to an understanding of property ownership. Different explanations have been offered to account for the normative value

12. *Property*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/property> (last visited Nov. 22, 2016).

13. *See, e.g.*, Rose, *supra* note 1, at 74 (noting that possession is at the root of property law). *See generally* Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1127–28 (1979) (discussing first possession in relation to various types of property).

14. *See, e.g.*, Epstein, *supra* note 13, at 1227 (arguing for labor theory, possession, and ownership).

15. *See, e.g.*, Alexander D. Northover, Note, "Enough and as Good" in the Intellectual Commons: A Lockean Theory of Copyright and the Merger Doctrine, 65 EMORY L.J. 1363, 1368 (2016) (defining the labor theory of appropriation); Richard A. Epstein, *Int'l News Serv. v. Associated Press: Custom and Law as Sources of Property Rights in News*, 78 VA. L. REV. 85, 108 (1992) (defending the labor theory of ownership). *See* WALDRON, *supra* note 1, at 147, for a detailed analysis of Locke's theory. *See generally* IAN HARRIS, *THE MIND OF JOHN LOCKE: A STUDY OF POLITICAL THEORY IN ITS INTELLECTUAL SETTING* 20–21 (1994) (detailing the history of Locke's theoretical background).

16. RICHARD SCHLATTER, *PRIVATE PROPERTY: THE HISTORY OF AN IDEA* 151 (1951).

17. For how else does one "have" their labor to mix with other things?

18. Although it can be argued that people own themselves with the common consent of mankind.

19. Epstein, *supra* note 13, at 1227–28. 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. This theory posits that property exists as a society-created construct created to enable a functional civilization, without implicating or requiring possession. *Id.*

of possession as it influences an individual's ownership of property.²⁰ For one, Richard Posner theorizes that the value of possession is based on economic efficiency: "possession . . . tends to allocate 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."²¹ Another explanation is that possession represents the most self-actualizing form of personhood in one's property.²² 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.²³ Margaret Jane Radin promotes this view in many of her articles.²⁴

Finally, Carol Rose opines that possession forms the basis of property ownership because of the value of communication through possession.²⁵ Essentially, possession is notice of an individual's ownership to the rest of the world. Next, this Article pinpoints the actions or words required to create possession.

II. WHAT IS POSSESSION?

In the most basic sense of the word, to possess means to hold.²⁶ The source of the word is *possidere*: *pos* + *sedere* (to sit), meaning to sit upon a thing.²⁷ A working legal definition must necessarily expand beyond the physical holding of an object; any definition of possession must trace itself back to that root, possession as a form of control. One's characterization of possession depends on his or her understanding of possession's prominence in property law. For Lockeans, possession may be the act of labor invested in property.²⁸ According to an initial reading of Rose, possession is the reward for useful labor.²⁹ More true to her definition, however, is that labor speaks clearly and makes one's actions understood.³⁰ Through acts of labor,

20. Derek Fincham, *The Distinctiveness of Property and Heritage*, 115 PENN ST. L. REV. 641, 672 (2011).

21. Richard A. Posner, *Savigny, Holmes, and the Law and Economics of Possession*, 86 VA. L. REV. 535, 553 (2000).

22. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959–61 (1982).

23. *Id.* at 958.

24. *Id.*

25. See Rose, *supra* note 1, at 78–79 (stating that communication is necessary in property law because "if no one knows whether he can safely use the land, or from whom he should buy it if it is already claimed, the land may end up being used by too many people or by none at all").

26. *Id.* at 76.

27. *Possess*, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1990).

28. Rose, *supra* note 1, at 73.

29. *Id.* at 79.

30. *Id.*

notice of ownership occurs and possession is granted. Thus possession is the act of creating notice. For other commentators who believe that possession is a complicated socio-legal construction containing a variety of attitudes toward land and human behavior, possession may be a legal construct made to fit whatever purposes the law finds suitable.³¹

The acts of possession exist on a sliding scale of physicality, ranging from grasping an object to a completely non-tangible act. For the sake of judicial expediency and uniformity in law, possession is divided into groups of action: actual possession and legal possession, or constructive possession, which is a legal fiction acting as a substitute for actual possession. In all cases,³² the law decides the level of connection with the property that constitutes possession. Even constructive possession requires that the act be removed from actual possession to satisfy the physical possession 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 Phenomenon and the Noumenon.³³ Phenomenon are objects known only through the senses while Noumenon are objects known *without* the senses.³⁴ This distinction is useful when thinking about actual and constructive possession. Actual possession exists as a Phenomenological style of control, and constructive possession exists as a Noumenon style of control, albeit accompanied by some signaling.

Kant had his own approach toward property and possession. He required intelligible possession for a social contract to enable private property.³⁵ Kant attempted to discredit the Lockean perspective on the formation of private property.³⁶ However, Kant's perspective is helpful in understanding possession regardless of the theory espoused on the origin of property. The distinction between the ownership models of dominium and stewardship are especially relevant to Kantian philosophy: dominium is related to control and operates on a Phenomenon modality while stewardship enables a more legalistic and Noumenon-type of possession.

Ultimately, there is no clear consensus on the level of possession necessary for establishing ownership. An individual system's understanding

31. See, e.g., Jill M. Fraley, *Finding Possession: Labor, Waste, and the Evolution of Property*, 39 CAP. U. L. REV. 51, 66 (2011) (detailing evolution of and variation in the definition of property among North America's colonizers).

32. In addition to relating to property law, possession can also be implicated in criminal law, possession of illegal substances, and the seizure of debts.

33. IMMANUEL KANT, A CRITIQUE OF PURE REASON 138 (Infomotions, Inc. 2000) (1781).

34. *Id.*

35. Howard Williams, *Kant's Concept of Property*, 27 PHIL. Q. 32, 33 (1977).

36. *Id.* at 35.

of property ownership influences the amount of possession required for ownership. Thus, the possession doctrines for cultural and indigenous properties—for which some have advocated a stewardship concept of ownership—will expand, allowing for non-formal possessions and disaggregating possession from ownership. This step may resolve some of the legal disputes surrounding these properties.

III. POSSESSION FOR CULTURAL AND INDIGENOUS PROPERTIES

As discussed below, traditionally, the stewardship concept of ownership has been used in the context of religious dictates and theology.³⁷ Stewardship of property implies that possessors may not be the ultimate owners of property; rather, someone else is invested in full ownership, the so-called *true owner*.³⁸ More recently, some scholars have advocated for the use of stewardship for properties where the current physical property regime does not adequately function.³⁹ Some examples include authors' and artists' creations,⁴⁰ cultural properties,⁴¹ and properties with a strong environmental impact.⁴² The stewardship model of ownership has even been used in the corporate context.⁴³

These scholars argue that the classic property ownership concept is associated with traditional rights of alienability, title, and exclusion; and, it tends to overlook the possibility of non-owners exercising custodial duties over tangible and intangible goods in the absence of title and possession.⁴⁴ On the other hand, the stewardship model facilitates an understanding of

37. See *infra* Part VI (discussing the stewardship concept in Christianity).

38. See generally Kristen A. Carpenter, *In Defense of Property?*, 118 YALE L.J. 1022, 1068–74 (2009) (discussing the different perspectives on defining stewardship).

39. STEWARDSHIP ACROSS BOUNDARIES 3 (Richard L. Knight & Peter B. Landres eds., 1998).

40. LIOR ZEMER, THE AUTHOR AS STEWARD “FOR LIMITED TIMES”: THE IDEA OF AUTHORSHIP IN COPYRIGHT 96–97 (2007).

41. Carpenter, *supra* note 38, at 1022.

42. See ASPEN INST., THE STEWARDSHIP PATH TO SUSTAINABLE NATURAL SYSTEMS 3, 4 (1999) (discussing the concept of stewardship in ecological conservation). See also WILLIAM J. BYRON, TOWARD STEWARDSHIP: AN INTERIM ETHIC OF POVERTY, POWER AND POLLUTION 14 (1975) (articulating the stewardship concept with respect to population control and poverty); ETHICS OF CONSUMPTION: THE GOOD LIFE, JUSTICE, AND GLOBAL STEWARDSHIP 545 (David A Crocker & Toby Linden eds., 1998) (discussing non-harming, mutual trusteeship, and stewardship); ALDO LEOPOLD, A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE 201–26 (1987) (discussing the concept of stewardship in ecological conservation); *Id.* at x (“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.”).

43. See, e.g., RAYMOND W.Y. KAO, STEWARDSHIP-BASED ECONOMICS 10, 16, 73, 75, 77 (2007) (articulating stewardship as an alternative to ownership); STEWARDSHIP ACROSS BOUNDARIES, *supra* note 39, at ix–3 (collecting articles from property scholars on stewardship).

44. Carpenter, *supra* note 38, at 1026.

resource protection that extends beyond the traditional ownership model and embodies a notion of mutual trusteeship.⁴⁵ It also allows for a disaggregation of title, possession, and exclusion.⁴⁶ In doing so, it can reconfigure the rights of possession, use, and production among non-owners as well as owners.

Some advocate for stewardship as a means of defining ownership because of its potential: it could reform copyright and the judicial application of the Copyright Act by emphasizing the duties to the public that correlate with ownership rights.⁴⁷ Stewardship has also been used to mediate between the U.S. Government and Native American Tribes.⁴⁸

The stewardship concept has profoundly influenced the areas of transfers of ownership and possession. Cultural scholars and tribal courts have agreed that the laws governing physical property have been ineffective for indigenous properties.⁴⁹ In reaction, tribal courts rejected private property concepts with respect to the holding and transfer of cultural property.⁵⁰ However, regarding indigenous cultural properties, the effects of the stewardship concept of ownership on their possession doctrines have not yet been fully explored or explained.

The stewardship ownership concept enables a more constructive form of the possession doctrine than does the dominium concept.⁵¹ For example, the Native American Grave Protection and Repatriation Act (NAGPRA)

45. *Id.* at 1078.

46. *Id.* at 1082.

47. See ZEMER, *supra* note 40, at 220 (discussing ways to change copyright law to benefit public interest). See also Roberta Rosenthal Kwall, *The Author as Steward “for Limited Times,”* 88 B.U. L. REV. 685, 705 (2008) (reviewing LIOR ZEMER, *THE IDEA OF AUTHORSHIP IN COPYRIGHT* (2007) (describing stewardship within the Copyright Act)).

48. See generally R.C. GORDON-MCCUTCHAN, *THE TAOS INDIANS AND THE BATTLE FOR BLUE LAKE* xvi–xvii (1991) (chronicling the events leading up to the return of the Blue Lake to the Taos Indians). See also *The Wilderness Act*, 16 U.S.C. § 1131(c) (2012) (defining “wilderness”). When it restored trust title to Blue Lake, Congress also imposed several conditions, including “[t]hat 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. See also Ralph W. Johnson & Sharon I. Haensly, *Fifth Amendment Takings Implications of the 1990 Native American Graves Protection and Repatriation Act*, 24 ARIZ. ST. L.J. 151, 155–56 (discussing how unearthed human remains are generally treated as a form of quasi-property of which survivors or descendants act as stewards for the purpose of conducting a funeral).

49. Cortelyou C. Kenney, *Reframing Indigenous Cultural Artifacts Disputes: An Intellectual Property-Based Approach*, 28 CARDOZO ARTS & ENT. L.J. 501, 516–17, 519 (2011).

50. See FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 605–10, 1230–32 (Rennard Stickland et al. eds., 1982) (discussing Indian Law and property rights under U.S. law). 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).

51. See *infra* Part IV (discussing dominium).

prioritizes reconfiguring custody and possession as opposed to reconfiguring title and ownership. Scholars understand NAGPRA as embodying the stewardship concept of cultural properties.⁵² Because possession can be more loosely obtained and transferred, NAGPRA is more effective.

The relationship between stewardship and possession can also be helpful in solving some of the issues concerning indigenous properties. According to Cortelyou C. Kenney,⁵³ museums and indigenous groups fail to agree on who should have physical control of indigenous cultural artifacts.⁵⁴ Current property doctrines lead to situations where museums deny indigenous groups access to ceremonial artifacts.⁵⁵ Museums bitterly fight for—and usually win—the right to retain their possession over these artifacts.⁵⁶ In order to address these concerns, Kenney proposes integrating intellectual property law theory with traditional property law theory for cultural objects.⁵⁷

However, the constructive possession doctrine may more easily resolve these disputes. For instance, under a stewardship concept, full control of an object is not necessary and does not guarantee possession. Although indigenous groups may not currently control some of the objects, they could still receive possession under an informal transfer-of-possession doctrine. Here, the court requires showing a cultural claim to an object for use rights without physical control. Museums would still be able to retain ownership once possession is decoupled from ownership. This compromise—which ensures that both sides' needs are met—is only possible under a stewardship concept, where physical control does not determine ownership.

To justify prioritizing stewardship's possession doctrines over other means of ownership, this Article contrasts stewardship with other theories. Next, this Article explores two distinct ownership concepts: dominium and stewardship.

IV. DOMINIUM

Analyzing the Roman legal concept of dominium and contrasting it with stewardship over property demonstrates the relationship between

52. Carpenter, *supra* note 38, at 1093.

53. Kenney, *supra* note 49, at 502.

54. *Id.* at 517.

55. *Id.* at 518.

56. *Id.* at 518–20.

57. *Id.* at 520–21.

possession and ownership concepts. This comparison is most vivid in the Christian and Jewish law context.

Alan Rodger claims, “[it] is well known that no ancient legal text contains a Roman definition of ownership.”⁵⁸ The Romans’ practical approach to property theory may have caused this failure to define ownership: their legal texts immediately delve into the distinctions between different forms of property and the legal rights in property.⁵⁹

Other Roman doctrines provide further insight on the Roman concept of ownership. Roman law contained 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 distinguish them. Ulpian, in the Digest misleadingly said, “[o]wnership has nothing in common with possession”⁶⁰ But possession was actually an important component of Roman ownership. It is possible that the Roman ownership concept grew out of the notion of possession. As stated in Justinian’s Digest:

The younger Nerva says that the ownership of things originated 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;

58. ALAN RODGER, OWNERS AND NEIGHBOURS IN ROMAN LAW 1 (1972).

59. See generally FRANCIS DE ZULUETA, INSTITUTE OF GAIUS II § 8 (W.M. Gordon & O.F. Robinson trans., 1988) (discussing the division of the subject of property). See, e.g., Dig. 7.1.1 (Paul, Vitellius 3)–8.6.25 (Paul, Views 5) (“Usufruct and the Way in Which a Man May Exercise It”); ALAN WATSON, THE LAW OF THE ANCIENT ROMANS 49–70 (1970) (providing a succinct summary of Roman legal doctrines concerning property); Peter Birks, *The Roman Law Concept of Dominium and the Idea of Absolute Ownership*, in ACTA JURIDICA 1, 2–3 (T. W. Bennett et al. eds., 1985) (discussing the “non-theoretical bias of the jurists”).

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 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.

Id. (footnotes omitted). 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 “[e]very 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).

60. Dig. 41.2.12.1 (Ulpian, Edict 70).

for such things forthwith become the property of those who first take possession of them.⁶¹

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.”⁶²

Differentiating between dominium and possession requires finding that possession was regarded as physical control whereas ownership was regarded as the ultimate right, the title to property. 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 a thing.”⁶³ Alternatively, dominium may be thought of as a stand-in for ownership. Possession could be seen as true ownership,⁶⁴ which could lead to dominium as ownership by law. The law independently recognized possession regardless of whether the possession was lawfully obtained.⁶⁵ As stated in the Digest: “It makes no difference in this interdict whether the possession against others is just or unjust. For every kind of possessor has by the virtue of being a possessor more right than the nonpossessor.”⁶⁶ This is because possession creates a presumption of ownership.⁶⁷ 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.⁶⁸

The Roman concept of *dominium directum et utile*⁶⁹ implied absolute⁷⁰ control of the property in its acquisition and in its possession. The civilian

61. Dig. 41.2.1.1 (Paul, Edict 54).

62. Dig. 41.3.3 (Modestinus, Encyclopedia 5).

63. Dig. 41.2.1 (Paul, Edict 54).

64. 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.

65. See generally DE ZULUETA, *supra* note 59, §§ 3–17 (W.M. Gordon & O.F. Robinson trans., 1988) (analyzing possession and how it is obtained).

66. Dig. 43.17.2 (Paul, Edict 65).

67. This is found even in other legal systems. See CODE CIVIL [CIVIL CODE] art. 2279 (Fr.) (“[e]n 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 nine-tenths of the law).

68. Dig. 41.2.35 (Ulpian, All Seats of Judgment 5).

69. See *Fairfax’s Devisee v. Hunter’s Lessee*, 11 U.S. 603, 618 (1812) (explaining “*dominium directum & utile*”).

writers in the Middle Ages characterized it as *utendi, fruendi, and abutendi*; or the right to use the thing, to have its fruits, and to consume it.⁷¹ The nature of dominium is oriented toward acts of control and occupation as opposed to mere legal constructs. Because of dominium's role in property ownership, many of the Roman legal methods of acquisition and possession relate to the demonstration of control. As Boris Kozolchik notes:

It was not until the 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. 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 *manu captum, mancipium, usucapio, and occupatio*. The latter of these acquisitions, occupation of land, was 'original' in the sense 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.⁷²

The early Romans were known as the *Quirites*, meaning spearmen,⁷³ and it was through acts of war and occupation that the Roman legal system spread. As Alan Watson said:

70. See Birks, *supra* note 59, at 1 ("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 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.")

71. See RICHARD PIPES, *PROPERTY AND FREEDOM* 11 (1999) (defining *dominium, utendi, and abutendi*). An early twentieth-century commentary posits that dominion in the Roman law consisted of "the unrestricted right of using, enjoying, and disposing of a thing." 2 CHARLES PHINEAS SHERMAN, *ROMAN LAW IN THE MODERN WORLD* 149–52 (1917). See also WILLIAM C. MOREY, *OUTLINES OF ROMAN LAW* 282–83 (2nd ed. 1914) (noting that the "plenary control" over an object represented in Roman law the technical rights of use, enjoyment, and disposition).

72. Boris Kozolchik, *Transfer of Personal Property by a Nonowner: Its Future in Light of its Past*, 61 TUL. L. REV. 1453, 1458–59 (1987) (internal footnotes omitted) (citing 1 R. VON JHERING, *L'ESPRIT DU DROIT ROMAIN DANS LES DIVERSES PHASES DE SON DÉVELOPPEMENT* 111–19 (3d ed. 1886)).

73. 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, *DAS EDICTUM*

Gaius is describing the *legis actio sacramento in rem* and he says that the rod which was laid on the object claimed, such as a slave, represented a spear, the symbol of lawful ownership, because they (i.e. the early Romans) considered to be pre-eminently theirs by lawful ownership what they took from the enemy Thus, in Gaius' view, in early times when these procedures were introduced, the instance *par excellence* of the acquisition of private ownership was what a man took from the enemy.⁷⁴

Like possession, dominium influences not only acquisition of property but also ownership uses and rights. Along with dominium of first possession comes the right to use the property, implying absolute control and capture.⁷⁵ With respect to owners' use rights, the common law follows this concept 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.⁷⁶

However, not everyone takes such an extreme view of the absolute control rights of property owners: some claim that restrictions exist on the use of private property. For example, an ancient Roman maxim intones "[s]ic utere tuo ut alienum non laedas, meaning that one should use one's

PERPETUUM 5 (Ein Versuch & Seiner Weiderherstellung eds., 3d ed. 1927) (explaining that certain legal solutions were required in rural areas, such as vindication proceedings for rural pieces of property).

74. ALAN WATSON, *THE LAW OF PROPERTY IN THE LATER ROMAN REPUBLIC* 65 (1968).

75. Steven T. Newcomb, *The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery, Johnson v. McIntosh, and Plenary Power*, 20 N.Y.U. REV. L. & SOC. CHANGE 303, 319 (1993).

76. Carpenter, *supra* note 38, at 1065–66 (alterations in original) (emphasis added) (footnotes omitted).

own property in such a way as not to injure the property of another.”⁷⁷ Moreover:

[T]he 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 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.⁷⁸

While dominium holds that property is owned only when it is fully controlled, stewardship offers a different way to regard property ownership.

V. STEWARDSHIP

Stewardship of property implies that possessors may not be the ultimate owners of property; rather, full ownership is invested in someone else, the so-called true owner.⁷⁹ Many commentators use this concept to argue for property-use limitations that are environmentally abusive or self-destructive.⁸⁰ The property stewardship concept also refers to types of property, such as cultural artifacts or inviolable properties, to highlight the lack of the possessor’s ownership.⁸¹

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 bailment doctrine. Although related, these two concepts are distinct. The stewardship-bailments concept is a common law concept that refers to

77. JESSE DUKEMINIER ET AL., PROPERTY 779 (8th ed. 2014). See also Paul Turner & Sam Kalen, *Takings and Beyond: Implications for Regulation*, 19 ENERGY L.J. 25, 41–42 (1998) (explaining that republicans like Franklin viewed property as a concept created by society and “the security of property had to take a secondary role to the needs of the community.”).

78. Ora R. Sheinson, *Lessons from the Jewish Law of Property Rights for the Modern American Takings Debate*, 26 COLUM. J. ENVTL. L. 483, 509–10 (2001) (footnotes omitted).

79. THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 81 (2007).

80. See Lynton Keith Caldwell, *Land and the Law: Problems in Legal Philosophy*, 1986 ILL. L. REV. 319, 322–23 (1986) (“Before the law can embrace the concept and practice of stewardship, a major shift in the prevailing popular assumptions regarding rights to land use must occur.”). See also Timothy Patrick Brady, *“But Most of It Belongs to Those Yet to Be Born:” The Public Trust Doctrine, NEPA, and the Stewardship Ethic*, 17 B.C. ENVTL. AFF. L. REV. 621, 624–27, 630, 633 (1990) (arguing that the common property concept in the public trust doctrine can effectively introduce the stewardship ethic to the law).

81. See *supra* Part III (discussing possession for cultural and indigenous properties).

the physical possession and transfer of personal property: the personal property, chattel, transfers from one person, the bailor, to another, the bailee, who subsequently possesses property.⁸² The concept usually appears when a person gives property to someone else for safekeeping.⁸³ Here, stewardship refers to the bailee's legal role, including possession and certain contracted rights and duties, but not ownership.⁸⁴

On the other hand, abstract stewardship lacks a contract between the owner and the possessor. Instead, abstract stewardship refers to a relationship, not contractual norms. One can become an abstract steward against one's will and without consideration from the true owner.

A. Stewardship and Religion

The stewardship concept of property is also associated with a religious *Weltanschauung*.⁸⁵ Given the *a priori* assumption that God owns all property, some posit that religion considers humans as stewards of God's property.⁸⁶ For instance, Frank Alexander "explores property law through the Christian framework of creation, fall, and redemption."⁸⁷ Moreover,

82. Zach Howe, *Deposits as Debts: The Peculiar Relationship Between Bank and Depositor*, 84 UMKC L. REV. 913, 919 (2016).

83. *Id.*

84. 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. 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 suffers loss of use of the property by relinquishing control of the property 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.

85. Carpenter, *supra* note 38, at 1077.

86. See generally Robin Attfield, *Christian Attitudes to Nature*, 44 J. HIST. IDEAS 369, 374, 377, 380 (1983) (discussing the debate among Christian thinkers about dominion over nature and stewardship).

87. Robert F. Cochran, Book Review, *Christianity and Law: An Introduction*, 25 J.L. & RELIGION 249, 251 (2010).

“[p]roperty, as a part of God’s creation, is ‘very good’ and we are called to be stewards of it.”⁸⁸ As Robert Cochran explains:

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 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.”⁸⁹

The Jewish concept of property stewardship expresses this view as well.

B. Stewardship and Jewish Law

Judaism subscribes to the stewardship concept⁹⁰ through its belief that God placed everything in this world at human disposal.⁹¹ However, along with the rights of use come responsibilities toward God, community, and the property itself.

A prime example of the stewardship concept within Judaism is the law of the Jubilee year. The Torah states that at the end of every 50th year, a cycle established when the Jews entered the land of Israel, all sold property shall revert to its previous owners.⁹² This illustrated 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 use it.⁹³

Within Jewish property law, Rabbis often work to construct laws, understanding that full control of property should be qualified. This qualification eradicates the destructive effects of an inordinate obsession with one’s private preserve, which weakens concern for others and creates

88. *Id.* (alteration is original).

89. *Id.* (alterations in original) (citing JOHN WITTE JR. & FRANK S. ALEXANDER, CHRISTIANITY AND LAW: AN INTRODUCTION 9 (2001)).

90. Phillip J. Bentley & David Ehrenfeld, *Judaism and the Practice of Stewardship*, in JUDAISM AND ENVIRONMENTAL ETHICS: A READER, 129–30 (Martin D. Yaffe ed., 2001).

91. See, e.g., *Genesis* 1: 26, 28 (Rev. Standard Version) (“Then God said, ‘Let us make man in our image, after our likeness; and let them have dominion over . . . all the earth, and over every creeping thing that creeps upon the earth . . . Be fruitful and multiply, and fill the earth, and subdue it . . .’”).

92. Bentley & Ehrenfeld, *supra* note 90, at 133. See also *Leviticus* 25:1–24 (declaring the 50th year as the Jubilee Year and detailing how property must be returned to its original owner).

93. Bentley & Ehrenfeld, *supra* note 90, at 133.

excessive legal and psychological barriers between people.⁹⁴ This qualification depicts the Jewish law system as a duty-based system, not rights-based. Either way, these stem from a stewardship property concept. Jewish property law not only restricted property use but also retained the power to transfer the use rights from one individual to another via *Hefker Bais Din*, a judge's discretionary ability to transfer property ownership.⁹⁵ Commentators explain that courts have the power to alter ownership rights without any formal legal transfer methods because the property is never fully in the possession of the individual.⁹⁶ Because the courts are charged with enforcing God's will and God is the ultimate owner of all property, the courts act as proxies to carry out property transfers.

The stewardship concept can be distinguished from the dominium concept in that it allows for more constructive forms of possession. This can be discerned by comparing three distinct legal doctrines, highlighting how the laws of possession distinguish ownership concepts.

VI. COMPARING ROMAN AND JEWISH LAW

Comparing Roman and Jewish legal systems highlights how the ownership concept influences possession doctrines. As has been discussed many times in academic writings,⁹⁷ the Roman and Jewish legal bodies share many similarities. First, they developed adjacent to one another geographically and chronologically,⁹⁸ and it is likely that they had reciprocal exposure, influencing one another at their earliest stages.⁹⁹ Second, both are closed, text-based legal systems that operate in similar

94. AARON KIRSCHBAUM, *EQUITY IN JEWISH LAW* 189 (Norman Lamm ed., 1991).

95. 1 TALMUD BAVLI, TRACTATE GITTIN 36b¹ (Hersh Goldwurm et al. eds. & trans., Mesorah Publications 1993).

96. 1 TALMUD BAVLI, TRACTATE BAVA BASRA 54b¹ n.8 (Hersh Goldwurm et al. eds. & trans., Mesorah Publications 1992) (positing that the power of the courts comes from the law that local rules must be obeyed).

97. See, e.g., Jay M. Harris, *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., 2003) (discussing the works of Shmuel Eisenstadt and the Jewish Law Society's reliance on Roman Law). See also ASHER GULAK, *YESODE HA-MISHPAT HA-'IVRI [FOUNDATION OF JEWISH LAW]* xi (1913).

98. See SHMUEL EISENSTADT, *CORPUS IURIS CIVILIS: INSTITUTIONES* 18–19 (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.).

99. See generally JAY M. HARRIS, *NACHMAN KROCHMAL: GUIDING THE PERPLEXED IN THE MODERN AGE* 113–22 (1991) (discussing history and influences during the development of Judaism). Some Jewish law scholars have disagreed with this approach. See Amihai Radzyner, *Between Scholar and Jurist: The Controversy over the Research of Jewish Law Using Comparative Methods at the Early Time of the Field*, 23 *J.L. & RELIGION* 189, 195–96, 199–206 (2007), for a general overview of this debate.

fashions. For these reasons, the two systems are used comparatively to highlight legal theories and to instruct the common law.¹⁰⁰ Therefore, the differences in these possession doctrines are even more striking and are traced to their differing ownership concept.¹⁰¹

100. 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, 817–19 (1993) (discussing how American legal scholars use Jewish law to reconstruct American legal theory); Neil W. Netanel & David Nimmer, *Is Copyright Property? — The Debate in Jewish Law*, 12 THEORETICAL INQUIRY L. 241, 250 (2011) (explaining how Jewish law does not have a general definition of property); J. David Bleich, *The Metaphysics of Property in Jewish Law: An Analysis of Kinyan*, 43 TRADITION 49, 52–53 (2010) (explaining how the concept of *kinyan* influenced American property laws). See generally Michael J. Broyede & Michael Hecht, *The Return of Lost Property According to Jewish and Common Law: A Comparison*, 12 J.L. & RELIGION 225, 226–53 (1995) (comparing the legal rules and jurisprudence in American common law with Jewish law for abandoned properties).

101. 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 possession and the Jewish law of Chazakah lie in the influence of dominium versus stewardship. 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. See Radzyner, *supra* note 99, at 236–37, for a discussion on the influence of Roman law on Jewish law. Radzyner quotes Rav Herzog, who dismissed Asher Gulak's theories, noting 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. R. Herzog criticizes Gulak's approach over a number of pages 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 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.

Id. (alteration in original) (footnotes omitted).

A. First Possession

The doctrine of first possession reveals the different concepts of ownership and its effect on possession. To analyze the doctrine of first possession, it is instructive to look at the classic¹⁰² case of *Pierson v. Post*.¹⁰³ 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.¹⁰⁴ The angry Post sued the interloper for the value of the fox on the theory that his pursuit of the fox had established a property right.¹⁰⁵ The majority disagreed, holding that actual possession was necessary to establish ownership.¹⁰⁶ The court said that the discussion should be the "simple question of what acts amount to occupancy, applied to acquiring right to wild animals[.]"¹⁰⁷

To answer this question, the court first turned to ancient Roman authorities. The majority quotes:

*Justinian's Institutes . . . and Fleta . . . [who] adopt the principle that 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. The same principle is recognized by Bracton.*¹⁰⁸

They then quote Puffendorf, who "defines occupancy of beasts *ferae naturae*, to be the actual corporal possession of them, and *Bynkershoek* is cited as coinciding in this definition." And, "[t]he 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."¹⁰⁹

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";¹¹⁰ and says that

102. This case is a fixture in most property casebooks. See, e.g., MERRILL & SMITH, *supra* note 79, at 81 (including *Pierson v. Post* in their Property casebook as a historic property law decision); see also OLIN L. BROWDER ET AL., BASIC PROPERTY LAW 28 (5th ed. 1989) (including *Pierson v. Post*).

103. *Pierson v. Post*, 3 Cai. 175, 177 (N.Y. Sup. Ct. 1805) (holding that the mere pursuit of a fox is not such an act of ownership).

104. *Id.*

105. *Id.*

106. *Id.* at 178.

107. *Id.* at 177.

108. *Id.*

109. *Id.* at 178.

110. *Id.*

although the ancients required actual possession, 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 naturae*, 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.¹¹¹

Although Justice Livingston, speaking for the dissent, eloquently argues for a more modern approach to the case,¹¹² the court ultimately adopts a rule from Roman law. First possession rules are common to a variety of legal schemes across the broadest range of cultures, including: Native American, African, Civil, and Islamic law.¹¹³ The common law preference for laws of first possession may find their root—as do many other common law rules¹¹⁴—in Roman law.¹¹⁵ The Roman law of first

111. *Id.* at 179.

112. *Id.* at 180–81. (“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* . . . 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.”)

113. Richard A. Epstein, *Property as a Fundamental Civil Right*, 29 CAL. W. L. REV. 187, 189 (1992). See also DEAN LUECK & THOMAS J. MICELI, PROPERTY RIGHTS AND PROPERTY LAW 14 (Polinsky & Shavell eds., 2004) (summarizing the range of cultures that use first possession as a basis for acquiring property); 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 for specific examples of cultures that use first possession as a basis for acquiring property); K. N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE 224–26 (5th ed. 1973) (examining first possession principles in Native American law, particularly how Cheyenne Tribes determined the property rights in horses found or taken during raids); K. Bentsi-Enchill, *The Traditional Legal Systems of Africa*, in 6 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).

114. See, e.g., CARL GÜTERBOCK, BRACTON AND HIS RELATION TO THE ROMAN LAW 35, 38 (Brinton Coxie trans., J.B. Lipincott & Co. 1979) (1866) (outlining Bracton’s commentary to show the influence of Justinian and Roman law in Bracton’s work); R. C. VAN CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW 89–92 (1973) (highlighting that English law worked essentially within the existing feudal framework, whereas continental law incorporated many extraneous elements).

115. See JOSHUA GETZLER, *Roman Ideas of Landownership*, in LAND LAW: THEMES AND PERSPECTIVES 81, 82–83 (Susan Bright & John Dewar eds., 1998) (expounding on the idea of *dominium* as the owner’s “‘absolute’ right to claim title and hence the possession and enjoyment of a thing”).

possession was formed by the concept of dominium and the idea that ownership rights go with absolute, corporeal control, which also requires actual control.¹¹⁶ To illustrate the effect that the dominium concept has on the law, compare the *Pierson* ruling with a Talmud ruling about first possession.

The Tractate Bava Basra¹¹⁷ Talmud records a case similar to *Pierson* within a discussion on business monopolies. The Talmud discusses a mill owner's right to shut down a new mill in the same neighborhood that causes a loss of revenue for the existing mill.¹¹⁸ "If a resident of a *mavoi*¹¹⁹ 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] . . . for he can say to him . . . You are cutting off my livelihood!"¹²⁰

The Talmud attempts to prove this law with a previous ruling that had forced fishermen to separate their nets: "If a fisherman discovered the lair of a particular fish and spread his net between the fish and his lair . . . [other fisherman] must distance their fishing nets from the fish . . . as far as the fish swims in one spell."¹²¹ This proves that we allow 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."¹²² Therefore, if a fisherman sets a trap with food near the fish's lair, the fish is already in his hands. If another fisherman takes the fish, it would be as if the second fisherman took the fish from the first fisherman, unlike opening a competing mill.

Although there is some discussion of the exact meaning of the Talmud,¹²³ the most authoritative interpretation of Rashi mirrors the reasoning of *Pierson v. Post*.¹²⁴ When the two fisherman compete over the

116. *Id.* at 82–83.

117. 1 BAVA BASRA, *supra* note 96.

118. *Id.* at 21b¹.

119. *Id.* An alley surrounded by several courtyards leading into the street. *Id.* at 20b n.10.

120. *Id.* at 21b¹.

121. *Id.*

122. *Id.*

123. *Id.* See also *id.* at 42 (including commentary by Tosafot and Rabbeinu Gershom).

124. *Id.* at 42 (including commentary by Rashi). 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

same fish, the first fisherman's expended effort, resources, and certainty of catching the fish gives him constructive possession as the true owner of the hunted fish.

To achieve first possession and subsequent ownership, the *Pierson* court required full control. 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 for actual possession, the majority chose the former, even at the benefit of "a saucy intruder."¹²⁵ The court relied on Roman legal authorities' dominium-based approach to possession, requiring actual control of the hunted animal. The Talmud, on the other hand, used the stewardship model of possession and therefore held that actual possession was unnecessary. Because stewardship enables ownership without full control or dominium, the Talmud instructs that the fisherman who expends effort and is likely to capture the fish, possesses the fish. The Talmud determines ownership based on the certainty of capture,¹²⁶ merely chasing and hunting does not satisfy anyone's definition of possession. But, when certainty combines with expended effort, the animal belongs to the hunter. This difference results from the possessory concept and the divergence between dominium and stewardship.

B. Adverse Possession

Adverse possession is another example of how different legal theories of possession enable divergent positions on ownership. Generally speaking, adverse possession is when one occupies someone else's property and uses it for a specific amount of time, thereby gaining possession of the land.¹²⁷ Today, all states recognize that when a possessor satisfies the adverse possession elements, the possessor assumes ownership of the property.¹²⁸

To acquire land through adverse possession, a possessor must prove a minimum of five elements, though some states require additional elements

a pride of place to Rashi's commentary and made it a point of departure for all other commentaries.

1 BAVLI TRACTATE NEDARIM Introduction (Hersh Goldwurm et al. eds. & trans., Mesorah Publications 2000).

125. *Pierson v. Post*, 3 Cai. 175, 181 (N.Y. Sup. Ct. 1805) (Livingston, J., dissenting).

126. 2 TALMUD BAVLI, TRACTATE GITTIN 59a, 60b (Yisroel Simcha Schorr et al. eds. & trans., Mesorah Publications 1993).

127. Thomas J. Miceli & C.F. Sirmans, *An Economic Theory of Adverse Possession*, 15 INT'L REV. L. ECON. 161, 162 (1995).

128. *Id.*

as part of an adverse possession claim.¹²⁹ The basic elements are described as follows: First, the possession must be *actual*.¹³⁰ There must be physical control and use of the disputed property for the duration of the entire statutory period.¹³¹ Second, the possession of the disputed property must be *hostile* to other competing claims to the property.¹³² Third, possession must be *open and notorious*, such that individuals who have competing claims actually know or should have known of the hostile possession.¹³³ Fourth, possession must be *exclusive*, such that others with competing claims to the property are wholly excluded.¹³⁴ Lastly, the possession must be *continuous*.¹³⁵

There are three economic justifications¹³⁶ for adverse possession. First, adverse possession encourages the beneficial use of property.¹³⁷ Second, adverse possession tends to increase the efficiency of real estate markets.¹³⁸ Finally, adverse possession protects the adverse possessor's reliance interests that accrued during the property's occupation.¹³⁹

129. *See* Unger v. Mooney, 63 Cal. 586, 595 (1883) (requiring taxes to be paid). *See also* Sparks v. Douglas & Sparks Realty Co., 166 P. 285, 286 (Ariz. 1917) (recognizing color of title as an element of adverse possession).

130. *DUKEMINIER, supra* note 77, at 148.

131. *Id.* at 149.

132. *Id.* at 150.

133. *Id.* at 148.

134. *Id.*

135. *See, e.g.,* Rodgers v. Threlkeld, 80 S.W.3d 532, 534–35 (Mo. Ct. App. 2002) (holding fact issues during the statutory period for adverse possession precluded summary).

136. 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.” Letter from Oliver Holmes, to William James (Apr. 1, 1907), *reprinted in* MAX LERNER, *THE MIND AND FAITH OF JUSTICE HOLMES* 417–18 (1946). 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.” JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* 45–46 (2000). 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.” JOSEPH WILLIAM SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* 166–71 (Richard A. Epstein et al. eds., 3d ed. 1993).

137. Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1127 (1984).

138. *Id.* at 1129.

139. *Id.* at 1131.

Adverse possession encourages property owners to put their land to productive use rather than allow the property to lie fallow.¹⁴⁰ Putting property to use benefits the economy.¹⁴¹ Adverse possession is heralded as “a wonderful example of reward to useful labor, at the expense of the sluggard.”¹⁴²

The second economic justification for adverse possession is that it creates an efficient real estate market with low transaction costs.¹⁴³ Again, adverse possession favors active possessors over passive owners.¹⁴⁴ Typically, the passive, absentee, owner will be harder to negotiate with 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.¹⁴⁵ Adverse possession creates certainty in the real estate market,¹⁴⁶ thereby increasing efficiency. “Adverse possession [reduces] the cost of establishing rightful ownership claims by removing the risk that ownership will be disputed on the basis of the distant past.”¹⁴⁷ Adverse possession also allows purchase prices to reflect land value rather than the costs of researching ownership and insurance against suits.¹⁴⁸ Third, by rewarding the adverse possessor’s

140. *Id.* at 1151.

141. *Id.*

142. 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.

143. Merrill, *supra* note 139, at 1129.

144. *See id.* at 1130 (noting that the property’s true owner, at a minimum, must “periodically . . . assert his right to exclude others”).

145. SINGER, PROPERTY LAW, *supra* note 136, at 166–71.

146. *Id.* at 166.

147. ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 162 (Denise Clinton et al. eds., 5th ed. 2008).

148. 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.

invested time, adverse possession protects reliance interests accrued during the property's occupation.¹⁴⁹

Aside from economic justifications, adverse possession's history also influenced the shaping of the doctrine. The common law subscribed to the Roman concept of dominium, enabling the law to privilege squatters' rights over those of the previous landowners. Moreover, adverse possession originates in the Roman law concept of *usucaption*.¹⁵⁰ "Under Roman law, dominion signified legal sovereignty and ownership."¹⁵¹ Dominion is the oldest recognized title and is the most indefinite and unrestricted right over a thing.¹⁵² Dominion remained in the last person to acquire it until another, acquired it through a similarly recognized process.¹⁵³

Romans viewed possession as a separate concept that had distinct legal consequences and connections to dominion. Dominion represented legal sovereignty, and possession represented factual sovereignty.¹⁵⁴ "Through derivative possession, tenants, lenders, and easement beneficiaries acquired present possessory interests, but certainly not in derogation of the ultimate rights of the owner."¹⁵⁵ Over time, possession connected to ownership.¹⁵⁶ "[L]egal rules developed to protect the interests of possessors against interference from strangers and even out-of-possession owners."¹⁵⁷ Roman law recognized that a possessor without dominion could still acquire dominion through possession for a sufficiently long time.¹⁵⁸ This is the concept of adverse possession.

Tracing the history of adverse possession leads to English law. The history of adverse possession in England dates to the 12th century. Then, a landlord could assert his title under a proprietary action, and a squatter could assert his possessory rights under a possessory action.¹⁵⁹ Over the last five centuries, the law has been developing favor for squatters, not landowners. This pattern is due to the doctrine's Roman foundation.

149. Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L.R. 611, 665–66 (1988).

150. Note, *International Art Theft Disputes: Harmonizing Common Law Principles with Article 7(b) of the UNESCO Convention*, 17 FORDHAM INT'L L.J. 129, 166 n.240 (1992).

151. Carol Necole Brown & Serena M. Williams, *Rethinking Adverse Possession: An Essay on Ownership and Possession*, 60 SYRACUSE L. REV. 583, 584 (2010).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

Even in American jurisprudence, the courts have used a Roman foundation to justify adverse possession. At the turn of the 20th century, the Supreme Court took up adverse possession in the state of New Mexico. The first case, *United States v. Chavez*,¹⁶⁰ discussed whether Mexican law contained adverse possession prior to the 1848 secession and, if so, whether the rule continued through statehood.¹⁶¹ *Chavez* held that the adverse possession principle came from “general jurisprudence, and is recognized in the Roman law and the codes founded thereon . . .”¹⁶² While the opinion referred to few American cases, it relies on Roman law for the conclusion. The Court in *United States v. Pendell* followed the *Chavez* precedent and relied on other American cases that had since developed.¹⁶³

Thus, the Roman dominium concept and its relation to possession have created the modern adverse possession doctrine. A legal system that did not prescribe to dominium could not have developed in the same way. To see dominium’s influence on adverse possession, return to Jewish law.

Jewish law also contains an adverse possession doctrine, *chazakah*.¹⁶⁴ On its surface, *chazakah* mirrors adverse possession except that *chazakah* requires a three-year statute of limitations.¹⁶⁵ However, deeper investigation reveals that they differ. Whereas adverse possession is a mechanism of land transfer, *chazakah* is not. *Chazakah* is only raised in support of a claim of true ownership.¹⁶⁶ 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.¹⁶⁷

Unlike adverse possession, meeting the criteria of *chazakah* in a vacuum will not effectuate a change in ownership.¹⁶⁸ Instead, a possessor must assert an additional claim with his *chazakah* argument.¹⁶⁹ *Chazakah* is only recognized to substantiate the companion claim of ownership.¹⁷⁰ The companion claim requires elements to warrant *chazakah* as proof of

160. *United States v. Chavez*, 175 U.S. 509, 509 (1899).

161. *Id.* at 520.

162. *Id.* at 523.

163. *United States v. Pendell*, 185 U.S. 189, 196–97 (1902).

164. See 1 BAVA BASRA, *supra* note 96, at Introduction to Chapter 3 (detailing legal features *chazakah* similar to those of adverse possession).

165. *Id.*

166. *Id.* at 28b¹.

167. *Id.* at 41a¹ n.4.

168. In adverse possession, meeting the requirements grants land ownership to the adverse possessor.

169. 1 BAVA BASRA, *supra* note 96, at 41a¹.

170. See *id.* (comparing *chazakah* to producing a deed to prove ownership).

ownership: the possessor must assert that he bought the property, at one time had the deed, but has since lost it.¹⁷¹

The Mishnah provides that “[a]ny *chazakah* [claim] not accompanied by a claim [of ownership] is not a [valid] *chazakah*.”¹⁷² The *Mishnah* continues to define *chazakah* claim boundaries by describing invalid *chazakahs*. 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.¹⁷³ In other words, if he originally lived on the land with the belief that it was ownerless, he would lose the *chazakah* claim even if he met its other elements.

However, if the possessor claims both that he has met the elements of *chazakah* and that the original owner sold him the land, but he has since lost the deed, the possessor will succeed.¹⁷⁴ 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.¹⁷⁵

The resulting doctrine is the conceptual antithesis of adverse possession. Where adverse possession removes ownership from the true owner and vests 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, squatting on the property is not enough to effect a property transfer.

C. Deathbed Bequests

Deathbed bequests are the final example. The laws of the *donatio causa mortis* are widely discussed¹⁷⁶ because they illustrate an interesting

171. *Id.*; see also *id.* at Introduction to Chapter 3 (reciting the common *chazakah* claim and listing the elements needed to establish the *chazakah*).

172. *Id.* at 41a¹.

173. *Id.*

174. *Id.*

175. *Id.* at 41a² (relating a failed *chazakah* claim with an insufficient underlying claim of ownership).

176. See, e.g., BROWDER ET AL., *supra* note 102, at 725 (explaining what delivery is necessary for a gift *causa mortis*); GRANT S. NELSON ET AL., *Methods of Transferring Property: An Overview*, in CONTEMPORARY PROPERTY (2d ed. 2002) (discussing *inter vivos* transfers, intestate succession, and testamentary wills as means for transferring property); SUSAN FLETCHER FRENCH & GERALD KORNGOLD, CASES AND TEXT ON PROPERTY 511 (6th ed. 2015) (discussing the revocability of gifts *causa mortis*).

twist on the laws of gift giving. As a rule, all gifts require valid delivery.¹⁷⁷ Scholars disagree about the rationale of the delivery requirement.¹⁷⁸ In most *inter vivos* (lifetime gifts) cases, courts have relaxed the formal requirement of manual delivery, allowing other methods as substitutes.¹⁷⁹ However, for *donatio causa mortis*, some courts adopt formalist views and reject all substitutes. *Foster v. Reiss* depicts this trend.¹⁸⁰ Here, an elderly lady on her deathbed wrote an informal letter to her husband and told her caretaker to

177. This requirement was judicially developed and was not enacted through legislation. See, e.g., *Howell v. Herald*, 197 S.W.3d 505, 508 (Ky. 2006) (citing decisions requiring delivery of a deed for property transfer to take effect); 15 RICHARD R. POWELL, POWELL ON REAL PROPERTY, Ch. 85 § 85.21 (Michael Allen Wold ed., 2000) (listing the three requirements of an *inter vivos* gift: intent to make a gift, delivery of the gift, and acceptance by the donee).

178. POWELL, *supra* note 177, § 85.21 (discussing the history of the delivery requirement). 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 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 indispensable 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, 805 (1941) (“To accomplish an effective gift of a chattel . . . delivery of the chattel is ordinarily required and mere donative words are ineffective.”). See also Philip Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 ILL. L. REV. 341, 348–49, 354 (1926) (discussing reasons for delivery).

179. Although manual delivery has not been completely negated, the courts have accepted many substitutes such as constructive or even symbolic delivery. See, e.g., *Coble v. Kauffman (In re Estate of Piper)*, 676 S.W.2d 897, 899 (Mo. Ct. App. 1984) (finding while delivery may be actual, constructive, or symbolic, there must be evidence to support the conclusion there was delivery); *Gruen v. Gruen*, 496 N.E.2d 869, 874 (N.Y. 1986) (stressing that courts should apply delivery rules flexibly and in light of the policy behind the rule); *Speelman v. Pascal*, 178 N.Y.S.2d 723, 726 (N.Y. 1961) (upholding a delivery consisting of an informal letter); *Jesse Parker Williams Hosp. v. Nisbet*, 7 S.E.2d 737, 742–43 (Ga. 1940) (holding that 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, *Gift Inter Vivos of a Chose in Possession by Delivery of a Key*, 19 MOD. L. REV. 394, 404 (1956) (where donor transfers to the donee possession of a key, such transfer operates as the transfer of possession); W. Lewis Roberts, *The Necessity of Delivery in Making Gifts*, 32 W. VA. L. REV. 313 (1926). See also Mechem, *supra* note 178, at 355 (stating that the existing case law supports the proposition that courts are accepting actions that satisfy the functional reasons behind delivery as substitutes for delivery).

180. *Foster v. Reiss*, 112 A.2d 553, 555 (N.J. 1955). See also MERRILL & SMITH, *supra* note 79, at 539, 542 (including and discussing *Foster v. Reiss*); BROWDER ET AL., *supra* note 102, at 712 (explaining *Foster v. Reiss*).

deliver the letter. The letter listed places in her house where she had hidden money and instructions on its use.¹⁸¹ It read:

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 a 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 out everything.

Your kissing, loving wife, Ethel Reiss 1951 – 1 - 4.¹⁸²

The husband received the note and took possession of the money. The elderly lady died shortly thereafter. Her children from a previous marriage sued the husband, alleging that the money he had taken belonged to them. The court struggled to validate the gift because the gift was never formally delivered from the woman's possession to the husband. Instead, the husband took the gift after receiving the letter's instructions. The majority held that the gift was invalid, even though the donor intended for the donee to receive the gift and had instructed him to take possession of the money. The court reasoned that the gift failed because it was not manually delivered. There, the court adopted a strict formalist approach.¹⁸³

Not all courts have agreed with the *Foster* decision. Many courts have upheld deathbed bequests so as to realize the donor's intentions even without formal delivery.¹⁸⁴ Although the current trend is not conclusive,

181. John J. Sciallo, *Gifts—Causa Mortis—Delivery*, 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).

182. *Foster*, 112 A.2d at 554–55.

183. *Id.* at 555.

184. The Wyoming Supreme Court held that since

a gift causa mortis, too, cannot come into the enjoyment of the donee till after the death of the donor . . . delivery of the gift, accordingly, cannot 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 purposes of evidence in gifts causa mortis.

other cases resulted in similar decisions.¹⁸⁵ One such case is *In re Estate of Link*.¹⁸⁶ The court held that stating an intention to give engagement and wedding rings does not satisfy the delivery requirement for a *donatio causa mortis*.¹⁸⁷ Similarly, courts in Missouri¹⁸⁸ and Virginia¹⁸⁹ required strict formal delivery for deathbed bequests. These more recent decisions relied on some of the *Foster* reasoning. However, other courts¹⁹⁰ adopted a functionalist view of delivery. For example, the Virginia Supreme Court¹⁹¹ 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

Begovich v. Kruljac, 267 P. 426, 429 (Wyo. 1928). The court, therefore, allowed the gift to transfer even without the formal delivery since there was evidence of the intention of the donor. *Id.* See also *Pushcash v. Dry Dock Sav. Inst.*, 140 Misc. 579, 581 (N.Y. Civ. Ct. 1931) (holding that manual delivery is not always necessary if there is apprehension of the donor’s death or if the donor is in impending peril). 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.” *Foster*, 112 A.2d at 562 (Jacobs, J., dissenting). The dissent is quoted in the case of *Whitney v. Can. Bank of Commerce*, where the Court upheld a *donatio causa mortis* that was not formally delivered. *Whitney v. Can. Bank of Commerce*, 374 P.2d 441, 443 (Or. 1962). 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. *Id.*

However, as recently as 2011, the decision in *Foster* was still quoted in court opinions. See *Bhagat v. Bhagat*, No. C-179-03, 2011 WL 1529857, at *7 (N.J. Super. Ct. App. Div. Apr. 25, 2011) (referencing the court in *Foster* saying that “[u]nless it is impossible or impractical, delivery of the property gifted is required”). See also *In re Estate of Link*, 746 A.2d 540, 544 (N.J. Super. Ct. Ch. Div. 1999) (quoting *Foster*, 112 A.2d at 558) (“[Decedent] never attempted a delivery in any way. . . . plaintiff argues this is a situation which ‘is incompatible with the performance of such a ceremony’”); *Scherer v. Hyland*, 380 A.2d 698, 700 (N.J. 1977) (contrasting the traditional manual delivery requirement in *Foster* with the contemporary evidence of intent requirement in the present case).

185. See *Schenker v. Moodhe*, 200 A. 727, 730 (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). See also *Keepers v. Fid. Title and Deposit Co.*, 28 A. 585, 587 (N.J. 1983) (arguing that delivery of a key was not considered enough of a delivery for a *donatio causa mortis*); W.E. Shipley, Annotation, *Delivery as Essential to Gift of Tangible Chattels or Securities by Written Instrument*, 48 A.L.R. Fed. 2d 1405 § 9 (1956) (explaining an informal instrument).

186. *In re Estate of Link*, 746 A.2d at 546.

187. *Id.*

188. *Slager v. Allen*, 220 S.2d 752, 757 (Mo. Ct. App. 1949) (holding that, prior to the donor’s death, the third party should accept the gift on the donee’s behalf).

189. *Woo v. Smart*, 442 S.E.2d 690, 693 (Va. 1994) (internal citations omitted) (holding that a check does not constitute a valid delivery for a *donatio causa mortis*).

190. See, e.g., *McCarton v. Estate of Watson*, 693 P.2d 192, 194 (Wash. Ct. App. 1984) (holding that intention to deliver a gift coupled with constructive delivery should be enough to validate a *donatio causa mortis*).

191. *Brown v. Metz*, 393 S.E.2d 402, 404 (Va. 1990) (addressing whether a key to a deposit box constitutes valid delivery).

that “[i]n determining whether a gift *causa mortis* has occurred, we are guided by principles of reason and common sense as applied to the facts of each case.”¹⁹² Although courts vacillate between formalist and functionalist views on deathbed bequests, they all agree that deathbed bequests are not regular gifts.

The *Halacha* (Jewish Legal Code) contrasts with the common law approach to *donatio causa mortis*. An exploration of *Halacha* reveals an almost anti-formalist approach toward deathbed bequests. The *Mishna*¹⁹³ in *Bava Basra*¹⁹⁴ discusses *deyathiqi*, which is Greek for will and testament. The Talmud¹⁹⁵ in *Bava Metziah*¹⁹⁶ explains that the *deyathiqi* is a gift that is given from the donor’s deathbed and is only activated by the donor’s death.¹⁹⁷ Later, in the Talmudic period, a gift in contemplation of death was referred to as a *matnas schiv mera*.¹⁹⁸ The *donatio causa mortis* found in the Talmud shares many similarities with the common law version: both hold that the gift retroactively invalidates if the donor recovers.¹⁹⁹ They differ²⁰⁰ on the importance of words: under *matnas schiv mera*, the donor transfers the gift by words alone,²⁰¹ and the oral communication effectuates the transaction.²⁰² This contrasts with the Talmudic Law requirement of

192. *Id.* at 404.

193. THE MISHNAH (Herbert Danby trans., 1933).

194. See 1 BAVA BASRA, *supra* note 96, at Introduction (describing the subject matter of Tractate Bava Basra).

195. See THE MISHNAH, *supra* note 193, at xiii–xxxii (relating an in-depth history of the Mishnah).

196. 2 TALMUD BAVLI, TRACTATE BAVA METZIA xxxiii (Hersh Goldwurm et al. eds. & trans., Mesorah Publications 1992) (defining Metziah as “the middle gate”).

197. See REUVEN YARON, GIFTS IN CONTEMPLATION OF DEATH IN JEWISH AND ROMAN LAW 22–25 (1960) (comparing the texts found in Ancient Greek Testaments to the texts of the ones mentioned in the Talmud).

198. *Id.* at 28, 29.

199. *Id.* at 83.

200. The Roman law also allowed the gift to be effectuated informally in certain circumstances, for example for soldiers, where the Talmudic law permits gift transfer through informal delivery. An additional difference is that the *matnas schiv mera* must be a total disposition of the donor’s property. See 3 TALMUD BAVLI, TRACTATE BAVA BASRA, 147a² (Hersh Goldwurm et al. eds. & trans., Mesorah Publications 1994) (concluding that a *matnas schiv mera* must be the entire disposition of property to be effectuated).

201. 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 *matnas schiv mera* can be effectuated even on the Sabbath, a time when traditional transactions are prohibited. *Id.* That would seem to indicate that the oral delivery of the *matnas schiv mera* 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, *matnas schiv mera*, does not require a *kinyan*, and would indicate a total lack of delivery for the *matnas schiv mera*.

202. 3 BAVA BASRA, *supra* note 200, at 151a³, 174b⁴–175a¹. See also 1 TRACTATE GITTIN, *supra* note 95, at 13a¹–a², 15a¹ (expanding on cases where informal property transfers are valid).

strict formalism. There, the transfer of possessions requires a *kinyan*, or an act of acquisition.²⁰³

The Talmud explores the history and legal reasoning behind the lack of formalism in deathbed bequests.²⁰⁴ It concludes that the lack of a required formal delivery was a rabbinic exception created out of fear that the donor “will lose his mind.”²⁰⁵ As occurs often in Talmudic commentaries, this nebulous statement is interpreted in four ways.²⁰⁶ The accepted explanation is that the Tannaim (Rabbis of the *Mishnah*) were concerned about the potential health effects on the terminally ill donor.²⁰⁷ The rabbis avoided the fear of fraud found by requiring two witnesses to testify to the bequest.²⁰⁸

The distinctions between the common law and Jewish law doctrines of the *donatio causa mortis* can be traced to their differences in ownership theory. The property stewardship theory allowed Jewish law to formulate rules of transfer that did not require actual or physical acts of transfer. This enabled the rabbis to decree that a dying donor could transfer property by verbal wishes alone.

203. See YARON, *supra* note 197, at 34–36 (introducing *ainyan sudar* as a new mode of acquisition that requires only symbolic and constructive delivery instead of traditional manual delivery).

204. See 3 BAVA BASRA, *supra* note 200, at 135b¹, 147b¹ (resolving the law of *matnas schiv mera* as Rabbinic, rather than textual in origin). At the beginning of the discussion, the Talmud attempts to find a Biblical origin for the *matnas schiv mera*, possibly as a reaction to the Greek and Roman laws that were extant at the time of the Talmud and to prove that there was a Jewish origin. *Id.* at 147b¹. See also YARON, *supra* note 197, at 46–47, 194 (discussing how the concept of the *matnas schiv mera* was taken from the Greeks and the Egyptian dispositions in contemplation of death).

205. 3 BAVA BASRA, *supra* note 200, at 147b¹.

206. See *id.* for a discussion of one of one the ways. See also *id.* at 151a² (discussing what happens when one makes a deathbed bequest). Rashbam reasons that the Talmud might mean that, if we do not allow the transfer to go through, there is a possibility the donor may die or become incapacitated before he is able to complete a formal *kinyan*. Rashbam was not satisfied with this answer, so he explains the Talmud means that the Rabbis were concerned about the potential health effects of stress on the donor should his wishes not be carried out. The Rashbam 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, 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. *Id.* 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 whether they meant that this will exacerbate the current illness and therefore lead to ill effects on the donor’s health. Rashbam seems to indicate that the overarching concern is the illness that the terminal patient is currently afflicted with. However, Rabbeinu Gershom 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.

207. See generally THE CODE OF MAIMONIDES, BOOK TWELVE, THE BOOK OF ACQUISITION §§ 8.2, 8.24 (Julian Obermann ed., Isaac Klein trans., 1951) (finding that one’s words, spoken at “the point of death,” will be ratified after death).

208. YARON, *supra* note 197, at 63.

This argument is weakened by the fact that both common law and Roman law allowed informal transfers for *inter vivos* gifts *donatio causa mortis*, respectively.²⁰⁹ Yet, the stewardship concept played a significant role in the *matnas schiv merah* of Jewish law because, within the jurisprudence of Jewish inheritance laws, a deceased person's possessions belong to God. According to many of the commentators, individuals may not own possessions after death. Instead, the property reverts back to God, who dictates how to apportion it. This concept rationalizes the practice of dishonoring a donor's wishes if they conflict with the Torah's instructions.²¹⁰ Further, stewardship's informality explains the lack of formalism in the rabbinic doctrine of deathbed bequests. Because the property reverts back to God at death anyways, the donor does not need to exercise delivery to effectuate a transfer. Although there could be other motivations for *matnas schiv merah*, they do not preclude the possibility that stewardship figured prominently in the formulation of this doctrine. Finally, divergence from the Roman doctrine is not dispositive of other foundations for the same law within different legal systems.

CONCLUSION

Baseline paradigms significantly shape legal analysis. Through the Talmudic law comparison, it is clear that different concepts of ownership have impacted the formation of possession doctrines. Depending on whether the underlying concept is dominium or stewardship, the law changes dramatically. Property scholars and judges should keep in mind this idea when analyzing the effect of stewardship on indigenous property. A constructive possession doctrine can resolve issues in these artifact disputes.

209. See Dig. 29.1.1 (Ulpian, Edict 45) (quoting Trajan who said that "following the openness of my heart towards those excellent and most faithful fellow soldiers . . . that whatever the way in which they made their wills, their wishes should be confirmed. Therefore, let them make their wills in any way they wish . . . and let the bare wishes of the testator suffice to settle the distribution of their property").

210. 3 BAVA BASRA, *supra* note 200, at 130a¹.