Chattels, 161 U. Pa. L. Rev. 807 (2013); Henry E. Smith, The Language of Property: Form, Context, and Audience, 55 Stan. L. Rev. 1105 (2003).

4. Does Rose overly romanticize Native Americans' relationships to nature? Lewis and Clark's journals reported that Plains Indians routinely killed far more animals than they ate (for example, by herding buffalo over cliffs), and deliberately set fire to tall pine trees to watch them explode. More recent historical work confirms that Indians used fire extensively as a wildlife management agent, and apparently hunted some prehistoric animals to extinction. See, for instance, Stephen J. Pyne, Fire in America: A Cultural History of Wildland and Rural Fire 71-76 (1982); Shepard Krech, The Ecological Indian: Myth and History (1999). Does all this mean that Indians had a more callous and instrumental attitude toward nature than Rose suggests? If so, is it fair to suggest that the common law of property has a uniquely instrumental and domineering attitude toward nature?

5. An academic literature loosely described as "ecofeminism" also explores the relationship of nature to property. A classic work is Carolyn Merchant, The Death of Nature (1980), arguing that the post-Renaissance development of male-dominated, rationalistic, scientific thought has contributed to an estrangement from nature in modern Western thinking; interestingly enough, Merchant identifies rationalistic science with capitalist property. Are science, capitalism, and property all tied together in an instrumental and domineering attitude toward nature? Or is the "conquest of nature" simply part of what all people do in their use of natural resources? See James R. McGoodwin, Crisis in the World's Fisheries (1990), detailing attitudes and practices in small fishing communities around the world; see also Bonnie McCay & James Acheson, The Question of the Commons (1990), in which several essays deal with indigenous practices and attitudes about wildlife.

6. There is an extensive literature on how European colonists acquired, by conquest and otherwise, the lands of indigenous peoples on other continents. See, e.g., Stuart Banner, How the Indians Lost Their Land: Law and Power on the Frontier (2005); Robert A. Williams Jr., The American Indian in Western Legal Thought: The Discourses of Conquest (1990); Eric Kades, The Dark Side of Efficiency: *Johnson v. M'Intosh* and the Expropriation of American Indian Lands, 148 U. Pa. L. Rev. 1065 (2000); and infra p. 273, the selection by Stuart Banner on the English dispossession of the Maori in New Zealand. See generally Carol M. Rose, Property and Expropriation, 2000 Utah L. Rev. 1 (analyzing different types of expropriations).

7. A rule that awards ownership to a first possessor may trigger a duplicative or otherwise wasteful race to be first. How might legal rules be shaped to minimize this problem? See Dean Lueck, The Rule of First Possession and the Design of the Law, 38 J.L. & Econ. 414 (1995).

8. Under what circumstances is possession inadequate to warrant conferral of paramount title? A thief has possession of stolen goods, but not ownership of them in a legal sense. When a patron checks her coat in a restaurant, she does not relinquish ownership of it to the restaurant (which is merely a bailee). For discussion of how some leading legal minds have analyzed the relevance of the possessor's intentions in these sorts of contexts, see Richard A. Posner, Savigny, Holmes, and the Law and Economics of Possession, 86 Va. L. Rev. 535 (2000). For a comparative perspective, see James Gordley & Ugo Mattei, Protecting Possession, 44 Am. J. Comp. L. 293 (1996).

claims to land in what is now a large part of Illinois and Indiana. The plaintiffs in this case claimed through Indian tribes, on the basis of deeds made out in the 1770s; the defendants claimed under titles that came from the United States. The Court found for the defendants, holding that the claims through the Indians were invalid, for reasons derived largely from international law rather than from the law of first possession. But tucked away in the case was a first-possession argument that Marshall passed over. The Indians, according to an argument of the claimants from the United States, could not have passed title to the opposing side's predecessors because, "[b]y the law of nature," the Indians themselves had never done acts on the land sufficient to establish property in it. That is to say, the Indians had never really undertaken those acts of possession that give rise to a property right.

Although Marshall based his decision on other grounds, there was indeed something to the argument from the point of view of the common law of first possession. Insofar as the Indian tribes moved from place to place, they left few traces to indicate that they claimed the land (if indeed they did make such claims). From an eighteenth-century political economist's point of view, the results were horrifying. What seemed to be the absence of distinct claims to land among the Indians merely invited disputes, which in turn meant constant disruption of productive activity and dissipation of energy in warfare. Uncertainty as to claims also meant that no one would make any productive use of the land because there is little incentive to plant when there is no reasonable assurance that one will be in possession of the land at harvest time. From this classical economic perspective, the Indians' alleged indifference to well-defined property lines in land was part and parcel of what seemed to be their relatively unproductive use of the earth.

Now it may well be that North American Indian tribes were not so indifferent to marking out landed property as eighteenth-century European commentators supposed. . . . Or it may be that at least some tribes found landed property less important to their security than other forms of property and thus felt no need to assert claims to property in land. But however anachronistic the *Johnson* parties' (ultimately mooted) argument may now seem, it is a particularly striking example of the relativity of the "text" of possession to the interpretative community for that text. It is doubtful whether the claims of any nomadic population could ever meet the common law requirements for establishing property in land. Thus, the audience presupposed by the common law of first possession is an agrarian or a commercial people—a people whose activities with respect to the objects around them require an unequivocal delineation of lasting control so that those objects can be managed and traded.

But perhaps the deepest aspect of the common law text of possession lies in the attitude that this text strikes with respect to the relationship between human beings and nature. At least some Indians professed bewilderment at the concept of owning the land. Indeed they prided themselves on not marking the land but rather on moving lightly through it, living with the land and with its creatures as members of the same family rather than as strangers who visited only to conquer the objects of nature. The doctrine of first possession, quite to the contrary, reflects the attitude that human beings are outsiders to nature. It gives the earth and its creatures over to those who mark them so clearly as to transform them, so that no one else will mistake them for unsubdued nature.

We may admire nature and enjoy wildness, but those sentiments find little resonance in the doctrine of first possession. Its texts are those of cultivation, manufacture, and development. We cannot have our fish both loose and fast, as Melville might have said,[61] and the common law of first possession makes a choice. The common law gives preference to those who convince the world that they have caught the fish and hold it fast. This may be a reward to useful labor, but it is more precisely the articulation of a specific vocabulary within a structure of symbols approved and understood by a commercial people. It is this commonly understood and shared set of symbols that gives significance and form to what might seem the quintessentially individualistic act: the claim that one has, by "possession," separated for oneself property from the great commons of unowned things.

NOTES AND QUESTIONS ON FIRST POSSESSION

1. Rose presents the meaning of "possession" as culturally relative. Is it? Is Sugden more accurate when he suggests that some indicia of ownership are "found everywhere"? Consider blazes cut into trees by the Native American hunters, whose practices are described in the selection from Demsetz, supra p. 112: Would those be recognized as property claims everywhere? What about a wall or a fence? Are these universally recognizable assertions of ownership? If so, would this mean that possession is not culturally relative after all? See, e.g., Robert C. Ellickson, The Inevitable Trend Toward Universally Recognizable Signals of Property Claims: An Essay for Carol Rose, 19 Wm. & Mary Bill Rts. J. 1015 (2011); Carol M. Rose, Response, 19 Wm. & Mary Bill Rts. J. 1057, 1058-1059 (2011).

2. Even if one supposes that the specific indicia of property are relative, how do those indicia begin and evolve? Who thought of putting a chair in the shoveled-out parking place and how did others decipher its meaning? Are there similarities between these signaling devices and the more general evolution of language? See, e.g., Martin A. Nowak, Natalia L. Komarova & Partha Niyogi, Evolution of Universal Grammar, 291 Sci. 114 (2001). See also the selections on informal property rights, infra Chapter 6. For a suggestive study based on experiments showing that non-legally-trained adults and very small children have intuitions about first possession and its relation to ownership that track the law, see Ori Friedman & Karen R. Neary, First Possession Beyond the Law: Adults' and Young Children's Intuitions About Ownership, 83 Tul. L. Rev. 1 (2009).

3. Rose slides easily from visible signals of property to "artificial" systems of property designation, such as recording systems. Are these really so similar? Might the intervention of legal institutions make the latter "marking" devices differ with respect to costs, effectiveness, and responsiveness to change? Are the audiences for signals of possession and ownership different? See, e.g., Matt Corriel, Up for Grabs: A Workable System for the Unilateral Acquisition of

61. . . . Moby-Dick, ch. 89 ("Fast-Fish and Loose-Fish") (1st ed. London, 1851). . . .

recognize as capable of being reduced to ownership. "Would you please save my place?" one says to one's neighbor in the movie line, in order to ensure that others in line know that one is coming back and not relinquishing one's claim. In my home town of Chicago, one may choose to shovel the snow from a parking place on the street, but in order to establish a claim to it one must put a chair or some other object in the cleared space. The useful act of shoveling snow does not speak as unambiguously as the presence of an object that blocks entry.

Why, then, is it so important that property owners make and keep their communications clear? Economists have an answer: Clear titles facilitate trade and minimize resource-wasting conflict. If I am careless about who comes on to a corner of my property, I invite others to make mistakes and to waste their labor on improvements to what I have allowed them to think is theirs. I thus invite a free-for-all over my ambiguously held claims, and I encourage contention, insecurity, and litigation — all of which waste everyone's time and energy and may result in overuse or underuse of resources. But if I keep my property claims clear, others will know that they should deal with me directly if they want to use my property. We can bargain rather than fight; through trade, all items will come to rest in the hands of those who value them most. If property lines are clear, then, anyone who can make better use of my property than I can will buy or rent it from me and turn the property to his better use. In short, we will all be richer when property claims are unequivocal, because that unequivocal status enables property to be traded and used at its highest value.

Thus, it turns out that the common law of first possession, in rewarding the one who communicates a claim, *does* reward useful labor; the useful labor is the very act of speaking clearly and distinctly about one's claims to property. Naturally, this must be in a language that is understood, and the acts of "possession" that communicate a claim will vary according to the audience. Thus, returning to *Pierson v. Post*, the dissenting judge may well have thought that fox hunters were the only relevant audience for a claim to the fox; they are the only ones who have regular contact with the subject matter. By the same token, the mid-nineteenth-century California courts gave much deference to the mining-camp customs in adjudicating various Gold Rush claims; the Forty-Niners themselves, as those most closely involved with the subject, could best communicate and interpret the signs of property claims and would be particularly well served by a stable system of symbols that would enable them to avoid disputes.

The point, then, is that "acts of possession" are, in the now fashionable term, a "text," and that the common law rewards the author of that text. But, as students of hermeneutics know, the clearest text may have ambiguous subtexts. In connection with the text of first possession, there are several subtexts that are especially worthy of note. One is the implication that the text will be "read" by the relevant audience at the appropriate time. It is not always easy to establish a symbolic structure in which the text of first possession can be "published" at such a time as to be useful to anyone. Once again, *Pierson v. Post* illustrates the problem that occurs when a clear sign (killing the fox) comes only relatively late in the game, after the relevant parties may have already expended overlapping efforts and embroiled themselves in a dispute. Very similar problems occurred in the whaling industry in the nineteenth century: The courts expended a considerable amount of mental energy in finding signs of "possession" that were comprehensible to whalers from their own customs and that at the same time came early enough in the chase to allow the parties to avoid wasted efforts and the ensuing mutual recriminations.

Some objects of property claims do seem inherently incapable of clear demarcation — ideas, for example. In order to establish ownership of such disembodied items we find it necessary to translate the property claims into sets of secondary symbols that our culture understands. In patent and copyright law, for example, one establishes an entitlement to the expression of an idea by translating it into a written document and going through a registration process — though the unending litigation over ownership of these expressions, and over which expressions can even be subject to patent or copyright, might lead us to conclude that these particular secondary symbolic systems do not always yield widely understood "markings." We also make up secondary symbols for physical objects that would seem to be much easier to mark out than ideas; even property claims in land, that most tangible of things, are now at their most authoritative in the form of written records.

It is expensive to establish and maintain these elaborate structures of secondary symbols, as indeed it may be expensive to establish a structure of primary symbols of possession. The economists have once again performed a useful service in pointing out that there are costs entailed in establishing *any* property system. These costs might prevent the development of any system at all for some objects, where our need for secure investment and trade is not as great as the cost of creating the necessary symbols of possession.

There is a second and perhaps even more important subtext to the "text" of first possession: the tacit supposition that there is such a thing as a "clear act," unequivocally proclaiming to the universe one's appropriation — that there are in fact unequivocal acts of possession, which any relevant audience will naturally and easily interpret as property claims. Literary theorists have recently written a great deal about the relativity of texts. They have written too much for us to accept uncritically the idea that a "text" about property has a natural meaning independent of some audience constituting an "interpretive community" or independent of a range of other "texts" and cultural artifacts that together form a symbolic system in which a given text must be read. It is not enough, then, for the property claimant to say simply, "It's mine" through some act or gesture; in order for the "statement" to have any force, some relevant world must understand the claim it makes and take that claim seriously.

Thus, in defining the acts of possession that make up a claim to property, the law not only rewards the author of the "text," it also puts an imprimatur on a particular symbolic system and on the audience that uses this system. Audiences that do not understand or accept the symbols are out of luck. . . .

In the history of American territorial expansion, a pointed example of the choice among audiences made by the common law occurred when one group did not play the approved language game and refused to get into the business of publishing or reading the accepted texts about property. The result was one of the most arresting decisions of the early American republic: *Johnson v. McIntosh*,[49] a John Marshall opinion concerning the validity of opposing

49. 21 U.S. (8 Wheat.) 543 (1823).

With these more serious claims in mind, then, I turn to the maxim of the common law: first possession is the root of title. Merely to state the proposition is to raise two critical questions: What counts as possession, and why is it the basis for a claim to title? In exploring the quaint old cases' answers to these questions, we hit on some fundamental views about the nature and purposes of a property regime.

Consider *Pierson v. Post*,[16] a classic wild-animal case from the early nineteenth century. Post was hunting a fox one day on an abandoned beach and almost had the beast in his gunsight when an interloper appeared, killed the fox, and ran off with the carcass. The indignant Post sued the interloper for the value of the fox on the theory that his pursuit of the fox had established his property right to it.

The court disagreed. It cited a long list of learned authorities to the effect that "occupancy" or "possession" went to the one who killed the animal, or who at least wounded it mortally or caught it in a net. These acts brought the animal within the "certain control" that gives rise to possession and hence a claim to ownership.

Possession thus means a clear act, whereby all the world understands that the pursuer has "an unequivocal intention of appropriating the animal to his individual use." A clear rule of this sort should be applied, said the court, because it prevents confusion and quarreling among hunters (and coincidentally makes the judges' task easier when hunters do get into quarrels).

The dissenting judge commented that the best way to handle this matter would be to leave it to a panel of sportsmen, who presumably would have ruled against the interloper. In any event, he noted that the majority's rule would discourage the useful activity of fox hunting: who would bother to go to all the trouble of keeping dogs and chasing foxes if the reward were up for grabs to any "saucy intruder"? If we really want to see that foxes don't overrun the countryside, we will allocate a property right—and thus the ultimate reward—to the hunter at an earlier moment, so that he will undertake the useful investment in keeping hounds and the useful labor in flushing the fox.

The problem with assigning "possession" prior to the kill is, of course, that we need a principle to tell us when to assign it. Shall we assign it when the hunt begins? When the hunter assembles his dogs for the hunt? When the hunter buys his dogs?

Pierson thus presents two great principles, seemingly at odds, for defining possession: (1) notice to the world through a clear act, and (2) reward to useful labor. The latter principle, of course, suggests a labor theory of property. The owner gets the prize when he "mixes in his labor" by hunting. On the other hand, the former principle suggests at least a weak form of the consent theory: The community requires clear acts so that it has the opportunity to dispute claims, but may be thought to acquiesce in individual ownership where the claim is clear and no objection is made.

On closer examination, however, the two positions do not seem so far apart. In *Pierson*, each side acknowledged the importance of the other's

16. 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

principle. Although the majority decided in favor of a clear rule, it tacitly conceded the value of rewarding useful labor. Its rule for possession would in fact reward the original hunter most of the time, unless we suppose that the woods are thick with "saucy intruders." On the other side, the dissenting judge also wanted some definiteness in the rule of possession. He was simply insisting that the acts that sufficed to give notice should be prescribed by the relevant community, namely hunters or "sportsmen." Perhaps, then, there is some way to reconcile the clear-act and reward-to-labor principles.

The clear-act principle suggests that the common law defines acts of possession as some kind of *statement*. As Blackstone said, the acts must be a *declaration* of one's intent to appropriate. . . .[23]

Possession now begins to look even more like something that requires a kind of communication, and the original claim to the property looks like a kind of speech, with the audience composed of all others who might be interested in claiming the object in question. Moreover, some venerable statutory law obligates the acquiring party to *keep on* speaking, lest he lose his title by "adverse possession."

Adverse possession is a common law interpretation of statutes of limitation for actions to recover real property. Suppose I own a lot in the mountains, and some stranger to me, without my permission, builds a house on it, clears the woods, and farms the lot continuously for a given period, say twenty years. During that time, I am entitled to go to court to force him off the lot. But if I have not done so at the end of twenty years, or some other period fixed by statute, not only can I not sue him for recovery of what was my land, but the law recognizes him as the title owner. The doctrine of adverse possession thus operates to transfer property to one who is initially a trespasser if the trespasser's presence is open to everyone, lasts continuously for a given period of time, and if the title owner takes no action to get rid of him during that time.

Here again we seem to have an example of a reward to the useful laborer at the expense of the sluggard. But the doctrine is susceptible to another interpretation as well; it might be designed, not to reward the useful laborer, but to require the owner to assert her right publicly. It requires her to make it clear that she, and not the trespasser, is the person to deal with if anyone should wish to buy the property or use some portion of it. . . .

Possession as the basis of property ownership, then, seems to amount to something like yelling loudly enough to all who may be interested. The first to say, "This is mine," in a way that the public understands, gets the prize, and the law will help him keep it against someone else who says, "No, it is *mine*." But if the original communicator dallies too long and allows the public to believe the interloper, he will find that the interloper has stepped into his shoes and has become the owner.

Similar ideas of the importance of communication, or as it is more commonly called, "notice," are implicit in our recording statutes and in a variety of other devices that force a property claimant to make a public record of her claims on pain of losing them altogether. Indeed, notice plays a part in the most mundane property-like claims to things that the law does not even

23. [2 Commentaries on the Laws of England] 9, 258.

*Possession as the Origin of Property**

Carol M. Rose

How do things come to be owned? This is a fundamental puzzle for anyone who thinks about property. One buys things from other owners, to be sure, but how did the other owners get those things? Any chain of ownership or title must have a first link. Someone had to do something to anchor that link. The law tells us what steps we must follow to obtain ownership of things, but we need a theory that tells us why these steps should do the job.

John Locke's view, once described as "the standard bourgeois theory,"[1] is probably the one most familiar to American students. Locke argued that an original owner is one who mixes his or her labor with a thing and, by commingling that labor with the thing, establishes ownership of it. This labor theory is appealing because it appears to rest on "desert," but it has some problems. First, without a prior theory of ownership, it is not self-evident that one owns even the labor that is mixed with something else. Second, even if one does own the labor that one performs, the labor theory provides no guidance in determining the scope of the right that one establishes by mixing one's labor with something else. Robert Nozick illustrates this problem with a clever hypothetical. Suppose I pour a can of tomato juice into the ocean: Do I now own the seas?[5]

A number of thinkers more or less contemporary to Locke proposed another theory of the basis of ownership. According to this theory, the original owner got title through the consent of the rest of humanity (who were, taken together, the first recipients from God, the genuine original owner). Locke himself identified the problems with this theory; they involve what modern law-and-economics writers would call "administrative costs." How does everyone get together to consent to the division of things among individuals?

The common law has a third approach, which shares some characteristics with the labor and consent theories but is distinct enough to warrant a different label. For the common law, *possession* or "occupancy" is the origin of property. This notion runs through a number of fascinating old cases with which teachers of property law love to challenge their students. Such inquiries into the acquisition of title to wild animals and abandoned treasure may seem purely academic; how often, after all, do we expect to get into disputes about the ownership of wild pigs or long-buried pieces of eight? These cases are not entirely silly, though. People still do find treasure-laden vessels, and statesmen do have to consider whether someone's acts might support a claim to own the moon, for example, or the mineral nodes at the bottom of the sea. Moreover, analogies to the capture of wild animals show up time and again when courts have to deal on a nonstatutory basis with some "fugitive" resource that is being reduced to property for the first time, such as oil, gas, groundwater, or space on the spectrum of radio frequencies.

*Source: 52 U. Chi. L. Rev. 73-88 (1985).

1. Richard Schlatter, Private Property: The History of an Idea 151 (1951).

5. . . . Anarchy, State and Utopia 175 (1974). . . .