2011

Finding Possession: Labor, Waste and the Evolution of Property

Jill M. Fraley
Washington and Lee University School of Law, fraleyj@wlu.edu

FINDING POSSESSION: LABOR, WASTE, AND THE EVOLUTION OF PROPERTY

JILL M. FRALEY*

I. ABSTRACT

Although possession has long been intimately linked to labor, recent historical work on land claims during the sixteenth and seventeenth centuries suggests that the clash of divergent legal cultures of possession drove the two apart. This clash yielded an American concept of possession much more deeply connected to industrialization than the traditional understanding of labor. By providing evidence of how our concept of labor was industrialized, this article questions the outcomes in modern possession cases, particularly as they impact development and environmental preservation in rural areas.

II. INTRODUCTION

Within the common law, our theoretical justifications for private property tend to assume an initial blank slate and, from there, elaborate a defensible rule of first possession.[1] This primacy of possession has been justified on a number of grounds from economic efficiency[2] to self-

---

* The author will be joining the faculty of Washington & Lee University in the summer of 2011, teaching property and legal history. The author benefited from the comments of Robert Gordon, Bruce Ackerman, Dwight Billings, and Robert Ellickson, on previous drafts, as well as conversations with Carol Rose, Thomas Merrill, and George Priest. Thanks are also due to colleagues Damon Gross, Kristin Kuczenski, Sarah Hammond, and Diane Desierto. Portions of the research for this paper were previously presented in the Yale Forum for International Law, as well as at Ab Initio, hosted by the McNeil Center and the University of Pennsylvania Law School. The author is very grateful for the comments of colleagues in both venues, with particular thanks to Sally Gordon. Additionally, the author is grateful to the Robert F. Schalkenbach Foundation for support.

[1] Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1221–22 (1979) [hereinafter Epstein, *Root of Title*]. This assumption in property tends to rely strongly on a narrative framework rather than a scientific or analytical one. *See* Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37, 37–38 (1990) [hereinafter Rose, *Property as Storytelling*].

[2] *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 36–45 (5th ed. 1998), *reprinted in* PERSPECTIVES ON PROPERTY LAW 54, 54–55 (Robert C. Ellickson et al. eds., 3d ed. 2002) *(continued)*

actualization and personhood[3] to communication.[4] Such an elaboration of competing theories results, in part, from the dominant role of first possession rules in establishing property rights across many different cultures and legal systems.[5] Indeed, first possession rules are common to a variety of legal schemes across the broadest range of cultures—from Native American to African law and from Civil to Islamic law.[6] Even in the ancient era, there are indications to suggest the first occupation of a parcel of land generated a right of ownership,[7] and in the modern world, first possession rules have spread from property in land to other interests such as oil and gas,[8] water rights,[9] and wildlife.[10] Therefore, Hume,

---

(discussing how a theory of first possession creates efficiency and generates economic value).

[3] MARGARET JANE RADIN, REINTERPRETING PROPERTY 1 (1993). A self-actualization and personhood theory of property "connects ownership with central idelogical commitments of liberal thought, particularly with notions of freedom and individualism." *Id.*

[4] *See* Rose, *Property as Storytelling*, *supra* note 1, at 38–39 (taking into account that philosophers use narratives to communicate principles of property).

[5] Dean Lueck, *The Rule of First Possession and the Design of the Law*, 38 J.L. & ECON. 393, 393–94 (1995).

[6] Richard A. Epstein, *Property as a Fundamental Civil Right*, 29 CAL. W. L. REV. 187, 190 (1992). See Lueck, *supra* note 5, at 394, for a summary of the range of cultures that use first possession as a basis for acquiring property. For specific examples of cultures that use first possession as a basis for acquiring property, see Jacob H. Beekhuis, *Civil Law*, *in* 4 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: PROPERTY AND TRUST 3, 3–21 (Frederick H. Lawson et al. eds., 1973) (providing a historical progression of property rights in civil law); KARL N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE 224–26 (5th ed. 1973) (showing that despite conflicting testimony, first possession principles appear to have existed in some Native American law, particularly in how the Cheyenne Tribes determined the property rights of horses found or taken during raids); K. Bentsi-Enchill, *The Traditional Legal Systems of Africa*, *in* 4 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: PROPERTY AND TRUST 68, 94–95 (Frederick H. Lawson et. al. eds., 1973) (noting that acquisition of property in African Tribes involved first possession or settlement).

[7] *See* sources cited *supra* note 6.

[8] *See* Hammonds v. Cent. Ky. Natural Gas Co., 75 S.W.2d 204, 205 (Ky. Ct. App. 1934). Indeed, historically courts have compared the capture of wild animals to drilling for oil and gas while developing doctrines of property. *See id.* at 206.

[9] *See, e.g.*, Eddy v. Simpson, 3 Cal. 249, 252 (Cal. 1853) (noting first occupancy as the primary rule of water rights).

Sugden, and others have argued that first possession rules are in some way embedded with a "natural prominence."[11]

Although we have strongly favored first possession as a means for understanding and justifying our system of private ownership, this justification for property is by no means beyond question. Richard Epstein has argued that there is no moral justification for first possession rules, even though he acknowledges that there is a strong practical and intuitive appeal to such rules.[12] His argument echoed the more ancient one of Blackstone, who suggested that our embrace of the first possession theory carried with it an air of desperation.[13] Blackstone believed we put such an emphasis on possession that "we seem afraid to look back at the means by which it was acquired, as if fearful of some defect in our title."[14]

Both Epstein and Blackstone strongly favored an opportunity to examine theories of possession in light of their evolution and historical entrenchment.[15] Yet, in the decades since, our theories of property have continued to elaborate philosophical and theoretical justifications for first possession rules without substantially engaging the question of what possession has meant through time.[16] Thus, this article is not an attempt to

---

[10] Pierson v. Post, 3 Cai. 175, 175–76 (N.Y. Sup. Ct. 1805). The quintessential case of first possession rules is often considered to be *Pierson v. Post*, which is a classic of student property texts and involves the capture of a wild fox. Angela Fernandez, *The Lost Record of* Pierson v. Post, *The Famous Fox Case*, 27 LAW & HIST. REV. 149, 149–50 (2009).

[11] *See, e.g.*, James E. Krier, *Evolutionary Theory and the Origin of Property Rights*, 95 CORNELL L. REV. 139, 155 (2009) (discussing how Sugden agreed with Hume that there is a "natural prominence" in the assignment of persons, objects, and possession).

[12] Epstein, *Root of Title*, *supra* note 1, at 1240–41.

[13] WILLIAM BLACKSTONE, 2 COMMENTARIES *2–11 (1776), *reprinted in* PERSPECTIVES ON PROPERTY LAW 45, 46 (Robert C. Ellickson et al. eds., 3d ed. 2002) (discussing how a theory of first possession creates efficiency and generates economic value).

[14] *Id.* There is a certain oddity to the idea of first possession as a justification for title to private property. To summarize Henry George's argument: to have the earth laid out in claim by a first generation when countless more will follow seems an odd proposition in the long term. HENRY GEORGE, PROGRESS AND POVERTY 344 (1929).

[15] See Epstein, *Root of Title*, *supra* note 1, at 1241, for his specific suggestions in regards to this inquiry. *See also* BLACKSTONE, *supra* note 13, at 46.

[16] *See infra* Part V. When possession has been examined, our focus has fallen on adverse possession cases, although generally without any awareness of an evolving definition. *See, e.g.*, 16 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 91.01 (Michael Allen Wolf ed., 2010) (providing a definition of adverse possession and how collective acts over a period of time can establish ownership). A more limited inquiry has focused on the meaning of possession within adverse possession cases, primarily, although not exclusively,

(*continued*)

join the many voices that have justified or criticized first possession rules but rather an attempt to answer the narrow, and yet, critical question of what we have meant by possession: to examine theories of possession with an eye to both socio-historical circumstances and legal evolution.

Building on Martin Horowitz's study of the transformation of the common law in America during the nineteenth century, scholars have investigated how property doctrines—including our concepts of possession—incorporate preferences for industry, and thereby, detrimentally impact current environmental protection initiatives.[17] Such work is critical to understanding how current property doctrines implicate particular views of land and natural resources—including moral perspectives. Unfortunately, most contemporary works stop short of questioning Horowitz's launching point in post-revolutionary America.[18] As Richard Powell lamented more than a decade ago, there has been very little historical work on the earliest era of land law in America. Yet, there is strong evidence to suggest that significant and driving doctrinal changes occurred long before the American Revolution. Drawing out some of this lost period in the legal history of property law, this article argues that the transformation of the common law in America began before the revolutionary era—driven by both increasing industrialization and the conflict of imperial powers seeking natural resources in the New World.[19]

---

within the later periods and describing some of the uses of land that contribute to adverse possession claims. *Id.* See William G. Ackerman & Shane T. Johnson, *Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession*, 31 LAND & WATER L. REV. 79, 106–12 (1996), for how the meaning of possession and time provisions differ substantially across the states.

[17] *See, e.g.*, John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 520 (1996) [hereinafter Sprankling, *Antiwilderness*]; John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 817 (1994); Ackerman & Johnson, *supra* note 16, at 79–80.

[18] *See, e.g.*, Wythe Holt, *Morton Horwitz and the Transformation of American Legal History*, 23 WM. & MARY L. REV. 663 (1982); Jenny B. Wahl, *Twice-Told Tales: An Economist's Retelling of the Transformation of American Law, 1780-1860*, 37 TULSA L. REV. 879 (2002).

[19] *See* Sprankling, *Antiwilderness*, *supra* note 17, at 523. John Sprankling argues that the wilderness context in America was significant in adoption of the common law within America. *Id.* The intent of this paper is not to disagree with Sprankling's conclusions regarding the significance of the American wilderness in the adoption of the common law but rather to add to Sprankling's insights by drawing out the importance of both natural

(*continued*)

Part III of this article outlines the traditional literature on the primacy of possession and then engages the common law understanding of possession, particularly as it has intersected with a labor-ownership theory of property. This section argues that prior to colonization, the British concept of possession was strongly aligned with an understanding of labor as indicative of possession. Part IV introduces the concept of waste—a lesser-known common law property doctrine—which flowed from the association of labor and possession. Part V follows the evolution of the British concept of possession as it encountered colonial North America and increasing industrialization. This section demonstrates how pressures of industrialization and the clash of divergent legal cultures of possession during the colonial era drove the concepts of possession and labor apart. As a result, the concept of private property rooted in possession that took hold in developing American law cannot be traced entirely to either the British heritage or revolutionary philosophy and politics but rather significantly evolved through the process of settlement, particularly through the colonial contest for natural resources. Yet, our cultural connotations still associate private property with a labor theory of possession in ways that affirm the primacy and nearly absolute inviolability of private property. Finally, Part VI considers how this historical evolution of possession is relevant to our modern struggles with private exploitation of natural resources.

III. POSSESSION & THE ROOT OF OWNERSHIP

One need not read far in the common law literature of property to find tribute to the primacy of rules of first possession.[20] The right of exclusive possession is "the bedrock of English land law"[21] or in the words of Epstein, "the backbone of the common law system of property rights."[22] In *Sabariego v. Maverick*,[23] a trespass case decided by the U.S. Supreme Court in 1887, the Court reasoned that "first possession should in such

---

resources and the context of the imperial clash in the Appalachian Mountains during early colonization.

[20] Epstein, *Root of Title*, *supra* note 1, at 1244.

[21] Hunter v. Canary Wharf Ltd., [1997] A.C. 655 (H.L.), 703 (appeal taken from Eng.). With that said, Carol Rose has argued that Blackstone would have seen the right of exclusive possession as an "ideal type rather than a reality." Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 604 (1998).

[22] Richard A. Epstein, *How to Create—or Destroy—Wealth in Real Property*, 58 ALA. L. REV. 741, 742 (2007).

[23] 124 U.S. 261 (1887).

cases be the better evidence of right" because such a conclusion was "the just and necessary inference of law."[24] In Blackstone's words, "[O]ccupancy is the thing by which the title was in fact originally gained."[25] Further back, the English preference for rules of first possession may find their root in Roman law,[26] which was highly influential on both civil and common law systems.[27] Its central concept was the idea of *dominium*, or the right to full control and to exclude others.[28]

A. Definitions of Possession

With first possession serving as such a staple of the common law, we have tended to assume that it is a well-understood concept.[29] Yet, our many affirmations of possession as a bedrock principle shed more light on the *rights obtained* by possession rather than on the meaning of possession. Perhaps we are, as Blackstone once said, afraid of looking too closely because we have been oddly comfortable with a circular definition.[30] Property is defined in terms of possession, and possession is defined in terms of property.[31] Consider Merriam-Webster's musings on the subject:

> **Possess**: Etymology: 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) a: to have and hold as property: own; b: to have as an attribute, knowledge, or skill; 2) a: to take into one's possession; b: to enter into and control firmly: dominate.[32]

---

[24] *Id.* at 298.

[25] BLACKSTONE, *supra* note 13, at 51.

[26] *See* Joshua Getzler, *Roman Ideas of Landownership*, *in* LAND LAW: THEMES AND PERSPECTIVES 81, 81–83 (Susan Bright & John Dewar eds., 1998).

[27] *Id.*

[28] *Id.*

[29] O. Lee Reed, *What is "Property"?*, 41 AM. BUS. L.J. 459, 498 (2004).

[30] BLACKSTONE, *supra* note 13, at 46.

[31] Epstein, *Root of Title*, *supra* note 1, at 1222, 1227. Epstein has also criticized first possession theories of property as circular, but his argument rests on the association of possession and labor. *Id.* at 1225–28. Epstein argues that "[t]he labor theory is called upon to aid the theory that possession is the root of title; yet it depends for its own success upon the proposition that the possession of self is the root of title to self." *Id.* at 1227.

[32] *Possess Definition*, MERRIAM-WEBSTERDICTIONARY.COM, http://www.merriam-webster.com/dictionary/possess?show=0&t=1288331078 (last visited Nov. 1, 2010).

> **Property**: Etymology: Middle English *proprete*, from Anglo-French *proprete*, from Latin *proprietat-*, *proprietas*, from *propius* . . . 2) a: something owned or possessed; specifically: a piece of real estate; b: the exclusive right to possess, enjoy, and dispose of a thing: ownership; c: something to which a person or business has a legal title.[33]

A British case from 1919, *In re Southern Rhodesia*,[34] is an excellent example of the confusion. When the court was challenged to determine whether a group of natives had possession of the land at issue, the court found that they did not have possession because they did not have a system of property that the Europeans recognized.[35] They did not have possession of the land specifically because they did not have "transferable rights of property as we know them."[36] Similarly, the U.S. Supreme Court met the same quandary when interpreting an early treaty in *Foster v. Neilson*.[37] In *Foster*, the court engaged the different notions of possession, asking of the French claims:

> What period is referred to? Did it mean at the period when the enterprising La Salle first descended the Mississippi, which the French considered the first possession; or when a few adventurers endeavoured to establish a settlement at Biloxi, which was speedily abandoned; or when her restless monarch, stretching his influence from the northern lakes to the Gulf of Mexico, was labouring to effectuate his gigantic project of attaining the ascendancy over the entire continent?[38]

Black's Law Dictionary has defined an occupant as equivalent to one "who can control what goes on on premises."[39] Frustratingly, Black's

---

[33] *Property Definition*, MERRIAM-WEBSTERDICTIONARY.COM, http://www.merriam-webster.com/dictionary/possess?show=0&t=1288331078 (last visited Nov. 1, 2010).

[34] *In re* Southern Rhodesia, [1919] A.C. 211 (P.C.) (appeal taken from the unrecognized nation, Rhodesia).

[35] *Id.* at 233–34.

[36] *Id.* at 234.

[37] 27 U.S. 253, 273–74 (1829).

[38] *Id.* at 269.

[39] BLACK'S LAW DICTIONARY 973 (9th ed. 2009); *see* Smith v. Sno Eagles Snowmobile Club, Inc., 823 F.2d 1193, 1197–98 n.7 (7th Cir. 1987) (applying Black's definition of occupant and discussing possession in the context of determining an "occupant").

definition points to the distinction between who *can* control a property and who has *a right* to control the property,[40] when in fact, the later is often derived from the former. Possession is not such an easy thing to ascertain.

Such confusion is particularly notable because the most literal interpretation is not physically possible. To possess means to have and to hold, to sit upon—not a definition that works literally for the appropriation of more than a few square feet of land at the most.[41] Indeed, when the term "possess" has been used within legal regulations, it has often been found difficult to establish.[42] Consider the issue as a hypothetical: does Sam possess a new uncharted and uninhabited island, measuring 2,000 acres, when he is shipwrecked on the shore? Does he possess the part where he has built a small lean-to of tree branches? The part where he forages for fruits, berries, and fresh water? Or only the part where he sits day after day on the tallest point, hoping for a glimpse of a ship?

B. Theories of Possession

With possession lacking substantial definition, it has been noted that the idea of a rule of first possession is misleading and that "title more often also depended upon labor, cultivation, and improvement."[43] In reality, possession is more of a legal metaphor—a stand in for a much more extensive and culturally contingent concept.[44] In its most basic sense,

---

[40] BLACK'S LAW DICTIONARY, *supra* note 39, at 973, 1046.

[41] *Id.* at 1046.

[42] *See, e.g.*, Donald W. Baker, *Some Thoughts on Agricultural Liens Under the New U.C.C. Article 9*, 51 ALA. L. REV. 1417, 1432 n. 48 (2000). There are, of course, a number of musings on precisely what it means to possess a handgun within the meaning of criminal statutes. *See, e.g.*, Jenny Miao Jiang, *Regulating Litigation Under the Protection of Lawful Commerce in Arms Act: Economic Activity or Regulatory Nullity?*, 70 ALBANY L. REV. 537, 559–60 (2007).

[43] James R. Rasband, *Questioning the Rule of Capture Metaphor for Nineteenth Century Public Law: A Look at R.S. 2477*, 35 ENVTL. L. 1010, 1012 (2005). The emphasis on labor may also be traceable to the Roman approach to property, which specifically focused on choosing a system of property ownership that maximized the utility of all land. *See* Brian Gardiner, Comment, *Squatters' Rights and Adverse Possession: A Search for Equitable Application of Property Laws*, 8 IND. INT'L & COMP. L. REV. 119, 124–25 (1997).

[44] *See, e.g.*, United States v. Bailey, 553 F.3d 940, 944 (6th Cir. 2009). The metaphor is apparent when modern cases add the descriptive "actual" before possession to reference a more literal holding of the thing in question. *See generally* United States v. Caraway, 411 F.3d 679, 682 (6th Cir. 2005) (discussing a criminal statute that makes the actual or constructive possession of a firearm a felony).

possession means to hold, as a handful of land was held when title was transferred via the ceremony of seisin.[45] Just as the ritual of seisin is symbolic of a much larger transfer,[46] so is our idea of possession. We do not in fact ever occupy or hold more than the tiniest bit of earth, even if we build a house, cultivate, and place animals upon a much larger portion of land. When common law sources spoke more than a sentence or two about first possession, they inevitably moved more towards explaining a theory of labor than a literal theory of possession.[47]

Such theories of labor are generally now grounded in the Lockean view of property.[48] Social philosopher John Locke viewed property as an institution of natural law, which arose without the intervention of the state (or even its existence) and stemmed from the direct investment of a person's labor.[49] Locke's theory went hand-in-hand with the theory of first possession,[50] which of course was actually established through proving one's labor: the building and occupation of a dwelling, the planting of fields, the building of fences, the taming of animals, and so forth.[51] In

---

[45] See Lauerman v. Destocki, 662 N.E.2d 1122, 1130 (Ohio Ct. App. 1993), for a modern reference to the historic ceremony of seisin and its meaning.

[46] BLACK'S LAW DICTIONARY, *supra* note 39, at 953.

> Livery of seisin involved either (1) going on the land and having the grantor symbolically deliver possession of the land to the grantee by handing over a twig, a clod of dirt, or a piece of turf (called *livery in deed*) or (2) going within sight of the land and having the grantor tell the grantee that possession was being given, followed by the grantee's entering the land (called *livery in law*). *Id.*

[47] *See* Epstein, *Root of Title*, *supra* note 1, at 1245. For an explanation of how first possession theories may be examined as accession separately and after Locke's view of labor, see Thomas W. Merrill, *Accession and Original Ownership*, 1 J. LEG. ANALYSIS 459 (2009).

[48] Richard A. Epstein, *No New Property*, 56 BROOK. L. REV. 747, 750 (1990) [hereinafter Epstein, *No New Property*].

[49] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, 287–88 (Peter Laslett ed., Cambridge University Press 1988) (1690).

[50] *See* Epstein, *Root of Title*, *supra* note 1, at 1227.

[51] Rasband, *supra* note 43, at 1012. The alternative theory advocated, for example, by Margaret Radin is founded in Hegelian ideas of personhood. *See generally* MARGARET JANE RADIN, REINTERPRETING PROPERTY (1993); G.W.F. HEGEL, PHILOSOPHY OF RIGHT (S.W. Dyde trans., Prometheus Books 1996) (1896) (discussing how personhood and property are interrelated and distinguishable from each other).

Carol Rose's words, the doctrine of first possession utilizes "texts . . . of cultivation, manufacture, and development."[52]

Epstein argued that the Lockean linking of labor and land through use and habitation was a part of the "great American experiment in government," which was "a striking departure from the English view of property rights" that Epstein described as focusing on the King as the "first lawful possessor of property rights from whom all other persons obtained their title to land" via land grants.[53] Epstein contrasted the English system of land grants with the American system, finding that "the basic theory was that property rights emerged from first possession, first occupation, and homesteading, and not from state grant."[54] Although Epstein's understanding is correct as to the ultimate formulation of property rights in England, there is less evidence to support his claim that the American system was a "bottom up" system (as opposed to what he styles the British system of "top down"), at least within the Appalachian region during the mid to late eighteenth century.[55]

C. Evidence of Possession

Early cases suggest that large-scale land grants fell short of establishing rights to land where homesteaders had already placed themselves.[56] For example, in *Green v. Watkins*,[57] the U.S. Supreme Court required that land be "vacant"—empty of white settlers—before a state land grant could validly operate to convey title to the land.[58] Although this appears to establish a preference, it more effectively indicated a race to the land, and land grants from legislatures were naturally faster than settlers in wagons crossing mountains.

Wilma Dunaway's recent study of Appalachia found very little evidence of inhabitant-owners:

> Actually Kentucky redistributed very little land to people who lived on and cultivated the soil. Rather than legislate

---

[52] Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 82 (1985) [hereinafter Rose, *Possession*].

[53] Epstein, *No New Property*, *supra* note 48, at 749.

[54] *Id.* at 750.

[55] *Id.* at 749–50.

[56] *See, e.g.*, Green v. Liter, 12 U.S. 229, 230–31 (1814) (involving an issue of whether the title issued by a land grant was barred by a claim of adverse possession).

[57] 20 U.S. 27 (1822).

[58] *See id.* at 29–30.

> the transfer of acreage to small homesteaders in the early 1800s, Kentucky's Policymakers favored land grants to "monopolizing capitalists" for "the purpose of speculation" and to promote industry. As a result less than one-third of Kentucky's frontier titles were held by actual inhabitants. In Floyd, Laurel, Pulaski, and Whitley Counties there were no settlement entries among the early grants.[59]

Although the evidence from settlement of the Appalachian region does not support Epstein's claim that settlement was preferred over land grants in America,[60] the more important point is that the transition Epstein assumed—one of the creation of a new system of habitation-based settlement in America as contrasted to the British system of "top down" ownership[61]—is misleading. Land grants were deeply significant in establishing ownership of land in both colonial America and the new Republic,[62] but more to the point here, Epstein's idea of the British system as entirely "top down"[63] does not accurately reflect the British approach to unsettled land during the colonization period.

More recent evidence suggests that when faced with unsettled land, the British did not initially vest the King with possessory rights but rather the opposite: a subject's habitation of unsettled land secured the King's rights to it.[64] The English favored possession as a means of establishing title, and possession was defined in very specific ways that aligned with the concepts of habitation and labor—the building of fencing, the planting of gardens, the building of homes, and the living within those homes.[65]

---

[59] Wilma A. Dunaway, *Speculators and Settler Capitalists: Unthinking the Mythology About Appalachian Landholding, 1790–1860*, *in* APPALACHIA IN THE MAKING: THE MOUNTAIN SOUTH IN THE NINETEENTH CENTURY 50, 61 (Mary Beth Pudup, et al. eds., 1995).

[60] Epstein, *No New Property*, *supra* note 48, at 749.

[61] *Id.* at 749–50.

[62] *See id.* at 749–51 (discussing how land grants were given without conditions in the United States and how that influenced our conception of title and governmental regulation).

[63] *Id.* at 750.

[64] *See* PATRICIA SEED, CEREMONIES OF POSSESSION IN EUROPE'S CONQUEST OF THE NEW WORLD 19 (1995).

[65] *Id.* at 65.

IV. WASTE: THE INVENTION OF LABOR

The connections between property, possession, and labor were indeed so strong that some theorists, such as Scrope (who elaborated on Blackstone's original theory), have suggested that possession is not valid as a property claim unless there is "full and complete utilization" of the property.[66] This understanding of labor and possession birthed a second concept known as waste,[67] which while little known today, is integral to understanding the evolving relationships between property, possession, and land.

The concept of waste dates at least back to biblical times when the notion of a wasteland was connected with the concept of wilderness.[68] Religious usage was a part of the transformation of the idea of waste into a popular cultural norm. Wasteland became synonymous with wilderness "against which civilization had waged an unceasing struggle."[69] As settlements developed and the population expanded in England, Scotland, and Wales much property was claimed, but there remained vast unsettled areas.[70] Beyond the "common lands" that were shared by the members of any village or manor, there were also large tracts of land that fell between villages or manors that were not specifically allocated.[71] These non-arable lands were known as wastes and were not claimed as property.[72] Simply put, the wastes were not possessed within the English understanding of the term.[73] As Vattel proclaimed in his treatise on International Law during the mid-eighteenth century, the vast territories of North America could be legally settled because they were not inhabited and farmed—they were *not possessed* within the English understanding of the term.[74]

---

[66] Pat Moloney, *Colonisation, Civilization and Cultivation: Early Victorians' Theories of Property Rights and Sovereignty, in* LAND AND FREEDOM: LAW, PROPERTY RIGHTS AND THE BRITISH DIASPORA 31 (A.R. Buck, et al. eds., 2001).

[67] *Id.* at 25.

[68] RODERICK NASH, WILDERNESS AND THE AMERICAN MIND 13 (3d ed., 2001).

[69] *Id.* at 8.

[70] *See* KENELM EDWARD DIGBY, AN INTRODUCTION TO THE HISTORY OF THE LAW OF REAL PROPERTY 8 (Claredon Press 2005) (1897).

[71] H.S. BENNETT, LIFE ON THE ENGLISH MANOR: A STUDY OF PEASANT CONDITIONS 56–58 (1989).

[72] DIGBY, *supra* note 70, at 8.

[73] BENNETT, *supra* note 71, at 56.

[74] EMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 38 (James Brown Scott ed., Chares G. Fenwick trans., 1758).

Little scholarly work from the time exists to explain ownership of the wastes, and from what is known there are contradictions.[75] Even contemporary writers disagreed as to whether the wastes were rightly shared between all of the neighboring villages only[76] or with anyone within the country.[77] The lack of precise explanation, even by such landmark legal treatises as Blackstone's Commentaries, suggests that more accurately, the wastes simply did not fall within the framework of property rights developed at the time. This view is supported by a number of accounts which suggest that the land within the waste was open to "the opportunity for approvement [sic], with or without new grants" as well as "inclosure"—a term which referenced the fencing of an area for cultivation, the building of a home, or both.[78] The doctrine of waste continued much later than might be expected and was still a concept very much in the English mind at the time of settlement of North America.[79] Much of the United Kingdom remained in the "waste" category through the end of the 1700s.[80] Even though populations were growing and natural resources on the islands dwindling, the English still lacked the technology and knowledge necessary to make many areas of the country productive.[81]

V. SIXTEENTH AND SEVENTEENTH CENTURY EVOLUTIONS IN PROPERTY: POSSESSION, LABOR, AND WASTE IN THE COLONIES

Historically, it has been the fate of lands unclaimed or known as wastes to disappear.[82] As settlements became denser and property less abundant, more and more lands that were un-owned or owned in common

---

[75] *See, e.g.*, BENNETT, *supra* note 71, at 56–57; FREDERIC WILLIAM MAITLAND, TOWNSHIP AND BOROUGH 98 (1898).

[76] BENNETT, *supra* note 71, at 56–57.

[77] VATTEL, *supra* note 74, at 94. Notably, in many accounts, wastelands are categorized with roads, which were considered the public property of all. *See, e.g.*, J.N.L. Baker, *England in the Seventeenth Century*, *in* AN HISTORICAL GEOGRAPHY OF ENGLAND BEFORE A.D. 1800, at 387, 394 (H. C. Darby ed., 1969).

[78] E.C.K. GONNER, COMMON LAND AND INCLOSURE 109 (1912); *see also* Nellie Neilson, *English Manorial Forms*, 34 AM. HIST. REV. 725, 726 (1929).

[79] *See* MAITLAND, *supra* note 75, at 2.

[80] FIRST REPORT FROM THE SELECT COMMITTEE OF THE HONORABLE HOUSE OF COMMONS, APPOINTED TO TAKE INTO CONSIDERATION THE MEANS OF PROMOTING THE CULTIVATION AND IMPROVEMENT OF THE WASTE, UNINCLOSED, AND UNPRODUCTIVE LANDS OF THE KINGDOM 9 (1796).

[81] *See* JAMES C. SCOTT, SEEING LIKE A STATE 90–91 (1998).

[82] *See* GONNER, *supra* note 78, at 43–45.

were reduced to individual property, and as agricultural techniques developed, more and more land became arable.[83] However, colonization presented a new challenge to the evolution of property law: there was no shortage of land,[84] so the issue became claiming as much as possible when there were other competitors seeking to do the same.[85]

An English observer by the name of Riley from the eighteenth century explained the problem fittingly:

> The English colonies are now confined within the Appalachian Mountains, a space not two hundred miles broad, and to lands certainly not so fruitful as those upon the Ohio and Mississippi. Upon the banks of the latter river, the French may in time become so very powerful, as to render our plantations beyond the mountains precarious, *unless we exert ourselves, and settle those lands with the same spirit and rapidity as we have our other colonies* . . . besides the advantages of such an attempt in a political view; the objects of trade with the Indians, and the great probability of finding mines; I mean not of gold and silver . . . but of iron, copper, lead and coal, which, the three first especially, may become branches of industry: Leave Spain to dig gold.[86]

Riley went on to proclaim that by the "observation of Mr. Locke, it [the land] will only remain with the careful and industrious."[87]

Traditionally, we have often thought of the colonial process as purely a question of power, naval supremacy, and willingness to settle in a foreign land,[88] but recent historical work details a much more legal question.[89] The tendency to group colonial powers together as one force against the native peoples has resulted in a history that has said little about the way land

---

[83] *See* SCOTT, *supra* note 81, at 39, 41, 90; *see also* GONNER, *supra* note 78, at 42.

[84] *See* Stuart Banner, *Why Terra Nullius? Anthropology and Property Law in Early Australia*, 23 LAW & HIST. REV. 95, 99–100 (2005).

[85] *Id.*

[86] J. RIDLEY, THE ADVANTAGES OF A SETTLEMENT UPON THE OHIO IN NORTH AMERICA 2 (1763) (emphasis added).

[87] *Id.* at 3.

[88] *See generally* Ronald J. Horvath, *A Definition of Colonialism*, 13 CURRENT ANTHROPOLOGY 45, 46 (1972) (defining a unified theory of colonialism).

[89] *See, e.g.*, J. Michael Williams, *Law*, *in* 1 COLONIALISM: AN INTERNATIONAL SOCIAL, CULTURAL, AND POLITICAL ENCYCLOPEDIA 334, 334–36 (Melvin E. Page ed., 2003).

possession took place, particularly vis-à-vis other European powers.[90] Historian Patricia Seed recently broke this trend persuasively arguing that European colonial powers believed not only in their military superiority but also in their *legal right* to colonial lands.[91] The European imperial rulers had certain points of agreement between them. Each believed in the right of Christian rulers to grant charters to non-Christian lands.[92] Traditionally, it has been this right—the right of conquest—which has garnered attention in the legal world.[93] However, Patricia Seed's novel-historical work has pointed us toward a more neglected question—one with deep implications for our modern system of property rights.[94] If each country believed in its right to colonial lands, how were property and possession concepts translated across cultures when England, Spain, and France all claimed the same region?

A. Conflicting Cultures of Property

In any legal system, property doctrines are particularly tied to narratives and imbedded within social practices and understandings.[95] In other words, property rights are deeply socially contingent—a fact that also renders them subject to change with major shifts in society. The colonial desire to appropriate—and the belief in the right to do so—was a product for each country of its own cultural history.[96] Unsurprisingly then, Seed describes a colonial history full of competing and conflicting notions of property and first possession.[97]

Although "discovery" was later argued as a right for English possessions in North America, there is little evidence that the English

---

[90] SEED, *supra* note 64, at 3.

[91] *Id.* at 2.

[92] Christopher Tomlins, *The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century*, 26 LAW & SOC. INQUIRY 315, 319 (2001) [hereinafter Tomlins, *The Legal Cartography*].

[93] *See, e.g.*, SHARON KORMAN, THE RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE 47–49 (1996) (discussing how European nations used Christianity and legal rights as rationales for colonizing non-Christian lands).

[94] *See generally* SEED, *supra* note 64 (providing a historical account of property rights of colonial lands).

[95] Neal Milner, *Ownership Rights and Rites of Ownership*, 18 LAW & SOC. INQUIRY 227, 227 (1993).

[96] SEED, *supra* note 64, at 6.

[97] *See id.* at 2–6, 12.

themselves subscribed to this belief—at least through the first decades of settlement.[98] The English favored possession as a means of establishing title.[99] The French, by contrast, did not believe that they needed to inhabit the areas they claimed within the New World.[100] Instead, the French transferred their claim of land forward by virtue of the consent of native peoples through alliances (however cooperative).[101] In essence, the French were making the natives into French people and using their own already existing habitation to make claims to land. Similarly, the Spanish argued the native tribes they conquered, or who surrendered to them peacefully, became "subjects and vassals" of Spain, and thereby, transferred the claim of Spain to the lands that they occupied.[102]

This colonial environment of conflicting claims to land and natural resources is no dusty, historical relic. For legal concepts, it was a primordial stew teeming with clashes and encounters, strategies and changes, optimization and failure. Unfortunately, histories of law and colonialism have followed a relatively strict dichotomy—either the story of European domination and the imposition of outside law and governance, or alternatively, the story of how subordinated groups mobilized opposition and used the European legal system to offer resistance.[103] Neither fully embraces the dynamics of the colonial environment. The first category may be corrected by adding that both colonizers' and natives' concepts were interacting to create the elements of the New World's social and political structure.[104] With respect to the second category, there is much evidence that although colonizers held powerful tools—cartographic and legal—those tools were also "an imaginative resource not entirely under the colonizer's control."[105] In addition to these two major threads of

---

[98] *Id.* at 17.

[99] *Id.* at 16, 18–19.

[100] *Id.* at 41–42, 44, 48.

[101] *Id.* at 41, 44.

[102] *Id.* at 81.

[103] John L. Comaroff, *Colonialism, Culture, and the Law: A Forward*, 26 LAW & SOC. INQUIRY 305, 306–08 (2001) [hereinafter Comaroff, *Colonialism*].

[104] *See* Andrew Sluyter, *Colonialism and Landscape in the Americas: Material/Conceptual Transformations and Continuing Consequences*, 91 ANNALS ASS'N AM. GEO. 410, 420 (2001).

[105] Tomlins, *The Legal Cartography*, *supra* note 92, at 331; *see also* JOHN L. COMAROFF & JEAN COMAROFF, 2 OF REVELATION AND REVOLUTION: THE DIALECTICS OF MODERNITY ON A SOUTH AFRICAN FRONTIER 365–67 (1997) (noting the contradiction of a legal system

(*continued*)

investigation, historians have also recognized that colonial possessions were laboratories of legal experimentation.[106] Yet, Seed's work, when brought into dialogue with what we know about the evolution of common law concepts of property, suggests yet another line of inquiry—one that questions the truth of the euphemism of the "common law inheritance." How did the British concepts of property and possession transform as they encountered distinct parallel theories in other cultures and as those competing theories clashed in the colonial context?[107]

B. The Evolution of British Concepts of Property

We have recognized that much transformation of British concepts of property occurred during the sixteenth and seventeenth centuries. According to Thompson, property was solidifying and emphasis was shifting to commodification—the ability to rent, sell, and deed property.[108] As the doctrine was evolving, so was the relationship between law and property, or more specifically, between property and the state. There was a drastic rise in the prosecution of property crimes.[109] During the economic crises of the late sixteenth and early seventeenth centuries, Peter Lawson demonstrated that the reporting and prosecuting of property crimes rose substantially.[110] Douglas Hay investigated execution rates during the seventeenth and early eighteenth centuries.[111] According to Hay, about 75% of executions involved property crimes, with a total of somewhere between 500 and 1,000 over a period of fifty years.[112]

---

that provides for both the subordination of indigenous peoples as well as provisions allowing a cause of action by those same indigenous peoples for such subordination).

[106] Comaroff, *Colonialism*, *supra* note 103, at 308; *see also* Christopher Tomlins, *In a Wilderness of Tigers: Violence, the Discourse of English Colonizing, and the Refusals of American History*, 4 THEORETICAL INQUIRIES L. 451, 453–54 (2003) (discusing how English legal texts were modified to fit the colonial experiment) [hereinafter Tomlins, *In a Wilderness of Tigers*].

[107] *See generally* SEED, *supra* note 64, at 6–7.

[108] EDWARD PALMER THOMPSON, CUSTOMS IN COMMON 135 (1993).

[109] Peter Lawson, *Property Crime and Hard Times in England, 1559–1624*, 4 LAW & HIST. REV. 95, 95 (1986).

[110] *Id.* at 112–13.

[111] *See* Douglas Hay, Crime, Authority and the Criminal Law: Staffordshire 1750–1800, at 519 (Aug. 1975) (unpublished Ph.D. dissertation, University of Warwick) (on file with the Center for Research Libraries).

[112] *See id.*

Such changes have been thought to emerge within the British socio-political context, the enclosure movement, and so forth.[113] Euro-centrism has shrouded the possibility that the deep evolution of property during the sixteenth and seventeenth centuries did not originate in Europe and spread to the colonies.[114] Rather the colonial experience, driven by increasing industrialization, powered these major shifts in doctrine—the common law shifted on the colonial margins and then moved toward the center rather than vice versa.[115] Contests over property, a natural source of change in our theoretical concepts, were playing themselves out in the colonial context in powerful ways—just as Frederick Jackson Turner recognized when he argued that the westward expansion, rather than the initial settlement frameworks, was the primary factor in the development of American socio-legal traditions.[116]

Encounters of European powers in North America demonstrate an initial obliviousness to their contrasting understandings of possession.[117] Simply put, they were, symbolically as well as literally, ships passing in the night. With each set of property beliefs deeply ingrained in a cultural narrative, one's own set of beliefs must have seemed wholly natural. In a foreign encounter, the tendency was to speak past each other.[118] With no international law governing claims to non-Christian lands, each country argued its right to possession in terms that made sense in its own legal context.[119]

C. Influence of Waste on the Evolution of Property

The British imported their understanding of possession and its strict associations of habitation and labor, as well as their concept of waste.[120] This allowed them to claim any land that was not being "used" or even "utilized to the fullest,"[121] just as had been acceptable in the British homeland. "Entire categories of landscape that were agriculturally

---

[113] *See* DAVID LEVINE, REPRODUCING FAMILIES: THE POLITICAL ECONOMY OF ENGLISH POPULATION HISTORY 60 (1987).

[114] *See* AUDREY SMEDLEY, RACE IN NORTH AMERICA: ORIGIN AND EVOLUTION OF A WORLDVIEW 46 (2d ed. 1999).

[115] *Id.*

[116] FREDERICK JACKSON TURNER, THE FRONTIER IN AMERICAN HISTORY 1–4 (1928).

[117] SEED, *supra* note 64, at 10–11.

[118] *See id.* at 3, 12.

[119] *See id.* at 11–12.

[120] *Id.* at 19.

[121] Moloney, *supra* note 66, at 31.

productive before colonization have become reconceived as 'wastelands.'"[122] Indigenous people were not seen as inhabiting the land in the sense of dwelling and cultivating, but rather, were seen as movable.[123] Thus, the Georgia Charter's 1732 description of America explains: "[T]he land is 'waste and desolate,' the indigenous population simply a marauding enemy."[124] In the eyes of many sixteenth and seventeenth century developers, the entirety of America was a waste awaiting development.[125]

When it came to other colonial powers, the English government refused to recognize that discovery or claim, without settlement upon the land, was a legitimate source of a right to that territory.[126] When the Portuguese government argued claim and discovery, the English recognized the foreign king's claim "where he ha[d] forts and receive[d] tribute."[127] Similarly, when the Spanish also argued that their possession of discovered lands in the New World gave them ownership of the lands, the English government responded that declaration and decree do not make ownership; only possession through habitation was capable of generating title.[128]

Unfortunately, the British understanding of wastes and the association of possession with labor quickly became a problem. Wastes were, at their most central, lands of many types (mountains, forests, swamps) that one could not easily cultivate.[129] Consequently, claiming land within the waste areas was particularly trying for doctrines of property that aligned rightful control and possession with the idea of habitation and settlement.[130] The wastes could not be settled very rapidly—at least not by societies that were primarily agricultural and possessed very limited transportation mechanisms.[131] In fact, the common law tradition still recognizes that

---

[122] Sluyter, *supra* note 104, at 411.

[123] *See* Tomlins, *In a Wilderness of Tigers*, *supra* note 106, at 470.

[124] *Id.*

[125] Wayne Glausser, *Three Approaches to Locke and the Slave Trade*, 51 J. HIST. IDEAS 199, 215 (1990).

[126] SEED, *supra* note 64, at 9–10.

[127] *Replication of the Portuguese Ambassador from June 7, 1562*, *in* 4 CALENDAR OF STATE PAPERS, FOREIGN SERIES, OF THE REIGN OF ELIZABETH, 1562, at 77 (Joseph Stevenson ed., 1867).

[128] SEED, *supra* note 64, at 10.

[129] *See, e.g.*, Alexandra B. Klass, *Adverse Possession and Conservation: Expanding Traditional Notions of Use and Possession*, 77 U. COLO. L. REV. 283, 292–93 (2006).

[130] *See id.* at 292.

[131] *See* BENNETT, *supra* note 71, at 58.

"wild and undeveloped land" is "not readily susceptible to habitation, cultivation, or improvement."[132] With the colonial process strongly driven by the idea of appropriating supposedly endless supplies of natural resources,[133] the English understandings of possession and waste were a bothersome vestigial tail, both cumbersome and limiting.

During the earlier centuries in England, the issue of settling waste had not appeared in any substantial form.[134] First, waste existed in relative abundance, and those who wanted to stake claims within it were often allowed to do so—at least in the part that was not claimed by a particular lord.[135] And more importantly, the terminology itself is telling. Waste was waste. No one wanted it very desperately. Although the English were aware of the resources in waste, and at times limited the taking of resources from wastes owned by a particular lord, waste was often open to taking by the commoners.[136] This free taking extended to what we now call "natural resources," such as coal, which commoners dug for their fires from within the waste.[137]

D. Influence of Industry on the Evolution of Property

This trend would continue until industrialization quickly reframed the value of natural resources as commodities.[138] By the seventeenth century, coal was "being rapidly developed" within English lands.[139] This desire to find resources fueled the imperialism of the British.[140] Settlement in North America was more than an extension of the British state; it was an "expedition," and one generally financed by commercial sources that expected a return.[141] Early maps of North America mapped natural resources as often, or even more often, than they mapped potentially life

---

[132] Klass, *supra* note 129, at 292 n. 42.

[133] Tomlins, *The Legal Cartography*, *supra* note 92, at 337.

[134] *See* BENNETT, *supra* note 71, at 57, 59.

[135] *See id.* at 57–59.

[136] *Id.* at 57–60.

[137] THOMAS BLOUNT, TENURES OF LAND & CUSTOMS OF MANORS 163 (W. Carew Hazlitt ed., Reeves & Turner 1874) (1784).

[138] Guyora Binder & Robert Weisberg, *Cultural Criticism of Law*, 49 STAN. L. REV. 1149, 1193 (1997).

[139] Baker, *supra* note 77, at 421.

[140] *See, e.g.*, Carville Earle, *Pioneers of Providence: The Anglo–American Experience, 1492–1792*, *in* 82 ANNALS OF THE ASS'N OF AM. GEOGRAPHERS 478, 481 (1992); Moloney, *supra* note 66, at 32.

[141] *See* Earle, *supra* note 140, at 479–81.

threatening "obstacles" to those resources, such as native settlements, river rapids, waterfalls, rattlesnake ridges, and bear flats.[142] Even more notably, the push to possess resources was not driven for the British by the desire for gold, but rather for resources that had specific commercial application such as timber, oil, iron, and coal.[143]

Unfortunately, the French and the Spanish could obtain land in North America far more rapidly than could the British.[144] Each made their legal claim to land through imagining possession in a very different way than the English—through conquest and alliance, deputizing and consent rather than through the settlement of their own citizens.[145] For the French and Spanish, the movement was easier. They could "deputize" the natives into second-rate citizens through either consent or military force, and then, protect the claims with a limited military through a series of forts.[146] Thus, the progression of land claims in North America—at least initially—strongly favored the French and Spanish.[147] There is much evidence that the British were highly unhappy about this situation.[148] They complained that they were "hemmed in" and that the French had cut them off from the "bounty" of the main part of the continent.[149] The British were hungry for the resources found on the far side of the Appalachian Mountains and within the range itself.[150]

---

[142] *See* SEYMOUR I. SCHWARTZ & RALPH E. EHRENBERG, THE MAPPING OF AMERICA 77 (Patricia Egan & Reginald Gay eds., 1980); RICHARD VAN DE GOHM, ANTIQUE MAPS FOR THE COLLECTOR 58–59 (1973); TURNER, *supra* note 116, at 16. Rattlesnake ridge continues to be an area in Carter County, Kentucky and the place name is kept in the county utilities. *See* RATTLESNAKE RIDGE WATER DISTRICT, http://www.rrwater.org/ (last visited Dec. 27, 2010). Also, maps still identify bear flats in Elliott County, Kentucky. *See, e.g.*, SATELLITEVIEWS, http://www.satelliteviews.net/cgibin/g.cgi?fid=2337138&state=KY&ftype=flat (last visited Dec. 27, 2010).

[143] RIDLEY, *supra* note 86, at 2.

[144] *See, e.g.*, Jeremy Adelman & Stephen Aron, *From Borderlands to Borders: Empires, Nation-States, and the Peoples in Between in North American History*, 104 AM. HIS. REV. 814, 820–21 (1999); SEED, *supra* note 64, at 64; Arthur R. Ropes, *The Causes of the Seven Years' War*, *in* 4 TRANSACTIONS OF THE ROYAL HIST. SOC. 143, 145 (1889).

[145] SEED, *supra* note 64, at 6, 18–19, 41–48, 81.

[146] *See id.* at 63–68, 81.

[147] *See* RIDLEY, *supra* note 86, at 2.

[148] *See, e.g.*, Adelman & Aron, *supra* note 144, at 821; Ropes, *supra* note 144, at 150; RIDLEY, *supra* note 86, at 2.

[149] Ropes, *supra* note 144, at 148–50.

[150] WILMA A. DUNAWAY, THE FIRST AMERICAN FRONTIER: TRANSITION TO CAPITALISM IN SOUTHERN APPALACHIA 1 (1996).

E. The British Move Away from the Possession Theory of Property

As settlement progressed in the North American colonies, it became clear that if the British were to keep up in colonial North America, it was critical for the British to establish claims to land that they did not in fact inhabit.[151] The British needed to adapt their common law that had for centuries favored possession—defined in terms of habitation and cultivation—to a new theory of property that allowed for the claiming of lands, at least by the government if not by individuals, that were unseen and perhaps even unexplored.[152] As John Sprankling argued, "Eighteenth century English property law was a poor tool for encouraging the exploitation of virgin land."[153] The British had to move their concept of property from tangible possession to an intangible legal claim that would be respected by other foreign powers.[154] The British had to move from fences to borders, and as they did so, they also moved from habitation to survey as a method of establishing land claims.[155] The concept of claiming land replaced labor as the ideal of possession with the perfection of title.[156]

In his classic, *The Transformation of American Law: 1780-1860*, Morton J. Horwitz chronicled an evolution of property law from an original agrarian idea of absolute dominion—the notion expressed in the Roman ideal of property—to a later utilitarian vision of use.[157] When the focus moves specifically to the relationship between our notions of possession and labor, Horwitz's theory of evolution receives a significant correction. The property ideal has evolved from an original idea of absolute dominion to a utilitarian notion of use and labor and from there evolved again to an idea of claim and development. This notion, which privileges rights and sets aside the question of labor, is focused on providing the maximum incentive for natural resource development and can historically be traced to the socio-legal norms of the industrial revolution.

---

[151] *See* Lynton K. Caldwell, *Rights of Ownership or Rights of Use?—the Need for a New Conceptual Basis for Land Use Policy*, 15 WM. & MARY L. REV. 759, 760–61 (1974).

[152] Epstein, *No New Property*, *supra* note 48, at 749–50.

[153] Sprankling, *Antiwilderness*, *supra* note 17, at 523.

[154] *See* Tomlins, *The Legal Cartography*, *supra* note 92, at 328–29.

[155] *See id.* at 326–27.

[156] Rose, *Possession*, *supra* note 52, at 85–86.

[157] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 31–34 (1977).

F. Influence of Survey Mapping on the Evolution of Property

A central aspect of this process of land claim was the development of survey and mapping technologies. Through survey and mapping, land became something that was literally possess-able.[158] In another sense, a sheaf of papers in the hand, even though still intangible as a social right, held up against others.[159] In the field of geography, much has been written about the relationship between mapmaking and the process of colonization.[160] Edney, for example, has argued, "Imperialism and Mapmaking intersect in the most basic manner. Both are fundamentally concerned with territory and knowledge."[161] The project of mapping of lands was in itself a major force behind the process of colonization.[162] Drawing on the increasing power of science, maps projected images of land that were pre-political and assumed rationality and detachment.[163] "Maps speak the language of authority and expertise precisely by virtue of their detachment."[164] This detachment is, on closer inspection, a figure of the scientific imagination. Only in the last three decades have we become socially cognizant of the nature of maps as persuasive rather than neutral documents.[165] As J.B. Harley explained in his path-breaking article, *Deconstructing the Map*, "All maps state an argument about the world and they are propositional in nature . . . [t]he steps in making a map—selection, omission, simplification, classification, the creation of hierarchies, and 'symbolization'—are all inherently rhetorical."[166] Until recently, this thread of work on colonization and mapmaking in the field of geography

---

[158] Tomlins, *The Legal Cartography*, *supra* note 92, at 323–24, 326.

[159] *Id.*

[160] *See, e.g.*, *id.* at 322–24; MATTHEW H. EDNEY, MAPPING AN EMPIRE: THE GEOGRAPHICAL CONSTRUCTION OF BRITISH INDIA, 1765–1843, at 1 (1997); TIMOTHY MITCHELL, COLONISING EGYPT 32 (1991).

[161] EDNEY, *supra* note 160, at 1.

[162] *See id.* at 1–2.

[163] MITCHELL, *supra* note 160, at 6–7, 32–33.

[164] Nicholas Blomley, *Landscapes of Property*, 32 LAW & SOC'Y REV. 567, 598 (1998) [hereinafter Blomley, *Landscapes of Property*].

[165] *See, e.g.*, J. Brian Harley, *Deconstructing the Map*, 26 CARTOGRAPHICA 1, 1–2 (1989) (arguing that maps are rhetorical devices used to obtain power) [hereinafter Harley, *Deconstructing the Map*].

[166] *Id.* at 11.

awaited connection to the role of law. However, the work of Christopher Tomlins and Nicholas Blomely has brought these two fields together.[167]

Nicholas Blomley attributed much of the change in common law property to the development of scientific tools during the sixteenth and seventeenth centuries. In his 2003 article, *Law, Property and the Geography of Violence: The Frontier, the Survey, and the Grid*, Blomley attributes much of the evolution in property occurring during this time period to technical innovations, in particular, the three geographical concepts of the frontier, the survey, and the grid.[168] Techniques in surveying and drafting were emerging, and thereby, facilitating the administration of property relations.[169] Blomley argues maps and, more generally, the linear perspective allowed us to create "the view that space in general, and property in particular, were disembedded from lived and social relations."[170] In the public discourse, maps were drawing upon "the Enlightenment understanding of science," a view that "the world can be mapped exactly, the world can be known," and that the map is "natural" and becomes the world itself.[171]

One very relevant example of this is the transformation of maps of the colonies over time. The earliest maps showed lands deeply settled by native tribes whereas later maps displayed space as empty—to be written over.[172] As shown below, the 1607 map of Virginia by Captain John Smith names many tribes and settlements and places the greater emphasis on the Native American figure to the left side of the map.[173]

---

[167] Nicholas Blomley, *Law, Property, and the Geography of Violence: The Frontier, the Survey, and the Grid*, 93 ANNALS ASS'N AM. GEO. 121 (2003) (discussing how surveying and property law intersect) [hereinafter Blomley, *Geography of Violence*]; Tomlins, *The Legal Cartography*, *supra* note 92 (reviewing how maps and surveys were used to transform the acquisition of property in the American colonies).

[168] Blomley, *Geography of Violence*, *supra* note 167, at 123.

[169] *Id.* at 128.

[170] *Id.* at 127.

[171] EDNEY, *supra* note 160, at 21.

[172] Tomlins, *The Legal Cartography*, *supra* note 92, at 335 n. 27.

[173] *See* John Smith, Captain John Smith's Map of Virginia, (Oxford, Joseph Barnes 1612), *available at* the Yale University Beincke Rare Book & Manuscript Library, call number Taylor 256.

174


175

By the time the map was reproduced a few decades later, the crest had moved forward in prominence and increased in size whereas the native figure decreased and settlements became blank.[176] In some instances, the persuasive changes can be rather obvious—although only if given the opportunity to view the two versions.

More generally, Blomley's well-received argument is that "[t]he manner in which space was projected, bounded, and named . . . can be

---

[174] *Id.*

[175] Hendrik Hondius, Nova Virginiae Tabula (Amsterdam, Hondius 1633), *available at* the Yale University Library Map Collection, call number Franklin 783 1633.

[176] *Compare* Smith, *supra* note 173, *with* Hondius, *supra* note 175.

consequential for the ways in which property relations are understood."[177] At a more obvious level, maps were the way in which territory became real estate.[178] Mapping was becoming increasingly common,[179] and cartographic skills were developing.[180] According to Blomely, an even more intimate relationship was being forged between the state, property, and violence as the military became increasingly involved in surveying and the production of maps.[181]

Christopher Tomlins argued that the process of mapping combined with a legal cartography, which was embodied in the many colonial charters, provided a way to "imprint *England* on America."[182] Through charters, the Europeans were able to project forward their existing legal concepts into an idealized new settlement, establishing proper orders.[183] Although Tomlins adds in the element of legal doctrine, he notes that it worked in tandem with the cartographic developments.[184] Tomlins argues that "British access to technologies of systematic measurement—geodetic triangulation, statistical survey—allowed them to discipline the Indian subcontinent with their science."[185]

Maps are, at their most basic level, practices of representation.[186] Maps were, therefore, able to "extend and reinforce" our legal concepts.[187] Symbolic discourse in maps was perhaps one of the most powerful tools, at least in the colonial context, where a painting of a ruler, a crest, a seal, or an imprint was used to symbolize governance, control, and possession.[188] Queen Elizabeth, for example, placed the royal arms on each map

---

[177] Blomley, *Landscapes of Property*, *supra* note 164, at 606.

[178] Comaroff, *Colonialism*, *supra* note 103, at 309.

[179] *See* Blomley, *Geography of Violence*, *supra* note 167, at 126.

[180] *See id.* at 128–29.

[181] *Id.* at 128.

[182] Tomlins, *The Legal Cartography*, *supra* note 92, at 331.

[183] *Id.* at 316.

[184] *Id.* at 326.

[185] *Id.* at 324. See EDNEY, *supra* note 160, at 200–01, for a similar view.

[186] DEREK GREGORY, GEOGRAPHICAL IMAGINATIONS 7 (1994).

[187] Harley, *Deconstructing the Map*, *supra* note 165, at 12.

[188] Peter Barber, *England II: Monarchs, Ministers, and Maps, 1550-1625*, *in* MONARCHS, MINISTERS, AND MAPS: THE EMERGENCE OF CARTOGRAPHY AS A TOOL OF GOVERNMENT IN EARLY MODERN EUROPE 57, 77 (David Buisseret ed., 1992).

produced to reinforce her rule.[189] More concretely, maps were a method to effectuate surveillance.[190] In the context of the social relationships of property, the critical point was that maps embedded within them existing ideas about social structured and propertied relationships.[191]

In this way, maps and surveys were critical to the transformation of possession's attachment to labor into an association with claim. Maps and surveys allowed the British government to project an image of possession that could be shown to others at home and abroad.[192] Maps were serving as the transition point between possession and claim; maps were moving from mapping actual habitation and settlement to mapping by virtue of lines—lines that projected claims of land onto unsettled and possibly unexplored areas.[193] In this way, both the British and American government would come to describe lands not formally admitted as states or provinces as "territories of the United States" or "possessions of Her Britannic Majesty."[194] Consequently, the common law continued to speak of possession but no longer could specifically link possession to labor.

G. Influence of Early Case Law on the Evolution of Property

The question was placed at the forefront in the 1814 case, *Green v. Liter*.[195] In *Green*, the Supreme Court was challenged to decide whether a settler occupying a tract of land could hold title against a challenger who had an earlier land grant from the state but had never actually entered upon the land.[196] The difficulty here was that the settler had not entered upon

---

[189] J. Brian Harley, *Maps, Knowledge, and Power*, *in* THE ICONOGRAPHY OF LANDSCAPE: ESSAYS ON THE SYMBOLIC REPRESENTATION, DESIGN AND USE OF PAST ENVIRONMENTS 277, 280 (Denis Cosgrove & Stephen Daniels eds., 1988).

[190] *Id.* at 300.

[191] *See* Tomlins, *The Legal Cartography*, *supra* note 92, at 324.

[192] *Id.*

[193] Treaty between the United States of America and Great Britain in 1842, 8 Stat. 572 (1848) ("A Treaty to settle and define the boundaries between the territories of the United States and the possessions of Her Britannic Majesty in North America; for the final suppression of the African slave trade; and for the giving up of criminals, fugitive from justice, in certain cases.").

[194] *Id.*

[195] 12 U.S. 229 (1814).

[196] *Compare id.* at 230 (discussing a situation where John Liter, the settler, entered under color of a younger patent from the state after challenger John Green's older patent was issued), *with* Clay v. White, 15 Va. (1 Munf.) 162, 162–64 (1810) (discussing a *(continued)*

the land until after the land grant.[197] In an opinion by Justice Story, the Court stretched to find reasons why a non-occupying grantee might prevail over a settler even though the settler had no actual notice of the grant and settled in good faith.[198] Although such an outcome may not seem obviously just, it did strongly favor the policy of industrialization and development. The Court sought common law justifications for what was, in fact, a colonial doctrinal invention by engaging a number of common law cases where uncommon circumstances prevented entry onto land after there had been an intent to transfer the land.[199] Notably, none of these cases involved the *first possession* of land.[200] Yet, the Court looked to these cases instead of examples of first possession conflicts in North America decided by earlier courts or to the common law notion of defining possession, and therefore title, in terms of habitation.[201] The important issue the Court found was that "the legislature was competent to give their patentees a perfect title and possession without actual entry."[202]

Notably, Story's opinion holds:

> At the time of the passing of the [A]ct of 1779, Kentucky was a wilderness. It was the haunt of savages and beasts of prey. Actual entry or possession was impracticable; and, if practicable, it could answer to no beneficial purpose. It could create no notoriety; it could be evidence to no vicinage of a change of the property. An entry therefore would have been a vain and useless and perilous act.[203]

Such a rendition of the facts deeply reflects the moral perspective of industrialization. Settlement could—and did—rapidly occur in the Appalachian Mountains, although it did follow behind the more rapid entry

---

situation where White, the settler, entered under color of a younger patent from the state before the even younger grant to Clay).

[197] *See Green*, 12 U.S. at 244–49.

[198] *Id.* at 244.

[199] *See, e.g.*, *Clay*, 15 Va. (1 Munf.) at 162–64; Speed v. Buford, 6 Ky. (3 Bibb) 57, 57 (1813); Patterson's Devisees v. Bradford, 3 Ky. (Hard.) 108, 109-10 (1807); Quarles v. Brown, 2 Ky. (Sneed) 203, 203 (1802).

[200] *See Clay*, 15 Va. (1 Munf.) 162; *Speed*, 6 Ky. (3 Bibb) 57; *Patterson's Devisees*, 3 Ky. (Hard.) 108; *Quarles*, 2 Ky. (Sneed) 203.

[201] *Green*, 12 U.S. at 236–38, 240.

[202] *Id.* at 248.

[203] *Id.*

for the sole purpose of exploiting natural resources.[204] The Court concluded that even if at common law there were a requirement for habitation and occupation to take possession of land and establish title, "the doctrine would be inapplicable to the waste and vacant lands of our country."[205] Grounding the historic requirement of actual possession solely in the idea of notice to the community, Story was able to reason that land grants were sufficient for the wilderness because "the reason of the rule itself ceases when applied to a mere wilderness."[206]

By 1832, the transformation in the idea of possession was complete, and the labor-habitation model was dismissed in favor of the land grant, which favored industrialization. In *United States v. Arredondo*,[207] the Supreme Court found ancient law where there was none stating, "This gives to the words 'in possession of the lands' their well settled and fixed meaning; possession does not imply occupation or residence; had it been so intended, we presume they would have been used."[208] Possession had become entirely separable from title, with the Court holding that "the law deems every man to be in the legal seisin and possession of land to which he has a perfect and complete title."[209]

VI. IMPLICATIONS FOR NATURAL RESOURCES TODAY

Possession, rather than being a basic and unalterable beginning point, is a complicated socio-legal construction that hoards within itself a variety of attitudes toward land and ideals of human behavior.[210] We continue to speak of possession, however, as though it is something literal and physical, as though labor has attached property to body, issuing a mud of soil, blood, sweat, and tears. It is the same sentiment expressed by Oliver Wendell Holmes when he said, "A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in

---

[204] *See, e.g.*, Paul Salstrom, *Newer Appalachia as One of America's Last Frontiers*, *in* APPALACHIA IN THE MAKING: THE MOUNTAIN SOUTH IN THE NINETEENTH CENTURY 76, 83–84 (Mary Beth Pudup et al. eds., 1995); Kathleen M. Blee & Dwight B. Billings, *Violence and Local State Formation: A Longitudinal Case Study of Appalachian Feuding*, 30 LAW & SOC'Y REV. 671, 697 (1996).

[205] *Green*, 12 U.S. at 249.

[206] *Id.*

[207] 31 U.S. 691 (1832).

[208] *Id.* at 743.

[209] *Id.*

[210] *See* discussion *supra* Part III.A.

your being and cannot be torn away."[211] Yet, even as we continue to think of possession in the literal sense and dwell on the bodily uniting of soil and labor, historical evidence demonstrates that, at least in the America tradition, labor was divorced from possession during the colonial era as the British government sought to make more and more extensive claims to land and natural resources far beyond its lines of settlement.[212]

By neglecting the colonial evolution of property and possession concepts, our cultural concepts falsely reach back into the depths of the common law speaking of possession and labor as wed and linking them with private property and "the very foundation of civilization."[213] As Jennifer Nedelsky observed, such myths of property are "pernicious," shielding "a structure of power and insulat[ing] it from democratic debate."[214] By speaking of possession as though it is literal—a thing not to be disturbed because it is too close to disturbing the body of the man himself, his home, his family—we have reified property as a thing never to be disturbed. A thing not to be touched by taxes any more than absolutely necessary. A thing not to be impinged upon by the well-being of others. We have protected property as though it is a personal right—something akin to personal liberty or freedom, something not to be touched by the government or by others without extraordinary circumstances.[215] We have

---

[211] Oliver Wendell Holmes, *The Path of the Common Law*, 10 HARV. L. REV. 457, 477 (1897).

[212] *See* SEED, *supra* note 64, at 2 (discussing how Colonial rule was initiated largely through practices such as remaining silent and that sometimes the silence preceded military conquests for settlement because Europeans living in the Sixteenth and Seventeenth century believed in their *right* to rule).

[213] HENRY GEORGE, PROGRESS AND POVERTY: AN INQUIRY INTO THE CAUSE OF INDUSTRIAL DEPRESSIONS AND OF INCREASE OF WANT WITH THE INCREASE OF WEALTH—THE REMEDY 261 (1886). Henry George criticizes this view of private property and land possession as a basic requirement for a civilized society. *Id.* at 261–62. He acknowledges that this belief is pervasive in American society. *Id.* at 261.

[214] JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 260 (1990).

[215] *See, e.g.*, Alan E. Brownstein, *Constitutional Wish Granting and the Property Rights Genie*, 13 CONST. COMMENT. 7, 53 (1996). The reality, of course, differs from the rhetoric. The property owner's right to be free from government interference is a limited one—based only on the right to productive use of the land. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992) (holding that a taking occurs when a regulation takes all economic beneficial use of a landowner's land). Yet we often speak of a landowner's right "to do . . . as he sees fit" with property. Stewart E. Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55, 55 (1987).

treated land as an extension of the body—in the way that a woman can be assaulted by a man who simply grabs hold of her purse and tugs hard as he runs away. By thinking of possession literally, even though in reality we have transferred our common law sense of possession from cultivation and habitation to instead a piece of paper granting ownership, we have treated property as an unassailable, personal right.[216]

Unfortunately, such an association of property and unassailable personal rights obfuscates a central fact of property: the relationship between ownership of land and wealth in a society.[217] The story is ironic. There is a deep emotional link between labor and property in terms of sustenance and survival.[218] Yet, sustenance and survival, in terms of both poverty alleviation and environmental stewardship, are jeopardized by our willingness to view private property as a personal right never to be impinged. Sustenance is dependent on property; in the words of Henry George, "[L]abor cannot produce without the use of land."[219] Private property is not a personal right but rather a social one—one that must constantly be held in relation to others.[220] Although personhood may be

---

[216] *See generally* Lynda L. Butler, *The Pathology of Property Norms: Living Within Nature's Boundaries*, 73 S. CAL. L. REV. 927, 930 (2000). My argument is, to some degree, a parallel to Lynda L. Butler's more broad argument that many real property norms inherently conflict with reasonable natural resource and ecosystem management. *Id.* at 928.

[217] GEORGE, *supra* note 213, at 209–10.

[218] Rose, *Property as Storytelling*, *supra* note 1, at 40. Rose suggests that Locke's major contribution to property theory was not so much in terms of explaining the labor link as by elaborating the connection between property and survival. *Id.*

[219] GEORGE, *supra* note 213, at 241.

[220] *See, e.g.*, Harold Demsetz, *Toward a Theory of Property Rights*, *in* THE ECONOMICS OF PROPERTY RIGHTS 31, 31–32 (Eirik G. Furubotn & Svetozar Pejovich eds., 1974); Joseph William Singer, *Property and Social Relations from Title to Entitlement*, *in* PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP 8, 11, 15–16 (Charles Geisler & Gail Daneker eds., 2000). In a more blunt formulation, Henry George said, "There is in nature no such thing as a fee simple in land. There is on earth no power which can rightfully make a grant of exclusive ownership in land." GEORGE, *supra* note 213, at 52–53. Such powers to grant ownership claims are productions of society, not a natural part of our environment. *Id.*

Historically, there were a number of Marxian analyses of property arguing that property was, in and of itself, a tool to exploit others. *See, e.g.*, C.M. Hann, *Introduction* to *The Embeddedness of Property*, *in* PROPERTY RELATIONS: RENEWING THE ANTHROPOLOGICAL TRADITION 1, 3–4, 14–16 (C.M. Hann ed., 1998); Kenneth R. Minogue, *The Concept of Property and Its Contemporary Significance*, *in* PROPERTY 3, 4–5 (J. Roland Pennock & John W. Chapman eds., 1980).

attached to or expressed within land that is ancestral, those attachments reference the far smaller portion of land in the United States with the greater portion of land involved in commercial enterprises.[221] Thus, the majority of land in the United States should not be equally entitled to the vast and gracious system of rights attached to our notion of property as a literal possession.

Reifying property as an unassailable right has consequences that go far beyond maintaining an already stable system of private property and capitalism. The intent here is not to argue against such a system, particularly when it is existent and stable. Our cultural and social understandings of property are intimately linked to our willingness to in any way limit a property owner's rights—including sufficiently taxing natural resource extraction, particularly when there are significant environmental consequences to extraction.[222] As Carol Rose observed, "[N]arratives change our minds,"[223] so when we speak of possession and labor as though the common law always made claims to land through their intertwining, we conceptualize property and justify it in those terms.[224] We often think of our property system as justified because it supposedly originated with a first possession, from which all subsequent titles are derived via a valid legal transfer of the property interest, and which is justified on the basis of man's need to inhabit and cultivate a parcel of land for his direct survival. The intention here is to suggest that there is more myth than truth to this idea of the original establishment of title, at least within the United States and particularly within the system of common law property that we have inherited. Our concept of property harbors within it a more particular view of natural resources and the legal method of making a claim upon those resources.

VII. CONCLUSION

Although we have spoken of possession as a basic level concept, one without need of much explanation and elaboration, a closer examination shows that our definition is decidedly circular.[225] We define possession in

---

[221] Hann, *supra* note 220, at 8 (showing that inheritance was *previously* the dominant way to receive property).

[222] *See* Singer, *supra* note 220, at 6–7, 10–11 (showing that limitations to property rights will follow if there are significant public effects from an owner's actions).

[223] Rose, *Property as Storytelling*, *supra* note 1, at 55.

[224] *Id.* at 55–56.

[225] *See* discussion *supra* Part III.A.

terms of property and property in terms of possession.[226] In future theoretical work on property rights, possession must be engaged for what it is: a contingent, cultural term with a variety of understandings. Only in this way can theories of first possession serve as a justification for a system of private property.

Moreover, we must be willing to examine critically how the assumption of possession and labor together has reified private property as an unassailable, private right. More than once in recent years, scholars have argued that the truest part of democracy—the ideals of liberty, democratic accountability, and popular sovereignty—are lost behind property rights.[227] This may in part be a result of our tendency to closely guard property as an almost personal right, as though the Constitution affirmed life, liberty, and *property* following Locke word for word, as opposed to substituting happiness. Ironically, such a notion of inviolable property is not consistent with Locke's own views, which limited private property when it interfered with the ability of others to obtain their basic sustenance.[228] We glorify private property rights to the extent that we hesitate to impose the taxes and environmental use restrictions that would sustain society as a whole even though Locke himself was philosophically committed to supporting such impositions on an absolute property right.

---

[226] *See* discussion *supra* Part III.A.

[227] SAMUEL BOWLES & HERBERT GINTIS, DEMOCRACY AND CAPITALISM: PROPERTY, COMMUNITY, AND THE CONTRADICTIONS OF MODERN SOCIAL THOUGHT 3 (1986).

[228] LOCKE, *supra* note 49, at 64–65.