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POSSESSION PUZZLES

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Possession Puzzles

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Lee Anne Fennell*

The subject of this lecture is possession, but I want to start by asking you to think about its opposite, dispossession. This, unfortunately, does not require you to stretch your imagination: the housing crisis has made dispossession a depressingly frequent modern occurrence and a widespread ongoing threat.¹ Behind the litany of dire statistics, we find a familiar story: A family is living in a home for which it can no longer make the necessary mortgage payments, either because the terms of the mortgage have become less favorable, or because a breadwinner has lost her job. Refinancing is impossible; the property is deeply underwater. Attempts at loan modification fail and foreclosure looms. Property rights have moved out of alignment with possession. Something has to give. Either property rights are

¹ Professor of Law, University of Chicago Law School. I have revised the original lecture for publication, adding citations and some additional material for clarity and completeness. I am grateful to the attendees of the Third Annual Wolf Family Lecture for their comments and questions.

¹ While the picture is bleak nationwide, Florida is among a handful of states that has been especially hard-hit. More than 1 in 17 Florida housing units, 5.93%, had at least one foreclosure filing in 2009. RealtyTrac, RealtyTrac Year-End Report Shows Record 2.8 Million U.S. Properties with Foreclosure Filings in 2009, available at http://www.realtytrac.com/contentmanagement/pressrelease.aspx?itemid=8333. This was over two and a half times 2009’s national rate of 2.21%. Id. As of the fourth quarter of 2009, 26% of Florida’s residential mortgages were one payment or more past due, and 20.4% were 90 days or more past due. Mortgage Bankers Association, Delinquencies, Foreclosures Starts Fall in Latest MBA National Delinquency Study, Feb. 19, 2010, available at http://www.mortgagebankers.org/NewsandMedia/PressCenter/71891.htm. In that same quarter, an estimated 47.8% of mortgaged residential properties in Florida were “underwater,” with loan balances exceeding the property value. First American CoreLogic, Negative Equity Report, Q4 2009, Table 1: Negative Equity by State, available at http://www.facorelogic.com/newsroom/marketstudies/negative-equity-report.jsp. This was twice the national average of 23.8%. Id.
abridged so that possession can continue, or existing property rights are enforced and possession ends, perhaps quite painfully.²

The ongoing flood of defaults and foreclosures represents only one facet of dispossession, of course, and the recent policy initiatives to keep people in their homes represent just the latest entry in a long line of efforts to address fears about displacement. Similar concerns about disrupted possession have animated policy measures to protect tenants against eviction or against displacement from rising rents. Anxiety about dispossession may even explain one of the most controversial doctrines known to property law: adverse possession. In offering a rationale for prescriptive rights, Oliver Wendell Holmes referenced the pain of dispossession, observing that “[a] thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it.”³ At a broader level, the entire system of real property rights is arguably motivated in large part by the value that people place on secure possession.

That raises an interesting question: If property rights are designed to make possession more secure, as they are generally believed to do, why does the United States, which has very well-developed property rights, have so much insecurity of tenure? Not only do well-developed property rights accompany insecure tenure, some of the refinements in property rights actually contribute to that insecurity. After all, it is the ability to mortgage one’s home that presents the threat of foreclosure, a threat that grows as equity stake

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² This way of framing the issue assumes that the security interest in the property is well-defined and properly formalized, so that it is clear what it would mean to enforce “existing property rights.” In fact, questions about the ownership and enforceability of repeatedly reconveyed interests have come to constitute a significant strand in the unfolding foreclosure drama. See, e.g., Kimberly Miller, New Rule Says Banks Must Prove Ownership Before Foreclosing, MIAMI HERALD, June 1, 2010; Christopher Peterson, Foreclosure, Subprime Mortgage Lending, and The Mortgage Electronic Registration System, U Cin. L. Rev. (forthcoming 2010), draft available at http://www.ssrn.com/abstract=1469749. For a theoretical take on formalism in property law, see Carol M. Rose, Crystals and Mud in Property Law, 40 STAN. L. REV. 577 (1988).
³ Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 477 (1897).
requirements fall (to say nothing of the impact of more complex securitization processes on the overall crisis, and on the prospects for loan modifications). Similarly, it is only the ability to divide a fee simple into time slices called leaseholds that allows people to possess property as tenants, and that thereby turns them into occupants who tend to be especially vulnerable to dispossession.

What gives? Why should the further development and refinement of an institution that is designed to make possession more secure actually do the opposite? And what, if anything, can or should law do about it? As a first cut, we need to examine some connections between property rights, possession, and value.

**Property, Possession, and Value**

Property rights are tightly related to, but conceptually distinct from, possession. Possession features heavily in accounts of the origin of property rights and represents a way in which such rights can be acquired in the first instance. It is also the means through which real property ultimately delivers value, at least to the extent we understand possession as entailing the ability to use property in valuable ways, and to keep others from using the property in inconsistent ways. Even leaving land in an undeveloped state requires “possession” of a sort—taking control of the land to the extent necessary to keep others out.

People can, of course, extract wealth from real property without possessing it themselves—owners can be landlords or even speculators. As John Christman has suggested, however, that is only possible because someone else gets (or anticipates getting) value from

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6 See, e.g., JOHN CHRISTMAN, THE MYTH OF PROPERTY: TOWARD AN Egalitarian Theory of Ownership 133 (1994) (using the term “exclusive control rights” to capture the value that attaches to possession and use).
directly using (or otherwise controlling) the property.\(^7\) We can see, then, that property produces value for owners in two quite distinct ways: (1) by providing a valuable consumption stream that is gleaned through possession; and (2) by providing an investment return that is gleaned through alienating possession.\(^8\) Property rights support both sources of value, but there is sometimes a tension between them.

Although it is relatively clear how property rights facilitate alienation, it is worth spelling out how property rights support and buttress possession. We might at first wonder why property rights would be necessary to derive value from possession, especially if everyone follows the rule of deferring to a current possessor rather than fighting it out.\(^9\) Yet bare possession does not get us far; even in a highly possession-deferential regime, people must spend a lot of time and resources standing guard.\(^10\) Indeed, empirical work by Erica Field comparing titled and untitled squatter communities in Peru shows that a lack of

\(^7\) See id. ("[E]xclusive control rights must ultimately vest somewhere if goods are to be consumed. And without the opportunity for consumption there can be no motive for trades.") (emphasis in original).

\(^8\) Many scholars have noted this dichotomy, sometimes explicitly referencing the distinction between "exchange value" and "use value" developed in Karl Marx, Capital: A Critical Analysis of Capitalist Production 2-8 (Frederick Engels ed., Samuel Moore & Edward Aveling trans., George Allen & Unwin 1972) (1887). See, e.g., John R. Logan & Harvey L. Molotch, Urban Fortunes: The Political Economy of Place 1–2 (20th anniversary ed. 2007); Eduardo M. Peñalver, Land Virtues, 94 Cornell L. Rev. 821, 834-35 (2009); see also Christman, supra note 6, at 128 (distinguishing "control ownership" from "income ownership"); J.W. Harris, Property and Justice 26–27 (1996) (distinguishing "the use of things" from "the allocation of items of social wealth"); Madeline Morris, The Structure of Entitlements, 78 Cornell L. Rev. 822, 837–38 (1993) (distinguishing "in-kind enjoyment" from "monetary compensation").

\(^9\) Some scholars have suggested that property rights may find their origin in a convention of deference to possessors. See James E. Krier, Evolutionary Theory and the Origin of Property Rights, 95 Cornell L. Rev. 139, 154-55 (reviewing literature on this point, including Robert Sugden, The Economics of Rights, Co-operation, and Welfare (2d ed. 2004)).

\(^10\) See Timothy Besley & Maitreesh Ghatak, Property Rights and Economic Development §§ 2.1.2 – 2.3 (Feb. 2009), available at http://ssrn.com/abstract=1546900 [forthcoming in Handbook of Development Economics (Dani Rodrik & Mark Rosenzweig, eds.)] (developing a model that includes "guard labor" to capture and qualify the intuition that "[p]oor property rights . . . divert[] resources (here labor) from productive to unproductive uses"). As Besley & Ghatak note, it is possible that guarding the property and producing value from the property will be complementary, as where constant presence on agricultural property by a farmer tends both to reduce the risk of expropriation and to increase the productive use derived from the land. See id.
property rights often translates into a very large proportion of time spent at home.\textsuperscript{11} Work and socializing must be conducted largely from home if bare possession governs use rights; leave for an afternoon and someone else may swoop in and take over. In contrast, if property rights are recognized and protected by the state, one need not stay home all day to guard one’s home and goods. The data bear this out. With property rights in hand, employment rises and time spent at home decreases.\textsuperscript{12}

Here, we see how property rights, by conferring the right to secure possession, actually relieve owners of the need for constant, in-person physical possession.\textsuperscript{13} Possession turns out to be both valuable and costly; property rights make possession more valuable by rendering it less costly. People can loan things to each other without losing the rights to them. A homeowner can go away on vacation without losing rights to occupy her home. Property rights also make possession more valuable by enabling a possessor to remain in place long enough to benefit from any investments she makes on or with the property,\textsuperscript{14} whether planting crops, remodeling the living room, getting to know her neighbors, learning the best commuting routes, or fostering business goodwill in the local community. Again, empirical evidence supports the proposition that investments in property, including residential property, increase when title is secure.\textsuperscript{15}

\textsuperscript{11} See Erica Field, \textit{Property Rights, Community Public Goods, and Household Time Allocation in Urban Squatter Communities: Evidence from Peru}, 45 WM & MARY L. REV. 837, 858 (2004) (finding in a study of communities in Peru that “in neighborhoods in which the titling program has entered, pre-program squatters are significantly less likely to keep a person at home guarding property”).

\textsuperscript{12} See id. at 859.

\textsuperscript{13} See Bell & Parchomovsky, \textit{supra} note 4, at 556 (observing that legal protection of property rights “makes possible the temporary separation of ownership and possession”).

\textsuperscript{14} See, e.g., Armen A. Alchian & Harold Demsetz, \textit{The Property Rights Paradigm}, 33 J. ECON. HIST. 16, 23 (1973).

\textsuperscript{15} See, e.g., Erica Field, \textit{Property Rights and Investment in Urban Slums}, 3 J. EUR. ECON. ASSOC. 279, 280 (2005) (finding, based on study of the effects of a titling program in Peru “that strengthening tenure through property formalization in urban squatter settlements has a large positive effect on investment”). An important exploration of the linkages between property rights and investment is Timothy Besley, \textit{Property Rights and Investment Incentives}, 103 J. POLIT. ECON. 903 (1995). As Besley notes, untangling causation can be difficult if one believes that investments themselves tend to produce property rights. \textit{Id}. at 904. Besley also identifies several possible mechanisms through which property rights might increase
Things may not always go well, of course. Families may split up, crops may fail, businesses may fold, neighborhoods may unravel. As Henry Smith has suggested, we can think of property law as giving owners wide discretion to place bets on projects of their choosing.\textsuperscript{16} Property rights do not guarantee that owners will win all their bets or that their holdings will not lose value,\textsuperscript{17} but property rights do enable owners to stick around long enough to see how those bets turn out. How long will that be? Because various sets of projects and owners will have different time horizons, the answer is “it depends.” Property rights can accommodate that answer very well, because property ownership can continue indefinitely, allowing the owner to continue possessing as long as she likes, trading off present and future payoffs in whatever manner seems best to her.\textsuperscript{18}

**Is Possession Lumpy?**

Sometimes the payoffs from possession come not in the form of a crop or other tangible payout, but in a stream of intangible benefits, like living in a friendly and safe (or, if you like, hip and edgy) neighborhood. In those contexts, the value of the consumption investments: by reducing the risk of expropriation, by enabling property to be used as collateral, and by making property alienable so that gains from trade are possible. \textit{Id.} at 906-07; \textit{see also} Besley & Ghatak, \textit{supra} note 10 (reviewing empirical and theoretical literature and developing an analytic framework for assessing how property rights affect economic development). A recent paper studying the effects of titling in Buenos Aires, which avoided the reverse causation problem by taking advantage of a natural experiment in which some squatters received title earlier than others for exogenous reasons, found that formalization was associated with increased investment in physical and human capital (home improvements and education); the potential use of the property as collateral played a much smaller role. Sebastian Galiani & Ernesto Schargrodsky, \textit{Property Rights for the Poor: Effects of Land Titling} (Jan. 28, 2010), available at http://www.ssrn.com/abstract=1544578.


\textsuperscript{17} It is interesting to note that dispossession is regarded very differently in law and policy than similar drops in monetary value; efforts to keep homeowners in possession in the wake of the economic crisis have not been matched by efforts to restore lost value to 401(k) accounts, even though many households lost much more in economic terms in the latter context than they would stand to lose from dispossession. This is consistent with the differential treatment in takings law of actual physical invasions and regulatory measures that reduce value. \textit{See, e.g.}, Richard A. Epstein, \textit{The Seven Deadly Sins of Takings Law: The Dissents in Lucas v. South Carolina Coastal Council}, 26 LOY. L.A. L. REV. 955, 957-59 (1993) (noting and criticizing this distinction).

\textsuperscript{18} \textit{See} Harold Demsetz, \textit{Toward a Theory of Property Rights}, 57 AM. ECON. REV. 347, 355 (1967).
stream may itself depend on how long possession has already gone on, as well as on how long one expects possession to continue. A long-time resident in the community may get more out of, say, an annual St. Patrick’s Day parade than someone who just moved in, and a newcomer who plans to stay for fifty years may also get more out of the parade than her neighbor who anticipates staying only a few months.

Just as individual property holdings may become cumulatively more valuable when aggregated into a large, consolidated development, so too may possession become more valuable when aggregated together into a continuous whole. In other words, we might say—using a highly sophisticated economic term—that possession is a lumpy good. A lumpy good is one that does not deliver utility in even, proportionate increments, but rather in large jumps once enough of the good has been assembled. A bridge is a standard example of an extremely lumpy, or step, good. Half a bridge is not one-half, or even one-tenth, as useful as a full bridge. Indeed, a bridge is nearly worthless until it’s all there, and then, suddenly, it produces a large jump in utility.

Is possession also lumpy? The parallel may at first seem obscure. There is no specific duration of possession that we can associate with a large jump in value; no specific week or month or year that seems analogous to adding the last plank to a bridge. But it still may be the case that staying a long time generates disproportionately more benefits than staying a short time, at least for some households, and at least up to a point. Of course, possession does not always become increasingly valuable as it continues; sometimes the

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19 It is not always the case that aggregation renders property more valuable, of course; parcels, or other property rights, may be more efficiently held individually. See Michael A. Heller, The Tragedy of the Anticommons: Property in the Transition from Marx to Markets, 111 Harv. L. Rev. 621, 674-75 (1998) (discussing situations in which individually held property rights might efficiently give many owners veto power).


21 See, e.g., Russell Hardin, Collective Action 59 (1982). This example is a simplification, of course, given that bridges come in many forms of varying cost. See id.
opposite occurs. Perhaps the home one is occupying has become tiresome and irritating; it is too small or too large, too far or too close to town, too old-fashioned or too modern. The dislocation and pain of moving (or the benefits of staying put) may also fluctuate over the life cycle depending on many factors, including family circumstances, the ages of one’s children, health considerations, employment status, and so on. There may be more precise timing considerations as well. For example, leaving at the end of a school year may allow an owner to glean much more value from possession than departing mid-year, which might argue for staying either a shorter or a longer period of time.

Whatever the relationship between utility and length of tenure may be in a given case, people will be unable to predict its shape perfectly in advance, which is to say that possession’s value may grow or shrink as time passes. What is really valuable, then, is not the ability to remain in possession for some particular (or particularly lengthy) period of time, but rather the ability to choose one’s own departure date—in other words, a possessory option.

The Possessory Option

Property rights, at least at their most iconic (think of the fee simple absolute) confer an important option to continue possessing indefinitely. An option confers the right, but not the obligation, to do something. Thus, a property owner does not have to possess, but rather owns the option to go on possessing as long as she likes, and at whatever intervals she likes, and, equally important, to stop possessing whenever she wishes. That last factor is quite

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22 There are some limits on this principle. Failure to be in possession of one’s property for a significant period of time could, in the absence of monitoring, lead to the loss of the property through adverse possession. Thus, the option one holds with respect to real property does not extend to ignoring it indefinitely.
important: being forced to stay in a particular place when one wants to leave is just as much an infringement of autonomy (if not more) than being forced to leave when one wants to stay.

The ability to depart when one wishes is a little more complicated than it sounds, however, and it implicates the second facet of real property—its value as an investment, which derives from its alienability. Alienating property depends on finding a willing counterparty to whom one can transfer the possessory interest. Typically, an owner must also repay any outstanding mortgage debt before she can transfer the property; if she owes more than the sales proceeds will yield, she will have to bring money to the table to sell the property, unless the lender will accede to a “short sale” that does not cover the mortgage balance. Of course, it is possible for an owner to walk away from her property without finding a buyer or repaying the mortgage. As negative equity deepens, the risk that an owner will opt for voluntary or “strategic” default increases, especially in states that do not permit the lender recourse against the owner’s other assets. Nonetheless, many homeowners react to negative equity not by defaulting, but by digging in.

23 The Obama administration has introduced an initiative to support short sales by providing incentives to lenders and relocation funds to owners. See David Streitfeld, Program Will Pay Homeowners to Sell at a Loss, N.Y. TIMES, Mar. 7, 2010.

24 The common law does not allow owners of real property to abandon their fee estates in the legal sense. Lior Jacob Strahilevitz, The Right to Abandon, 158 U. PA. L. REV. 355 (2010). However, properties are often forfeited to lenders. A borrower who lives in a state where recourse against her other assets is not legally permitted (or who simply has no significant other assets) can thus be viewed as holding a “put option” that allows her to force a sale of the home back to the lender at the price of the unpaid mortgage balance—even if that is far more than the home is worth. See Todd J. Zywicki and Joseph D. Adamson, The Law and Economics of Subprime Lending, 80 U. COLO. L. REV. 1, 26-27 (2009).

25 A recent study examining how negative equity correlates with the propensity to strategically default is Luigi Guiso, Paola Sapienza, and Luigi Zingales, Moral and Social Constraints to Strategic Default on Mortgages *5 (NBER Working Paper No 15145, June 2009), online at http://www.nber.org/papers/w15145 (visited Nov 13, 2009); see also David Streitfeld, No Help In Sight, More Homeowners Walk Away, N.Y. TIMES A1 (Feb 3, 2010).

26 Even where such recourse is available, many borrowers lack significant assets other than the home, making pursuing a deficiency judgment a costly and futile endeavor. See, e.g., Zywicki & Adamson, supra note 24, at 30. Nonetheless, a recent study suggests that borrowers likely to have negative equity are less likely to default in recourse states, with the magnitude of the effect (unsurprisingly) correlating with wealth. See Andra C. Ghent and Marianna Kudlyak, Recourse and Residential Mortgage Default: Theory and Evidence from U.S. States (Federal Reserve Bank of Richmond Working Paper No 09-10, July 2009), available at http://ssrn.com/abstract=1432437 (visited Nov 13, 2009). Although it involves issues that are
Interestingly, then, low or negative levels of equity may threaten either dispossessing through foreclosure or involuntary continuation of possession—or may force an owner to choose between remaining trapped in place or voluntarily defaulting. These equity deficits are very much a function of property rights; without the ability to alienate a security interest in one’s home, mortgages would themselves be impossible. This presents a paradox: security of tenure, understood to encompass both the “staying when you want” and the “leaving when you want” sides of the possessory option, can be threatened as well as buttressed by the development of property rights.

The Paradox of Property Rights

A major theme in the law and economics literature is the capacity of well-defined and freely tradable property rights to add value. Often, gains can be achieved by breaking down a given piece of property into finer slices in order to have each facet owned optimally. So mineral rights might be traded independently of surface rights, or a leasehold might be sliced off from a fee simple, or a warranty or insurance policy might put the risk associated with a given asset on someone other than the person who is designated as the owner. The law puts some limits on what property interests can be parcelled off and sold separately, perhaps to prevent the kind of excessive fragmentation that might make it harder to put things to good

27 Researchers have documented a lock-in effect in which negative equity markedly reduces mobility. For a graphic depiction of the relationship between mobility hazard rates and home equity, see Andrew Henley, Residential Mobility, Housing Equity, and the Labour Market, 108 ECON. J. 414, 423 fig. 1 (1998). This stickiness in the housing market can inflict real social costs if it keeps people from moving in response to job opportunities. See Housing Prices and Mobility: Off the Road, THE ECONOMIST, Dec. 30, 2009.

28 See, e.g., Yoram Barzel, ECONOMIC ANALYSIS OF PROPERTY RIGHTS 6 (2d ed. 1997) (“Net gains from exchange can often be increased if the original owners of commodities transfer only subsets of the commodities’ attributes while retaining the rest. Cases where only a subset of rights is transferred are common; for instance, this is so in all rental agreements, as it is in any sale subject to guarantee.”).

29 See id. at 115-17 (discussing the example of a refrigerator warranty).
use later on. Or we may think that certain parts of the bundle simply need to “stick together” (as Joseph Singer has put it) in order for property to serve its purposes.

In the present context, we might ask what limits should be placed on property transactions that might interfere with the possessory option. To take a timely and important example, consider the mortgage. The free alienability of security interests in real property allows that property to be used as collateral. Indeed, as we see in Hernando de Soto’s work, this is often touted as one of the core advantages of formal property rights. But if a loan is not repaid, the lender can reclaim the collateral, resulting in the owner’s dispossession. In a recent theoretical critique of the so-called “de Soto effect,” Timothy Besley and Maitreesh Ghatak note that where credit markets are not competitive, borrowers may be forced to put up collateral that they would not otherwise have been required to provide, leaving them worse off. A second example is the leasehold. When an owner slices away a temporally limited possessory interest and grants it to a tenant, a tension is created between the tenant’s right to remain and the landlord’s right to regain possession. The balance can be struck contractually through a lease, barring any legal limits, but the end result may be dispossession.

Taking the alienability of property rights to its logical conclusion means parties may strike deals that may end up causing possession to become less, rather than more, stable.

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31 Joseph William Singer, Democratic Estates: Property Law in a Free and Democratic Society, 94 CORNELL L. REV. 1009, 1021-22 (2009) (“[P]roperty law requires that certain sets of rights in the bundle stick together (so to speak); when you transfer certain property rights, others have to go along for the ride.”).
34 Similar points have been made outside of real property contexts, where issues arise about whether or not to “propertize” things like human organs. Property theorist J. E. Penner makes the point vividly in suggesting we subject our intuitions about property to what he terms “the bankruptcy test.” Penner writes:
The relationship between secure possession and fully articulated property rights thus has a somewhat paradoxical character. If we were to sketch that relationship on a cocktail napkin,\textsuperscript{35} not in an effort to be empirically precise but rather to try to understand the basic dynamic, we might end up with something like Figure 1’s lopsided frown.

\begin{figure}[h]
\centering
\includegraphics[width=0.5\textwidth]{property_rights_security.png}
\caption{Property Rights and Security of Tenure}
\end{figure}

As we move from a regime of bare possession to one of well-defined, state-protected property rights, possession becomes more and more secure, at least up to a point. But as we continue on, making property rights more fine-grained and severable in order to pull as much value from assets as possible, security of tenure ultimately drops, because part of what can be traded is the very option to stay in place.

\begin{quote}
Loads of people are happy to claim that their rights to their kidneys or their right to vote are property rights, thinking no doubt that all of their valuable entitlements are their property. Or, if they embrace Lockean ideology, they may think that property rights are somehow better, stronger, or more fundamental than other rights. Until, that is, the consequences of bankruptcy for one's property rights are mentioned, and then the air is riven by the screaming clutch of an argument thrown into reverse.
\end{quote}

\textsuperscript{35}Cocktail napkins, along with envelope backs, hold an esteemed place in the transmission of ideas. In his 1993 Coase Lecture, my colleague Randy Picker suggested the following test for the talk’s success, which I think applies equally well here: “Given two bar stools and a stack of cocktail napkins, could the ideas in this talk be explained to an intelligent person in a crowded bar with a bank of TVs showing the Bulls and the Blackhawks?” Randal C. Picker, 1993 Coase Lecture: An Introduction to Game Theory and the Law, available at http://www.law.uchicago.edu/node/1306.

Certainly, one can alienate aspects of the option to remain and still end up in a place that is somewhat better than bare possession—one need not stand guard all day at one’s home in order to avoid losing rights to it. But purely from the standpoint of maximizing stable possession, more alienability may mean less security. Whenever you see a curve like Figure 1 one, there’s an impulse to try to figure out how to stay at the apex. Why overshoot into the righthand territory? Why not roll back certain kinds of mortgages and leaseholds that seem to jeopardize the right to remain, and get to this nice spot in the middle, with less alienability and more security? A general answer is that maximizing security of tenure is not our only goal; there are other interests and values that must be considered as well. A more tailored answer, however, is that the apex is not open to everyone.

**Access v. Secure Possession**

The reason that not everyone can get to the apex is simple: it is costly to hold the unqualified right to remain. Like any option, the right to remain is highly valuable to the option holder, but it also necessarily (and by conscious design) restricts the opportunities available to those against whom the option may be exercised (here, the rest of the world). If one’s option to remain is absolute, nobody else has any right to interrupt your possession; indeed, everyone has a duty not to interfere with your continued possession. That may sound ideal, unless you need to do business with one of those other people, such as a lender or a landlord, in order to get into possession in the first place.

Thus, there is a well-known tradeoff between access to housing and security of tenure. To think about it, consider another one of those cocktail napkin graphs, Figure 2,
which sketches the relationship between difficulty of obtaining credit and effects on both initial access to property ("homebuying") and security of tenure ("homekeeping").\footnote{Although I use the term “homekeeping,” the real variable of interest is the strength of the possessory option, which encompasses not only the ability to stay when one wants, but also the ability to leave when one wants. The effect of credit access on this second side of the possessory option is more ambiguous, however, because easier credit also means more people to whom one can sell one’s home, making departure easier to carry out except where sharp price declines have put the property “underwater,” constraining the ability to sell.}

\begin{figure}[h]
\centering
\includegraphics[width=0.5\textwidth]{fig2.pdf}
\caption{Homebuyers and Homekeepers}
\end{figure}

The slope and height of the lines may be empirically different than in Figure 2, of course, but the basic relationship among the components offers a helpful way of framing the relevant tradeoffs. The downward slopes of the solid and dashed lines reflect the fact that both initial access and secure possession for a homeowner tend to decrease as credit tightens.\footnote{The reason is intuitive: access to credit facilitates initial access, which is a prerequisite for secure possession.} But the slopes of the two lines are not the same: looser credit means that a larger proportion of homebuyers are likely to lose possession involuntarily.\footnote{I do not mean to suggest that the ease of access to credit is the only factor that influences whether people obtain or lose homes. The characteristics and pricing of mortgage products can increase home loss without offering increased access to homeownership, and homeownership may be advanced in ways that do not involve easing credit access. Thus, as discussed below, it may be possible to advance access and security simultaneously.} If credit is very hard to get, fewer people will be able to buy homes, but those who purchase have an excellent chance of
retaining possession as long as they wish. We can tell a similar story about the effects of rent control—it makes finding a unit more difficult (there are fewer units, and less turnover) but once in, an occupant is much less likely to be displaced (assuming the rent control is appropriately buttressed with eviction controls).

One might ask why we would ever want to move toward the righthand side of such a graph, if it is really true that both initial access and long-term tenure are maximized with easier access. Clearly, our answer would have something to do with the people who are in the dark shaded wedge between the solid and dashed lines in Figure 3, who would end up getting and then losing access to housing. We would be concerned both about the impacts on those households and about the spillovers on their neighbors, on the surrounding community, and perhaps even on society-wide norms and expectations about housing and stability.

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39 These are examples of a more general tradeoff that arises whenever limits on bargaining options both decrease the chances of landing an entitlement and increase the surplus that will be gleaned in that event. Cf. Russell Hardin, *The Utilitarian Logic of Liberalism*, 97 ETHICS 47, 61 (1986).

40 As an empirical matter, the relative position and slopes of the lines might differ substantially from what Figure 2 indicates, and it is not impossible that particularly lax credit arrangements could lead to less homekeeping in absolute terms. While it might seem that at least as many people would keep their homes in a world with easy credit as in a world with tight credit (since those able to qualify and keep their homes in the latter world would also be present in the former world), high default rates might erode norms and alter expectations about homeownership and stability in ways that would increase default rates in an “easy credit” world even among those who would have kept their homes had credit restrictions remained tight.
We must also consider the households in the lighter shaded wedge shown in Figure 3, however—the ones who would succeed under a regime of greater access but who could not obtain access to homeownership under a stricter one. In considering this group, it is crucial not to overstate the effects of access to credit on access to homeownership. To return to the context of the present housing crisis, it is clear that many of the people who secured problematic subprime loans would not have been locked out of homeownership altogether in the absence of those mortgage products; they would have qualified for another type of loan, perhaps on a less expensive property.\textsuperscript{41} Nonetheless, freer availability of credit would be expected to enhance access to homeownership at the margin,\textsuperscript{42} a point that is especially important to keep in mind as policymakers struggle with the best ways to move forward after the crisis.

\textsuperscript{41} See, e.g., \textsc{Dan Immergluck}, \textit{Foreclosed: High-Risk Lending, Deregulation, and the Undermining of America’s Mortgage Market} 141 (2009). As Immergluck notes, even those who might not have received immediate access to homeownership without the availability of subprime loans might have qualified just a bit later, after saving and working a little longer.

\textsuperscript{42} See \textsc{Edward M. Gramlich}, \textit{Subprime Mortgages: America’s Latest Boom and Bust} 6-9 (2007).
Where access and security conflict, how should we go about making the tradeoff? First, consider the impacts on the households themselves. How bad is it to have something and then lose it? Is it worse than never having had it at all, and, if so, how much worse? Behavioral law and economics has been attempting to answer this question. There is a great deal of empirical evidence that “willingness to pay” (what people are willing to pay to acquire something) is consistently lower than “willingness to accept” (the payment people would require in order to give up something they already have).\(^{43}\) This is sometimes interpreted as loss aversion, a status quo bias, or an endowment effect; in any case, it appears that losing something one has is more painful than not gaining something one does not yet have.\(^{44}\) We might understand property law as representing an institutional response to this fact, by granting people a wide degree of authority over when and how they will lose possession.

Popular culture and academic writings alike suggest that control over when and how one’s possession will end has special resonance in the context of residences. Margaret Jane Radin has suggested people’s identities are “bound up” in particular properties that have special significance for them, including the home. Many other scholars have assumed that losing the home is an unusually devastating loss. But there are some dissenting voices. Stephanie Stern has recently questioned whether the purported high costs of home loss have any empirical basis, and has concluded that there is very little evidence that this is the kind of


extraordinarily costly loss that law should take heroic measures to avert.\textsuperscript{45} Clearly, involuntary foreclosure is experienced as a traumatic event for a great many households,\textsuperscript{46} but not everyone reacts to it in the same way.

If there is heterogeneity among households with respect to the pain associated with home loss, it might seem that people should be left free to make their own choices about the risk of such an outcome. After all, property rights that deliver unconditional, inalienable options to remain are expensive, and compelling entitlements to fit that mold will cut many people out of the game who might very much want to participate. Two main reasons are cited for limiting choice: that the choice will harm the chooser, or that the choice will harm other parties.\textsuperscript{47} Both of these considerations surface in contexts involving dispossession, as the subprime mortgage example illustrates. One concern is that people tend to be too optimistic about their own financial prospects, underestimating the chance that they will later fall on hard times. They may also lack information about the degree to which they will adapt to their new surroundings, or how painful the loss of the home would be.\textsuperscript{48}

Spillovers on third parties offer a less controversial basis for restricting choice. Foreclosures, as we have seen, inflict costs on neighborhoods and communities.\textsuperscript{49} When homes are not cared for, crime and vandalism increase, overgrown lawns and algae-filled

\textsuperscript{46} See, e.g., IMMERGLUCK, \textit{supra} note 41, at 145-47.
\textsuperscript{48} A separate issue, which we can leave to one side because it has a clear policy answer, involves deception and fraud in the course of the mortgage transaction.
\textsuperscript{49} For recent overviews of these costs, see, e.g. G. Thomas Kingsley, Robin Smith, and David Price, \textit{The Impacts of Foreclosures on Families and Communities} 13–21 (Open Society Institute Report, May 2009), online at http://www.urban.org/UploadedPDF/411909_impact_of_forclosures.pdf; IMMERGLUCK, \textit{supra} note 41, at 149-58.
pools make areas aesthetically displeasing, and wildlife may move in.\(^{50}\) When property taxes and homeowner assessments go unpaid, stresses on budgets and infrastructure create difficulties for surrounding homeowners.\(^{51}\) Unsurprisingly, clusters of foreclosures cause surrounding property values to fall.\(^{52}\) To the extent that public policy abhors dispossession and will step in to keep it from occurring on a large scale, the polity as a whole may end up paying.\(^{53}\)

Another way to look at the question is to focus on the positive impacts that a possessory option delivers to communities and to the economy as a whole. Stable tenure has been associated with a variety of benefits, beyond the bare fact of sparing neighbors the upshot of involuntary dispossession. People who expect to stay put are more likely to make certain kinds of site-specific investments in their neighborhoods—efforts that tend to be good for the neighbors as well. The flip side of the possessory option, the ability to leave when one wishes, generates a different set of social gains by enabling people to match up geographically with employment opportunities. The picture is a complicated one in which efforts to achieve the levels of stability and mobility that a strong possessory option can deliver vie against interests in ensuring broad access to possession.


\(^{51}\) See Kingsley, Smith & Price, supra note 49, at 18-20; Stephanie Chen, As Dues Dry Up, the Neighbors Pay, WALL ST. J. D1 (May 13, 2008).


\(^{53}\) A variety of federally funded measures have been undertaken in an effort to stanch the tide of foreclosures and limit their negative effects. See, e.g., U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, OFFICE OF POLICY DEVELOPMENT AND RESEARCH, REPORT TO CONGRESS ON THE ROOT CAUSES OF THE FORECLOSURE CRISIS 44-52 (Jan. 2010), available at http://www2.huduser.org/Publications/PDF/Foreclosure_09.pdf (providing an overview of policy responses); Nick Timiraos, How Many Will the New Mortgage Modification Programs Reach? WALL ST. J., Apr. 5, 2010 (summarizing some of the more recently enacted programs). In addition, the housing crisis and associated financial crisis generated large-scale macroeconomic effects that have spread costs widely. See Immergluck, supra note 41, at 158-62.
Moving Forward: More of Both?

We have seen that the development of property rights has brought both the benefits of more secure possession and the benefits of increased access to real property, but that the two kinds of benefits tend to be in tension with each other. That tension may require the difficult tradeoffs that the discussion above has framed without resolving. But might it also be possible to alleviate the tension between security and access in ways that will make tradeoffs between them less necessary? Both goals could be advanced simultaneously if we could successfully counter threats to secure possession that fail to enhance access, or, conversely, threats to access that do not enhance security of possession. In the remaining space, I will briefly explore two ways to do just that: the first involving precommitment to use the home as a savings vehicle, and the second involving an offloading of the sorts of risks that threaten the possessory option.

Precommitting to a Piggy Bank

Some people make use of enhanced property rights, and the alienability and collateralization they provide, not in order to gain access to a home or make other investments, but rather to fund consumption—this is the “home as an ATM” phenomenon that is frequently pilloried in the popular press. ATMs exist for a reason, however, and households often have similarly good reasons for wanting to access their home equity. In some cases, the ability to access home equity can make the difference between being able to continue living in an area where property taxes and other expenses are rising, and having to move out. Some households, however, may use this access to equity to fuel higher levels of consumption than the household itself would prefer, given the associated debt and the threat
that it poses to continued possession.\textsuperscript{54} The possibility that people suffer from self-control problems introduces many complexities for social policy, and the home plays an interesting and important role in those debates.

David Laibson has suggested that, to the extent that a home is an illiquid asset, people who are aware of their own self-control problems may use homeownership as a way of precommitting to wealth-building.\textsuperscript{55} But, as Laibson acknowledges, easy home equity loans and lines of credit undo this advantage; thus, it is possible that the increased liquidity actually makes some people worse off.\textsuperscript{56} Of course, it makes other people better off, for the reasons already noted. In thinking about how law might help people make better choices, one of the most promising avenues, and least restrictive of individual autonomy, would let people choose when to bind themselves to particular decisions. Offering ways for homeowners to precommit not to draw equity out of their homes (except under certain limited circumstances) could help to increase stability of possession for those who have already gained access to homeownership. People could customize the ease with which money could be taken out of a home, effectively deciding whether to go with an ATM model, a piggy bank model, or something in between.

A menu of alternatives is not a perfect solution, of course. Some people lack insight into their own self-control issues, while others may be inclined to bind themselves too rigidly.\textsuperscript{57} But a precommitment alternative represents one way in which we could support

\textsuperscript{54} The question of what anyone “prefers” is complicated, given the possibility that preferences shift over time. \textit{See}, e.g., B. Douglas Bernheim & Antonio Rangel, \textit{Choice-Theoretic Foundations for Behavioral Welfare Economics}, in \textit{THE FOUNDATIONS OF POSITIVE AND NORMATIVE ECONOMICS: A HANDBOOK} 155 (Andrew Caplin & Andrew Schotter, eds., 2008).


\textsuperscript{56} \textit{Id.} at 465-67.

\textsuperscript{57} \textit{See}, e.g., Ted O'Donoghue & Matthew Rabin, \textit{Self-Awareness and Self-Control}, in \textit{TIME AND DECISION} 217 (George Loewenstein et al., eds., 2003) (noting heterogeneity in awareness of self-control problems); Ran Kivetz & Itamar Simonson, \textit{Self-Control for the Righteous: Toward a Theory of Pre-commitment to Indulge}, 29 J. CONSUMER RES. 199 (2002) (suggesting that some individuals would actually be better off if they could precommit to not exercise restraint).
continuity of possession without rolling back access. Instead of moving back leftward on Figure 1’s horizontal axis by curtailing property rights, we can continue to move rightward by making them even more sophisticated. To the ability to alienate certain aspects of one’s option to remain, we would add the ability to place out of one’s own reach that very alienation right.

**Offloading Upside Potential and Downside Risk.**

I want to mention briefly one other idea that I (and others) have explored in much more depth elsewhere: the possibility that both security and access could be improved by altering how much of the investment risk of the home is held by individual households. Here we see again that homes are not just places to live in, to possess, but are also investments that can gain or lose value. The potential for the home to lose value creates much of the risk of losing possession, as we have seen; it is also the condition that creates pressure in favor of strategic default. Both voluntary and involuntary foreclosure have negative impacts on residential stability. At the same time, the potential for the home to gain value is part of what makes it so expensive to buy—households must buy rights to all the future gains in value that the home may experience.

Very importantly, most of the things that cause homes to gain and lose value occur “offsite” and have absolutely nothing to do with the choices of the individual homeowner. Sure, you can make a truly regrettable redecorating choice that makes your home’s value plummet, or you can do a really brilliant home improvement on the cheap that suddenly causes its value to skyrocket. But the folks who are underwater on their mortgages and at risk of losing their homes are not in that position because they lacked decorating savvy. Even when housing market fluctuations are much more localized, as they historically have been, the causes are outside of the control of individual households and relate to factors like
employment markets, transportation policy, land use decisions, governmental services, commercial development nearby, and so on. Some people might want to gamble on how these factors will play out just like they might want to invest in anything else. But why have this level of investment risk, which comes at a significant price, be a standard part of owning a home?

An initial response to this line of reasoning might be bewilderment. Isn’t the investment component the entire point of owning a home? Shouldn’t people who don’t want investment risk just rent instead? Of course, owning differs from renting along many dimensions other than the acceptance of “offsite” housing market risk. Chief among these differences is the “onsite” investment component—the ability to enjoy the gain or suffer the loss associated with maintenance, decorating, and landscaping choices. Not only can owners modify their homes in ways that renters typically cannot, they also tend to have more autonomy than renters in terms of household composition, pet keeping, and so on. An intangible “pride of ownership” and substantial federal income tax benefits round out the usual laundry list of homeownership’s charms.

Perhaps the most important distinction between owning and renting, however, goes back to stability in possession and the option to remain. Many people who own homes do so because they strongly desire the option to stay in place for as long as (but no longer than) they wish. It is not easy to get that sort of option through a leasehold. Rent control regimes can try to approximate it, but that approach carries well-known drawbacks, including a landlord who would prefer that the option to stay not be exercised. A longer lease might

59 Although these tax benefits could in theory be withdrawn, this does not seem to be a political possibility at present; the tax code is thus likely to continue to influence tenure choices into the foreseeable future.
60 This assumes that a “vacancy decontrol” policy applies in which the landlord is freer to adjust rent levels between tenancies than within them.
also turn out to approximate a possessory option, but these are uncommon in residential contexts, perhaps because of the high costs they would impose on landlords. While it is certainly imaginable that leaseholds could deliver a true possessory option under certain circumstances or in combination with certain policies, this does not change the fact that, as things currently stand, there is a large gap on the tenure spectrum between owning and renting.

I have elsewhere proposed a new form of tenure called Homeownership 2.0 (or H2.0 for short) that would involve offloading the upside and downside risk of offsite influences to investors who are in a better position to bear them. This is not a new idea. People have been talking about doing things along these lines for decades, and some limited versions of the idea have been implemented. But such alternatives have gained a lot of traction recently, for two main reasons. First, due in large part to work by Robert Shiller and his coauthors, it is now becoming feasible to use local housing price indexes as a platform for

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61 If a longer lease is actually binding on the tenant, it might require staying longer than desired. In fact, it is likely that a long lease would be asymmetrically binding and thus would resemble an option: a landlord might be held to the deal, but would often be unable to recover more than the security deposit from a defaulting tenant. For this reason, landlords would be unlikely to be interested in the long lease unless a hefty premium were frontloaded into the rent, a prospect which would cut against affordability.

62 For example, financial options keyed to local rental housing markets might help to protect tenants from unwanted displacement without eliminating mobility. See, e.g., Robert I. Lerman and Signe-Mary McKernan, Promoting Neighborhood Improvement while Protecting Low-Income Families *2–3 (Urban Institute Opportunity and Ownership Project No 8, May 2007), online at http://www.urban.org/publications/311457.html.

63 See, e.g., IMMERGLUCK, supra note 41, at 220-21 (noting the binary choice between owning and renting presented to U.S. households and arguing for alternatives); ANDREW CAPLIN ET AL., HOUSING PARTNERSHIPS: A NEW APPROACH TO A MARKET AT A CROSSROADS 6 (1997) (“The ‘all or nothing’ constraint on home ownership forces households to make the stark choice between rental accommodations’ disadvantages and complete ownership’s harsh financial realities.”).

64 Lee Anne Fennell, Homeownership 2.0, 102 NW. U. L. REV. 1047 (2008).

offloading risk to investors.\textsuperscript{66} For example, in exchange for providing a homeowner with a lump sum of money, an investor could gain rights to a portion of the home’s appreciation that is attributable to overall trends in the area, as measured by the local housing index.

Alternatively, a trade in these indexes could place the risk of downward price movements in the local area on an investor, while leaving risks associated with the individual home (such as the homeowner’s taste in wallpaper) on the household.\textsuperscript{67}

The housing crisis, which has sharpened concerns about tradeoffs between access and stability, is the second reason that the idea of rearranging homeownership risk has recently become more salient. The fact that credit will presumably become harder for people to obtain going forward has led to creative thinking about home financing.\textsuperscript{68} There has even been interest in pairing the alienation of upside appreciation rights with immediate mortgage relief to underwater homeowners. For example, my colleague Eric Posner and his coauthor Luigi Zingales have proposed that in areas that have experienced a significant drop in home values (such as 20\%, as measured by a ZIP-code-level home price index), lenders should be required to write down mortgages to the new value, while receiving in exchange a right to a share (say, 50\%) of the home’s future appreciation.\textsuperscript{69}

Creating new mechanisms to increase both stability and access will not be costless. But if stability of possession is one of the goods that the institution of property is uniquely

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\textsuperscript{68} See, e.g., Andrew Caplin et al., \textit{Facilitating Shared Appreciation Mortgages to Prevent Housing Crashes and Affordability Crises} (Hamilton Project Discussion Paper No. 2008-12, Sept. 2008)

well-suited to deliver, then it is worth examining how we might structure entitlements to better achieve that result.

**Conclusion**

I titled this lecture *Possession Puzzles*, because it does. Possession challenges us from a policy perspective when it diverges from ownership interests that the law is committed to uphold, and it puzzles us from a conceptual perspective when we try to explain exactly how and why it delivers or fails to deliver the benefits we associate with property rights. I do not claim to have solved these puzzles; the title is not *Possession Explained*. Instead, I have tried to show how viewing possession as a conduit for delivering real property’s benefits can clarify some important normative questions, focus attention on how to frame the relevant tradeoffs, and encourage creative thinking about the full slate of alternatives open to policymakers.