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ESSAY

SAVIGNY, HOLMES, AND THE LAW AND ECONOMICS OF POSSESSION

*Richard A. Posner**

FRIEDRICH Carl von Savigny (1779–1862) was one of the most important figures in the history of legal thought, and throughout the nineteenth century enjoyed enormous international prestige. Today—in America at any rate—outside of a tiny subset of legal historians, he is barely a name.¹ It seems to me that we lose something when we forget our intellectual ancestors so thoroughly. I shall try to demonstrate this by approaching Savigny from the direction of Oliver Wendell Holmes’s book *The Common Law*, which criticizes the influential theory of possession expounded in Savigny’s 1803 book *Das Recht des Besitzes* and in doing so paves the way for a modern economic analysis of possession. I focus on Savigny’s theory of possession, rather than on any of the other fields of law that he discussed, because it is the only part of Savigny’s work that Holmes discusses other than in passing. The disagreement between these two great legal thinkers over the law of possession also brings into view the question of Savigny’s method, which is the contribution to legal thought for which he is (or, more accurately, was) famous. For Savigny and Holmes had not only, or even mainly, different theories of possession; they had different conceptions of legal theory, of how to “do” law. Savigny had a considerable influence on Holmes, though it was indirect. But in Holmes’s conception of legal theory we can glimpse some of

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¹ As of November 1999, the Social Sciences Citation Index recorded only 180 journal citations to Savigny since 1972, which is only about six a year.

the early antecedents of the modern economic theory of law, a theory that, I shall argue, provides greater insight into the law of possession than either Savigny's or Holmes's theory of possession could provide. So I shall be endeavoring in this paper to contribute to the economic analysis of law as well as to the history of legal thought.

I.

I said that Savigny's prestige in the nineteenth century was international and immense, and now I add that this was as true in the Anglo-American legal world as it was elsewhere. The reason both for his former celebrity and for his present obscurity has to do with his "take" on law, which can be summarized in the following connected propositions and helps to explain Holmes's disagreements with him:²

1. It is a mistake to try to codify a nation's laws; codification stunts and distorts the growth of law. It is especially foolish to borrow another nation's code (and thus for a German state to borrow the *Code Napoléon*).³

2. The authentic law of every nation, including the Germany of Savigny's time (a cultural rather than a political entity) is the law that has evolved from the nation's aboriginal "folk spirit" (*Volksgeist*) or "common consciousness of the people" (*der allgemeine Volksbewusstsein*) in much the same way that a nation's language is

²For helpful discussions in English of Savigny's approach to law, see John P. Dawson, *The Oracles of the Law* 450–58 (1968); James Q. Whitman, *The Legacy of Roman Law in the German Romantic Era: Historical Vision and Legal Change* (1990); William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. Pa. L. Rev. 1889, 2012–43 (1995); Susan Gaylord Gale, *A Very German Legal Science: Savigny and the Historical School*, 18 Stan. J. Int'l L. 123 (1982); Hermann Kantorowicz, *Savigny and the Historical School of Law*, 53 L.Q. Rev. 326 (1937); Edwin W. Patterson, *Historical and Evolutionary Theories of Law*, 51 Colum. L. Rev. 681, 686–89 (1951); Mathias Reimann, *Nineteenth Century German Legal Science*, 31 B.C. L. Rev. 837, 851–58 (1990); Symposium, *Savigny in Modern Comparative Perspective*, 37 Am. J. Comp. L. 1 (1989). For a brief biography, see James E.G. De Montmorency, *Friedrich Carl von Savigny, in Great Jurists of the World* 561 (Sir John Macdonell & Edward Manson eds., 1914).

³See Friedrich Karl von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence* (Abraham Hayward trans., 1831) [hereinafter *Savigny, Vocation of Our Age*].

an organic development from ancient origins rather than the product of rational design, of a "code."⁴

3. To recover the authentic law, therefore, requires historical study. The focus of study should be Roman law, for it is the common law (in the sense of the nonlegislated law) of Europe,⁵ and its principles are thus the *Ur* law of Germany. The task of jurisprudence is to "get back" to those principles and discard later accretions not necessitated by the practical needs of the present. The later accretions are for the most part barnacles that retard the efficacy and integrity of the principles.

4. Once the original Roman principles are grasped in their purity, the resolution of legal disputes should proceed by deduction from the principles. Legal analysis properly is deductive ("formalist") rather than inductive, casuistic, social scientific, or political. The Roman jurists of the creative period of Roman law were themselves casuists, but the principles that guided their work now have to be extracted and made the foundation of a logical system of legal doctrine.⁶

The analogy of law to language is suggestive of formalism; language is a system of rules that you cannot get away with violating by reference to social policies. Savigny himself, as I have noted, pointed out the analogy of language to his conception of law.

5. The leading role in formulating the law should be played not by legislators or judges, but by law professors.⁷ They alone have the

⁴ See *id.* at ch. 2; 1 Friedrich Carl von Savigny, *System of the Modern Roman Law* 12–17 (William Holloway trans., 1867) [hereinafter Savigny, *Modern Roman Law*]. A computer language is an example of a language created by the application of rational principles rather than organic evolution. Esperanto is an intermediate example. Savigny's organicist conception of law has antecedents in Montesquieu and Burke, as is argued in Peter Stein, *Legal Evolution: The Story of an Idea* 57–59 (1980) [hereinafter Stein, *Legal Evolution*].

⁵ See Savigny, *Modern Roman Law*, *supra* note 4, at 3. Unless otherwise indicated, however, I shall use the term "common law" to refer to the Anglo-American common law.

⁶ "The German Romanists [including Savigny] were not interested in tracing the way in which Roman law had been adapted to serve the needs of contemporary society. . . . [T]hey wanted to reveal the inherent theoretical structure that was implicit in the [Roman] texts." Peter Stein, *Roman Law in European History* 119 (1999) [hereinafter Stein, *Roman Law*].

⁷ See Savigny, *Modern Roman Law*, *supra* note 4 at 36–40; Savigny, *Vocation of Our Age*, *supra* note 3, at 149–51. Savigny was himself a law professor, first at Marburg, where he wrote his treatise on possession (it was his doctoral thesis), and

time, training, and aptitudes necessary for the recovery of the law's authentic principles and the adaptation of those principles to modern needs. Universities are the supreme court of German private law.

It is easy to see why these propositions would not resonate with American lawyers and jurists either in the nineteenth century or today, and so an initial question is why Savigny was highly regarded by American legal thinkers in the nineteenth century. Part of the answer is no doubt the admiration that educated Americans felt in that era for German universities, which were the best in the world. Part is the nationalistic character of Savigny's conception of law (a nationalism blurred, however, by the transnational character of Roman law); the nineteenth century, especially its second half, witnessed the rapid growth of nationalism in both countries. Part of his appeal to American lawyers may have been that he academized or "scientized" law,⁸ a move that, at a time when the academic study of law in America was in a primitive state, was bound to be welcomed by law professors and other legal intellectuals, regardless of the applicability of his specific methods and results to American law. Savigny placed at the forefront of legal reform the need to achieve an academic or theoretical understanding of law by methods of historical research and (to a lesser extent) rational analysis that are more congenial to law's theoreticians than to its practitioners. He laid out an ambitious research program calculated to keep squads of professors busy for many years. When the program was completed, and Roman law well understood, the historical school, as the approach of Savigny and his epigones came to be known, faded. It no longer provided a research program, the *sine qua non* of a successful school of academic thought.

Now that American universities have caught up with their European counterparts, and law has become a secure part of university education and research, Savigny's significance in making law a re-

then at Berlin, where, until the Revolution of 1848, he occupied high judicial and other posts in the Prussian government while continuing as an academic. His political conservatism led to his removal from his governmental posts when, in the wake of the failed but frightening revolution, the Prussian king decided to give his government a more liberal appearance. See De Montnorencoy, *supra* note 2, at 566-73, 585.

⁸This ground for admiration of Savigny is explicit in Joseph H. Beale, Jr., *The Development of Jurisprudence During the Past Century*, 18 *Harv. L. Rev.* 271, 283 (1905).

spectable academic subject—indeed, in remaking it into “legal science” (*Rechtswissenschaft*)—has lost its relevance to the concerns of the American legal community. We are left with the five propositions that I listed earlier, none of which is especially relevant to American concerns. Codification is a non-issue in modern American law. That law is too vast in extent and varied in content to be brought under the rule of a single code or even a handful of like codes. Codification has proceeded piecemeal—we have a federal criminal code; federal rules of civil and criminal procedure and of evidence; a Bankruptcy Code; a Uniform Commercial Code governing sales, negotiable instruments, secured transactions, and other commercial subjects; and a number of other codes as well. But there is no felt need to codify core common law subjects, such as torts, contracts (though the Uniform Commercial Code codifies a portion of this field), agency, and property (except intellectual property). Savigny’s opposition to codification has no present relevance even in Germany, which in defiance of Savigny’s followers adopted a comprehensive code in 1900 that jettisoned many of his key ideas about possession.

As for the *Volksgeist*, such a concept can have little significance for a nation such as the United States, a nation of immigrants from many different countries. The nation’s founders frayed the threads that bound it to the *Ur* law, which was English, by revolting from Great Britain, the “mother” country. In any event, for us the *Ur* law was never Roman law. Britain began moving away from Roman law early in its post-Roman history.⁹ There are traces of Roman law in American legal thought,¹⁰ not least in the law of possession, but we have become oblivious to them; Roman law is a subject virtually unstudied in American law schools. Savigny’s project of recovering the legal principles that are authentically in tune with the *Volksgeist* by studying the history of Roman law is incomprehensible to all but a tiny handful of modern American legal

⁹ It has, however, been argued that “Roman law itself is closer to the common law than is any modern codified system based on Roman law.” Peter Stein, *Roman Law and English Jurisprudence Yesterday and Today*, in *The Character and Influence of the Roman Civil Law: Historical Essays* 151, 165 (1988).

¹⁰ See, e.g., Peter Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, in *The Character and Influence of the Roman Civil Law: Historical Essays*, supra note 9, at 411.

thinkers.¹¹ This incomprehension, moreover, is part of a larger “presentist” orientation, very much in the American grain, that marginalizes historical inquiry as a method of assisting in the solution of current problems and in providing guidance for the future.

As for trying to deduce legal solutions from fundamental principles, most American lawyers and jurists deride that as “formalism.” We are casuists and often pragmatists, proceeding in the decision of actual cases and in the formulation of our legal generalizations from the bottom up rather than from the top down, that is, proceeding from the facts of specific disputes and from specific social policies, often of a utilitarian cast, rather than from general principles whether historically or otherwise derived. Our legal system remains a case law system, one administered by judges who place much more weight on precedent and on their own intuitions of policy than on the treatises of law professors. Indeed, in recent years law professors, especially at the most prestigious law schools, have grown ever farther apart from the practical side of the profession. The idea of appealing a judicial decision to a law school—an actual practice in Savigny’s time and place—is unthinkable in our system.

II.

A.

America’s rejection of Savigny was announced in 1881 by Oliver Wendell Holmes, Jr., in his book *The Common Law*,¹² the most celebrated book in the history of American legal thought. Two of the lectures that make up the book deal with possession.¹³ They are the two lectures in which Holmes discusses “German theories” of law, and I do not believe that there is a sustained discussion of German legal theory anywhere else in Holmes’s *oeuvre*. The German theoretician whom Holmes discusses most in those lectures is Savigny. It is a tribute to Savigny’s international prestige that

¹¹ Among influential writers on American law at the present time, I can think only of Richard Epstein as regularly harking back to Roman law for ideas. See, e.g., Richard A. Epstein, *Principles for a Free Society: Reconciling Individual Liberty with the Common Good* 258–59 (1998).

¹² Oliver Wendell Holmes, Jr., *The Common Law* (1881).

¹³ See *id.* at 164–205, 206–46 (Lecture V: “The Bailee at Common Law” and Lecture VI: “Possession and Ownership”).

Holmes should have picked a book by him published seventy-eight years earlier as the principal foil for a discussion of one of the most important common law concepts, that of possession.

Holmes groups Savigny with other German thinkers (including Kant and Hegel) as arguing that possession, in the eyes of the law, requires that the person claiming possession intend to hold the property in question as an owner rather than recognize the superior title of another person, so that in providing possessory remedies to lessees, bailees, and others who lack such intentions, modern law sacrifices principle to convenience. To this Holmes responds that he

cannot see what is left of a principle which avows itself inconsistent with convenience and the actual course of legislation. The first call of a theory of law is that it should fit the facts. It must explain the observed course of legislation. And as it is pretty certain that men will make laws which seem to them convenient without troubling themselves very much what principles are encountered by their legislation, a principle which defies convenience is likely to wait some time before it finds itself permanently realized.¹⁴

And yet Holmes's *Common Law* could itself be thought—has in fact been thought—a project much like Savigny's of “deriving fundamental principles to guide the present from a study of the past.”¹⁵ One of Holmes's criticisms of the German theorists, signally including Savigny, is that they “have known no other system than the Roman,”¹⁶ and he sets out to prove that the Anglo-American law of possession derives not from Roman law, but rather from pre-Roman German law. Thus, just as Savigny and the other jurists of the historical school use historical inquiry to excavate and refine the principles of law, so Holmes uses historical inquiry to excavate and refine the principles of law. The focus of the inquiry is different—Roman in Savigny's case, Germanic (ironically) in Holmes's—and the principles recovered by historical inquiry are also different, as we are about to see. But these seem to be almost details.

¹⁴ Holmes, *supra* note 12, at 211; see also *id.* at 207, 218–19 (criticizing the German theorists' views on possession).

¹⁵ G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* 193 (1993).

¹⁶ Holmes, *supra* note 12, at 168.

Holmes's very challenge to the "universal authority" of Savigny's theory of possession¹⁷ could be thought a tacit endorsement of the concept of the *Volkgeist*: A different *Volk* can be expected to have a different *Geist*. This means that Holmes shared with Savigny a rejection of natural law; law cannot be excogitated from a universal moral code. And the erudition of *The Common Law* marks it as a contribution to *Rechtswissenschaft*; it is not a practitioner's handbook or treatise.¹⁸ Savigny's influence on Henry Maine has been noted,¹⁹ and Maine's *Ancient Law* (1861) influenced Holmes. Holmes had, therefore, a (characteristically unacknowledged) debt to Savigny.²⁰

B.

Still, the differences between the approaches of the two are profound, as will now be shown. Although Savigny's treatise is entitled "The Law of Possession," its actual subject, except for its brief last book devoted mainly to ecclesiastical law, is the *Roman* law of possession. Not until the treatise is one-third over is the possibility of a discrepancy between Roman and modern law acknowledged: If "a theory of Possession lays claims to be of any use in practice, it must subjoin to the views of the Roman lawyers those modifications under which the above views obtain practical validity amongst us at the present day."²¹ But the modifications discussed are relatively minor. This is remarkable. Savigny was writing in the nineteenth century. Justinian had lived in the sixth century, and most of the legal rules collected under his auspices were much older. But Savigny believed that the principles of ancient law were serviceable in modernity, and so his work was largely completed when he discovered those principles.

Holmes was interested in the process of change itself, in how the ancient principles had evolved into a greatly altered body of mod-

¹⁷ *Id.* at 206.

¹⁸ Holmes was appointed a professor of the Harvard Law School on the strength of *The Common Law*.

¹⁹ See Stein, *Legal Evolution*, *supra* note 4, at 89-90.

²⁰ See White, *supra* note 15, at 149.

²¹ Friedrich Carl von Savigny, *Von Savigny's Treatise on Possession; or the Jus Possessionis of the Civil Law* 134 (Sir Erskine Perry trans., 6th ed. 1979) (1848) [hereinafter Savigny, *Treatise on Possession*].

ern law. The motor of evolution was convenience or policy: "The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past."²² "The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received."²³ Holmes was content with this process; he had no desire to return the law to an earlier period of its development.

The difference between Savigny and Holmes with regard to history is obscured by the fact that the concept of possession existed in something like its modern form in ancient law; it is not an artifact of modernity. It is undoubtedly the earliest form or precursor of property, itself an ancient notion. The "problem" of possession, the source of its enduring fascination as much to the Romans, Savigny, and Holmes as to ourselves, is precisely its relation to property. On the one hand, possession seems an incident of property, or ownership; on the other hand, nonowners frequently are "in possession" of land or other things of value and owners are frequently out of possession. Moreover, the law in Roman times, as today, granted remedies to possessors as well as to owners, and sometimes to possessors against owners (as in the acquisition of title by prescription, that is, by passage of time) and to owners against possessors. Possessory remedies were often simpler than ownership remedies (this was as true of the Roman interdicts as of the English action in ejectment, a formally possessory action used commonly to prove title to real property; or trover, which is the counterpart to ejectment for personal property), so even owners might seek the former. Sorting out these relations was, and remains, a challenging intellectual exercise.

I am not a Roman lawyer and am not concerned with whether Savigny got his Roman law of possession right. I am interested in what his theory of possession was, how it differed in both content and purpose from Holmes's theory, and why it differed as it did.

For Savigny, possession was the conjunction of two facts: physical power over a thing, and an intention to own it in the lay sense

²² Holmes, *supra* note 12, at 1-2.

²³ *Id.* at 5.

of being able to use it, with no limitation of time, exclusively for your own benefit (*animus domini*). If you had that power, and that intention, you had possession. (And so a thief could obtain possession.) This ordinarily would entitle you to a remedy against anyone who interfered with your possession unless he had a claim to possession that the law regarded as superior, which the owner might (if the possessor was not the owner) or might not.

From this definition, much followed. Let me take the two elements of the definition, power and intention, separately. If you buy goods that are in a locked warehouse, you do not obtain possession in Savigny's sense until you get the keys. And if you wound a hare but do not kill it, you do not obtain possession of it until you catch it, since until then it might get away, and therefore until then it is not within your physical power. You possess your domestic animals, because they're in your physical power. But you do not possess wild animals until you trap or kill them unless the animal has *animus revertendi*, that is, the habit of returning, which makes him like a domestic animal (English common law makes the same distinction): It's as if he were on a long leash.

The implication of the power component of Savigny's definition is that possession, as distinct from use, which is often shared, can never be joint. For if you can act with reference to a thing only with the concurrence of someone else, it follows that you don't have physical dominion. A further implication is that separate parts of a whole cannot be separately possessed: the house and the soil it rests on, the arm and head of a statue, a carriage and its wheel, two stories of the same house. In the case of land, however, because it is divisible without destroying an organic unity—boundaries are arbitrary—Savigny is willing to allow co-ownership. To have a one-third interest in a parcel of land is enough like owning a smaller parcel carved out from the larger one to be treated the same way, since if the land were thus divided each owner would have exclusive control over his third. Likewise, buried treasure is severable from the land above it because one could remove the treasure without necessarily disturbing the land (the clearest case would be if the treasure was found by a contractor whom the landowner had hired to dig a well). They are not, or at least not quite, an organic unity, like the parts of the statue. Living before the age of the trailer park, Savigny evidently could not imagine moving a house.

The notion of physical power as a condition of possession becomes problematic in the case of land, as we have already glimpsed, and also when attention switches from the acquisition to the maintenance of possession. One does not take possession of land in the same sense in which one might take possession of a wad of cash, a carriage, or even a house, unless one fences the land, which Savigny does not require as a condition of possession. All he requires is *presence* on the land (conjoined, of course, with *animus domini*). But because presence is an ambiguous sign of taking control, the would-be possessor must give notice of his possessory intent (his “adverse possession,” as we would say) if someone else already possesses the land.

Once possession is obtained, the exertion of physical power that was necessary to obtaining it in the first place will often cease. You don’t remain on your land all the time, and in fact you may have leased it to someone else and so are never there. You leave your carriage on the street, where it is out of your control. Savigny does not treat these cases as cases of abandonment, which would deprive the owner of his possessory rights and remedies. But he requires, for possession to continue, that “there must always be a possibility of *reproducing* the immediate condition which has been described as the foundation of acquisition.”²⁴ He makes an exception, as already noted, for land, where possession cannot be lost until the existing possessor is notified that someone is seeking to wrest possession from him. But if someone loses a good, which Savigny calls a “movable” to distinguish it from land (we would call it a “chattel”), he ceases to possess it; the finder obtains possession, provided that he intends to keep it for his own use rather than return it to the owner or previous possessor.

This brings me to the second element of Savigny’s definition of possession—the requirement of *animus domini*. It too has important and sometimes startling implications. Two in particular require note. The first is that a bailee, tenant, or other custodian or occupier who has, as is usually the case of such holders, no intention of becoming the owner cannot be said to possess the thing held or occupied. The second implication is that you cannot possess some-

²⁴ Savigny, *Treatise on Possession*, supra note 21, at 265.

thing you don't realize you control, because then the *animus domini* is missing.

The idea that a tenant does not possess the leased premises seems especially odd. Savigny explains that the tenant can always call on his landlord to defend the tenant's rights. But this seems roundabout,²⁵ as well as inconsistent with Savigny's recognition that a "hirer" (someone who has the use of a thing by virtue of a contract with the owner), a pledge creditor (a lender who holds the borrower's property as a kind of hostage to assure repayment), and a "fructuary" (someone who has a right to the fruits or other income of land or goods) all have a right of possession if the right is granted to them by the owner. Such grants confer what Savigny calls derivative possession. He regards such cases as anomalous because the derivative possessor lacks *animus domini*, but he is willing to accept "an anomaly founded on practical grounds,"²⁶ most clearly in the case of the pledge creditor: If the borrower could dispossess the creditor, the purpose of the pledge would be defeated. In the case of the hirer and the fructuary, Savigny argues that the owner might have transferred his ownership to someone who was not interested in coming to the rescue of the person in possession. In that event, requiring that person—the hirer or fructuary—to appeal to the owner for help would be unavailing. So these holders are given possessory remedies. But the point seems equally applicable to the tenant.

Savigny is willing to allow practical need to trump *elegantia juris* or even fidelity to Roman legal principles. He acknowledges that "merely theoretic considerations must give way to the actual wants of daily life."²⁷ His emphasis on the acquisition of rights by prescription was apparently intended to foster the gradual extinction of feudal rights; he was thus, in his own way, an agrarian reformer.²⁸

²⁵ Unless the tenant hasn't taken possession yet. Under the so-called "English" rule, if when the lease begins the previous tenant remains in possession, the landlord has a duty to oust him.

²⁶ Savigny, *Treatise on Possession*, supra note 21, at 95; see also id. at 91.

²⁷ Id. at 404.

²⁸ See Whitman, supra note 2, at 183–86; Stein, *Roman Law*, supra note 6, at 119–20. The acquisition of rights by passage of time implies their possible extinction by passage of time; when Savigny wrote *Das Recht des Besizes*, many feudal obligations had fallen into disuse, especially in the wake of the French incursions into Germany that followed the French Revolution. See id. at 104–30.

Emphasis on possession as the basis of property rights has itself anti-feudal overtones, since the distinctively feudal rights (to services and support) are nonpossessory. And because possession, especially in Savigny's conception of it, is active, exertional, his emphasis on possession could be taken as an implicit criticism of a rentier economy based on aristocracy and inherited wealth. But the theme of social reform is a muted one in Savigny's treatise. He is reluctant to allow fidelity to legal principle to be overridden by pragmatic considerations, for "even this latter practical interest [that is, the actual wants of daily life] undoubtedly gains nothing by a procedure . . . [that] renders all fixed principles uncertain."²⁹

There is more to Savigny's theory of possession. But this sketch will suffice to indicate the main elements and to set the stage for a comparison with Holmes.

C.

In turning to the chapters on possession in *The Common Law*, we may at first think the differences between Holmes and Savigny largely technical, and wonder therefore at Holmes's hostility toward the German school. Holmes agrees with Savigny that possession requires physical power over the object possessed (and more power to gain than to continue in possession), conjoined with a certain intent. Only, for Holmes, the requisite intent is merely the intent to exclude others (except the owner, unless the owner has transferred possession) from interfering with one's use. This explains the common law right of the bailee to obtain a possessory remedy against someone who wrongfully deprives him of the bailed good. Holmes discusses a case in which the plaintiff had entrusted a safe to the defendant to sell for him.³⁰ The defendant found some banknotes, evidently the plaintiff's, in a crevice in the safe. The plaintiff demanded the money back. Holmes argues that he was entitled to get it back; contrary to Savigny's view, the plaintiff had not abandoned the notes, even though, being unaware of them (or at least of their presence in the safe), he could not be said to have *animus domini* with regard to them. In short, Holmes sev-

²⁹ Savigny, *Treatise on Possession*, supra note 21, at 404.

³⁰ See Holmes, supra note 12, at 225.

ers possession from ownership; the former, and the rights that go with it, need have nothing to do with any claim of ownership.

There are other differences between Holmes's theory of possession on the one hand and that of Savigny and his followers on the other—differences greater, incidentally, than the differences between the actual German and Anglo-American law of possession in the nineteenth century and especially today.³¹ Notably, Holmes rejects Savigny's claim that the possibility of reproducing the physical power used to obtain possession is a condition of retaining it. Holmes gives the example of a person who has left a purse of gold in his country house and is now a hundred miles away, in prison, and "[t]he only person within twenty miles [of the house] is a thoroughly equipped burglar at his front door, who has seen the purse through a window, and who intends forthwith to enter and take it."³² Holmes thinks it weird to regard the owner of the purse as losing possession to the burglar *before* the burglar actually takes it. But he thinks this weird result is entailed by Savigny's theory because the owner has lost the ability to reproduce the exercise of physical power that got him the purse in the first place (Holmes assumes that he had found it), and the burglar has acquired the ability to exercise exclusive control over it.

Holmes's definition of possession encounters anomalies, just like Savigny's. For example, at common law, which is to Holmes as Roman law is to Savigny—the body of principles that is to be reclaimed, clarified, purified, and expounded—an employee who steals his employer's goods is a thief. That is, he is treated as having taken the goods from the employer's possession, even though, under Holmes's definition of possession, the employee had possession because he had physical dominion over them coupled with the intent to exclude all others from the use of them. (A similar example that he discusses is that of a tavern customer who steals the plate on which the food is served him.)³³ Holmes considers this rule a pure historical vestige, reflecting the fact that slaves, the historical antecedents of employees, had no legal standing and so could not be regarded as possessors.

³¹ See James Gordley & Ugo Mattei, *Protecting Possession*, 44 *Am. J. Comp. L.* 293 (1996).

³² Holmes, *supra* note 12, at 237.

³³ See *id.* at 226–27.

So far there is nothing to suggest a methodological cleavage between Savigny and Holmes. That cleavage is to be found not in particular rules and outcomes, but in a difference in attitudes toward theory and history. Holmes does not take issue with Savigny's or other German jurists' interpretations of Roman law. But he does not believe that Roman law is the actual source of German legal theory, and in particular of Savigny's theory of possession. He thinks, rather, that the source is philosophy, particularly the philosophy of Kant and Hegel (though in fact Savigny was hostile to Hegel's legal theory³⁴). According to that philosophy, Holmes tells us, "[p]ossession is to be protected because a man by taking possession of an object has brought it within the sphere of his will . . . [p]ossession is the objective realization of free will."³⁵ The idea that *animus domini* is an element of possession—the idea that principally distinguishes Holmes's theory of possession from Savigny's at the operational level—thus takes its origin, in Holmes's view, not from Roman law (though Holmes thought it consistent with that law) and not from convenience, policy, or "the actual wants of daily life," but instead from German ethical philosophy.³⁶

For Holmes, this was a tainted origin. He was a moral skeptic who despised ethical philosophy and believed that a clear understanding of law required a clean separation between legal and moral duty and between legal and moral terminology. He may have misunderstood Savigny. The concept of the *Volksgeist* (which does not appear in the treatise on possession, however) expresses a historical rather than a rationalistic conception of law, and to that extent should have been congenial to Holmes—who instead repeatedly denounces Savigny and his followers for their "universalist" pretensions.³⁷ But the attitudes of the two men toward history are indeed crucially different, almost opposite. Savigny's is reverential; legal history has a "holier duty to perform" than merely "guard[ing] our minds against the narrowing influence of the present," and that is to keep up "a lively connection with the primitive state of the people . . . [T]he loss of this connection must take away from every

³⁴ The identification of Savigny with Kant rests on stronger grounds. See Ewald, *supra* note 2, at 1933–35.

³⁵ Holmes, *supra* note 12, at 207.

³⁶ "Roman law comes in to fortify principle with precedent." *Id.* at 209.

³⁷ See *id.* at 167–68, 206.

people the best part of its spiritual life."³⁸ Holmes's attitude toward history, like Nietzsche's,³⁹ is critical. For Savigny, the best legal thinkers were the Roman jurists, and the task of modern law is to recover the principles that animated Roman legal thought. For Holmes, the best legal thought is modern, because only a modern thinker can come to grips with modern problems. History provides a repertoire of concepts and procedures that can be drawn upon to deal with modern problems, and to that extent it is a resource and a help. But it is also a drag because of the legal profession's methodological conservatism, which by positing a duty of continuity with the past retards adaptation to the needs of the present. Holmes's dismissal of the rule that an employee does not "possess" goods that his employer entrusts to him as a historical vestige is thus a characteristic move for Holmes.

If, moreover, as he emphasizes, "the proximate ground of law must be empirical," that is, if "[l]aw, being a practical thing, must found itself on actual forces,"⁴⁰ we can expect variations in legal rules that cannot be referred to any general principle. Holmes illustrates using the different rules known to him for establishing the possession of whales.⁴¹ Under one rule, if the first whaler to strike the whale with his harpoon can't hold on, he has no right to the whale if it is eventually killed by another; under another rule, he is entitled to half the whale; and under another to the whole provided that the point of the harpoon remains in the whale, even though the line has been cut. Notice that the latter two rules are exceptions to the common law principle, which is similar to the Roman law principle expounded by Savigny, that to gain possession of a wild animal you must actually capture it.

Although Holmes makes clear his belief that law should be shaped to serve the practical needs of the present, he does not take the next step, which is to evaluate particular rules and decisions by that criterion. Like Savigny, Holmes focuses on the inner logic of

³⁸ Savigny, *Vocation of Our Age*, *supra* note 3, at 136.

³⁹ See Friedrich Nietzsche, *On the Uses and Disadvantages of History for Life*, in *Untimely Meditations* 57-123 (R.J. Hollingdale trans., 1983), *discussed in* Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 *U. Chi. L. Rev.* 573 (forthcoming Summer 2000).

⁴⁰ Holmes, *supra* note 12, at 213.

⁴¹ See *id.* at 212.

the law of possession rather than on its conformity to social need. The only explanation that he gives for his crucial move of rejecting the requirement of *animus domini* in favor of requiring only an intent to exclude is that legal duties precede legal rights. The law of possession creates a duty not to interfere with the possessor's exclusive use of the thing possessed; the duty gives rise to a corresponding right to enjoin or otherwise prevent or obtain redress for such interference; therefore the only intent the possessor has to have is the intent to repel such interference.⁴² But the "therefore" does not follow. There is nothing illogical about confining possessory remedies to people who intend to retain possession against all the world, whether or not it is sensible or consistent with Anglo-American law.

What Holmes lacked was a social theory to take the place of the kind of internal legal theory that he denigrated in the German theorists. We now have that theory; it is called economics. It may not be a complete social theory, even with respect to possession; but it will carry us further than Holmes was able to go, and it will provide an additional perspective from which to examine Savigny's legacy to us.

III.

A.

It is highly desirable from an economic standpoint that valuable resources should be made subject to a right of exclusive use, control, and benefit in someone. Without such a right, incentives to invest in the production of valuable goods will be suboptimal—for example, the owner of farmland will have no assurance that he will be able to reap where he has sown.⁴³ Some resources, moreover, will be overused—for example, a pasture owned in common: None of the owners of the cattle pastured on it will consider the cost that their use imposes on each other by reducing the amount of forage. In short, efficiency requires property rights.⁴⁴

⁴² See *id.* at 219–20.

⁴³ This is not a modern insight; it was well known to Hobbes, Blackstone, and many others.

⁴⁴ See Richard A. Posner, *Economic Analysis of Law* 36–37 (5th ed. 1998). On the economics of possession generally, see Richard A. Epstein, *Possession*, in 3 *The New*

One can imagine two polar systems of property rights: ownership only in accordance with a system of paper titles, and ownership only by physical possession. Each, however, would involve serious inefficiencies. A universal system of paper titles assumes that everything is already owned,⁴⁵ and permits transfers only by formal conveyance (for example, the delivery of a deed). It is helpless to deal with problems of acquisition of property that is unowned, whether because abandoned or never owned. It also leaves undefined the status of non-owners who nevertheless have the exclusive use of property, such as tenants, and is helpless to deal with the inevitable mistakes to which a system of paper rights gives rise. The other polar regime, in which rights to the exclusive use of property are made to depend on physical control of the property, entails heavy investments in the maintenance of such control. It also makes no provision for rights to future, as distinct from present, use. An example is the appropriation system of water rights that is in force in the western states of the United States, under which one acquires a right to water by possessing—that is—using, water (in irrigation, for example). This system encourages wasteful present use as a method of staking a claim to the future use of the water. The future use may be sufficiently valuable to make the present wasteful expenditure worthwhile from the possessor's standpoint, even though a system of paper rights to future use would be more efficient from an overall social standpoint.

This discussion suggests that an efficient legal regime of property rights is likely to be a mixed system, one that combines paper rights with possessory rights. The task of economic analysis becomes that of identifying the efficient combination and comparing it with the combination actually found in the legal system.

B.

We can begin with the question whether *unowned* property should be obtainable only by possession, or also by grant or other nonpossessory method. The general answer is, only by possession. This can be seen best with the aid of an example. Suppose a new and, to simplify analysis, uninhabited continent were discovered.

Palgrave Dictionary of Economics and the Law 62 (Peter Newman ed., 1998); see also Dean Lueck, *First Possession*, in 2 *id.* at 132.

⁴⁵ An exception—the acquisition of title by a grant—is discussed below.

Would it be efficient to give the discoverer title to the entire continent before he had taken possession of it, in the sense of occupying all or at least most of it? Probably not. Such an enormous reward would incite an excessive investment in exploration. The explorer who discovered the continent just one day before his rivals would obtain the continent's entire value. The prospect of obtaining this value so greatly in excess of the value of his actual contribution to its creation would induce him, and likewise his rivals, to invest more than the social value of the investment in the quest.⁴⁶ An even more extreme case, one that was common in the early period of European explorations of other continents, was the effort by monarchs (including the Pope) to create property rights in undiscovered lands by grant.

The efficient alternative to basing ownership of previously unowned property on either discovery or a grant is to base it on possession in the sense of physical occupation somehow defined.⁴⁷ This approach has two advantages. First, it reduces the *net* reward for being first, and so alleviates the problem of excessive investment by forcing the would-be owner to incur costs of occupation. Second, it tends to allocate resources to those persons best able to use them productively, for they are the people most likely to be willing to incur the costs involved in possession. Thus, imposing possession costs on a would-be owner not only reduces the amount of resources devoted to becoming an owner by reducing the reward

⁴⁶ Suppose that the prize (the exclusive right to exploit the newly discovered continent) is worth $\$X$, and that if there were only one potential discoverer he would spend $\$.1X$ to discover it and this would take him T years. But there are 10 potential discoverers, and if they have an equal chance of being the first discoverer each will (assuming they are not risk averse) spend up to $\$.1X$ in the race to be first. The aggregate expenditure will be ten times what the single potential discoverer would spend. Suppose that as a result of the race, the continent would be discovered a year earlier; given the time value of money, this would increase the value of the discovery, say to $\$.1.1X$, but the increase ($\$.1X$) would fall far short of the added cost ($\$.9X$). The race would thus be wasteful from a social standpoint. Lueck points out, however, that there may be no race if one of the contestants has much lower costs than the others, so that it is apparent from the start that if there is a contest (and the contestants have equal access to the capital markets to finance the expense of the contest) he will win. See Lueck, *supra* note 44, at 134. In that event, the others will forbear to compete.

⁴⁷ For an analogy to trademark law, see William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 *J.L. & Econ.* 265, 281–82 (1987). The economic principles of possession have many applications to intellectual property, but I shall not discuss them in this Essay.

of ownership (the first point); it also acts as a screen to exclude aspirants who are unlikely to derive value from ownership. By doing this it reduces the transaction costs of a pure paper-title system. If the discoverer could obtain title to the entire continent just by declaration or filing, he would turn around and sell off most or all of the land, because he would surely not be the most efficient developer of all of it. It is more efficient to give the people who are actually going to possess the land the ownership right in the first place.

In short, conditioning ownership on possession can, in the case of newly found property, reduce both wasteful competition and transaction costs. It is a crude and costly method of optimization, but in a variety of historical circumstances may be the best available. Consider the whale cases discussed by Holmes. If the right to the whale went to the first whaler to stick his harpoon into the whale even if the harpoon quickly fell out (or the line broke) without slowing down the whale, we might find the ocean blanketed with amateurs good at flinging harpoons but not good at actually killing whales. This would be an example of a socially wasteful race to be the first "discoverer" of valuable property. But if instead the law gives the property right in the whale to the whaler who kills it, this may discourage cooperative activity that is essential to efficient whaling, as it is not to most hunting, where the rule that ownership can be obtained only by possession prevails.

The second rule discussed by Holmes, the "half a whale" solution, can be understood as a response to the problem of discouraging cooperation. Although it is a step away from a pure system of possessory rights in the direction of a claims or prospect system,⁴⁸ it is remote from a system in which exclusive rights to whales (or to a newly discovered continent, to which a newly sighted whale is economically analogous) are created by granting those rights to the first person to discover the commercial value of whaling. It illustrates the point that an optimal regime of property rights is likely to combine possessory and nonpossessory rights.

⁴⁸For a much richer discussion of nineteenth-century whaling norms from an economic standpoint, see Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes* 196-206 (1991).

C.

The issue of possessory rights is further illustrated by Holmes's case of the safe with the hidden banknotes in it. Under Anglo-American common law, the agent holding the safe for its owner does not acquire possession of the notes; under Roman law, according to Savigny, he does. Considered from the standpoint of economics, the bringing to light of lost property is a valuable service and should be encouraged. But as with the discovery of new continents, giving the discoverer of lost property its entire value could very well lead to an overinvestment in exploration. A further problem, which has no counterpart in the case of continental discovery, is that giving the discoverer of lost property its entire value may make owners overinvest in safeguarding their property. It seems that what is needed is not a shift of ownership to the finder, but a finder's reward, the domain of the law of restitution.⁴⁹ An inferior solution would be to divide the found property between the original owner and the finder. For if the division would reduce the total value of the property (not a problem with banknotes, however), the parties would expend resources on negotiating a transfer of one party's share to the other or both parties' shares to a third party.

In the case of the safe, I have been assuming that the owner owned the banknotes. Suppose he didn't. Consider a clearer example: Someone leaves his wallet, containing money, at a supermarket checkout counter. A customer picks up the wallet. The owner never claims it. Should the customer be entitled to retain possession of the wallet and money, or the supermarket (the "locus in quo," as the cases say)? The argument for the customer is that since it was he who found it, he deserves a reward; the supermarket did nothing. But if, knowing that he will be able to keep the wallet if the owner

⁴⁹ See *Nadalin v. Automobile Recovery Bureau*, 169 F.3d 1084 (7th Cir. 1999), and cases cited there; William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 *J. Legal Stud.* 83 (1978); Saul Levmore, *Explaining Restitution*, 71 *Va. L. Rev.* 65 (1985). Holmes also discusses a case similar to the case of the safe where "a stick of timber comes ashore on a man's land" (presumably without his knowing it). "[H]e thereby acquires a 'right of possession' as against an actual finder who enters for the purpose of removing it." Holmes, *supra* note 12, at 223 (footnote omitted). The optimal solution may be to give the finder a reward while giving the property right to the landowner—assuming the stick of timber was unowned when it washed ashore.

doesn't claim it, the customer walks off with it, it is less likely to be returned to the owner than if the wallet had been left to be found by a supermarket employee. For when the owner of the wallet discovers its loss, he will check in the places that he has been that day, and the search will quickly lead him back to the supermarket.

It is on this basis, which owes nothing to the analysis of the legal concept of possession, that American law has traditionally distinguished between lost and mislaid items, "lost" meaning that the owner doesn't realize the property is missing. Not realizing that it is missing, he is unlikely to search for it, and so the law awards lawful possession of lost property to the finder rather than, as in the case of mislaid property, to the owner of the place where it is found. The distinction is fragile and much criticized.⁵⁰ Why couldn't the finder of the mislaid item be given possession on condition that he leave his name and address with the supermarket so that the owner can track him down? But the point I want to stress is simply that the concept of possession does not drive the analysis when an economic view of the issue is taken. Instead, the choice of whom to give possession to is determined by asking which allocation of possessory rights will be more efficient.

I have not finished with the supermarket example. For there is another objection to allowing the customer-finder to keep either lost or mislaid property that is not claimed. His reward may be excessive in the sense that it might be much greater than the cost to him, and we have seen that excessive rewards for finding tend to attract excessive resources into the activities that generate such rewards. True, it is only *ex post* that the customer-finder obtains this reward, that is, it is only if the owner did not claim his property; and this means that the finder's *expected* reward may have been small, since most people who lose valuable property make an effort to recover it. But since an employee of the supermarket would probably have found the wallet shortly after the customer did, the value of the customer's finding it may have been slight—in fact negative, for the owner will have more difficulty reclaiming it from a customer than from the supermarket even if the customer is required to leave his name and address with the supermarket.

⁵⁰ See, e.g., R.H. Helmholz, *Equitable Division and the Law of Finders*, 52 *Fordham L. Rev.* 313, 316–21 (1983).

Suppose the rule is, therefore, that the supermarket has lawful possession, but the customer-finder doesn't know or doesn't care what the law is and walks off with the wallet—and then he forgets it in the next supermarket he goes into. This time an employee of the supermarket finds it, and the customer returns to the supermarket and claims it. Should he, the wrongful possessor, prevail over the subsequent lawful finder, the supermarket?⁵¹ Presumably not; depriving him of possession is the only feasible sanction for his initial wrongful act, and the prospect of such deprivation may be the only feasible deterrent against wrongful takings.

D.

The case of the safe casts light on the important question of whether physical control, either complete or in the attenuated form specified by Savigny (the power merely to reproduce that control), should be required for the maintenance as well as acquisition of possession. The answer given by economics is, in general, no. Such a requirement would lead to wasteful expenditures and also discourage specialization. Imagine that a tenant were deemed the owner of the leased premises because the landlord, by virtue of the lease, loses physical control over them (that is, the landlord cannot barge into the premises during the term of the lease). Savigny gets around this problem by denying that the tenant is ever in possession. But this leads to the awkward and costly result that the tenant can protect his undoubted possessory interests only by enlisting the aid of the landlord, even though the latter may be indifferent to the protection of the tenant's possessory interests. The landlord might not care, for example, whether the tenant was dispossessed, however wrongfully, by a creditor who promised to continue paying the rent. The tenant would have to sue the landlord for the cost of being dispossessed, and the landlord presumably would then turn around and sue the creditor as the primary wrongdoer—a circuitous method of dealing with wrongful dispossession.

It would be more sensible, though heretical in Savigny's system, to recognize the joint possession of landlord and tenant and to parcel out the right to take legal action to protect their possessory

⁵¹ See Jesse Dukeminier & James E. Krier, *Property* 100–103 (4th ed. 1998).

interest between them in accordance with comparative advantage in particular circumstances. I mentioned the case where the tenant has not yet taken possession. To this can be added cases in which dispossession by an intruder takes place late in the term, and the tenant lacks adequate incentive to sue; cases in which the infringement is more harmful to the landlord than to the tenant (for example if the tenant is dispossessed by a dealer in illegal drugs, who proceeds to frighten away the other tenants); and cases in which the tenant simply lacks the resources to litigate against the infringer.

Savigny recognizes the problematic character of requiring exertion in order to maintain a possessory right, by requiring notice as a precondition to dispossessing a landowner. Suppose a tract of land was previously unowned, unclaimed, and unoccupied, and there is no paper title to it. The first possessor is therefore the owner. But suppose that he is not continuously present on the land. If someone now occupies the land, is *he* the possessor? Savigny's answer, which is no, is surely correct; a contrary answer would lead to wasteful expenditures by owners on fencing and patrolling land. It is one thing to condition acquisition of title to newly found property on possession, as I argued earlier; but once title is acquired by this route, it should be enough for the maintenance of that title to record it in a public registry of deeds in order to warn away accidental trespassers. That is a cheaper method of notice than elaborate signage and fencing, let alone the kind of present, pervasive use that might reasonably be required to obtain title to *terra incognita*. It is another example of why a system of purely possessory property rights would be uneconomical.

But records are not infallible; nor do they ordinarily record abandonment. If a new occupier of land formally owned by another makes clear to that owner that he is claiming the land, and the owner does nothing to contest the claim for years, the law shifts the ownership of the land to the new occupier, who is said to have acquired ownership by "adverse possession." The requirement of adverseness is essential. Otherwise a tenant whose lease extended for the period of years required to obtain ownership by prescription (that is, by passage of time) would, at the end of that period, have become the owner of the leased property.

The tenant's possession is not "owner-like;" the adverse possessor's is. The root difference is in the possessor's intent, which can often be gathered from such "objective" indicia as the existence of a lease, the behavior of the owner (whether itself "owner-like"), and the behavior of the possessor (for example, whether he makes permanent improvements to the property, implying that he thinks of himself as the owner). Savigny was right, it turns out, to relate possessory rights to "ownerly" intentions, but wrong to suppose that such intentions should be required *always* to be present for a possessory right to be recognized.

The economic rationale of adverse possession, conceived as a method of shifting ownership without benefit of negotiation or a paper transfer, can be made perspicuous by asking when property should be deemed abandoned, that is, returned to the common pool of unowned resources and so made available for appropriation through seizure by someone else. The economist's answer is that this should happen when it's likely to promote the efficient use of valuable resources. It is undesirable in general that property should remain in the common pool, for the reasons explained at the outset of my discussion of the economics of possession. Thus the clearest case of abandonment is when a possessor deliberately "throws away" the property, in effect voluntarily returning it to the common pool. His act signifies that the property has no value in his hands, and so by deeming the property abandoned and therefore available for reappropriation by someone else, the law encourages the reallocation of the property to a higher-valued use. Similarly, the owner who does not react to the adverse possession of his property for years is indicating that he does not value the property significantly, which is the practical economic meaning of abandonment. A slightly less clear case of abandonment, which I have already discussed, is where the owner loses the property and makes no effort to reclaim it, or gives up on reclaiming it; but that is an unlikely occurrence with land.

Why, though, not require the adverse possessor to negotiate with the owner over a transfer of title? The answer is obvious when the owner actually throws away his property; his act indicates that he values the property at zero dollars or less, and so any finder who bothers to take the property is certain to be someone who values it more. In such a case, negotiation is not required to certify that the

appropriation of the property by the finder is indeed a value-maximizing transaction, and so the costs of negotiation would be a deadweight social cost, a waste. But adverse possession is almost always of land, and land, as I have said, is rarely thrown away, lost, or mislaid. When transaction costs are low, market transactions are a more efficient method of moving property to its socially most valuable uses than coerced transactions are. But transaction costs can be high even when one is dealing with parcels of land. The owner may be unknown. More commonly, the exact boundaries of his property are unknown, so that the adverse possessor doesn't know that he's encroaching or the owner that his property is being encroached upon. By the time the owner wakes up and asserts his rights, evidence may have faded and the adverse possessor may have relied on a reasonable belief that he is the true owner, creating a bilateral monopoly situation. The adverse possessor, thinking the property his, may have made an investment that will be worthless if he loses the property to the original owner, to whom, however, the property may also be worthless, as indicated by his having "slept" on his rights. When there is a gross disparity in the value that the only competitors for a good attach to it, transaction costs are likely to be high as each competitor vies for the largest possible share of that value.⁵² Adverse possession is a method of correcting paper titles in settings in which market transaction costs are high;⁵³ it improves rather than challenges the system of property rights.

Savigny makes the interesting suggestion that an intention to abandon property can sometimes be inferred from negligence in the use of it.⁵⁴ It would be more straightforward to say that the neglectful possessor both implies by his conduct that the property is not worth much to him and creates the impression among potential finders that the property has indeed been abandoned and is therefore fair game. Deeming the property abandoned in these

⁵² Suppose the land is worth \$1 million to the adverse possessor (perhaps because he is aware of mineral deposits on it) and only \$10,000 to the original owner. Then at any price between \$10,000 and \$1 million both parties will be made better off by a sale. But each will be eager to engross as much of the difference as possible, and that may make it difficult for them to agree on a price without lengthy and costly bargaining.

⁵³ See Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 *N.w. U. L. Rev.* 1122 (1984).

⁵⁴ See Savigny, *Treatise on Possession*, *supra* note 21, at 270-71.

circumstances becomes a method of reducing transaction costs and increasing the likelihood that the property will be shifted to a more valuable use.

Economics further implies that the right of adverse possession should be confined to cases in which the adverse possessor is acting in good faith—that is, he really believes the property is his. Otherwise the doctrine would encourage coercive property transfers in settings of low transaction costs. Confined to cases in which the true owner cannot easily be identified or found or seems clearly to have abandoned the property, the doctrine fulfills a traditional function of law conceived economically, that of mimicking the market in cases in which high transaction costs either prevent the market from bringing about an efficient allocation of resources or, as in the case of abandonment, becoming a pure waste.

We should be able to see by now the close relation between (as well as the interdependence of) possession and paper titles as methods of establishing property rights, and also the historical priority of the former. Possession, just like a deed of title recorded in a public registry, is, provided it is “open and notorious,” as the cases on adverse possession say, a way of notifying the world of the existence of a claim.⁵⁵ It is likely to be the only feasible way in the earliest stages of society. The fence is prior to the paper title as a method of announcing a property right. Once understood as being concerned with notice, the question of requiring an exercise of physical power, whether to obtain or maintain a possessory right, can be seen to involve a tradeoff between the costs of particular physical acts that communicate a claim and the benefits of clear communication. The more elaborate the required acts, the more unmistakable the communication, and this is good because the clear public definition of property rights lowers transaction costs and tends to optimize investment; but also the more costly this form of notice becomes. The costs of the most elaborate acts of notice by possession—acts of complete, continuous, and conspicuous occupation—will often outweigh the benefits. That is why a lesser degree of active possession will suffice to maintain a property right than would be necessary to acquire it.

⁵⁵ This function of possession is emphasized in Carol M. Rose, *Possession as the Origin of Property*, 52 *U. Chi. L. Rev.* 73 (1985).

Consider the colorful old case of *Haslem v. Lockwood*.⁵⁶ The plaintiff had raked horse manure dropped on the public streets into heaps that he intended to cart away the next day, that being the earliest he could procure the necessary transportation. Before he could haul them away, the defendant came by and hauled them off in his cart, and the plaintiff sued for the return of the manure. He won. This is the economically correct result. The original owners of the manure, who were the owners of the horses that had dropped it, had abandoned the manure; the plaintiff had found it. He took possession of it by raking it into heaps, and the heaps were adequate notice to third parties, such as the defendant, that the manure was (no longer) abandoned. To have required the plaintiff, in order to protect his property right, to go beyond the heaping of the manure—to fence it, or watch continuously over it, or arrange in advance to have a cart in place to remove the manure as soon as it was heaped—would have increased the cost of the “transaction” by which manure worthless to the original owner became a valuable commodity, without generating offsetting benefits.

E.

When property is stolen, it is not deemed abandoned, and so the purchaser from the thief, even if wholly and reasonably ignorant of the tainted source of his possession, has no right against the original owner. This rule can be defended as reducing the gain from, and hence the likely incidence of, theft; but there is more to a sound economic analysis, as is brought out by the currently much-discussed issue of property rights in stolen art.⁵⁷ Many works of art were stolen more than half a century ago during World War II. It can be argued that if the original owner has done nothing to try to recover the work in all that time, his title should be cut off, lest the current owner be reluctant to exhibit the work for fear of alerting his dormific predecessor; the work should be deemed “abandoned.” If this were the rule, original owners would have an incentive to take additional precautions to prevent the theft of

⁵⁶ 37 Conn. 500 (1871).

⁵⁷ See William M. Landes & Richard A. Posner, *The Economics of Legal Disputes Over the Ownership of Works of Art and Other Collectibles*, in *Economics of the Arts: Selected Essays* 177 (Victor A. Ginsburgh & Pierre-Michel Menger eds., 1996).

their art. But creating such an incentive is not the unalloyed benefit that it may seem. The cost of these precautions, precautions that might include refusing to allow the art to be exhibited widely, must be balanced against the cost of additional efforts by the purchaser to prevent the discovery of the art, as well as the additional search costs that an original owner will incur to discover his stolen art if he is entitled to get it back even from a bona fide purchaser from the thief. If the costs in concealment by the purchaser and search by the owner, under a system in which the original owner prevails, do not greatly exceed the costs in owner precaution under a system in which the bona fide purchaser prevails, the undesirability of making stolen goods more readily marketable is likely to tip the balance against allowing the purchaser to acquire title.

The problem is general, and harks back to the problem of safes and wallets. If we make it too easy for finders to acquire title by possession of lost or mislaid goods, we incite owners to take additional precautions to prevent their goods from being lost or mislaid. These precautions involve real costs. We need rules that will economize on them. Perhaps in the case of lost works of art, or other lost property of considerable value, the optimal solution (resembling the "half a whale" rule) is to restore the work to the original owner but to entitle the finder to a reward large enough to encourage the search for lost art, though not so large as to make owners excessively cautious about risking the loss of their property.

Holmes thought it anomalous, we recall, that an employee should not be deemed to possess property that his employer had entrusted to him. But the rule makes economic sense. The entrustment (like that of the dinner plate to the tavern guest) is narrowly circumscribed, with little room left for the exercise of discretion by the "custodian." So if the terms of the entrustment are deliberately violated, the inference of deliberate wrongdoing deserving severe punishment is easily drawn. There is no economic difference between the tavern guest who steals the plate and a person who enters the tavern and steals the plate without asking to be served and thus becoming a customer, or between the Brinks driver who makes off with his employer's cash-laden armored car and the stranger who put him up to the crime.

Savigny is right to worry about joint possession, though not because it is inconsistent with the definition of possession. Transaction

costs are greater if the law, rather than vesting the right to the use of property in one person, requires two or more people to agree with each other on how the property is to be used. The common law deals with this problem by allowing each joint possessor to insist on the partition of the jointly possessed property, so that the property becomes reconfigured as separate parcels, each controlled by only one person. Of course this won't be permitted if the partition would destroy the value of the property, as in Savigny's case of the statue's arm and head being separately owned. In such cases, efficiency requires a presumption that the whole object is the thing possessed.

I do not want to write a treatise on possession, so I will break off here my discussion of the economics of the law of possession. I have tried to show that while Holmes was right, or at least modern, to ask the law of possession to justify itself in terms of current social need, he couldn't do much with this important insight because he lacked the requisite social theory, which economics has now supplied.

IV.

In describing legal thinking about possession as passing through three stages in the last two centuries, the first represented by the legal theory of Savigny, the second by the legal theory of Holmes, and the third by economic theory, I may seem to be suggesting that Savigny missed the boat, that he was doubly in error in failing to use the functionalist approach of Holmes or the economic approach that has now operationalized it. That is not my intention. It is a mistake to suppose that every modern insight or approach was always available, so that the fact that it was not discovered or applied until recently is to be ascribed to the stupidity of our ancestors compared to ourselves. Different epochs have different needs. We risk committing the fallacy of anachronism when we criticize our predecessors for not looking at the world the way we do. Savigny, remember, was aware of the importance of the "actual needs of daily life" in shaping law. But the actual need of daily life that he emphasized, appropriately for his time and place, was for clear and uniform legal rules. Germany in 1803 was divided into hundreds of independent states and its legal institutions were too

weak and fragmented to bring clarity and uniformity to the law.⁵⁸ Especially in the western part of Germany (where Marburg, the site of the composition of Savigny's treatise on possession, is located), the French Revolution and its aftermath had unsettled, even disoriented, German thought. Savigny, as we know from his later criticisms of codification, did not think that Germany's legal culture was ready for the Benthamite project of starting from scratch with a clear and concise codification of functionally derived legal rules and principles. The alternative was to use the universities' intellectual resources to extract from Roman law—a highly sophisticated body of law—a set of clear principles to be the common law of Germany.

It is often said of particular issues in law that it is more important that the law be settled than that it be right. This is an aphoristic version of the argument for rules as distinct from standards. Rules abstract a few relevant facts from the welter of circumstances of each actual case and make the selected facts legally determinative. The consequence is an imperfect fit between rule and circumstances, resulting in some outcomes that are erroneous from the standpoint of the substantive principle undergirding the rule. This is a cost, but it must be traded off against the benefit of the rule in reducing legal uncertainty and the cost of litigation. Uncertainty is costly in itself and also may invite judicial corruption, whether financial or political, by making it difficult for outsiders to determine whether a judicial decision is in accordance with law. If it is especially urgent at a particular stage in a society's legal development to have clear legal rules, the approach taken by Savigny to the law of possession may well be the best approach to take—from an economic standpoint, as my discussion of the costs and benefits of rules versus standards has been intended to suggest.

Savigny provided a clear definition of possession and used it to deduce a host of specific rules. The structure is to some extent arbitrary, but its clarity is an enormous plus. To devise such a structure may have been more important than trying to derive rules or standards from considerations of social policy, not only because German law as Savigny found it was in urgent need of systematiza-

⁵⁸ "The German-speaking lands were an extraordinary legal patchwork." Whitman, *supra* note 2, at 102.

tion,⁵⁹ but also because German disunity created a political need that Roman law could fulfill. That law provided a *lingua franca* that because of its ethnic and temporal remoteness was politically neutral compared to a system of law avowedly based on current social needs, needs that would differ across German states and inevitably be inflected politically. Consistent with Max Weber's belief that the law must attain "formal rationality" in order to provide the clear, definite, and politically neutral framework required for economic progress, Roman law may well have played a role in the rise of commercial society in Europe⁶⁰—a role in which Savigny cast it. The individualistic and (as I suggested earlier) "anti-feudal" bias of Roman law made a return to it, paradoxically, an important measure of modernization.

The challenge that eluded Savigny, as it has eluded all legal thinkers, is to design a system of law that would achieve formal rationality in two distinct senses, each of which, however, might well be thought inherent in the concept: a system that would be coherent and would also consist of clear rules. Clear rules, as Savigny's own practice suggests, rarely achieve system-wide coherence; such coherence is generally possible only at a level of abstraction too high to generate specific rules.⁶¹

Savigny was also prescient in recognizing the importance of the universities as a force for intellectual unity in the face of Germany's political disunity. Drawing their students from all over Germany and focusing the research and teaching of their law faculties on the same body of legal principles, namely the Roman, universities became a substitute for a uniform judicial system.

Holmes faced a different situation from Savigny. The legal system of post-Civil War America was mature, sure-footed, and thoroughly professionalized. The nation was united after the trauma of the Civil War, and although it remained a federal system and the states retained a good deal of autonomy in matters of law,

⁵⁹ The jumble in which he found that law is typified by the work of the influential eighteenth-century jurist Moser. See Mack Walker, *Johann Jakob Moser and the Holy Roman Empire of the German Nation* 130–35 (1981).

⁶⁰ See, e.g., James Q. Whitman, *The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence*, 105 *Yale L.J.* 1841 (1996).

⁶¹ See Thomas C. Grey, *The New Formalism* (Stanford Law School, Sept. 6, 1999, unpublished manuscript, on file with the Virginia Law Review Association).

especially property law, there was a considerable homogeneity of approach. The American legal system (and one could rightly speak of *the* American legal system despite the laws of the different states) had the suppleness and the public confidence to be able to adapt legal principles to current social needs without undue danger of sacrificing legitimacy or creating debilitating legal uncertainty. In that setting, the formalism of Savigny and his followers was felt as constraining rather than liberating.

But while Holmes was enthusiastic about throwing off the fetters of the past and making law serve current social needs, he was not able to specify those needs. *The Common Law* tends to treat them as inscrutable, arbitrary preferences, or even instincts. Holmes says at one point, characteristically, that “[i]t is quite enough . . . for the law, that man, by an instinct which he shares with the domestic dog, . . . will not allow himself to be dispossessed, either by force or fraud, of what he holds, without trying to get it back again.”⁶² This tells us, perhaps, why there are possessory rights, but not their contours. (Recall how he merely set out the three rules for obtaining possessory rights in whales, without indicating which was best or how economics can differentiate among the rules.) The limning of those contours, the filling in of the picture, had to wait another century, when the tools of economics would attain the level of refinement required for dealing illuminatingly with the law of possession.

⁶² Holmes, *supra* note 12, at 213 (footnote omitted).

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