The Meaning of Property in Things

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Précis

Depending upon which department you visit at your favorite university, you will hear some rather different perspectives on property. The common view in humanities departments is that property is a modern, Western European, hegemonic construction, the cause of all wars and quarrels in the world. This is not hyperbole. One of its patron philosophers from the 18th century, Jean-Jacques Rousseau, imagined "what miseries and horrors would the human race have been spared…" had we not "forg[otten] that the fruits of the earth belong to all and the earth to no one." In the 19th century, Pierre-Joseph Proudhon declared, with clever moral inversion, what many still believe: "Property is theft!"

Across the quad in the natural sciences building, biologists will tell you that property is ubiquitous in the animal kingdom. Male baboons own the females in their harems. Red squirrels treat the tree in the backyard as their property. And bottlenose dolphins behave like that rare delicacy of a Spanish mackerel belongs to the dolphin holding it with his mouth. Birds also defend their claims against interlopers; western scrub jays, for example, protect their food caches from theft by re-hiding them if a potential pilferer caught a glimpse of the initial caching.

So on one side of campus, only some modern human beings have property, but on the other side, all sorts of animals have property in food, mates, and territory. In the building in between, home to the soft and squishy social sciences, people simultaneously entertain both views. Social scientists will say that, based on everyday experience, it certainly looks like the family dog has property when he jealously guards his bone, and those same professors will tell you that 17th-century Native Americans did not have notions of property like their European conquerors had. As a middling social scientist myself, let me propose a sticky compromise: *All humans* have property in things, and *Homo sapiens* is the *only animal* to have property in things.

As with most compromises, no one will be happy with this one. Current thinking in biology is that the gap between humans and all other animals is small. (Only human hubris makes humans exceptional in the animal kingdom.) The thinking in humanities departments is that the number and scope of human universals is so small that there are more important cultural things to talk about and social problems to attend to. (Only humans pride themselves on building the world as they imagine they can design it.) Social scientists, betwixt and between, blame themselves for not designing a better world (as only an exceptional animal can).

Part of the difficulty in talking about property is that the different disciplines talk past each other in their own languages. To convince you my compromise has some credence, I need to provide you with a common framework for thinking about property, a few open questions that frame the problem of explaining what property is, and some hard-to-dispute facts that neither the humanities nor the natural sciences—nor the social sciences in the middle unconsciously channeling both colleges—are synthesizing into a meaningful explanation of property.

First, and most obviously, all animals must use things to preserve the individual organism and propagate the species. Such things include food, mates, and shelter from the elements. All

mammals also live in territories that they defend against other members of the same species. Mammals, though, do not defend their territories for the land or space itself. They defend territories for the food, mates, and shelters inside it. Consequently, the first feature of my framework is that property is about *things* first and land or territories second.

The second feature is that both an animal's physical body and the environment in which it resides explain how an organism acts with regard to things. We thus have two potential sources of property to consider: the genes in our bodies and the people and things around us. A genetic explanation would mean property is universal to the species, but an environmental or socially transmitted explanation could mean that different groups of people think about property very differently, or some maybe even not at all. At this point we do not know if our genes or our environment explains property—or if, and here's a crazy idea, perhaps the answer lies to some degree in both—but we have a common framework, and we can ask questions of it.

So what do biologists' examples of nonhuman property have in common? Whatever nonhuman property might be, the effect of it is that male baboons, red squirrels, scrub jays, and dogs defend themselves against dispossession. If another animal attempts to acquire the thing in question, even if the animal is not currently using it, it will aggressively bear its teeth and make some noise. No parent has to teach its young to defend against dispossession. Such a response is inherited, and we can see why. Patsy progeny are less likely to reproduce if they give up their food or mate without at least the appearance of being willing to fight for it. Likewise, no human parent in any community teaches their child to resist attempts to take things securely within their grasp. Children are natural-born possessors.

Possession, however, is only nine points of the law. The last tenth is important. Another difficulty in talking about property around campus is that nine-tenths of our focus is on the *effects* of property. Every nonhuman example of property from biology—baboons, squirrels, dolphins, scrub jays, and dogs—is about the possession, exclusive use, and defense of food, mates, or territory in nature. Every human example of the absence of property from the humanities—think non-Western European societies—is about the non-exclusive use of certain things by certain peoples. Biology compares like effects across species and the humanities compare unlike effects within a species. But it is when we consider the *origins* of property in humans, and not simply its like and unlike effects, that we can begin to trace out what property is and how it works.

Many nonhuman species pass down practices about how to acquire things. Brown-headed cowbirds learn courtship songs and orangutans learn to how make and use tools for extracting food. Human beings, though, appear to be the only species to *teach* their progeny how *not* to acquire things. "No!" is how all parents teach their children the rules of how to acquire—or *not* acquire—things in the presence of other members of their species. Thou shalt *not* steal. (No linguist has found a language without the logical concept of "not.") Every generation of children must be taught the difference between the good and bad ways to acquire things in their community.

Even if a pair of Hello Kitty mittens hanging on a wall hook is identical to a pair lying on the floor, a child distinguishes between the two in such a way as to grab the pair that is "Mine!," regardless of which pair is the closest to them. Property is not the effect of leaving the closer pair of mittens on the floor. Property is not the effect of exclusively using the second pair of mittens on the hook. Property is not resisting the dispossession of the mittens within one's grasp. Property is in

the original perception that the two pairs of mittens are distinctly different things in the mind's eye. Property is knowing from experience that one pair is "mine," and the other is not.

Our human minds perceive the world of people and things through a socially transmitted custom of when you can and cannot say, "*This thing is mine.*" Property is a custom. It resides in our environment—well, partly.

The other part of property, of course, is in our genes. In every human language someone can say, "This (thing) is mine," and in every human language everyone knows exactly what that means. Linguists have found no exceptions. Children do not have to be taught the concept of "mine." They acquire it all on their own, or so parents tell me. Moreover, every human community distinguishes things that belong to the individual from things that belong to others. Not every human community has property in land, but all human groups have property in tools, utensils, and ornaments. However minimal it may be, there are some things about which only a particular individual can say, "This is mine." Not all spears or ceremonial ornaments are the same. Like lacrosse sticks and Hello Kitty mittens, the custom is such that there is but one individual who can wield or wear it.

If every human community recognizes property in tools, utensils, and ornaments, and if someone in every human community can say, "This thing is mine!" about something, then it would appear, contra the humanities, that *all humans have property in things*. And if property is fundamentally about not stealing, and humans are the only species that learns from mentors how *not* to acquire things, then it would appear, contra the biologists, that *Homo sapiens is the only animal to have property in things*.

Given these realities, it would also appear, contra the humanities, that property is indeed transmitted genetically. An open question, then, is why and how do humans universally perceive property in tools, utensils, and ornaments? Another open question is how did a *genetically* transmitted behavior regarding food and mates in nonhumans become a *socially* transmitted behavior about how *not* to acquire things like tools—not just food or mates—in humans? My answer, contra the numerous assertions by example in biology: It didn't. But for the full argument on how humans universally and uniquely cognize property, you will have to read my book. (I did warn you that no one would be happy with my compromise.)

This précis is drawn from my book manuscript, The Meaning of Property in Things*, under contract with Oxford University Press.*

Chapter 7

Disputes Explicate How We Cognize Property, Out of Which a Clear Rule Emerges

The Custom for Created Goods is First-in-Hand

Among the property cases that every (common) law student learns is the landmark English case of the chimney sweeper's boy and the jewel. The official record of *Armory v. Delamirie* (1722) summarizes the dispute in one extended sentence:

> The plaintiff being a chimney sweeper's boy found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who under pretence of weighing it, took out the stones, and calling to the master to let him know it came to three halfpence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones.[1]

A gem set in a ring is not something found in the common state of nature. Someone created the composite object and thereby could by custom say, "This ring is mine." Moreover, every person (and only a person) who happens upon a jewel lying around in some soot *re*cognizes it as a composite object, one meaning of which is that someone at some time exclusively, particularly, peculiarly, and properly had property in it. But when that someone is unknown or no longer around to say, "That ring is mine," what happens to the property in it? Can someone else have property in the ring? If so, who becomes the next person to have property in the ring, and how does one acquire property in it?

Recall the work that words do on the physical world when I say, "This ring is not mine, it is yours." Vocalizing those eight simple sounds changes how you and I think about the physical world. If the ring was mine, but I am unknown or no longer around, how would Marc Armory and Paul de Lamerie (the court reporter misspelled the defendant's name) cognize the ring? I cannot affect how they think about the ring because I'm not around to make such a claim. As far as Armory and de Lamerie are concerned, any property in the ring has been suspended. It could reappear if I reappear to say, "This ring is mine," but until then, there is no property in the ring.

Until I do in fact return, or if there is no reason to expect that I may return, the prudent course of action is for someone else to enjoy the thing and claim it with MINE. The question is, who? Who can say about the ring, "It is mine," such that other people will think (1) that he has a good reason to say, "This ring is mine," and (2) that no one else can say, "That ring is mine"? Armory or de Lamerie? Because such a situation is not uncommon, humans have a scheduling pattern that constitutes a set of expectations about what people can do regarding such things, viz., the custom is that the first person to find the thing, especially to grasp the thing with his hands, can say, "This is mine." This is nearly how Lord Chief Justice John Pratt rules: "That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover."[2]

Of the two claimants, Pratt awards the ring to the one who first had it in hand and laid claim to it, though, as the legal anthropologist Simon Roberts notes, the chief justice's statement is somewhat

imprecise. Whatever property Armory may have had in the ring, it did not bind "all but the rightful owner," but only all persons without a better claim to say, "This ring is mine."[3] Relative to de Lamerie, Armory first grasped the ring, but someone else relative to Armory could have also turned up in the future to say, "That is ring is mine," and that person need not be the person who "rightfully" had property in the ring before it was lost.[4] What this means is that *Armory v. Delamirie* may not illustrate so starkly "the fact that a right to possess will accrue from the mere fact of possessing" or that "the mere taking possession of a thing creates a right to its exclusive possession."[5] As the legal scholar Robin Hickey argues, albeit with a different line of reasoning, "the proposition that possession, without more, generates title" is a late 19th century interpretation of the early eighteenth-century case.[6] *Armory* may simply illustrate the first-in-hand custom by which someone can say, "This is mine."

Especially if the Thing is Your Creation

On the evening of April 6, 1869, Thomas Haslem instructed two employees to rake horse manure into piles off to the side of a public highway in Stamford, Connecticut.[7] After two hours of work, Haslem left the scene at 8:00 p.m., intending to cart the 18 piles to his land the next day. The next morning William Lockwood saw the manure and asked the borough warden if anyone had asked for permission to take the manure from the road. No one had asked. By noon Lockwood had removed the piles from the highway and applied them to his fields. Haslem asked to be compensated for the piles valued at $6 (roughly equivalent to $108 today), but Lockwood refused.

The trial court ruled in favor of Lockwood saying that "the facts proved the plaintiff had not made out a sufficient interest in, or right of possession to" the piles of manure. The Connecticut Supreme Court, however, found in *Haslem v. Lockwood* (1871) that the lower court had erred. When the manure fell from the horses and the riders continued on their way, the manure is considered to be abandoned and that Haslem should have been allowed a reasonable amount of time to return and cart away the manure.

There is no property in manure abandoned along a public road. When Haslem's employees raked the manure into piles, however, they created something no longer in the common state placed in nature. Manure doesn't fall in tidy heaps. By ancient custom Haslem could thereby say, "These piles are mine." No one was present when Lockwood came by the unguarded, neat and convenient piles, and like an American red squirrel, he made off with his adventitious find. Red squirrels, however, can't cognize external objects as creations, nor can they jointly attend to the heaper's end in creating the piles of manure. But humans like Lockwood can. And by working so quickly, including a trip to the warden and back, Lockwood knew that the scheduling pattern of people who heap 18 piles of manure for two hours included returning to the scene to collect them.[8] Arguing, as Lockwood did, that Haslem did not have property in the manure until it was removed from the public road was self-serving. Locke's barrage of questions seems appropriate here, for the moment of removal from the road is an arbitrary intermediate point in collecting the manure from the highway and depositing it on your field. *The moment we create an object it is first-in-hand* (so to speak in the case of a pile of manure). When we create an object, we create the property in the object, provided, of course, that the creating act fits with the system of customs operating in the background.

But also if the Thing is in the Common State Placed by Nature

If there is a property case more widely discussed in law schools and legal scholarship than *Armory v. Delamirie*, it is the New York case of the fox that got away until it didn't, or *Pierson v. Post* (1805). Sometime between 1800 and 1803, Lodowick Post wounded a fox and was pursuing it on an unowned Long Island beach when Jesse Pierson, knowing that Post was in pursuit but without a clear line of sight, interloped, killed the fox, and took it with his very hands.[9] The justice of the peace ruled for Post, who argued that he was in hot pursuit with his hounds. By Locke's standard, he had mixed his labor with that fox and thought that he could therefore say, "That fox is mine." Moreover, Pierson was just being plain rude, disappointing him of what he expected. Pierson, though, thought another custom, also practiced from time immemorial, applied in this case: Only upon taking a wild animal's natural liberty by killing or trapping it can someone say, "This fox is mine." After each party spent an estimated £1,000 on lawyers' fees (a tiny fortune worth approximately $100,000 today), the New York Supreme Court reversed the decision and awarded the fox to Pierson.[10]

Unlike a composite created object, a wild animal on a public beach is in the common state placed in nature. No one has property in a fox as it freely roams its home range. Moreover, its scheduling pattern regarding humans calls for evading anyone who attempts to put property via a bullet in it. Out of this additional cost of acquiring property in a thing emerged another of the uncountable customs that qualifies the Lockean custom of when someone can say, "This varmint is mine." Any labor is insufficient, and in particular, the pursuit of a fox is insufficient. Until you have actual physical control of the wild animal, you do not have property in it. When hunting wild animals on public land, the first person to deprive the animal of its natural liberty is the person who can say, "This animal is mine."

The Custom may Evolve to First-to-Work-Upon, if Costs are High

Sometime in the mid-nineteenth century, the crew of the American whaling ship *Rainbow*, managed by Gifford, harpooned a finback whale in the Sea of Okhotsk, located east of Siberia and north of Japan.[11] The line was originally attached to the ship, but somehow the whale escaped with the iron and the line still fastened in it. Gifford continued to pursue the whale, but the crew of the *Hercules*, owned by Swift, did not see the *Rainbow* in pursuit. The *Hercules* shot, killed, and captured the whale, but had not yet cut into it when Gifford appeared on the scene. The two ships, both based out of whaling capital of New Bedford, Massachusetts, established that one of Gifford's harpoons was indeed in the whale. Following the American whaling custom of iron-holds-the-whale, Swift then relinquished the physical control of the whale to Gifford.[12] The iron-holds-the-whale custom was that as long as a ship remained in pursuit of a harpooned whale, the pursuer maintained property in the whale provided the original marked harpoon remained in the whale and the claim was made before the subsequent ship had begun rendering the whale.

Upon returning home, Swift sued Gifford to reclaim the whale. Citing *Pierson v. Post*, among other cases, he argued "that the rule of law is, that wild animals become property only when fully and actually taken into possession." Moreover, the iron-holds-the-whale custom was "in contravention of this rule of law," "not universal," and "unreasonable." While Swift did not make this argument, 18th

century British whalers (who hunted right whales off the coast of Greenland) adhered to a different custom called fast-fish-loose-fish.[13] If a harpooned whale was held fast to the ship, the harpooner maintained property in the whale. But if, for whatever reason, the ship no longer maintained its attachment to the whale, the loose fish was fair game for any other ship.

The court held in *Swift v. Gifford* (1872) that iron-holds-the-whale custom was a reasonable and applicable to this dispute. The different decisions in *Pierson v. Post* and *Swift v. Gifford* illustrate the critical importance of scheduling patterns in understanding how property works. In Coke's language of property (*She has property in the swan*), the relationships between the hunters and property, and the prey and property loom large. There's more at play than the relationship between the hunters and their prey, than the physical facts of who delivered the mortal blow and assumed physical control of the animal. Pierson has property in the fox because over the course of human history the ancient custom of fast-varmint-loose-varmint emerged to reduce the transaction costs of hunting land mammals. The custom of projectile-holds-the-varmint or pursuit-holds-the-varmint could have emerged, but they didn't because they didn't fit the scheduling patterns of the hunters, their prey, and the hunters regarding their prey. American whalers inherited the English rule of first-fish-loose-fish, but when it didn't fit the scheduling patterns of their new levianthanic prey, they increasingly adopted a new custom that reduced the transaction costs of hunting a mammal that was far too large and too far at sea for humans to ever hunt in ancient times.[14] Gifford has property in the whale because humans, armed with some new technology, adapted a new scheduling pattern to a new kind of prey.

A common feature to all these cases is that the contextual custom contains an element of firstness, first in hand (created or not) or first worked upon with intent to finish the job. Why is firstness important? Because another feature common to all these cases is that the thing in question is itself not contained in something that someone can say, "This is mine." Except for *Armory*, which is silent on the issue, the person acquires property in the thing in a location that no one can say, "This location is mine." How important is firstness when the thing in question is contained in something that someone can say, "This is mine"? For judges, it's rather important, if not decisive; for us, it's immaterial, literally and figuratively.

Firstness doesn't Matter if Location Priorly Matters

In April, 1874, Herbert Durfee purchased an old safe and directed an agent to resell it. The agent offered to sell the safe to Orrin Jones, but he declined. The agent then left the safe with Jones "authorizing him to keep his books in it until it was sold or reclaimed."[15] Jones found a roll of banknotes worth $165 in the lining of the inside wall of the safe, informed the agent of the money he had found, and offered to give the money to the agent to give to Durfee. The agent said that the money was not his or Durfee's and advised Jones to deposit the funds somewhere "drawing interest until the rightful owner appeared."[16] When Durfee learned about the money from his agent, he first asked for the money from Jones, and when Jones refused him, Durfee "demanded the return of the safe and its contents, precisely as they existed when placed in [Jones's] hands. [Jones] promptly gave up the safe, but retained the money."[17]

Who has property in the banknotes found inside the wall of the safe, the bailee who finds the money in the walls of the safe, or the bailor who has property in the safe itself? The Rhode Island Supreme Court ruled in *Durfee v. Jones* (1877) that "the general rule undoubtedly is, that the finder of lost property is entitled to it as against all the world except the real owner, and that ordinarily the place where it is found does not make any difference."[18]

I have my doubts. First, the place where one finds swans and foxes ordinarily matters. Lady Young has property in the swans . . . in her waters. The Queen has property in the swans . . . in her waters. Post would have property in the fox . . . in his woods. Secondly, if the court has *Armory* in mind, the location where Armory found the ring is unstated and irrelevant because the case was not between Armory and the owner of the building in which the ring was found.

By appending that location does not matter, the court tacitly acknowledges that no custom stands independent of other customs, and the custom of first-in-hand for lost items is no different. Judges may accept that location does not matter as a matter of law, but everyday people do not. The psychologists Peter DeScioli and Rachel Karpoff asked 59 people to read a synopsis of the *Durfee* case and then report who they thought owned the item. Forty-seven ordinary people (80%) chose Durfee, citing what? The location of the money *in* the safe.[19] It does not matter that the money was lost. It does not matter that Durfee was unaware of the money in the safe. And it does not matter that the money was never "in the protection of the safe as *his* safe, or so as to affect him with any responsibility for them."[20] If Durfee has property in the safe—not 'property,' the physical object, but property, the universal and uniquely human custom by which Durfee can say, "This safe is mine"—, then Durfee has property in the money in the safe. Where the safe goes, so goes the property, and so goes the money in the lining. Because the safe contains both the property and the money, we cognize Durfee as having property in the money in the safe.[21]

If You have Property in Y *and* X *is in* Y*, You have Property in* X *in* Y

One year later *Durfee* serves as "the case more nearly in point than any other which has fallen under our observation," which is to say that Durfee's equivalent, Abner T. Bowen, also didn't think that first-in-hand applies to something found inside something he has property in.[22] Bowen and his partners owned a paper mill in Carroll County, Indiana and had purchased a bale of rags and paper in Kansas to be sorted in their facility near Delphi. In May, 1876, sixteen-year-old Ellen Quinn went to the paper mill in which her guardian and half-sister Anna Sullivan worked. (The litigants disputed whether Quinn also worked at the mill at time of the incident.) Among the paper and rags loose and scattered on the floor, Quinn found a clean unmarked envelope inside of which were two fifty-dollar bills (roughly equivalent to $2,249 today). She asked the floor supervisor to determine if the money was real and then to return it. The supervisor took the money to Bowen who confirmed it was genuine. When Quinn asked for the money back from Bowen, he refused and instead offered her $10.

Who has property in the banknotes found in an envelope from inside a bale of paper and rags, the person who finds the money in the envelope, or the person who has property in the bale inside his

mill? The first case that the Indiana Supreme Court cites in *Bowen v. Sullivan* (1878) is *Armory v. Delamirie*:

> Ever since the case of *Armory v. Delamirie,* 1 Strange, 505, in which a chimney-sweeper's boy, having found a jewel, left it with a goldsmith to ascertain what it was, was held entitled to recover it, the law has been steady and uniform that the finder of lost property has a right to retain it against all persons except the true owner.[23]

This is where Pratt's imprecise statement becomes consequential. Bowen is not the "true owner," but that's neither here nor there. The question is whether Bowen or Quinn has a better claim to say, "This money is mine." *Armory* may affirm the first-in-hand custom for subsequent graspers of this one ring, but that does not make the custom independent of context to rule all subsequent cases as precedent.

That location is irrelevant in *Armory* does not make location irrelevant here, which is why the Indiana Supreme Court considers *Durfee* to be the case more nearly in point. If the place where something is found ordinarily does not make any difference, then the prior court can hold "that, as the purchase was of the safe, not the safe and its contents, the money was not embraced in the purchase."[24] But wait. Didn't Bowen "purchas[e] the envelope containing the bills by weight [thereby] purchas[ing] the bank-bills in question"?[25] Also, aren't bills made of paper? To which the court replied in effect, so what? "Their existence was unknown when the envelope was purchased, and their weight was so infinitesimally small, compared with their value, that we do not concur in this proposition. It is unreasonable."[26]

If Bowen has property in the bale in his mill, then Bowen has property in the money in the envelope in the bale in his mill. Where the bale goes, so goes the property, and so goes the money in the envelope. Not only, does it not matter that Bowen was unaware of the money in the bale, it adds but another fact for a judge and jury to decide. Not only, does it not matter that the money was lost, it adds but another fact for a judge and jury to divine. And not only it does not matter that the weight of the money is infinitesimally small, it will become but another fact for a future court to determine what is and is not reasonably small.[27] Because we cognize property as being contained in something with a well-defined boundary, interior, and exterior, perhaps we can use such clear physical demarcations to clarify and simplify the general rule of who can say, "This is mine." If person *A* has property in a thing *Y* and another thing *X* is in *Y*, then *A* has property in *X* in *Y*. Notice that the proposition nicely encapsulates the principle of accession in chattels like cattle. If I have property in a pregnant cow, then I too have property in the calf before and after its birth.

The Rule is that Simple

Such a rule would make cases like *Jackson v. Steinberg* (1949) easier to decide. Laura Jackson worked as chambermaid for Karl Steinberg doing business as Arthur Hotel in Oregon. In the course of her duties, she found several $100 bills "concealed carefully under [a] paper lining of [a] dresser drawer in [a] guest room."[28] When Steinberg was unable to find the original owner, Jackson asked Steinberg to return the money to her, but he refused.

Jackson argued that the money should be considered treasure trove. If something is treasure trove, then by ancient custom someone who does not have property in the place where the treasure is found can say, "This treasure is mine." *The American and English Encyclopedia of Law* explains that "treasure trove, under law, must be hidden or concealed so long as to indicate that its owner, in all probability, is dead or unknown."[29] This was important to Jackson's appeal to the Oregon Supreme Court because "there is no question" the scheduling pattern/duty of hotel cleaning staff is "to seek for and find valuable property left behind in guest rooms by guests, and to deliver such property to [Steinberg]."[30] Determining whether this found money is treasure trove, which is straightforwardly not the case here, could easily be a nontrivial fact to discern. What does it mean to be hidden or concealed? How long is so long? What is the probability that the owner is dead or unknown? Instead of asking and answering a barrage of questions, the sole question to ask is, who has property in the drawer of the hotel in which the money was found? Steinberg or Jackson? The end. Next case. Or better, there's no case to begin with because the rule is clear.

The other key feature of this case for the court to determine was whether the money was lost or mislaid, because as every first year law student learns, the subtle difference matters. If the money was mislaid, precedent would award the money to Steinberg. But if the money was lost, it would go to Jackson. The origins of this split hair lie in our last two cases, which precede all of these cases but *Armory* and *Pierson*.

And a Difficult Case Indicates How to Test the Rule

In October, 1847, Bridges, as the British say, called on the shop of Messrs. Byfield & Hawkesworth.[31] As he was leaving, he found a small parcel on the floor, which he opened up with the attending clerk. Inside was £65 (approximately $6,926 in today's US dollars). Bridges gave the money to Hawkesworth to keep until the owner claimed it. After three years elapsed, during which time Hawkesworth advertised in *The Times* that the banknotes had been found, no one claimed the money. Bridges then requested the money be returned to him, which Hawkesworth refused.

Who has property in the banknotes found in the parcel in the shop? The shopkeeper who has property in the shop or the customer who found the parcel in the shop? The County Court of Westminster ruled for Hawkesworth, but Bridges appealed to the Court of the Queen's Bench, who reversed the decision. As we shall see, *Bridges v. Hawkesworth* (1851) is a difficult case that demonstrates the limits of the synthesis and analysis in this book. It is precisely because of such limits, however, that *Bridges* is, with hindsight, a poor case to serve as precedent for above cases that would follow and appeal to it.

The Queen's Bench first reiterates the rule espoused in *Armory*: "The general right of the finder to any article which has been lost, as against all the world, except the true owner, was established in the case of *Armory v. Delamirie*, which has never been disputed. *This right would clearly have accrued to the plaintiff had the notes been picked up by him outside the shop of the defendant*…" (italics added).[32] The case, moreover, "resolves itself into the single point on which it appears that the learned judge decided it, namely, whether the circumstance of the notes being found inside the defendant's shop gives him,

the defendant, the right to have them as against the plaintiff, who found them. There is no authority in our law to be found directly on point."[33] The court also noted that Hawkesworth was not aware of the parcel and hence, unlike an innkeeper, "the notes were never in the custody of the defendant, nor within the protection of his house." Nor were the notes intentionally placed with Hawkesworth. They appeared to be lost. "We find, therefore, no circumstances in this case to take it out of the general rule of law, that the finder of a lost article is entitled to it as against all persons except the real owner, and we think that that rule must prevail, and that the learned judge was mistaken in holding that the place in which they were found makes any legal difference."

Hawkesworth disputed *Armory* precisely on the basis that the parcel was found in his store. As the court noted, if Bridges had picked up the parcel outside the shop, Hawkesworth clearly could not say, "Those notes are mine." The court appears to question why a mere few yards should matter. A mere few yards matters decisively in *The Case of the Swans*, which has the added difficulty that the object in question exercises natural liberty concerning the border in question. As noted above, the mind does the marvelous work of instantaneously replacing the Queen's notion of MINE with Lady Young's whether or not Lady Young knows a swan is in her waters or not. The Keeper of the Queen's Swans cannot find swans in Lady Young's private waters precisely because the boundary matters.

So why does the boundary *not* matter for the Queen's Bench, but matter for the learned judge of the county court? Perhaps because the spatial container that the context conveys to the mind is less clear, less defined for the judges of the Queen's Bench than for the learned judge. If one perceives the parcel as located on a regularly traversed thoroughfare, more akin to a Long Island beach or Stamford highway, then first-in-hand would appear to be the controlling custom. But if one perceives the parcel as contained within the well-defined boundaries of the shop, one would so qualify the first-in-hand custom.

DeScioli and Karpoff find that people agree with the Queen's Bench. Of the 60 people who read the *Bridges v. Hawkesworth* scenario, forty-five (75%) side with Bridges.[34] And therein lies the problem with *Bridges* setting a precedent for Jones, Bowen, and Jackson to argue that location is plainly irrelevant to where the item is found. The safe, the bale in the mill, and the drawer in the hotel are more readily perceived as contextually *containing property and the thing in question* than a path towards the exit of a store.

This may then explain why the original judge in *McAvoy v. Medina* went out of his way to justify awarding the found item to the proprietor (Medina) and not the customer-finder (McAvoy), thereby annoying American law students ever since with the fine distinction of lost versus mislaid items.[35] In this case, the plaintiff customer found a pocketbook on a table in the defendant's barbershop.

The Massachusetts Supreme Judicial Court opens its reasoning in *McAvoy* citing *Bridges*, bound by the "the settled law that the finder of lost property has a valid claim to the same against all the world except the true owner, generally that the place in which it is found creates no exception to this rule."[36] It would seem quite easy for the judge in *McAvoy* to apply *Bridges* and be done with the case, but the physical context doesn't have the same feel. The pocketbook was not on the ground on a path on the

way to an exit (note the prepositions), but on a table inside the barbershop. The in-ness is more salient for a table in a shop than a path on the floor of a shop. But the boundary in *Bridges* wasn't modestly ruled as a grey area, but as irrelevant. So to get out from underneath of *Bridges*, the judge in *McAvoy* had to differentiate the case, not on the stark physical facts of the location, but on the intentions of the person who lost the pocketbook as divined from the physical facts of the location. And so, the pocketbook is not "to be treated as lost property in that sense in which a finder has a valid claim to hold the same until called for by the true owner," but rather as mislaid, a term not used by the supreme court but one that would be subsequently and broadly adopted to distinguish *McAvoy* from *Bridges*.

McAvoy consequently raises the possibility to postdict how DeScioli and Karpoff's volunteers would decide this case. If, as I argue, there is more in-ness, more defined containment of the item in *McAvoy* than *Bridges*, then a higher percentage of people would choose Medina than Hawkesworth, which is 25% and statistically less than likely than a flip of a coin. Furthermore, if there is less in-ness, less defined containment of the item in *McAvoy* than in *Durfee*, then we would also postdict that fewer people would side with Medina than Durfee, which is 80% and statistically more than likely than a flip of a coin. What do we find? Voilà! The results fall neatly in between. Of the 59 people surveyed, 26 (44%) choose Medina, which is statistically not different from flipping a coin.[37] As Ellickson says of the evidence in favor of his whaling norm hypothesis, "any ex post explanation risks being too pat, and this one is no exception."[38] But it does lead us to the following testable proposition for an ex ante experiment.[39] The more defined the containment of *X* in *Y*, the more people will adhere to the proposition that if *A* has property in *Y* and *X* is in *Y*, then *A* has property in *X* in *Y*.

In an alternate timeline if *Durfee* and *McAvoy* had preceded *Bridges*, we might have precedents that more closely coincide with how ordinary people cognize property. And even if the Queen's Bench had upheld the lower court in *Bridges*, despite conflicting with how a supermajority people think about that case, we would still have a clearer general rule consistent with how our species cognizes the meaning of the custom.

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[1] *Armory v. Delamirie* (1722, p. 664).
[2] *Armory v. Delamirie* (1722, p. 664).
[3] Simon Roberts (1982).
[4] Simon Roberts (1982; p. 686).
[5] Peter Birks (2000, ¶ 4.40) and William Swadling (2008, p. 650).
[6] Robin Hickey (2015, p. 143).
[7] *Haslem v. Lockwood* (1871).
[8] While obvious, it is not irrelevant that Lockwood also knew that the piles wouldn't be exerting any natural liberty that day.
[9] Bethany Berger (2006).
[10] Angela Fernandez (2009).
[11] *Swift v. Gifford* (1872).
[12] Robert Ellickson (1989).
[13] Robert Ellickson (1989).
[14] Robert Ellickson (1989). See also Bart Wilson, et al. (2012) who document how changing prey from "right whales" to "sperm whales" in a laboratory experiment increases the conflict among virtual whalers who endogenously follow a fast-fish-loose-fish rule.
[15] *Durfee v. Jones* (1877).

[16] *Durfee v. Jones* (1877).
[17] *Durfee v. Jones* (1877).
[18] *Durfee v. Jones* (1877).
[19] Peter DeScioli, and Rachel Karpoff (2015).
[20] *Durfee v. Jones* (1877).
[21] Note how this also applies to the *Haslem* case. Haslem does not have property in the manure strewn along road. However, if Haslem, by custom, has property in the pile he creates, then he has property in the manure (contained) in the pile. Yes, the pile literally is manure, and the safe is not literally the money, but all abstract thought is metaphor, not literality. See Steven Pinker (2007).
[22] *Bowen v. Sullivan* (1878).
[23] *Bowen v. Sullivan* (1878).
[24] *Bowen v. Sullivan* (1878).
[25] *Bowen v. Sullivan* (1878).
[26] *Bowen v. Sullivan* (1878).
[27] *Durfee v. Jones* (1877).
[28] *Jackson v. Steinberg* (1949).
[29] Charles Williams (1894, p. 537).
[30] *Jackson v. Steinberg* (1949).
[31] *Bridges v. Hawkesworth* (1851).
[32] *Bridges v. Hawkesworth* (1851).
[33] *Bridges v. Hawkesworth* (1851).
[34] Peter DeScioli and Rachel Karpoff (2015).
[35] *McAvoy v. Medina* (1866).
[36] *McAvoy v. Medina* (1866).
[37] Peter DeScioli and Rachel Karpoff (2015).
[38] Robert Ellickson (1989, p. 95).
[39] See also Bart Wilson, et al. (2012).

Chapter 8

The Results of a Test are Agreeable to the Prediction