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SOME REALISM ABOUT LEGAL SURREALISM

JEANNE L. SCHROEDER

One must discard the prejudice that truth must be something tangible.¹

I. INTRODUCTION: GRASPING AT STRAWS

Commercial law—the private law of personal property—is in the grasp of a physical metaphor. The legal concept of possession is conflated with the sensuous experience of grasping a physical thing in one's fist. This metaphor is merely inept for the analysis of noncustodial property interests in tangible chattels that, at least theoretically, could be grasped. It is bizarre when applied to intangibles. Rather than being simple and intuitive, as its proponents claim, the metaphor of sensuous grasping can only be maintained through the use of increasingly elaborate auxiliary metaphors and analogies. If legal realism was an attempt to make commercial law more nearly reflect actual economic practice, then the physical metaphor is legal surrealism.

This physical metaphor can be found in both an affirmative and negative form. The defenders and critics of property alike implicitly agree that the paradigm of property is the sensuous grasp of physical things but disagree as to its implications. Does it mean that nonsensuous property interests need to be analogized to sensuous ones? Or, alternatively, does the absurdity of such analogies prove that property is a meaningless or

obsolete concept?

In a series of recent articles, I have explored the persistence of the physical metaphor in contemporary jurisprudence\(^2\) and in doctrinal scholarship.\(^3\) In this Article, I further explore the per-

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I have suggested that the physical metaphor persists despite its disutility, not because of its utility, because it relates to the psychoanalytic tendency to try to reduce the legal or Symbolic to the prelegal or Real through Imaginary identification of legal conceptions with actual physical objects. In this and my other articles, I refer to Jacques Lacan’s concept of the psychoanalytic orders of the Symbolic, the Imaginary, and the Real. See id. at 6-8; Schroeder, Bundle-O-Stix, supra note 2, at 246-55; Schroeder, The Vestal and the Fasces, supra note 2, at 884-93; Schroeder, Virgin Territory, supra note 2, at 155-56.

A complete explanation of these concepts is beyond the scope of this Article. For the limited purposes of this Article, it is sufficient to say that the Symbolic includes the social order of language and law. See Schroeder, The Vestal and the Fasces, supra note 2, at 885; Schroeder, Virgin Territory, supra note 2, at 159. The Real stands for that which is prelinguistic and cannot be reduced to or contained by language. See Schroeder, The Vestal and the Fasces, supra note 2, at 885; Schroeder, Virgin Territory, supra note 2, at 156-57. It is, therefore, the order of limitation. It is not equivalent to the actual physical world per se but includes our psychoanalytical sense of a world external to our consciousness. The Imaginary is the order of images and includes our identification of the Symbolic and the Real with actual objects. See Schroeder, The Vestal and the Fasces, supra note 2, at 885; Schroeder, Virgin Territory, supra note 2, at 157-58. For example, our identification of the order of the Real with the physical world is an Imaginary identification.

In my articles and forthcoming book, I also suggest that the physical metaphor for property is not the Imaginary identification of property with just any physical object. I argue that, in Lacan’s psychoanalytical theory, sexuality plays a parallel role in the development of legal subjectivity as property does in Hegel’s philosophical theory. The physical metaphor is, therefore, specifically a phallic one—the imagery of seeing, grasping, and wielding the male organ, or entering and/or protecting the female body from violation. In other words, the ostensible ownership doctrine is not merely a fallacy, but a phallosy. I do not rely primarily on this specific feminist analysis of the physical metaphor in this Article.
nicious use of the physical metaphor in commercial law, scholarship, and doctrine, with particular emphasis on the law of perfection of noncustodial security interests and security interests in intangible property. Specifically, I consider the rules governing the perfection of security interests under Article 9 of the Uniform Commercial Code (UCC), and under the revisions to Articles 8 and 9.4

In this Article, I will concentrate on the most extreme and surrealistic example of the affirmative version of the physical paradigm in commercial law—the doctrine of ostensible ownership. This doctrine is frequently promoted as the justification for the perfection requirements of Article 9.5 To the proponents of this doctrine, property should not merely be grasped; it must be wielded in the sense of being displayed for all to see.6 Not only does the sensuous grasp of a physical thing raise a legal presumption that the grasper is the owner, but property interests which do not, or cannot, take the form of physical grasping—such as when the object of the property interest is itself intangible—are deemed to be so problematic as to be presumptively fraudulent unless "cured."7

In order to rethink property imagery, we must consider the definition of property in terms of the functions it is supposed to

4. The National Conference of Commissioners on Uniform State Law (NCCUSL) adopted sweeping revisions to Article 8 and related changes to Article 9 at its August 1994 session. These proposals were proposed for adoption by the several state legislators in early 1995. As of the publication of this Article, they have been adopted by at least 13 states and are being considered for adoption by a number of others. The revisions are intended to reflect more adequately the indirect holding system through which most publicly traded securities are held today. See infra notes 135, 142, 144-45 and accompanying text. Among other changes discussed in this Article, the revisions will return the rules for the attachment and perfection of security interests in investment property to Article 9 from Article 8. I discuss this new statutory regime extensively in Jeanne L. Schroeder, Is Article 8 Finally Ready This Time? The Radical Reform of Secured Lending on Wall Street, 1994 COLUM. BUS. L. REV. 291 [hereinafter Schroeder, Is Article 8 Finally Ready This Time?].

In this Article, references to Articles 8 and 9 of the UCC shall be to the official text as amended by the 1977 amendments. When the most recent amendments to these articles are pertinent to the discussion, I will refer to such sections by their 1994 amended date.

5. See infra notes 15-17 and accompanying text.

6. See infra notes 54-56, 83, 117 and accompanying text.

7. See infra notes 36-38 and accompanying text.
serve and how it can be distinguished from contract. Elsewhere, I have offered a justification for the UCC's treatment of property within classical liberal political and jurisprudential theory that emphasizes natural rights, personal autonomy, and negative liberty. In this Article, I offer an alternative justification for the perfection requirement based on G.W.F. Hegel's philosophy of right, which emphasizes the creation of personality, intersubjectivity, and positive freedom. I will suggest that, despite the fact that Hegel's theory of property is unfamiliar to most American property law scholars and practitioners, it offers an even more satisfactory account of property law than traditional Lockean theory.

In examining the law of perfection, I shall resurrect, and partially rehabilitate, one of the chestnuts of precode law traditionally vilified by modern commercial law scholars and supposedly rejected by Article 9—the notorious case of *Benedict v. Ratner.* In *Benedict,* the Supreme Court held that a purported assignment of accounts receivable where the assignor retained sole and unfettered dominion of the accounts—i.e., the right to collect or otherwise dispose of accounts without any obligation either to account to the assignee or to substitute collateral—was fraudulent as a matter of law and unenforceable against creditors of the assignor. Although its specific holding and stated justification are confused, the opinion reveals an intuitive appreciation of property that the metaphor of sensuous grasp only reflects as in a glass darkly. That is, in order for a relationship to be given the legal status of "property," it must include the element that Hegel called "possession" and which I call "objectification." This is because, in contradistinction to simple contract claims, property interests are generally enforceable against a class of noncontracting third parties. The values of autonomy and in-

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10. *Id.* at 360.
11. Hohfeld drew this distinction between *in personam* and *in rem* claims. Wesley N. Hohfeld, *Fundamental Legal Conceptions As Applied In Judicial Reasoning* 85 (W. Cook ed., 1919). I agree with this part of Hohfeld's analysis. As I have addressed at length elsewhere, however, I disagree with Hohfeld's contention that property does not also require an object or res. See *Schroeder, The Vestal and the*
dividuation require that property claims subjectively asserted by any individual legal subject must be "objectively" manifested as a condition of enforceability against noncontracting third parties. This requirement is not merely formal but inherent in the functional logic of a property regime.

Articles 8 and 9’s perfection provisions can be explained as a statutory objectification requirement for the property claim that we call a security interest. The legislature might decide, per Article 9, that physical custody of tangible collateral is, in a specific fact situation, an adequate mode of objectifying a subjective claim to a security interest. It does not follow, however, that custody is the only possible mode of objectification, let alone the most adequate or archetypical one, against which other perfection alternatives must be compared. Specifically, in this Article I demonstrate that the mode of objectification adopted in Benedict—dominion—presaged the new, favored mode of perfection proposed in revised Articles 8 and 9—control.

II. THE OSTENSIBLE OWNERSHIP FALLACY

A. Ostensible Ownership

1. Introduction

Commercial law scholarship and practice has traditionally assumed that the archetypical form of ownership is immediate physical contact with, and custody of, a visible and tangible

FASCES, supra note 2; Schroeder, Bundle-O-Stix, supra note 2, at 241; Schroeder, Virgin Territory, supra note 2, at 60-61; Schroeder, Liquid Property, supra note 3, at 2-6.
12. See infra notes 174-95 and accompanying text.
13. See infra notes 205-14, 233-40 and accompanying text.
14. As one critic of the assumption that custody in fact adequately objectifies a security interest has stated:

   By providing generally for possession either to constitute the exclusive or preferred means of perfection or to alternate with filing, Article 9 follows the premise that possession satisfies the function of perfection. Subsequent parts of this article discuss why possession both fails to satisfy the equitable basis for the preferential effects of perfection and imposes costs . . .

object. I take the physical metaphor to its logical extreme and call it “property as sensuous grasping.” Ownership interests that cannot be so reduced—either because the interest is nonpossessory or because the object of the property interest is itself intangible—are considered problems that need to be explained. In other words, this doctrine holds that reasonable creditors presume that the possessor of property is ostensibly the owner. Consequently, in order to prevent actual or constructive fraud on creditors, security interests need to be perfected. Possession, in the sense of physical custody or sensuous grasp by the secured party, is the preferred mode of perfection because it eliminates the ostensible ownership problems with respect to the debtor’s creditors. Article 9’s alternate mode of perfection by filing for many situations in which custody is impossible or impractical is permitted as a substitute, in the sense of a form of fictive custody. This notion of perfection is un-

15. As Professor Phillips has stated:
   The presumption of a right to possession from the fact of possession, moreover, largely underlies the doctrine of ostensible ownership, by which one is presumed to own the property he possesses. Numerous decisions and statutes, including the Statute of 13 Elizabeth, c. 5 (1571) and its modern progeny, the Uniform Fraudulent Conveyances Act, rest upon that doctrine and the further assumption that creditors rely upon the debtor’s possession. The purchaser or creditor who allowed a false inference of ownership to arise by leaving property in the debtor’s possession could expect no leniency in resulting litigation.
   Id. at 4 (footnotes omitted).

16. Professor Phillips also noted:
   The secured party could best rebut the inference of the debtor’s unfettered ownership and assert her own right in the collateral by taking possession of it. The original purpose of recording statutes was “rebuttal of [the] fraud created by possession.” Article 9, quite conservatively, tracks this historical emphasis on possession and ostensible ownership.
   Id. (quoting John Hanna, The Extension of Public Recordation, 31 Colum. L. Rev. 617, 622 (1931)) (alteration in original) (footnotes omitted).
   “The legal system’s original method of providing this information was to give primacy to possession. At common law, a debtor’s possession of personal property assured a prospective creditor that the debtor could give him an unencumbered interest in that property. Possession was indeed nine points in the law.” Douglas G. Baird & Thomas H. Jackson, Possession and Ownership: An Examination of the Scope of Article 9, 35 Stan. L. Rev. 175, 180 (1983) (footnote omitted).

17. The UCC takes the approach that “[a] secured creditor need not take possession of the collateral, but if he does not, he must make a public filing in a designated place before he can shift the risk of competing claims to other property claim-
questioningly adopted by a large percentage of the academy and the courts—a LEXIS search will produce literally dozens of articles and cases that parrot it as dogma.

This rule of perfection is typically justified on a combination of ethical, economic, and empirical grounds. In the words of Peter Goodrich, in “deciding which of two innocent parties should bear the loss . . . the courts have tended to resolve the choice between innocent parties by distinguishing desirable and less desirable forms of innocence.” This choice is made by redefining innocent behavior as culpable. For example, our legal system does not normally recognize a duty of any party in the market to make affirmative disclosures to other parties, absent a fiduciary, or fiduciary-like, duty to speak. Consequently, we

As Professor Phillips so accurately argues in his critique of possession as a mode of perfection, Article 9 still reflects the historical “preference accorded possessory security interests over filed security interests,” Phillips, supra note 14, at 3, despite the availability of filing as an alternate mode of perfection and despite the fact that “business people have discounted the importance of possession, especially in its role as a perfecting mechanism” as indicated by the fact that “[f]iling, instead, dominates as the means of perfecting security interests,” id. Indeed, the filing requirements have a “structural affinity to possession reflected in the tie between the location of filing and the place of possession.” Id. Moreover, “possession by the debtor generally governs the time by which . . . the secured party must so file.” Id. (footnotes omitted). Phillips applauds the amendments made to Article 9 since its original adoption. He believes these amendments have moved Article 9 further away from what I have called the physical metaphor and argues that numerous considerations “should continue to contribute to the decline of possession’s importance.”

18. In his critique of ostensible ownership theory, Phillips presumes its traditional ethical justification of preventing fraud. Phillips, supra note 14, at 4. In their defense of ostensible ownership theory, Baird and Jackson recognize the traditional ethical argument but seek to justify the rule in terms of efficiency. See Baird & Jackson, supra note 16, at 179-90 (arguing that the assurance of a superior claim rests in a party’s ability to ascertain the risks imposed by both existing and future creditors; the availability of such knowledge benefits both the creditor and the debtor).


20. This rule is familiar to securities lawyers because it provides a stumbling block in the development of a coherent theory of when insider trading constitutes securities fraud under Rule 10b-5. 17 C.F.R. § 240.10b-5 (1995). The law does not prohibit all trading based on material, nonpublic information, only such trading when the trader has a duty to disclose the information. Although our law generally prohibits making affirmative misstatements, it does not usually make silence actionable. In the case of securities fraud, the Supreme Court has consistently found that there is no duty to speak absent a statutory requirement or a fiduciary or similar
need to declare that the market's supposed presumption of nonencumbrance imposes an ethical obligation on the secured party who takes a nonpossessory security interest to give notice to the market. The implied ethical obligation transforms the actually innocent secured lender into a constructive scoundrel. Not only does the earlier-in-time claimant lose his claim, we now say that he deserves to lose because his action intentionally or at least negligently deceived or misled the subsequent purchaser. The purchaser not only wins, but we now say that she deserves to win because she was deceived and reasonable commercial expectations, those tickling skittish spirits, were defeated.

The attractions of such an ethically based analysis are obvious. We feel good when virtue is rewarded and evil punished. Unfortunately, the appeal to ethics and morality is, in fact, mere justificatory rhetoric. It is too expensive to compare the actual relative moral worth or culpability of actual rival claimants in each case. We, therefore, create legal presumptions of good or bad behavior on the parts of the rival claimants without making any empirical investigation of actual market expectations and practices. If "secret liens" are not actual frauds, they become constructive frauds. Consequently, these rules that are ostensibly ethically justified are, in fact, ethically bankrupt.

If the ethics of ostensible ownership theory are infirm, there is an alternate efficiency rationale, which is, in turn, dependent on a number of empirical assumptions.\(^{21}\) Economically, we pre-
sume it to be more efficient if creditors can be assured of knowing whether assets of a debtor have been encumbered. The first to file or perfect priority rule is justified as being the efficient rule that the parties would agree to ex ante. It is supposed to be cheaper, in the aggregate, to charge a single secured lender with notifying the market through relatively inexpensive perfection formalities, such as physical possession and filing, than to require the several lenders to engage in costly title searches. An observation of the fact of physical custody is supposed to be the simplest and cheapest search mechanism for creditors, but requiring a secured party to take custody in all cases imposes substantial costs on the debtor.

Opponents of ostensible ownership theory have argued for

not have some intuitive appeal and, therefore, might or might not serve as a hypothesis worthy of testing. Unfortunately, rather than suggesting an appropriate empirical investigation of how creditors in fact make credit decisions and how to estimate the relative costs of different regimes, they assume the very empirical data on which their argument depends. As a consequence, they not only fail to make the argument they claim; they flout the very scientific method that law and economics claims to respect. Consequently, ostensible ownership is not a doctrine or even a theory; it is mere dogma to be accepted on faith.

22. Id. at 176-77, 182-90.

23. See id. (explaining the costs of placing the transaction risks on either the earlier secured party or the later secured party and how Article 9's balance of placing some risk on both parties is more efficient); Thomas H. Jackson & Anthony T. Kronman, Secured Financing and Priorities Among Creditors, 88 Yale L.J. 1143 (1979) (supporting Article 9's systematic treatment of priority rules as compared to the ad hoc approach it replaced).

24. "We think that, as a general rule, the party wishing to take or retain a nonpossessory property interest should bear the burden of curing the ostensible ownership problem, regardless of the type of relationship that party has with the party in possession of the collateral." Baird & Jackson, supra note 16, at 189.

25. As Baird and Jackson state:

Because of the high costs of a rule that bans the separation of ownership and possession of property, one ought to examine the alternatives. One alternative, of course, is simply to abandon all efforts to formulate a rule for controlling the problem of ostensible ownership. First, one can argue that the benefits of secured credit are not large and that a legal regime that leaves some creditors less secure (and others more secure) than the present one is therefore not particularly objectionable. Second, one can argue that the costs of the ostensible ownership problem, even in the absence of an applicable legal rule, are small: To the extent that creditors need to know which property the debtor owns, private markets will develop to provide the optimal amount of such information.

Id. at 182.
years—persuasively, in my opinion—that there is strong empirical evidence that its basic underlying assumptions are obsolete. In our modern economy, property interests commonly, or even typically, are not accompanied by physical custody of tangible objects. Consequently, the marketplace is fully aware that physical custody standing by itself has no evidentiary value.

In other words, creditors do not have to undertake expensive investigation to learn that encumbrances exist; they can assume, based on empirical data concerning debtors on the whole, that they do.

Ostensible ownership doctrine, in this view, surrealistically reverses cause and effect. Nevertheless, ostensible ownership remains one of the primary explanatory theories of commercial law. The theory probably persists because its critics have yet to articulate a plausible alternate account of perfection requirements. As we shall see, in contradistinction, the sweeping revisions of the sections of Articles 8 and 9 dealing with security

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26. Many writers, including myself, question the empirical presuppositions of the ostensible ownership argument. See Schroeder, Liquid Property, supra note 3, at 1. Probably the most trenchant critic is Charles Mooney, Jr., The Mystery and Myth of "Ostensible Ownership" and Article 9 Filing: A Critique of Proposals To Extend Filing Requirements to Leases, 39 ALA. L. REV. 683 (1988). Professor Phillips has stated:

Criticism of the doctrine of ostensible ownership finds its strongest behavioral support in the actions of parties who extend secured or unsecured credit subsequent to the secured transaction. Even with respect to creditors, one can poke holes in this criticism but its case seems incontrovertible—business people look to written, not possessor evidence of ownership. And this view leads generally to recognizing filing, but not possession, as a means of notice.

Phillips, supra note 14, at 35.

27. According to Professor Phillips:

The high cost and relative ineffectiveness of possession as a means of allowing efficient use of the debtor's resources and providing certainty explain why filing dominates as the perfecting mechanism. The ineffectiveness of possession as a constructive notice is the foremost reason why the law should recognize and encourage possession's demise. These factors are related. Any attempt to make perfection through possession more effective in providing the secured party with certainty conflicts with the debtor's use of collateral. And efforts to make perfection through possession more effective in allowing collateral to be put to its most efficient use inevitably increase the risk that third parties might mistakenly rely upon the debtor's ostensible ownership and extend credit or purchase assets unaware of the secured party's interest.

Phillips, supra note 14, at 8.
interests in investment securities, which have been recently adopted by the National Council of Commissioners on Uniform State Laws (NCCUSL), not only reject the specific doctrine of ostensible ownership applied to securities intermediaries, but supplant the more general physical metaphor on which it is based.

2. Baird and Jackson

Probably the most vociferous and consistent proponents of the physical metaphor in commercial law are Douglas Baird and Thomas Jackson. Starting with their 1983 article, Possession and Ownership: An Examination of the Scope of Article 9 and continuing through Baird's recent article, Security Interests Reconsidered, they have taken the doctrine of ostensible ownership to its logical extreme. As described by Baird and Jackson: "Since Twyne's Case, . . . possession has been viewed as the best available source of information concerning 'ownership' of most types of personal property. Separation of ownership and possession has been viewed as a source of mischief toward third parties and, for that reason, as fraudulent." According to Baird and Jackson, the same analysis should apply equally to any other arrangement by which physical custody and property rights are separated, such as bailments. The issue of how os-

28. I examine these provisions in full in Schroeder, Is Article 8 Finally Ready This Time?, supra note 4, at 291.


32. Their casebook on secured transactions is probably their most complete and sustained paean to ostensible ownership theory. Baird & Jackson, supra note 29, at 1.

33. Baird & Jackson, supra note 16, at 180 (emphasis added) (citations omitted). Mooney, who does not buy into such unvarnished ostensible ownership doctrine, describes possession in the context of personal property leasing: "When a lessor puts a lessee in possession of goods, the argument goes, the lessee's possession creates the appearance of ownership by the lessee and may mislead third party creditors and purchasers, including secured creditors." Mooney, supra note 26, at 725-26 (citation omitted).

34. As Baird and Jackson have stated:
tensible ownership enthusiasts define possession is discussed below in considerable detail. At this stage of the discussion, it is sufficient to say that possession is supposed to mean immediate and visible physical custody as epitomized by sensuous grasping of tangible things.

Baird and Jackson go far beyond merely arguing that ostensible ownership policy might underlie certain provisions of Article 9 of the UCC. They view all noncustodial property interests in personal property to be problems that must be solved by a proxy for custody or avoided as fraudulent. They argue that legal and economic policy, and consistency, demand that ostensible ownership theory be extended beyond its traditional realm of secured transactions to all other noncustodial property interests.

Baird and Jackson’s argument is both normative and descriptive. The weak form of the normative argument supports a filing regime for the perfection of hypothecations. The strong form would extend the filing system for other forms of noncustodial property interests. Some aspects of the weak form of normative argument are powerful. To paraphrase what I think is the primary point: if we decide that we want to encourage or even permit secured lending, then it might make sense to provide a

One can argue that a bailor and a bailee, a lessor and a lessee, and a buyer and a seller should be able to allocate ownership rights between themselves as they please. But such an argument loses force when at stake are the rights of a third party who asserts a competing claim to the property.


35. See infra notes 54-69 and accompanying text.


37. “We think that, as a general rule, the party wishing to take or retain a nonpossessory property interest should bear the burden of curing the ostensible ownership problem, regardless of the type of relationship that party has with the party in possession of the collateral.” Id. at 189.

38. “We have argued that lessors, other bailors, and secured parties should generally have an obligation to cure ostensible ownership problems as a condition of making their property rights effective against third party claimants.” Id. at 190. Moreover, a debtor who has pledged collateral should have to perfect to protect its interests against creditors of the secured party. Id. at 191.

39. “Uncontroverted benefits of secured credit are not easy to identify . . . .” Id. at 182. Whether we should encourage security interests on efficiency grounds has been the subject of vociferous debate over the last decade. See, e.g., David G.
simple queuing system whereby lenders can establish, and rely on, their relative priorities in collateral. As a society, we have relied traditionally on the intuition that a general rule favoring the first in line furthers our goals of fairness, simplicity, and low costs (as well as our Lockean jurisprudential tradition that recognizes natural rights of property in the hands of the first possessor), although we occasionally recognize exceptions whereby certain favored lenders can get "frontsies."

In other words, we may want to set up a filing system to determine the priorities of security interests for the same intuitive pragmatic reason that Zabar's installs a "take-a-number" machine at the smoked salmon counter on Sunday mornings—it reduces the number of fistfights among people waiting their turn to obtain a scarce but desirable resource. In order to encourage reliance and to keep investigation costs down, the line should be relatively public and simple to join. One can argue that this roughly describes the Article 9 filing system that currently applies to many forms of collateral.

I start becoming suspicious that something is wrong when I turn to the strong form normative argument. If third parties are misled by secret noncustodial ownership interests, if a system in which secret noncustodial interests are voided is desirable on ethical, efficiency, or other grounds, and if we have a relatively free market, then why has the market failed to respond by establishing practices or legal regimes that require perfection of all noncustodial interests? Baird and Jackson raise this argument but dismiss it assertorily by assuming the very empirical evidence on which their arguments depend. If legal realism is

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Carlson, On the Efficiency of Secured Lending, 80 Va. L. Rev. 2179 (1994) (arguing that security interests may be theoretically efficient).

40. An example is when we give purchase money security interests superpriority over prior filed security interests. U.C.C. § 9-312(3)-(4) (1977). Moreover, a few regimes reverse this schema and impose a last-in-time, first-in-right priority rule. Maritime liens are an example of such an "ultimogeniture" regime. Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty 742-51 (2d ed. 1975).

41. Some commentators, including Baird and Jackson, further suggest that the default priority rule of first-to-file, first-in-right and the superpriority exception for purchase money security interests may also be explained on economic efficiency grounds. See, e.g., Baird & Jackson, supra note 29, at 316-29, 336-42, 397-402.

42. According to Baird and Jackson:
supposed to require the examination of actual commercial practice, then such presumption of facts without empirical investigation is legal surrealism.

In contradistinction, I believe that anecdotal evidence strongly suggests that creditors are not particularly bothered by noncustodial interests generally, even though they seem to want a clear priority system established with respect to secured credit specifically. As discussed below, even in the case of secured credit, the drafters of the revisions to Articles 8 and 9, with respect to security interests in investment securities, took the realist approach of observing actual market practice and implicitly concluded that lenders are not necessarily bothered by nonpossessory or nonpublic security interests, let alone laboring under any presumption of nonencumbrance.\(^3\)

3. The Historicity of the Ostensible Ownership Argument

The weakness of Baird and Jackson's normative argument suggests fundamental problems in their descriptive argument. Baird and Jackson present the history of personal property law as evincing a concern for the separation of possession and ownership. They note:

With the exception of secured transactions and certain other transactions [serving similar functions such as consignments], courts and legislatures generally have respected con-

Second, one can argue that the costs of the ostensible ownership problem, even in the absence of an applicable legal rule, are small: To the extent that creditors need to know which property the debtor owns, private markets will develop to provide the optimal amount of such information.

... [P]rivate markets in information ultimately rely on a third party monitoring the debtor to ensure that he does not misbehave. Although this private monitoring may reduce some costs imposed by debtor misbehavior, monitoring itself is costly. ... We believe that legal rules can be shaped to make relevant information publicly available at low cost. The availability of reliable information about the debtor's property reduces the debtor's incentive to misbehave by removing opportunities to do so. For these reasons, an approach relying solely on private markets seems less desirable than one that ensures priority status to a creditor under defined conditions ... .

Baird & Jackson, supra note 16, at 182-83 (footnote omitted).

43. See infra notes 135-48 and accompanying text.
tractual divisions of rights in personal property... between bailor and bailee, lessor and lessee, and buyer and seller, even though third parties (principally potential creditors) could not easily discover these divisions.\textsuperscript{44}

Despite this admission, the thrust of their argument is that judicial suspicion of noncustodial property interests is the historical norm, and "[t]hat we tolerate the ostensible ownership problems created by these transactions is largely an accident of history."\textsuperscript{45} To Baird and Jackson, the traditional protections of leases, bailments, and other interests are economically irrational aberrations to a general ostensible ownership doctrine. Indeed, they emphasize repeatedly that, if we are to take the ostensible ownership problem seriously, we should impose filing or other notoriety requirements on other forms of noncustodial interests, such as bailments.\textsuperscript{46}

One can, however, view the history of the ostensible ownership doctrine quite differently. For example, Charles Mooney argues that our legal and economic system has never had a general concern about the separation of ownership and possession per se.\textsuperscript{47} There has, however, been a concern for limiting opportunities for fraud. "This fraud concern is separable from the ostensible ownership concern that possession of personal property begets misleading appearances of ownership upon which creditors and purchasers may rely."\textsuperscript{48} According to Mooney, the landmark cases on which Baird and Jackson rely invalidated the property interests of certain parties because the facts in those situations seemed particularly amenable to being used fraudulently.\textsuperscript{49} In this view, the traditional doctrine of os-
tensible ownership did not generally void property arrangements that separated ownership and possession as fraudulent; it merely established a rebuttable presumption of fraud in the case of hypothecations and a few other specific forms of the noncustodial transfers. Moreover, most instances of separation of ownership and possession have traditionally been found to be unproblematic. Disputes among different claimants to various forms of property are usually resolved by application of a combination of "derivation" (i.e., first in time, first in right) and "negotiability" (i.e., bona fide purchaser) principles without reference

"their" property. Id.

We do not know much about the parties, but the skimpy facts reported in the case are suspicious. The judgment of Poe against Hancock was for the accounting of a defunct partnership between the two men. Although the court described this as an "amicable suit," id., my experience is that even friendly breakups of partnerships, like uncontested divorces, often result in bitterness. This outcome is especially true when the parties disagree about the division of property. For example, my former law firm has split twice in the last two years. Because I had resigned and withdrawn my capital a few years ago, in order to teach, I was able to sit and watch with morbid fascination the pitiful and disgusting sight of former friends descending into mutual recriminations and, eventually, litigation.

Moreover, Clow and Sharp were not ordinary secured lenders of Hancock. Rather, they had signed instruments as accommodation parties for Hancock. Id. The hypothecation was to secure Hancock's reimbursement obligation in the event that the accommodation parties were ever called under their suretyship obligation. People do not act as sureties without a reason. Apparently Clow and Sharp were never called to pay under the instruments. At the time the sheriff tried to execute upon the property over six months after the hypothecation, the "collateral" was still being used by Hancock. Id. Were Clow and Sharp close friends or intimate business associates of Hancock whom Hancock preferred over his former associate, Poe? Rather than being a legitimate transaction that can be characterized as an abstract constructive fraud against hypothesized future creditors, this case reeks of being an actual fraud—a sham transaction entered into for the sole purpose of defrauding Poe.

50. Mooney, supra note 26, at 728-29. Mooney points out that Benedict v. Ratner, 268 U.S. 353 (1925), the one famous case in which an irrebuttable presumption of fraud was found, was not an ostensible ownership case. Mooney, supra note 26, at 733. The Supreme Court expressly noted that, as the assigned property was accounts, possession was impossible. Benedict, 268 U.S. at 362. Mooney is technically correct. As I discuss later, however, I agree with Baird and Jackson that the rule of Benedict is closely linked conceptually to ostensible ownership doctrine, with dominion over accounts serving as a metaphor for possession. See infra notes 70-99 and accompanying text.

51. See Mooney, supra note 26, at 731 & n.183 (stating that, at common law, it was possible to separate ownership from possession in the conditional sale context).
to pejorative and conclusory allegations of implied fraud.

Mooney gives a convincing account of how the doctrine of ostensible ownership developed and a policy argument as to why the doctrine should not be extended beyond its original factual context.\(^5\) I am suspicious of attempts to ground rules of commercial law on the supposed presence or absence of fraud. As I have suggested, if we are not willing to engage in case-by-case determinations of the actual mental state of the parties in every secured transaction, then we must draft rules of general applicability. This requires the adoption of concepts of constructive fraud, which rob the rules of the ethical purchase supposedly implicit in the use of the word “fraud.”

Nevertheless, I find Mooney’s historical argument quite persuasive. My critique of Baird and Jackson’s theory, however, is not based primarily on historical interpretation. Although I do argue that there are trends in the law that recognize that sensuous grasping is not a completely adequate account of personal property, I also agree with Baird and Jackson that the physical metaphor of property as sensuous grasping has played, and continues to play, a primary role in law and jurisprudence.\(^3\)

The dispute over which trend was more significant is, however, not ultimately a concern with historical accuracy. It is, rather, an element in an overriding disagreement over current practice

\(^5\) Id. at 725-43. Unfortunately for Mooney’s argument, the language of the holdings in the cases on which he relies is very broad and can be read to reflect a general hostility to noncustodial property interests. For example, in Clow, Judge Gibson declared: “What will it avail then, that a person intending to cover his property by a sham sale, has it expressed in the contract, that he is to retain indefinite possession? Such a conveyance would bear the stamp of dishonesty on its front.” Clow, 5 Serg. & Rawle at 278 (Gibson, J.). Judge Duncan agreed that “[a]n absolute deed without the possession, is, in point of law, fraudulent.” Id. at 287 (Duncan, J.).

Similarly, in Sturtevant v. Ballard, 9 Johns. 337 (N.Y. 1812), Judge Kent stated that “[d]elivery of possession is so much of the essence of the sale of chattels, that an agreement to permit the vendor to keep possession, is an extraordinary exception to the usual course of dealing, and requires a satisfactory explanation.” Id. at 339. “Indeed, there is no case which sanctions such a sale as the one in the present instance; for here no reason whatever appears for withholding delivery of possession, and the sale must, therefore, be considered, in judgment of law, as fraudulent and void against the creditor.” Id. at 342.

\(^3\) Baird & Jackson, supra note 16, at 180-81, 212. Indeed, this is one of the primary theses of this and a number of my other articles. See Schroeder, Bundle-O-Stix, supra note 2, at 239; Schroeder, Liquid Property, supra note 3, at 1.
and future policy.

4. Custody As Evidence of Ownership

Baird and Jackson conclude:

Possession of personal property is the best evidence of its ownership. The law of secured transactions has ordered itself around this principle for nearly four hundred years. . . . The drafters of the [Uniform Commercial] Code did not go far enough either in abolishing metaphysical and unobservable distinctions based on concepts such as "title" or in adopting the more concrete concept of possession as their benchmark.\textsuperscript{54}

This is one of the clearest statements of property as sensuous grasping of physical things in contemporary legal scholarship. Legal relationships among people, which are not physically observable, are denounced by the realists' ultimate insult—metaphysics! Their phrase echoes Karl Llewellyn's embrace of the physical metaphor in the Official Comment to UCC section 2-101, which states that, under the law of sales:

The legal consequences are stated as following directly from the contract and action taken under it without resorting to the idea of when property or title passed or was to pass as being the determining factor. The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character.\textsuperscript{55}

Practical men need tangible things. In their article, Baird and Jackson never use the word "title" without their intended pejorative, "metaphysical." Presumably, by metaphysical they intend connotations such as unreal, fictional, imperceptible, invisible,

\textsuperscript{54} Baird & Jackson, supra note 16, at 212 (emphasis added).

\textsuperscript{55} U.C.C. § 2-101 cmt. (1977). I analyze how Llewellyn's critique of the common law of sales influenced the structure of Article 2 in SCHROEDER, THE VESTAL AND THE FASCES, supra note 2, and Schroeder, Liquid Property, supra note 3, at 12-44. The comment is reminiscent of statements made elsewhere in Llewellyn's writings. If not personally penned by him, it is a brilliant pastiche of his distinctive writing style.
intangible, inaudible, too abstract, excessively subtle, airy-fairy, supernatural, ambiguous, uncertain, etc. Certainly it is not serious enough (or, dare I say, too feminine?) for real men who are only happy when grasping their tangible things. In context, however, they use it to mean the legal (or what I have called “Symbolic”) as opposed to that which physically exists.\(^{56}\) Other metaphysical notions that they identify include leases, bailments, and security interests.\(^{57}\) In other words, they have inadvertently limited the word “metaphysical” to a simple-minded, folk-etymological meaning—that which is other than the physical—and imply that only the physical is actual.\(^{58}\) This limitation precisely reflects our psychoanalytic urge, which I have written about elsewhere, to achieve the goal of unmediated relationships by pretending to collapse the Symbolic (i.e., law) into the Real (i.e., that which is external to law) by the Imaginary conflation of the Real with the physical reality, as though property could be reduced to our animalistic, natural, physical relations with the material world.\(^{59}\) This approach is bound to fail precisely because property, like all legal relationships, is not a physical relation of a subject to a physical thing but a Symbolic relationship among legal subjects (albeit, in the case of property, one that concerns their relative rights with respect to the possession, enjoyment, and alienation of an external object).

Note, however, that Llewellyn's concern expressed in the Official Comment is not the misleading nature of noncustodial interests but of nonobjective ones—that is, property interests that "no man can prove by evidence."\(^{60}\) Unfortunately, his physicalist imagery already presupposes that objective means physical, and intangible means subjective. This assumption is precisely the

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56. See supra note 3 and accompanying text.
58. Etymologically, “metaphysics,” of course, means after or beyond physics. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1418 (unabridged 1986) (defining “meta” as after or beyond). This definition might seem to imply that it refers to that which does not relate to the physical world and, therefore, is unreal. The origin of the word, however, is much more mundane. It designates those subjects discussed in that chapter of Aristotle that followed his chapter on physics. Id. at 1420.
59. I develop this argument thoroughly in Schroeder, Bundle-O-Stix, supra note 2, at 246-55.
error that Baird and Jackson make.

Like all proponents of the physical metaphor for property, Baird and Jackson do, at some level, recognize its impracticability, if not impossibility. They offer one of the usual solutions: denial through the adoption of the physical metaphor and attribution of the pejorative "metaphysical" to alternates. That is, certain forms of nonphysical possession are implicitly analogized as being equivalent to physical custody.

For example, Baird and Jackson do not defend the filing regime on its own intrinsic utility. Rather, its utility is defended specifically on the grounds that filing is just like sensuous contact. "Both public recording files and possession share one central feature: Information about competing property interests is concrete and trustworthy. It is trustworthy because the information is conveyed by events—making a filing or taking possession—that themselves determine legal rights."  

Baird and Jackson assert this defense, despite the fact that they also recognize that filing has distinct advantages over custody, in that it allows the debtor to continue to use the collateral, thereby making it more likely that the secured party will eventually be paid.

A secured creditor need not take possession of the collateral, but if he does not, he must make a public filing in a designated place .... A filing system places fewer restrictions on the use of collateral ... yet it still provides information that allows a creditor to avoid the uncertainty caused by the possibility of debtor misbehavior.

At one moment, Baird and Jackson do recognize that the requirement of perfection must relate to some requirement that property interests be objectively manifest as a condition of general enforceability, but they do not understand this requirement's full implications. "The doctrine of ostensible

62. Id. at 183 (emphasis added).
63. Baird and Jackson try to justify this on efficiency grounds based on unverifiable empirical presumptions as to creditor behavior and the relative costs of alternate legal regimes. In contradistinction, I wish to avoid relying on that which we cannot prove. I try, therefore, to derive this requirement from jurisprudential theory of the ethical function of property. See infra notes 169-95 and accompanying text.
ownership assumes that such contractual divisions [i.e., of property rights] are irrelevant insofar as third party rights are concerned. What matters is that third parties be able to observe the division easily and accurately. 64 Unfortunately, after this correct starting place, their argument gets lost. Based on historical, but unverified, empirical assumptions, they first assume that physical custody is clear and informative and can serve as an effective way of objectively evidencing a property interest. From this they draw the non sequitur that noncustodial property interests are not objectively evidenced, but a problem that must be cured. This conclusion means that Baird and Jackson do not fully recognize that the question of objectification arises in all property claims. Because they conflate objectivity with physicality, they believe that the need for objectification, what they call the ostensible ownership problem, is created not by the claim to property but by the separation of such claims and physicality. Consequently, the test of an enforceable property interest changes from whether it is sufficiently objectified to whether it is sufficiently physicalized. “A party who wishes to acquire or retain a nonpossessory interest in property that is effective against others must, as a general matter, make it possible for others to discover that interest.” 65

Filing is therefore judged by whether it can serve as a substitute for possession and thus becomes a form of fictive possession. Elsewhere, Baird and Jackson note in passing that possession may not be so unambiguous or even possible, but they minimize this by assertorily denying the materiality of this problem.

Cases might also arise in which there is ambiguity about which of two parties is in possession of property.

... First, although the question of whether a party is in possession of property might be difficult in some cases, at least when goods are involved the inquiry will be quite straightforward... Second, many problem cases do not have to be resolved on a case-by-case basis...

... As we have seen, the doctrine of ostensible ownership provides potential claimants with a method for obtaining this

64. Baird & Jackson, supra note 16, at 190.
65. Id. at 178.
knowledge: If a debtor is in possession of property, and there is no filing, potential claimants can be confident they will prevail over earlier claimants.\(^6\)

Even if one buys (which I do not) Baird and Jackson's assertion that physical custody of goods is unproblematic in most cases, they are presupposing an economy in which most (or at least the archetypical forms of) property interests involve tangibles. This means that the law of perfection of security interests in intangibles is developed by analogy to the presumed norm of tangibles. If the law of tangibles is based on the presence or absence of physical custody, the law of intangibles is developed by reference to the presence or absence of something that, by definition, cannot exist.\(^6\) This requires the development of ever more elaborate fictions and metaphors.

As the drafters of revised Articles 8 and 9 have finally recognized, historical presumptions as to the primacy of tangible property and physical custody are obsolete in the securities industry.\(^6\) Consequently, the rules applicable to investment property should no longer be developed by analogy to the law of goods or negotiable instruments. I would go further and suggest that the noncustodial property interests will only grow in importance in the future and that we should completely jettison any and all legal presumptions in favor of physical custody.\(^6\)

\(^6\)Id. at 193-94.

\(^7\)The common law dealt with this in two ways. First, it made it generally difficult to convey property interests in intangibles. The assignment of choses in action was prohibited (although the numerous exceptions that grew up around this general proposition perhaps made it a rule more honored in the breach). See 1 Grant Gilmore, Security Interests in Personal Property §§ 7.1-.9 (1965). Second, it "reified" certain intangible and noncustodial interests into pieces of paper called negotiable instruments, negotiable documents, and securities certificates, so that we could fictively convey possession of the underlying property by handing over physical possession of the paper. See 2 id. §§ 25.1-.3.

\(^8\)See infra notes 135-48 and accompanying text.

\(^9\)The assumed clarity and informational value of physical custody is addressed below. See infra notes 100-11 and accompanying text.
5. Benedict v. Ratner

The fact that Baird and Jackson include the famous case of *Benedict v. Ratner*\(^7\) in the chapter of their casebook that covers the history of the ostensible ownership principle is significant.\(^7\) This inclusion, of course, follows from their custodial/noncustodial distinction: if noncustodial interests are defined as problematic, then property interests in intangibles must always raise the concerns that underlie ostensible ownership theory. In contrast, Mooney criticizes this approach because the Supreme Court expressly denied that it was applying ostensible ownership law.\(^7\) I argue that the Baird and Jackson approach may be more plausible.

First, Mooney does not recognize that Baird and Jackson’s definition of “ostensible ownership” differs somewhat from the common-law definition. They concentrate less on the presence of custody in the debtor and more on the lack of custody in the secured party. This approach may be implicit in the rule announced in *Benedict*. Second, despite his denials, Justice Brandeis might be read as analogizing ownership of accounts to

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70. 268 U.S. 353 (1925).
71. BAIRD & JACKSON, *supra* note 29, at 51-58. Baird and Jackson do not state expressly that ostensible ownership principles literally apply to security interests in accounts. Their placement of the discussion suggests, however, that they see a strong family resemblance.

Other authors have more expressly linked the rule of *Benedict v. Ratner* with ostensible ownership principles. For example, one commentator has stated: “The *Twyne* rule (and perhaps the *Benedict* rule) also may reflect the early common-law dissatisfaction with the notion that possession and ownership can be separated.” John Dolan, *The U.C.C.’s Consignment Rule Needs an Exception for Consumers*, 44 OHIO ST. L.J. 21, 34 n.84 (1983).

Another commentator has written:

> Perhaps the United States’s most noteworthy extension of *Twyne’s case* was articulated by the Supreme Court in *Benedict v. Ratner*.

> ... Reservation and dominion over the accounts by the debtor was inconsistent with the assertion that title had been given to [the assignee]. The debtor’s grant of unrestricted dominion over the goods which rendered ownership more than ostensible troubled the Court.


72. *See* Mooney, *supra* note 26, at 733-34. “But it is not true that the rule stated above and invoked by the receiver is either based upon or delimited by the doctrine of ostensible ownership.” *Benedict*, 268 U.S. at 362-63.
the sensuous grasp of goods and fixating on the lack of physical custody, or its analog, in the secured party.

This reading of Benedict’s rule exemplifies the tortured and surrealistic logic of the physical metaphor. This pre-UCC case invalidated an assignment of accounts receivable—what we would today call a non-notification security interest in accounts—on the grounds that, as structured, it was a fraud in law. Prior to the adoption of the UCC, courts were particularly hostile to noncustodial security interests and looked for every opportunity to strike them down. As discussed above, one of the weapons in the judicial arsenal was the doctrine of ostensible ownership, which raised a presumption of fraud when possession and ownership were separated in certain types of transactions.

The lawyers for the parties thought that they needed to address ostensible ownership law. According to Benedict’s syllabus, both the petitioner and the respondent were concerned with the impossibility of the literal application of its principles but, as can be expected, drew opposite implications. Counsel for the debtor’s receiver, who wished to strike down the assignment, first argued that the ostensible ownership rule was “not based on any appearance growing out of possession but on the fraudulent character of the arrangement.” Nevertheless:

Even were the rule predicated on a false appearance of ownership, the facts here supply the equivalent, and more than the equivalent, of any false appearance of ownership arising from possession of tangibles. There was the actual appearance of ownership deliberately preserved and sustained, and deliberate concealment of the assignment to avoid the obvious and contemplated consequences of disclosure of the fact of the assignment of all receivables present and future.

That is, there is an ostensible ownership problem because the assignee did not take the receivables analog to physical custody.

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73. See, e.g., U.C.C. §§ 1-201(37), 9-102 (1977) (defining “security interest” to include all assignments of accounts, including outright sales, in addition to assignments for security).
74. See 1 GILMORE, supra note 67, §§ 7.3-.4.
75. Benedict, 268 U.S. at 354 (argument for Petitioner).
76. Id. at 355 (argument for Petitioner).
Rather surprisingly, counsel for the assignee also argued that possession (in the sense of custody) of after-acquired collateral (in this case, accounts that arose after the date of the assignment) by the assignee was necessary to prevail against other creditors. Although it is in fact literally impossible to have actual physical custody of accounts, the assignee argued that, in this case, the assignee had an appropriate analog—i.e., he urged that the Court expressly adopt the physical metaphor.

Such lien becomes perfected and ripens into a right at law which is enforceable against third parties if, after the property is acquired, the assignee take possession thereof prior to an execution or attachment levy thereon, or the like, by third parties, or the appointment of a receiver upon the filing of a petition in bankruptcy by or against the assignor. The facts here constitute the equivalent, and more than the equivalent, of taking possession of the accounts receivable to the full extent that the nature of these choses in action permitted.

Alternately, the assignee argued that, if the court were to find that traditional law required actual physical custody of collateral, “a condition which cannot in its nature apply to such intangible property as choses in action,” it should recognize that, up until that point, the rule had only been applied to mortgages and that the court should not extend the rule to receivables financing. A doctrine that requires physical custody is “greatly out of joint with modern conceptions of industry and modes of possession.” In other words, the assignee argued that, if the court were to find that custody was required, then the court should find that the assignee had the equivalent of custody. If the court, however, were to find that what the assignee had was not equivalent to custody, then the court had to find that custody could not be required because to find otherwise would invalidate all assignments of accounts.

77. Id. (argument for Respondent).
78. See id. at 355–56 (argument for Respondent).
79. Id. (argument for Respondent) (emphasis added) (citations omitted).
80. Id. at 357.
81. Id.
The Supreme Court correctly noted the obvious—accounts are intangible, so they cannot be sensuously grasped. Upon making this discovery, the Supreme Court declared that it could not literally apply ostensible ownership theory, which held that the presence or absence of custody was the appropriate test for the validity of an assignment.82

What does one do when one sees nothing that can be sensuously grasped, as required by the physical metaphor? One common response is denial.83 In the Baird and Jackson reading of Benedict, the Court metaphorically reinstated the ostensible ownership rule, albeit under a new name. That is, the Court erected some characteristic of an intangible that could then serve as fictive tangibility that they could then pretend to grasp.

Perhaps more accurately, the Supreme Court, noting that traditional fraudulent conveyance law was by its terms necessarily limited to tangible collateral, turned to another closely related aspect of fraudulent conveyance law to develop a more generally applicable rule of constructive fraud. This more general rule announced in Benedict, rather than the traditional specific rule, is that which Baird and Jackson have developed into their theory of ostensible ownership.

The Supreme Court claimed to rely on a rule of New York law that had previously been applied only to chattels.84 "[A] transfer of property as security which reserves to the transferor the

82. "It may be assumed, as [the assignee] contends, that the doctrine does not apply to the assignment of accounts. In their transfer there is nothing which corresponds to the delivery of possession of chattels." Id. at 362. The Court of Appeals for the Second Circuit had found that the assignment was valid because ostensible ownership principles did not apply to assignments of accounts. See In re Hub Carpet Co., 282 F. 12 (2d Cir. 1922), rev'd sub nom. Benedict v. Ratner, 268 U.S. 353 (1925).

83. I might rudely suggest that this relates to my broader feminist-Lacanian theory that the physical metaphor for property is, specifically, a phallic one. As Freud noted long ago—and as many of my friends have anecdotally confirmed—when a little boy first becomes aware of woman's terrifying lack of a penis, he typically reacts with denial. He insists that what is lacking is really present, just very small. Sigmund Freud, Three Contributions to the Theory of Sex, Contribution II: Infantile Sexuality, in THE BASIC WRITINGS OF SIGMUND FREUD 580, 595 (A.A. Bill ed. & trans., 1938). Similarly, the Supreme Court, and Baird and Jackson, upon encountering intangible property's disturbing lack of physicality, reacted with denial, insisting that a small analogy of physicality could be glimpsed.

84. Benedict, 268 U.S. at 359-63.
right to dispose of the same, or to apply the proceeds thereof, for his own uses is, as to creditors, fraudulent in law and void.\(^{85}\)

By analogy, the assignment in question, which allowed the debtor to continue to collect the account and did not require the debtor either to apply the proceeds to the payment of the debt or substitute new accounts for collective accounts, was also fraudulent in law and void.\(^{86}\)

The Court distinguished this rule from the rule of ostensible ownership on the grounds that "[i]t rests not upon seeming ownership because of possession retained, but upon a lack of ownership because of dominion reserved."\(^{87}\) Dominion was, therefore, a replacement for possession as custody. But what did the Court mean by dominion?

The Court described dominion in terms of powers of disposition rather than physical possession. Taken in context, however, the Court clearly assumed that possession, in the sense of physical custody of chattels, was the norm. The Court described the cases on which it relied as follows:

> On the other hand, if the agreement is that the mortgagor may sell and use the proceeds for his own benefit, the mortgage is of no effect although recorded. Seeming ownership exists in both classes of cases because the mortgagor is permitted to remain in possession of the stock in trade and to sell it freely. But it is only where the unrestricted dominion over the proceeds is reserved to the mortgagor that the mortgage is void.\(^{88}\)

Why is it void? Because it is a fraud on creditors. The term "fraud" implies that a real creditor or an objective reasonable creditor observes the transaction and draw reasonable, but inaccurate, presumptions on which they might rely to their detriment. Consequently, the holding of the case was based not merely on the failure of the assignee to possess just anything, but on the assignee's lack of something that could have been seen by the creditors. Most interestingly, in this passage, the Court in-

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85. Id. at 360.
86. See id. at 361-62.
87. Id. at 363.
88. Id. at 364 (emphasis added).
sisted, albeit in dictum, that they would have found the assignment without dominion to have been insufficiently visible and therefore fraudulent, even if it had been made discoverable through recordation! Although the UCC rejected this result with respect to assignments of accounts, to this day it remains the rule for assignments of real estate rentals.

One can argue, therefore, that the Supreme Court implicitly assumed that the sensuous grasping of physical things was the norm of all property interests. Accordingly, they searched for a characteristic of accounts that could serve as an analogy to sensuous grasping. Practical men cannot depend on metaphysical somethings. Like the tribes of Israel in the desert, they feel compelled to erect tangible things to worship in their place. The Supreme Court decided that the validity of security interests in accounts should be determined based on the presence or absence of the creditor's dominion over them. The Court found that dominion was necessary to prevent the fraud of deceiving other creditors—the traditional rationale of the ostensible ownership theory. Dominion could serve as a form of sensuous grasp by analogy. In effect, the Court seemed to assume implicitly that by having dominion over an account, an assignee metaphorically had sensuous possession. That is, the analysis was based not on characteristics the interest had but on characteristics the interest not only did not, but could not, literally have.

The above analysis, of course, is Baird and Jackson's version of the ostensible ownership doctrine. The old ostensible ownership cases concentrated on the presence of possession of the property in question in the debtor/assignor. Baird and Jackson (and implicitly the Court in Benedict) recognized that this is a red herring. The real problem is the lack of possession in the secured party/assignee.

89. See David G. Carlson, Rents in Bankruptcy, 46 S.C. L. REV. 1075 (1995). This rule is further discussed below. See infra notes 132, 135-48 and accompanying text.
90. Benedict, 268 U.S. at 363-64.
91. See id. at 362-65.
92. In Lacanian terms, a legal subject asserting rights must take on the sexuated position of the masculine, but the ostensible ownership doctrine concludes that a noncustodial party is in the position of the feminine. The Lacanian psychoanalytic masculine position is that of having the object of desire (the phallus). The feminine
In their discussion of the early accounts receivable statutes that were adopted by several states partially in response to *Benedict*, Baird and Jackson ask:

Does the ostensible ownership problem justify the filing here? A debtor cannot appear to be in possession of something that is intangible. But is this the relevant test? What is the purpose of the filing rule? Is it to place a burden on secured creditors to provide others with information that they could only otherwise acquire with difficulty? Does filing in the case of accounts receivable serve this purpose?[^93]

In other words, Baird and Jackson argue that physical custody is the best evidence of the existence of a property interest. Security interests in intangibles are, therefore, problematic for precisely the same reason that hypothecations are problematic—the secured party failed to put the world on notice by taking physical custody of the collateral. It is not relevant that the reason for the failure differs in the two cases—physical custody being logically impossible in the former, and practically impossible in the latter. By concentrating on the retention of custody by the debtor, therefore, traditional ostensible ownership doctrine is somewhat misleading.

Indeed, under the Baird and Jackson approach, there is nothing wrong with a debtor’s retention of custody of physical chattel. The debtor, as well as the secured party, claims a property interest in pledged collateral, which needs to be evidenced. Consequently, Baird and Jackson argue that, although a pledge may put the debtor’s creditors on notice of the secured party’s security interest in the collateral, it creates a new ostensible ownership doctrine.


[^93]: BAIRD & JACKSON, supra note 29, at 58.
ship problem because it does not put the secured party's creditors on notice of the debtor's equity interest. 94

And so the Court in Benedict and Baird and Jackson are primarily concerned with the secured party's lack. Where this lack cannot be filled by custody, a substitute must be found or creditors will be misled. In the absence of a statutory substitute, 95 the Supreme Court invented dominion.

The drafters of the UCC insisted that they rejected the rule of Benedict with respect to accounts. 96 By this they meant that they did not adopt the Supreme Court's specific solution to the secured party's lack. Article 9 makes it much easier for lenders to offer what is known as non-notification accounts receivable financing. Section 9-205 provides:

A security interest is not invalid or fraudulent against creditors by reason of liberty in the debtor... to collect or compromise accounts... or to use, commingle or dispose of proceeds, or by reason of the failure of the secured party to require the


95. The Supreme Court's decision in Benedict might be read as implying that an assignment that leaves the power of disposition in the assignor would be fraudulent in law even if the parties comply with a relevant recording statute. The better reading is that the Supreme Court was only interpreting the case and statutory law of New York. That is, New York case law held that the relevant chattel mortgage recording act solved only the traditional ostensible ownership problem (i.e., the constructive fraud caused the assignor's custody). This does not imply that the legislature could not pass a statute extending the effect of the statute to the constructive fraud caused by failure of the secured party to take possession.

96. Official Comment 1 to § 9-205 states that this section "repeals the rule of Benedict v. Ratner." U.C.C. § 9-205 cmt. 1 (1977). The comment continues:

The principal effect of the Benedict rule has been, not to discourage or eliminate security transactions in inventory and accounts receivable—on the contrary such transactions have vastly increased in volume—but rather to force financing arrangements in this field toward a self-liquidating basis. Furthermore, several lower court cases drew implications from Justice Brandeis' opinion in Benedict v. Ratner which required lenders operating in this field to observe a number of needless and costly formalities: for example it was thought necessary for the debtor to make daily remittances to the lender of all collections received, even though the amount remitted is immediately returned to the debtor in order to keep the loan at an agreed level.

Id.
debtor to account for proceeds or replace collateral.\textsuperscript{97}

We need not, however, take the drafters' characterization of their denial of \textit{Benedict} at face value. On the contrary, the drafters implicitly embraced \textit{Benedict}'s more general conceptual error and insight. By error, I refer, of course, to the physical metaphor—the assumption that the secured party's lack of physical custody of collateral is a problem that needs to be cured. This assumption can be seen in the perfection rules of Article 9.\textsuperscript{98} More interestingly, the holding of \textit{Benedict} can be reinterpreted not solely in terms of the formalities necessary to make property interests enforceable (as Justice Brandeis did) but also in terms of the substantive elements of property itself. Accordingly, not only parts of Article 9 as currently in effect, but also its revisions, also can be reinterpreted in light of this insight.\textsuperscript{99}

\section*{B. The Case Against Ostensible Ownership Dogma}

\subsection*{1. The Informational Value of Physical Custody}

Baird and Jackson's argument as to the informational value\textsuperscript{100} of possession in the sense of physical custody or sensuous grasp is conclusory. Indeed, the data they present actually support the opposite conclusion. Baird and Jackson note that the law generally recognizes most noncustodial interests in personal property.\textsuperscript{101} Although this is an empirical question, I hazard to say that these noncustodial interests are not only extremely common but are becoming increasingly more common.\textsuperscript{102} This is because

\begin{footnotesize}
\begin{itemize}
    \item \textsuperscript{97} Id. § 9-205.
    \item \textsuperscript{98} See infra notes 145-48 and accompanying text.
    \item \textsuperscript{99} See infra notes 149-52 and accompanying text.
    \item \textsuperscript{100} Their question of whether custody has informational value is roughly equivalent to my question as to whether it adequately objectifies security interests.
    \item \textsuperscript{101} See supra note 44 and accompanying text.
    \item \textsuperscript{102} Phillips made precisely this point in 1979. Karl Llewellyn thought that the common law was stuck in the paradigm of an agricultural economy and sought to update the law to reflect a mercantile paradigm. See Schroeder, The Vestal and the Fasces, supra note 2; Schroeder, Liquid Property, supra note 3, at 12-13. Phillips argues that Article 9 still only imperfectly adopts a mercantile paradigm. He argues that the possessory alternative for perfection "calls to mind an agrarian or early mercantile society in which trading, lending and other commercial transactions might be thought to have occurred in a central town square within sight of all po-
\end{itemize}
\end{footnotesize}
of an increase in the type of property interests that make physical custody by all owners impracticable (such as lease financing) and the proliferation of intangibles, which makes any such sensuous contact a surrealistic absurdity.

As Mooney succinctly states:

Because filing generally is not required for leases under current law, a lessee's possession of equipment does not make ownership of the equipment ostensible at all. Simply stated, possession of equipment by a user carries with it no suggestion whatsoever, based on existing law, that the equipment is owned, rather than leased, by the possessor. Moreover, the prevalence of equipment leasing during recent years demonstrates, as a factual matter, that possession by a user indicates a reasonable possibility that equipment is leased, not owned, by the user.\[103\]

In other words, although it is probably impracticable to do a definitive empirical study establishing the facts, Baird and Jackson's assertion that physical custody is the best evidence of ownership seems intuitively wrong. Regardless of what has been historically assumed, contemporary property practices suggest that, today, physical custody provides very, very little (if any) information about ownership. As we have seen, counsel for the assignee in Benedict v. Ratner argued that this was already the case sixty years ago.\[104\]

Let us take as an example a relatively simple small business—my old law firm.\[105\] Although in colloquial conversation I

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103. Mooney, supra note 26, at 738-39 (footnote omitted).
104. See supra notes 77-81 and accompanying text.
105. Baird and Jackson do mention a similar issue but assertorily declare it atypical:

Cases might also arise in which there is ambiguity about which of two parties is in possession of property. For example, one might have to determine which property in a residential apartment is "possessed" by
used to describe myself as a partner in the firm, this was technically incorrect. We incorporated our business as a professional corporation. Accordingly, when I was an associate, I was a mere employee of the corporation. Although I spoke of having “made partner,” I was, in fact, elected as a director and given the right to purchase shares in the corporation. When I was still in private practice, the following goods were located in the suite of offices in which my secretary and I worked: a few word processors, some laser printers, some telephones, a photocopier, a laptop computer, a portable printer, and various items of office furniture and supplies. I personally owned the laptop and most of the furniture in my office, but the portable printer and my file cabinets belonged to two of my colleagues who had let me borrow them. Some of the word processors, printers, and the secretarial furniture belonged to the professional corporation of which I was a shareholder and director. Some of the furniture and computers in the suite belonged to other attorneys who were employees and/or shareholders of the corporation. Some of the equipment was leased by my corporation. Some were subject to purchase money security interests. I believe the telephone system was rented. My corporation had once owned the photocopier, but we had sold it to another company as part of a “leased employee” arrangement. In other words, the other company bought our copying equipment, hired the individuals who previously were employed as my corporation’s service staff, and provided copying services for our corporation on our premises. My corporation owned much of the supplies, but the photocopy paper was owned by the service company, which sold it to us as it was used. The corporation leased our main office in

the landlord and which by the tenants. Should either the landlord or the tenant have to file to protect his interests? Should both? What about the case in which a bank has a security interest in all the assets (including the furniture and office equipment) of a company, and some of the furniture in the corporate headquarters is in fact owned by employees? Should these employees have to choose between filing to protect their interests and bearing the risk that their company will become insolvent or default? Should one ask if the bank relied on the furniture in making the loan? As in other commercial law problems, one may have to balance the virtues of clear rules against those of flexible standards as well as balance competing equities of two innocent parties.

New York but had an equity interest in the lessor. Similar ownership arrangements governed other property located throughout the various offices my corporation owned or leased in other cities.

I can assure you that, when my law firm sought bank financing, it never occurred to the loan officers, who were familiar with modern business practice, to presume anything concerning the ownership of the various goods located in our offices, merely because of their physical location. Indeed, in the case of a corporate debtor—like my law firm—the informational value of physical possession becomes even more problematic. A corporation is an artificial person with no physical body—it has no hands with which to grasp sensuously. It can only hold things through its servants. This raises the question: were the objects in “my” office ostensibly owned by me as an individual or by the corporation through me as its servant? Or by our landlord? Consequently, the bank officers did what bankers normally do in making lending decisions. They searched the public files; obtained copies of the corporation’s tax returns and audited financial statements; examined the contracts, leases, and security agreements in our files; talked to the corporation’s members, accountants, and perhaps its major lessors and other creditors; and obtained representations, warranties, and personal guarantees.

To put this another way, as David Morris Phillips argues, Baird and Jackson must be wrong in asserting that physical custody is the best evidence of ownership. Custody can never convey unambiguous information as to ownership precisely because people do not take custody of goods solely or even primarily as a form of communication; instead, they perceive possession as serving a wide variety of practical purposes. The meaning of custody is always ambiguous. “Only an abstract means of perfecting security interests avoids both the uncertainty as well as other inefficiency costs associated with perfection through possession.” If avoiding ambiguity is the goal, one should require a formal act that no one would take for any reason other than for the purpose of con-

106. See supra notes 14-18 and accompanying text.
107. Perhaps the only instance of possession as a communicative act is the pledge. Even then, the secured party often takes custody of the collateral not merely to put the world on notice of its security interest but also as a way of policing the debtor.
108. Phillips, supra note 14, at 34.
veying information. Consequently, even though, historically, filing was developed as a "form of constructive possession," in fact, it better serves the functions of perfection and should supplant custody as the preferred norm. "Filing, with its attendant specifics of what, where and how, generally avoids the recurrent pitfalls that characterize perfection through possession and produce uncertainty." Indeed, at least in the case of aircraft and equipment, Congress has, by making recordation the exclusive mode of possession, implicitly determined that the mere fact of custody is too ambiguous to serve as objectification.

2. The Physical Metaphor As a Bad Infinity

Let us now examine in greater detail what Baird and Jackson mean by "possession," which they claim is simple and unambiguous. I have been helping them out so far by using the more precise terms "physical custody" and "sensuous grasping." I think that Baird and Jackson are improperly expanding on crude notions of ownership of consumer goods and negotiable instruments. We will see that, with a few narrow exceptions, even in the case of tangible chattels, their concept of possession as physical custody or other sensuous contact disintegrates almost immediately into a bad infinity. Before starting out, however, I do not wish to lay the error solely at Baird and Jackson's door. As discussed above, they are correct in identifying the simplistic concept of possession as sensuous grasping or physical custody as that used in Articles 2 and 9 of the UCC.

109. Id.
110. Id.
111. Federal law makes recordation a condition of enforceability of all property interests in aircraft and equipment, including ownership and leaseholds, in addition to security interests. 49 U.S.C. § 1403 (1988); 14 C.F.R. § 49 (1995); see Jeanne L. Schroeder & David G. Carlson, Airplanes in Bankruptcy, 3 J. BANKR. L. & PRAC. 203, 217, 254-59 (1994). The Supreme Court has interpreted these provisions as meaning that physical custody cannot serve as a perfecting formality for aircraft. See Philko Aviation, Inc. v. Shacket, 462 U.S. 406 (1983) (holding that the Federal Aviation Act of 1958 prohibits all titles of transfer to aircraft from having validity unless the transfer is evidenced by a written instrument recorded with the Federal Aviation Administration).
112. Although, to my knowledge, Baird and Jackson never use these terms.
113. See supra notes 29-38 and accompanying text.
One might argue that, despite the problems I will illustrate, as a practical matter we share a cultural understanding of what "possession" means in many, perhaps most, commonly recurring situations. My reply is that, regardless of whether this is correct, the legal conclusions that have been drawn from unexamined presumptions of physical possession—such as Baird and Jackson's suggestion that perfection formalities be extended to a wide variety of bailments—do make a practical difference. Moreover, any intuitions or cultural assumptions we may share about possession relate to property rights in goods and, by extension, negotiable instruments, documents, and traditional ownership of certificated securities (which are the reification of intangible interests into physical pieces of paper). As our economic organization becomes increasingly complex, and as intangible and intellectual property take on an increasingly important role in our economy, the conceptual problems with our assumptions about possession can be expected to become increasingly significant. The mismatch between our assumptions about physical custody as incorporated in legal doctrine on the one hand and market practice on the other, has already precipitated a crisis in the law of investment securities. Accordingly, the drafters of the revisions to Articles 8 and 9 have rejected the assumption of traditional law that owners normally take physical custody of their property. Although revised Articles 8 and 9 permit ownership through physical custody, they also recognize an alternate legal regime reflecting current practice in which physical custody of certificates resides with a central depositary and investors beneficially own securities indirectly through a series of intermediaries. Consequently, revised Articles 8 and 9 reexamine the role that physical custody is presumed to play and asks what other devices can serve this function. This is the policy behind the revised regime in which priority among rival secured parties is determined by the relative degree of power of alienation over the collateral. The most powerful form of perfection—"control"—will, in most

114. See supra notes 34, 46 and accompanying text.
115. See infra notes 135-48 and accompanying text; see also Schroeder, Is Article 8 Finally Ready This Time?, supra note 4, at 303-38; Schroeder & Carlson, supra note 111, at 234-38.
cases, be created by contract with third parties rather than physical custody.\textsuperscript{116}

As I have stated repeatedly, Baird and Jackson and the UCC implicitly limit the meaning of the word possession to physical custody epitomized by sensuous grasping.\textsuperscript{117} The most obvious mode of physical custody is what I have called sensuous grasping—holding a tangible thing in one's fist. This type of possession takes literal form in the law of negotiable instruments and documents. In order to enforce a negotiable instrument, an owner

\textsuperscript{116} U.C.C. § 8-106 (1994); \textit{see infra} notes 149-57, 205-14 and accompanying text.

\textsuperscript{117} This limitation is obvious in the rules of Article 9 concerning pledging as a mode of attaching and perfecting security interests in certain forms of collateral, U.C.C. § 9-304 (1977), and in the bona fide purchaser rules applicable to the entrustment of goods in § 2-403. I think it is fairly uncontroversial that the pledging rules contemplate the transfer of actual physical custody of physical things from the debtor to the secured party or to a bailee (who, of course, is defined as a person who has rightful physical possession of the property of another). For example, § 2-403(3) defines entrustment as "any delivery and any acquiescence in retention of possession" of goods to or by another. \textit{Id.} § 2-403(3). Once again, this definition rather clearly implies that the drafters contemplated that physical custody be with the entrustee.

Section 9-203(1)(a) requires as an element of attachment of a security interest that there be a security agreement between the debtor and the secured party and that the security agreement be evidenced either by possession by the secured party or a writing signed by the debtor. \textit{Id.} § 9-203(1)(a). Comment 5 to this section provides:

The formal requisite of a writing stated in this section is not only a condition to the enforceability of a security interest against third parties, it is in the nature of a Statute of Frauds. Unless the secured party is in possession of the collateral, his security interest, absent a writing which satisfies paragraph (1)(a), is not enforceable even against the debtor . . . . \textit{Id.} § 9-203(1)(a) cmt. 5. This language implies that the drafters agreed with Baird and Jackson that physical custody of physical objects is relatively unambiguous, at least in the sense that a signed writing containing minimal terms is deemed clear enough to satisfy the policy of a statute of frauds, which would allow the parties to get into court and testify as to the nature of their agreement. \textit{See} Jeanne L. Schroeder & David G. Carlson, \textit{Security Interests Under Article 8 of the Uniform Commercial Code}, 12 CARDOZO L. REV. 557, 577-80 (1990) (discussing how the drafters of the 1978 amendments to Article 8 adopted the statute of frauds aspect of § 9-203(1)(a) to investment securities by legal fiction). Moreover, the fact that physical custody of physical things is included as an alternate (and, in the case of instruments and money, exclusive) mode of perfection of security interests seems to indicate that the drafters also thought that physical custody was notorious enough to serve the same publicity function as filing. In Baird and Jackson's words, the UCC seems to agree that physical custody is not merely some evidence of a property interest, it is the "best evidence." \textit{See} Baird & Jackson, \textit{supra} note 16, at 212.
must literally hold it and present it to the obligor. Holding is defined as possession with any necessary indorsements. As anyone who has ever deposited or cashed a check knows, this means that the person seeking enforcement must literally hold the piece of paper in her hand and present it by literally showing it and tendering custody to the obligee. We think of the archetypical consumer transaction as going to the grocery store, taking a carton of milk out of the dairy case, handing dollar bills to the cashier, and carrying the milk home. Llewellyn called his imagery of sales as a physical event a “farmer’s transaction.”

The cliché of the minimum assets that even the poorest person owns is “the shirt on his back”—something with which he is literally in sensuous contact.

But, on second thought, this is inadequate even at this simplistic level. The owner does not always have to hold the instrument in her or his hand. Indeed, if the owner is an “it,” and not an individual, it does not even have a hand with which to grasp sensuously. The hand can belong not only to employees but agents and bailees. Under the 1977 Article 8, the hand that established “bona fide purchaser” status (the Article 8 analog to “holder in due course” status under Article 3) needed only to belong to someone “designated” by the property claimant. Despite the wishful thinking expressed in Official Comment 2 to section 9-305 that “it is of course clear, however, that the debtor or a person controlled by him cannot qualify as such an agent for the secured party,” there is no such language in the statute itself, and the question of when one can have vicarious physical custody through agents remains unclear. The permissible identity of a person designated for 1977 Article 8 purposes remains even more am-

119. See, e.g., U.C.C. § 9-305 (1977) (stating when a secured party can establish possession through the physical custody of a third party).
120. Id. § 8-313(1)(a)-(b).
121. Id. § 9-305 cmt. 2.
122. Within the literal language of Article 8, the debtor could be designated to hold the collateral for the secured party. Despite this, courts routinely read in common-law limitations on permissible designees. I discuss this ambiguity in much greater detail in Schroeder, Is Article 8 Finally Ready This Time?, supra note 4, at 322-34; Schroeder & Carlson, supra note 117.
biguous; there are not even any “helpful hints” in the Official Comments.

Physical custody of goods is perhaps even more confusing. I do not carry most of my consumer goods around with me. I leave most of them home in my apartment—that carton of milk is sitting in my refrigerator. Yet I still believe that I own and possess them. Possession, therefore, must mean more than mere immediate sensuous contact. Can I argue that I possess my clothes, jewelry, electronic equipment, and furniture because they are home in my apartment, which I own?

No, that is no more adequate. Although I think of myself as being a homeowner, I do not legally own my apartment because I live in a New York residential co-op. I own shares in the corporation that owns the building in which I live and from which I rent my apartment. Perhaps the better formulation is that I possess my clothes, jewelry, electronic equipment and furniture because they are home in my apartment which I possess (but don’t own). This argument, however, begs the question. What does it mean for me to possess my apartment? Because an apartment is too big for me to hold in my arms or on my back, one way I might “hold” an apartment is by letting it hold me, i.e., occupying it.  

Unfortunately, as I write this sentence, I am not there.

Perhaps, I could say that I occupy my apartment because, pursuant to the terms of my lease, I have exclusive physical access to and control of my apartment in which I keep my clothes, jewelry, electronic equipment, and furniture. Once again, this begs the question. My husband also controls my apartment. He is a joint tenant in my furniture, but I think I own my clothes and jewelry separately. Moreover, my cleaning lady has the keys to my apartment. Indeed, when I wrote the first draft of this paragraph, she was actually in my apartment and, as one of her jobs is to do

123. Psychoanalytically speaking, this situation is not merely analogous to, but the same as, the metaphor whereby men say they possess a woman when they have sexual intercourse—I possess my apartment by entering it. ERICH NEUMANN, THE GREAT MOTHER 99-100 (Ralph Manheim trans., 1991).
124. I have some question about this because I pay my bills out of a jointly owned checking account in which my husband and I commingle our salaries. I think, however, that my husband has made a gift to me of his joint interest in my clothes and jewelry.
the laundry, may actually have been grasping my clothing in her hands that very moment. We frequently entertain houseguests who temporarily have keys giving them access to my apartment, use of the sleeper couch, as well as my towels, sheets, TV, VCR, and stereo. I even allow them to consume my food, wine, shampoo, and toothpaste and to charge their use of electricity to my account.

Perhaps I could say that I have still retained some form of exclusive access and control because my co-ownership with my husband as tenancy in the entirety is a unique characteristic of the law of marriage, which considers us one legal unit for some purposes. In addition, we arguably retain our control because voluntary contractual relationships with my cleaning lady and my houseguests grant them merely limited access and control of my apartment and my things. I am not sure, however, that this is right either.

My landlord (i.e., the corporation of which I am a shareholder) is the owner of my apartment. It has certain rights to enter my apartment (through its agent, the management company that manages the building for the corporate owner, which manager, in turn, acts through the superintendent hired by my corporation) under certain circumstances even against my immediate will. For example, when I woke up this week, there was a notice under my door reminding us that the super and another person would be entering all apartments during the week in order to inspect the terraces and screens. My landlord can even evict me permanently in some cases, for example, if I do not pay my monthly maintenance. The landlord has power to approve not only the identity of any assignee or subtenant of my apartment but of the purchaser of my shares. Is the landlord in possession of my apartment? Once again, this might be explained by contract. By entering into a lease and purchasing shares in a cooperative corporation and thereby becoming subject to the contract terms of its by-laws, the landlord has transferred the right of possession to me for a set term. This right of possession, however, is subject to certain limitations including the ones mentioned above.

125. In the case of a proprietary lease issued by a co-op, this right has a term coterminus with my share ownership rather than a more conventional term of years.
126. Once again, Baird and Jackson raise a similar example but assertorily declare
It should now start becoming obvious that my so-called possession of my apartment is not physical at all. Rather, my possession even of my consumer goods is a legal construct—what Baird and Jackson would condemn as metaphysics. Except for the clothes, shoes, and jewelry I am wearing this very minute, and the chair and desk at which I am currently sitting, the rest of my possessions are possessed not in the sense of physical custody or any immediate sensuous sense but in what I identify as the Hegelian sense of legal acknowledgement by a certain community that they are identified to me—in other words, objectification. Moreover, although I am currently in actual sensuous contact with a keyboard in an office at the Benjamin N. Cardozo School of Law, it is Yeshiva University, its owner and my employer, and not I who is in possession of the computer.\(^{127}\)

Ostensible ownership doctrine holds that we imply owner-

it trivial or atypical and easily handled by some unspecified exception to a more general rule.

Cases might also arise in which there is ambiguity about which of two parties is in possession of property. For example, one might have to determine which property in a residential apartment is “possessed” by the landlord and which by the tenants. Should either the landlord or the tenant have to file to protect his interests? Should both? . . .

These and other problem cases might be put forward as objections to a general rule that makes a great deal turn on possession. We emphasize, however, two points. First, although the question of whether a party is in possession of property might be difficult in some cases, at least when goods are involved the inquiry will be quite straightforward. Whether a debtor is in “possession” of his drill press is generally going to be a much easier question to resolve than whether he is its “owner.” Second, many problem cases do not have to be resolved on a case-by-case basis as do inquiries into title.


127. This example points out how these problems become even more ludicrous and complex when we turn to ownership and possession by businesses. I have already referred to the very simple and typical case of my office in my law firm. See *supra* text accompanying notes 105-06. Similarly, I am today sitting in my office (really owned by my employer, Yeshiva University), typing on Yeshiva's computer but sitting on my chair, behind my desk, on a Chinese carpet jointly owned with my husband, staring at a painting owned by my husband severally, surrounded by my books sitting on Yeshiva's shelves. Baird and Jackson raise, but dismiss, the employer-employee relationship as a trivial exception that easily can be dealt with by a statutory exception to a general rule. See Baird & Jackson, *supra* note 16, at 193-94.
ship from the fact of possession. But even the most cursory analysis shows that possession is not a sensually observable fact. Rather, it is a legal conclusion that, in turn, can only be defined, analyzed, and recognized by reference to the broader legal concept of property. To put this in the Lacanian terminology I have used in other articles, possession is Symbolic.\textsuperscript{128}

Baird and Jackson argue that, if we take the ostensible ownership problem seriously, then we should require that all non-custodial property claimants cure the problem by some public act—presumably filing, unless there is a good reason not to do so. Because I am a tenant, there is no public record of my property interest in my apartment.\textsuperscript{129} At this very moment, as I type the first draft of this paragraph, I am neither sensuously touching the things in my apartment nor am I physically occupying the apartment. Do I need to cure some ostensible ownership problem by filing? In the past, there might have been a good reason not to require cure in this case—impracticability. With the advent of the so-called information superhighway, however, it will soon be as easy for me to log my noncustodial property interest onto the Internet every morning when I leave my apartment as it is for me to lock my door.\textsuperscript{130} Indeed, given the impressive array of locks that we New Yorkers feel obliged to put on our doors to protect our property interests from thieves, the former will probably be less time-consuming than the latter.

One might be tempted to argue that there is nothing to cure because I constructively physically possess my things, as they are physically located in the apartment that I legally possess. By looking in my window, the world is on inquiry notice that some-

\textsuperscript{128} See supra note 3.
\textsuperscript{129} Obviously, the building's ownership is recorded in the name of the corporation. The bank who holds the mortgage on my apartment has filed an Article 9 financing statement publicizing its property right against my interest in the corporation and the lease, but nowhere is my right against the corporation, let alone the world, of public record.
\textsuperscript{130} Indeed, in a recent article, Baird has actually invoked modern bar code technology to raise the possibility of a universal title registry of all property interests in equipment. Baird, supra note 29, at 2254-55, 2261-62. For a trenchant critique of Baird's suggestion, see Paul M. Shupack, On Boundaries and Definitions: A Commentary on Dean Baird, 80 VA. L. REV. 2273 (1994).
one is asserting the right to possess the apartment. Let us examine this assertion more thoroughly. The issue of ostensible ownership is not to establish that someone has a property right in an object. In our capitalistic society, everything is owned by someone unless it is expressly abandoned. Even then, the abandoned property escheats and belongs to the State. Rather, the question posed by ostensible ownership, is who has a property right—the person having immediate physical custody of the object or someone else?

One might argue that I can “stake out” my apartment and make my possession sensuously visible and obvious by leaving my personal goods in the apartment. If some nosy parker were to climb the tree in our courtyard and peer in my window, he will not see just anyone’s belongings—he will see my belongings and be on inquiry notice that I claim possessory property rights in the apartment. This argument, however, is a mise en abyme. If my ownership in my personal goods is physically possessory (and, therefore, does not cause an ostensible ownership problem) because the goods are in the apartment I possess, I cannot point to the presence of my goods in my apartment as evidence of my possession of the apartment to cure the ostensible ownership problem while I am at work.

3. Revised Article 8 and Ostensible Non-ownership

Baird and Jackson’s claims about ostensible ownership and deceived creditors thus seem highly unlikely as an empirical matter. On the one hand, we have no reliable data that creditors derive any presumptions from observations of physical custody. On the other hand, anecdotal evidence strongly suggests that, contrary to Baird and Jackson’s assertions, physical custody provides little, if any, information about ownership. Possession is a legal or Symbolic conclusion that cannot be simply equated with any physical fact. Temporarily adopting, purely for the sake of argument, Baird and Jackson’s unsupported assertion that creditors do rely, at least in part, on observations of physical custody of goods in making credit decisions, why would creditors do so unless they had presumptions that custody conveyed some information about the absence of rival secured parties? I suggest that Baird and Jackson confuse cause and effect. Baird
and Jackson argue that the law requires secured parties to take physical custody or make filing a condition of enforceability against certain other creditors because creditors have certain preconceptions as to possession. I would suggest that, if creditors in fact presume that possession without filing implies freedom from certain property interests, they do so only because the law invalidates most unfiled, noncustodial security interests. In other words, if creditors rely, they do so because the law directs them to do so. Once again, this empirical assertion is unverifiable, but I strongly suspect that if the practice or the law were to change, any such presumption would quickly disappear.

131. Because negotiation of negotiable instruments requires delivery of physical possession, and because the sale of goods typically involves a change in physical possession, pledges give secured parties considerable power to prevent a double dealing debtor from selling or otherwise absconding with the collateral. As the secured creditor found in the notorious case of Tanbro Fabrics Corp. v. Deering Milliken, Inc., 350 N.E.2d 590 (N.Y. 1976), however, physical control over collateral does not in all cases protect secured parties from buyers in the ordinary course of business. See Schroeder, Liquid Property, supra note 3, at 49 & n.176.

132. A wonderfully confused case illustrates how ostensible ownership law analysis complicates, rather than simplifies, the issues. In First Savings Bank of Virginia v. Barclays Bank, 618 A.2d 134 (D.C. 1992), a secured party tried to perfect a security interest in a residential co-operative apartment. Id. at 135. In a typical co-op, apartment "owners" do not in fact own their apartments but instead own shares of the corporation that owns the building and are tenants of the corporation under long-term proprietary leases. The co-op in First Savings was unusual because the co-operative entity did not issue physical shares to its members. Id. at 136. Consequently, because the secured party could not take physical custody of shares, it tried to perfect its interest by taking custody of the proprietary lease. Id. at 135-36.

The court found that custody of the lease could not constitute perfection because it was not the real thing in interest—i.e., the apartment. The court stated:

P]erfection by possession is permitted only where it is widely recognized that the underlying property which is of value, whether corporeal or intangible, is conceptually entirely embodied in the written item in question, so that the possession of the paper can be fairly deemed to be possession of the actual property insofar as notice to third parties is concerned.

Id. at 138.

Creditors would be misled because the debtor was in possession (through occupancy) of the apartment itself. The court consequently ruled that the secured party must have physical occupancy of the apartment. Id. at 138-39. Next, however, the court turned to real estate law and found that physical occupancy did not, in fact, govern priorities in real property in that jurisdiction. Id. at 139. Rather, one looked towards recorded title. Id. In other words, the court rejected physical custody of documents as an indicia of title on the grounds that physical occupancy of the premises was required, even though it also found that, pursuant to local law, physical
Consequently, evidence of creditor presumptions under the current legal regime is no evidence of what creditor presumptions would be in a state of nature and, therefore, cannot be used to justify the continued existence of the regime with respect to secured lending, let alone expansion of the regime to cover leases and other noncustodial property interests. As Phillips suggests, if people take custody of goods for a wide variety of practical (and, perhaps, impractical) purposes, the only conclusion that one can reach from observing the fact of custody is that the custodian probably wishes to further one of those many purposes.\textsuperscript{133}

I do not mean to suggest that there may not be other good theoretical or practical reasons for us to adopt a legal regime that would enforce only those property interests that we deem

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occupancy of the premises was not a sufficient indicia of title.

The problem with this analysis is that it confuses a legal conclusion with a finding of fact. The issue is not what third parties would presume by seeing the debtor in occupancy of the property in a vacuum. The third parties' expectations are formed by the rule of law. Indeed, the impact of recording acts is, as the court eventually found, that third parties cannot rely exclusively on the occupancy of real estate (although sometimes this can put real estate claimants on inquiry notice to investigate the state of title). The issue, consequently, is what is the legal regime in the District of Columbia for establishing title in apartments?

The court need only have turned to the local law for establishing title in real estate. Article 9 does not govern real estate leases, so the possessory rules of Article 9 are irrelevant. If the local real estate law requires real estate interests to be recorded, this is the end of the question without reference to ostensible ownership theory.

The perfection of security interests in real estate co-ops was a major issue in my home state of New York because this is the primary mode of residential ownership in the City of New York. The shares issued by a co-operative would seem to be Article 8 securities under the official version of 1977 Article 8, which can be perfected by possession. Nevertheless, the accompanying proprietary lease would seem to be a real estate interest that would have to be recorded. Consequently, secured parties used the "belt and suspenders" approach and both took possession and filed. New York simplified this through nonuniform amendments to Articles 8 and 9. Security interests in co-operative real estate are now governed by Article 9 and are perfected by filing in the appropriate office. N.Y. [U.C.C.] §§ 9-104(j), 9-304(1), (7), 9-401(1)(b), 9-403(8) (Consol. Supp. 1994). As a result, possession of the stock certificates and real estate registration are no longer required. Nevertheless, in order to police their debtors and discourage second security interests, co-op financiers typically do take possession of the stock certificates. (Indeed, one might ask, how could a bank physically occupy an apartment? By opening up a branch office in the bedroom?)

133. See supra notes 14-18 and accompanying text.
objective, in the sense of public, intersubjective, and determinable by affected third parties without the further cooperation of the property claimants. For example, I have already discussed that the secured lending industry might want some relatively simple, inexpensive, and reliable queuing system to establish priority. Even if one agrees that we want some legal regime requiring the objectification of certain property interests, however, it is absurd to posit—as the ostensible ownership theory does—reliance on any specific, preexisting regime as justification for the continuance of such a regime.

In contradistinction, the revisions of Articles 8 and 9 of the UCC governing security interests in securities, approved by the NCCUSL in 1994, were based not on the suppositions by academics about what presumptions hypothetical creditors should make but on an examination of the actual practices that have developed in the securities investment industry in the absence of an adequate statutory regime. The drafters thereby followed in the footsteps of the legal realists who originally drafted the UCC rather than those of the legal surrealists who have tried to interpret it. The revisions reflect a judgment by the drafting committee that the doctrine of ostensible ownership is no longer correct as an empirical matter in this industry. They go so far as to adopt what might be called a doctrine of ostensible non-ownership.

This is particularly remarkable because the physical metaphor had long been incorporated into the law of investment securities. In the nineteenth century, states adopted statutes

134. For example, in another article, I argue that the traditional liberal jurisprudential policy of furthering personal autonomy argues for requiring property claims in the law of sales to be objectively verifiable as a condition of enforceability against third parties. See Schroeder, Liquid Property, supra note 3, at 15-19. In this Article, I shall expand this analysis to security interests and further develop a Hegelian jurisprudential justification for objectification of property.

135. See Schroeder, Is Article 8 Finally Ready This Time?, supra note 4, at 351-59.

136. See infra notes 145-48 and accompanying text.

137. See THE AMERICAN LAW INSTITUTE, UNIFORM COMMERCIAL CODE REVISED ARTICLE 8. INVESTMENT SECURITIES (WITH AMENDMENTS TO ARTICLE 9 SECURED TRANSACTIONS) 1 (1994) [hereinafter REVISED ARTICLES 8 AND 9] (stating that Article 8 was originally “based on the assumption that possession and delivery of physical certificates are the key elements in the securities holding system”).
realizing securities into negotiable security certificates because the common law was uncomfortable with the concept of assignment of intangible property interests.\textsuperscript{138} This meant that, similar to negotiable instruments and documents, transfers of ownership of securities could then be accomplished through the delivery of the physical certificate evidencing the security (with any appropriate indorsements).\textsuperscript{139} Consequently, the only permissible mode of perfecting a security interest in a security was through sensuous grasp—pledging. Under Article 8 as amended in 1977, security interests in certificated securities in the custody of other persons are analyzed in terms of vicarious possession through common-law principles of agency and bailment.\textsuperscript{140} For the sake of parallelism, even the rules for security interests in uncertificated securities—which cannot be sensuously grasped—were based on fictive vicarious possession through agents and bailees.\textsuperscript{141}

This approach may have adequately described securities investment practices of the mid-twentieth century. Today, however, most investors no longer take physical custody of certificates representing securities. Rather, securities are held in a complex pyramidal system with a depositary who has actual custody of the certificates at the top, the ultimate investors at the bottom, and tiers of broker-dealers and other institutions in between.\textsuperscript{142}

The several property interests of the various parties are evidenced by book entries on the books of other parties. Upper-tier parties only have knowledge of the identities of their immediate lower-tier customers and account holders. Lower-tier parties

\begin{itemize}
  \item \textsuperscript{139} See Schroeder, \textit{Is Article 8 Finally Ready This Time?}, supra note 4, at 305-06.
  \item \textsuperscript{140} See id. at 328-31.
  \item \textsuperscript{141} Id. at 312-22.
  \item \textsuperscript{142} It is estimated that the certificates representing 60% to 80% of all publicly traded securities are held by one central clearing corporation, the Depository Trust Company. \textit{Revised Articles 8 and 9}, supra note 137, at 2. Moreover, under applicable federal regulations, all federal debt securities are issued in uncertificated form, and only members of the federal reserve system can be registered owners. Consequently, by definition, nonbank investors in treasury bills and other federal debt cannot take custody of their investments but must hold them indirectly through financial intermediaries. 31 C.F.R. §§ 306.117(a)(2)-(3) (1995); \textit{Revised Articles 8 and 9}, supra note 137, at 12-13.
\end{itemize}
only have direct knowledge of their immediate upper-tier financial intermediary. Upper-tier parties are not merely custodians of the securities "held" for their lower-tier customers but are also frequently their secured lenders holding security interests in such securities. Moreover, upper-tier parties may also, in turn, rehypothecate such custodial securities to parties further up the pyramid, as well as to other financial institutions. The simple physical metaphor and analogies to agency and bailment principles have become increasingly unrealistic as a theoretical matter, and unworkable as a practical matter, as a means of sorting out the interrelationships among these different parties.143

One thing seems clear, however. In such a complex system, neither actual custody of the certificates evidencing investment property by a depositary, broker-dealer, or other financial institution nor lack of custody by an institution or investor, can give the slightest clue as to the nature of the relative property interests claimed by the various parties in this system. The usual Article 9 solution when physical custody is impracticable—notice filing—is also unworkable in practice. Because of the unusual practices of the securities industry, if filing were required, every broker would have dozens of financing statements filed against it each saying only that "financial assets" were covered. Not only would such filing provide no additional information to the lending community, which already presumes that securities held by a broker are already encumbered, but it would be useless for establishing priorities.144

The 1994 revisions, in effect, reverse the structure of Article 9 with respect to investment securities in order to make it more accurately reflect actual industry practices. Article 9 starts with an implicit assumption that property is normally owned by one claimant free and clear of property claims of others. Consequently, secured parties must put the world on notice that they are changing the status quo by taking appropriate perfection formalities. In contradistinction, securities "held" by broker-dealers are usually subject to multiple competing property claims of customers, clearing agents, secured lenders, and others. Consequently,
the revisions, in effect, give notice of this practice to the world (i.e., the professional lending industry) and inform it that it is not legally entitled to make any presumption as to ostensible unfettered ownership of investment property from the fact of physical or constructive custody by any securities professional. From now on, creditors are legally required to assume the opposite—ostensible non-ownership.

Accordingly, revised Articles 8 and 9 provide for the automatic perfection of security interests in securities and other investment property granted by broker-dealers and certain other securities intermediaries. Moreover, recognizing that, under such a system, there will be no simple objective way of establishing the order of creation of security interests, all secured parties relying on automatic perfection will have the same priority and share the collateral pro rata.

By rethinking the concept of possession and perfection, the drafters of revised Articles 8 and 9 were also able to give creditors a means to opt out of this pro rata sharing regime. The problem with the existing regime is that the two traditional methods of perfection—custody and filing—as well as the new method of automatic perfection, give little meaningful information to the public about the specific property interest of any individual claimant. This is why all claimants who so perfect will share equally. This logic suggests, however, that a secured party who gives meaningful notice of its specific interest to other claimants should be entitled to individualistic treatment. To oversimplify somewhat, the revisions will impose a sliding scale of priorities based on the degree of power the secured party takes over the collateral, with the greatest power, termed “control,” having the highest priority.

146. Id. § 9-115(5)(d).
147. See infra notes 205-14 and accompanying text.
148. U.C.C. § 9-115(5)(a). Security interests taken by a securities intermediary in a customer’s investment property held through such securities intermediary will have priority over all other security interests no matter how perfected, but such a securities intermediary will always, by definition, have control of such financial assets. Schroeder, Is Article 8 Finally Ready This Time?, supra note 4, at 436-38.
III. OBJECTIFICATION: HEGELIAN POSSESSION AS AN ALTERNATIVE TO THE PARADIGM OF THE PHYSICAL METAPHOR

The 1994 revisions to Articles 8 and 9 offer an alternative to the physical metaphor without abandoning the property aspects of securities investments. They do this by supplementing the traditional paradigm of ownership as physical custody with a new concept of securities holding called “control.” Interestingly enough, the concept of control is almost identical to Benedict’s concept of “dominion.” The significant difference is that the revisions recognize control not as the only or even archetypical mode of creating or evidencing property rights, but as merely the fullest and most adequate way of doing so, entitled to the highest priority.

A. Attachment and Perfection

Although Article 9 security interests can only be created by contract, they are not merely contract interests but property interests in specific identifiable collateral. This means, among other things, that, in the event of the debtor’s bankruptcy, a secured party does not share in the estate pro rata with general creditors but is entitled to distribution out of earmarked assets. Consequently, Article 9 makes a distinction between attachment and perfection of security interests.150

Roughly speaking, when we say a security interest has attached, we mean that it has become enforceable only against the debtor who created the security interest and a discrete class of other parties.151 Perfection means that the attached security interest

149. Article 9 “applies to security interests created by contract.” U.C.C. § 9-102(2) (1977). One of the elements of attachment (i.e., creation) of a security interest is that there is an agreement. Id. § 9-203(1)(a).

150. Compare id. § 9-203 (attachment) with id. § 9-304 (perfection).

151. The four elements of attachment for security interests in collateral other than investment securities are located in U.C.C. § 9-203 (1977). The security interest must be established by agreement between the debtor and the secured party (i.e., security interests, unlike judgment liens, are voluntary conveyances; they are purchases), id. § 9-203(1)(a); either there must be a written security agreement containing a description of the collateral signed by the debtor or the debtor must give the secured party possession of the collateral (i.e., the security agreement must be evidenced by one of two formalities in the nature of a statute of frauds), id. § 9-
interest is also enforceable against subsequent lien creditors (including the debtor’s bankruptcy trustee) and certain other parties. Consequently, one can have unperfected but attached security interests in many categories of collateral, but there is no such thing as a perfected but unattached security interest.

Section 9-201 recites the usual derivation rule that, absent a statutory exception to the contrary, later-in-time claimants (such as purchasers, secured parties, and other transferees) take subject to first-in-time security interests. Nevertheless, the effect of sections 9-301 and 9-312 read together is that unperfected security interests prevail against very few later-in-time third parties. They lose to perfected security interests; lien creditors; bulk transferees; nonordinary course buyers of farm prod-

203(1)(a) cmts. 3, 5; the debtor must have rights in the collateral (i.e., there must be some object in which the debtor can assert a property interest, a special case of the derivation rule), id. § 9-203(1)(c); and the secured party must have given value (i.e., in order to form the contract, consideration must be given by the secured party), id. § 9-203(1)(b).

The 1977 amendments to Articles 8 and 9 moved the requirements for attachment and perfection of security interests in investment securities to Article 8. The 1994 revisions of Articles 8 and 9 have moved the requirements of attachment and perfection of investment securities back into Article 9.

My categorical statements are roughly true; unperfected security interests are enforceable (i.e., have priority) against a few third parties such as buyers of goods out of the ordinary course of business.

152. As usual, the UCC never states this general principle in so many words. Rather, it adopts the transactional approach and describes the priority of unperfected security interests vis-à-vis other parties in Part 3 of Article 9, id. § 9-301, the priority of conflicting security interests, id. § 9-312, and priorities against other parties, id. §§ 9-306, -310.

153. People often think that the elements of attachment and perfection under the 1977 Article 8 are identical, so that it is impossible to have an attached but unperfected security interest in investment securities. This is an overstatement. Section 8-321(2) provides that attached Article 8 security interests are always automatically perfected. Id. § 8-321(2). While it is impossible to create an attached yet unperfected security interest ab initio under Article 8, perfection can lapse resulting in an unperfected yet attached security interest. See Schroeder & Carlson, supra note 122, at 578 n.79.

The revision of Article 8 removed this anomaly by moving the attachment of security interests in investment securities back into § 9-203. See U.C.C. § 9-203 (1994).


155. See id. §§ 9-301, -312.
ucts who give value and take delivery; transferees of investment property, intangibles, and accounts who give value in good faith; and perfected secured parties. To oversimplify, unperfected security interests are enforceable against the debtor, donees, and knowledgeable buyers out of the ordinary course of most types of goods. In effect, once one creates a security interest, the negotiation rule becomes the default rule for most transferees, and the derivation rule the exception that must be established. That is, most transferees take more than the debtor had to transfer—the encumbered value of the collateral as well as the debtor’s equity—unless the true owner of the encumbered value (the secured party) can establish that the interest has been perfected. Once the security interest is perfected, however, the default rule is reversed. Generally, a perfected security interest is enforceable (i.e., prior) to subsequent transferees, unless the transferee can establish that it comes within one of the exceptions.

Why is this so?

B. Sensuous Grasping As an Example, Rather Than the Norm, of Objectification

As I have explained, the traditional interpretation of the policy underlying perfection by filing under Article 9 is that pledging—the sensuous grasping of a tangible thing—is the norm of property ownership, generally, and security interests, specifically. In the Baird and Jackson interpretation, it is the “best” evidence of a property interest. Where sensuous grasping is impossible or impracticable, filing is permitted as a substitute on the grounds that it can evince the same properties that sensuous grasping is presumed to evince—unambiguous information concerning the property interests of the secured party.

There is a second way of defending the filing system that does not presume that sensuous grasping is the unproblematic norm and then ask what other legal relations have properties similar

156. Id. § 9-301(1).
157. Id. § 9-312(5).
158. See supra notes 15-20 and accompanying text.
159. See supra text accompanying notes 32-33.
to sensuous grasping. Rather, it identifies sensuous grasping, at best, as an example, and not necessarily the best example, of either property as a whole or at least that element of property that traditionally goes by the name of "possession." We should ask: "What do we mean by property, and how do we distinguish it from contract?" "What purpose is possession supposed to serve?" "How and why does sensuous grasping, which many of us intuitively believe can serve as a mode of possession, perform this function?" "Can other devices be used to accomplish this purpose?"

The difference between my approach and the ostensible ownership approach is subtle but significant. One might be tempted to argue that one is likely to identify the same significant elements of property whether one analyzes sensuous grasping as the norm of possession (i.e., the traditional approach) or only as an intuitively simple example of an ideal of possession as objectification. This may be true, but, if one mistakenly identifies an example with the norm, one risks mistaking elements that are accidental, in the sense of unique to the example, with those that are essential to the category. It is precisely this error that characterizes the traditional property metaphor paradigm of sensuous grasp. And, it is precisely this error that made prerevision Article 8 unworkable.

For example, in their article *Information, Uncertainty, and the Transfer of Property*, Baird and Jackson at first blush seem to take an approach similar to mine, in that they analyze the appropriate modes for perfecting security interests in various forms of collateral based on the hypothesis that the purpose of perfection is to limit the risks of subsequent creditors by providing information. They argue that "[rules that increase the information about property ownership, however, bring their own costs .... These costs must be weighed against the benefits." They purport, as I do, to analyze perfection formalities in light of an external theoretical rationale, albeit their rationale

160. *See supra*notes 116-22 and accompanying text.
162. *Id.* at 300.
163. *Id.* at 301.
(notification as a priority rule to promote economic efficiency) is quite different from mine (objectification as an essential element of property in order to protect autonomy and promote self actualization). Baird and Jackson do not, however, follow through to the implications of their approach because they are entrapped in the physical metaphor. They continue to assume that custody is the norm and recording an exception that needs explaining. Recording systems are seen as a supplement to custodial regimes. They do not question, as I do, whether, and under what circumstances, custody can and does adequately convey information. Rather, custody is presumed to be simple, clear, and unambiguous as a general rule. One problem with a custodial regime is that it is expensive. In addition, custodial regimes make temporal divisions of property rights (such as between a debtor and secured party, lessor and lessee, life estate and remainderperson) problematic and tracing of certain claims difficult. Baird and Jackson are not particularly troubled by the fact that some forms of property are intangible and cannot be grasped because we could treat copyrights, patents, etc. the way we treat certain other forms of intangibles, such as debts and investment securities, and make the physical metaphor literal by reifying them into pieces of property that could then be grasped. Their analysis of the appropriateness of reification revolves around whether these types of intangibles are usually owned by one person or are subject to numerous property claims and ignores the absurdity of presuming that custody is the norm even when property is intangible.

The Hegelian approach holds out the promise of replacing the physical metaphor because it is not a simple negation of the physical metaphor that can serve as a reinstatement. Rather, it is a sublation. It preserves the true moment of the physical paradigm while negating the false moment. On the one hand, it recognizes that physical custody is not necessarily irrelevant to property analysis because, in some circumstances, it can perform

164. Id. at 308.
165. See id. at 302-03.
166. Id. at 303.
167. Id. at 310-11.
168. Id. at 311.
certain logical functions. On the other hand, it rejects the physical metaphor's claim to universal validity.

C. The Logic of Property

1. Classical Liberalism and Autonomy

The existing property regime of the UCC can be justified in terms of the classical liberal policy of furthering autonomy.\textsuperscript{169} A review of Karl Llewellyn's writings shows that he thought that the common law did not adequately distinguish the contract and property aspects of sales.\textsuperscript{170} It treated all of sales as a subset of the property relationship of conveyancing of title and did not recognize that certain aspects of sales, such as risk of loss, were better analyzed as merely contractual in nature. This approach made the law of sales simultaneously too objective and too subjective.\textsuperscript{171} Under traditional liberal analysis, in order to further personal autonomy, contract law should be subjective, in that the parties should be able freely to bind themselves by contract however they want. Autonomy, however, also demands that no one be bound without her consent. Property rights affect third parties, such as creditors, who are not parties to a conveyancing contract. Property interests should be objective\textsuperscript{172}—in

\textsuperscript{169} See Schroeder, Liquid Property, supra note 3, at 15-19.
\textsuperscript{170} See KARL N. LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES xiv-xv, 64 (1930); SCHROEDER, THE VESTAL AND THE FASCES, supra note 2; Llewellyn, supra note 118, at 725; Schroeder, Liquid Property, supra note 3, at 12-15, 23-33.
\textsuperscript{171} See Schroeder, Liquid Property, supra note 3, at 13-15.
\textsuperscript{172} In an earlier article, I showed how the word "objective" has many different and inconsistent meanings and is often used sloppily. For clarity, I offered a taxonomy of various different meanings. Jeanne L. Schroeder, Subject: Object, 47 MIAMI L. REV. 1 (1992). In this Article, I use the word "objectivity" in two ways. First, in this paragraph, I am referring to what I have called "Community Objectivity." This is the sense of objectivity as the polar opposite of subjectivity understood as private, idiosyncratic, and unique to one or a number of identified individuals. In this sense, objective means public—recognizable by third parties through intersubjective or community-accepted criteria. Secondly, I refer to what I have called "Philosophical Objectivity"—that which relates to objects understood as anything other than, or external to, a self-conscious will (i.e., a subject). In this case, I am referring to my assertion that the legal category of property concerns relations between legal subjects with respect to the possession, enjoyment, and use of an external object. Neither of these meanings of objectivity carries any necessary implications of universal essential truth.
the sense of being intersubjectively determinable—in order to compromise between the autonomy interests of the parties to a conveyance and the noncontracting third parties who are affect- ed by the conveyance. On the one hand, the title rule of the common law of sales overly restrained the freedom of the parties with respect to the contract aspects of sales. On the other hand, the property aspects of property (i.e., the location of ownership in the form of title) was determined by the subjective whim of the conveyancers despite the objective manifestation of the actual indicia of property rights.\(^{173}\)

This analysis is powerful, but it is limited in that it arguably depends on a liberal presupposition of human nature as atomistic individuality with a natural right of negative liberty as personal autonomy (and, to a lesser extent, a natural right to prop- erty). These presuppositions are, perhaps, not so universally shared in our society as they once were. Hegelian philosophy neither presupposes nor rejects the liberal concept of personal- ity—it critiques it. Nor is it based on empirical observations of presuppositions. Hegelian political theory does not necessarily reject liberal concerns for individuality, autonomy, and negative liberty but seeks to supplement them with an understanding of community, ethical life, and positive freedom. Hegel's political theory is a sublation of liberalism and liberal property theory; it seeks to preserve its true moment while negating and superseding its false claims to universality. Hegel claimed not to presuppose any natural right of property but to ask what logical function property serves.

2. Hegelian Personality Theory

To understand what Hegel meant by property, we should return to his theory of its role in his dialectical logic.\(^{174}\) Hegel

\(^{173}\) Schroeder, Liquid Property, supra note 3, at 15-19.

\(^{174}\) The following is intended as only the most rudimentary introduction to this complex and subtle theory. I present much more detailed exegeses in Schroeder, The Vestal and the Fasces, supra note 2; Schroeder, Bundle-O-Stix, supra note 2, at 245-46; Schroeder, The Vestal and the Fasces, supra note 2, at 841-73; Schroeder, Virgin Territory, supra note 2, at 114-53; see also Peter Benson, Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Law, 10 Cardozo L. Rev. 1077 (1989); Alan Brudner, The Unity of Proper-
argued that property rights are a logically necessary step in the development of the individual, freedom, and the State. According to Hegel, legal subjectivity can only be intersubjectivity mediated by objectivity.\textsuperscript{175} He thought that the concept of the autonomous individual posited by liberalism was an unstable idea because it implicitly (but logically) always presupposed and depended on the existence of other individuals and objects. By this he meant that the autonomous individual posited by liberalism can only constitute himself as a legal actor—a subject—capable of bearing legal rights and thereby capable of exercising his autonomy through recognition of such rights by another legal subject. As a consequence, Hegelian philosophy is intensely and desperately erotic: we are driven by an insatiable desire to be recognized as human beings by others whom we recognize as human beings. This means that we do not merely seek to assert our own rights. We passionately desire to accord rights to others in order to raise them to the dignity of human beings so that their opinion of us counts. In other words, I only truly see myself as a person in my reflection in the eyes of my beloved at the moment he simultaneously sees himself reflected in mine.

Property is the first stage of a process by which the logical concept of the autonomous, abstract individual takes on individuating characteristics making her recognizable to others.\textsuperscript{176} This enables her to become a legal subject capable of interrelating to others and bearing rights enforceable against others.\textsuperscript{177} Hegel argued that this function of recognizability, which he called property, logically required three elements: possession, enjoyment, and alienation (in the sense of exchange of objects external to the owning subject).\textsuperscript{178} These elements should not

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\textsuperscript{175} French psychoanalytical philosopher Jacques Lacan came to a similar conclusion. See SCHROEDER, THE VESTAL AND THE FASCES, supra note 2; Schroeder, Bundle-O-Stix, supra note 2, at 249; Schroeder, The Vestal and the Fasces, supra note 2, at 819; Schroeder, Virgin Territory, supra note 2, at 154.
\textsuperscript{176} Schroeder, Virgin Territory, supra note 2, at 133.
\textsuperscript{177} See id.
be confused with any specific empirical manifestation of the elements but with extremely abstract logical and Symbolic concepts—i.e., exactly what Baird and Jackson condemn as metaphysics.

Before going any further, it is useful to concentrate on what Hegel meant by an object of property. Too frequently, legal writers adopt the physical metaphor and assume that an object must be a tangible thing or at least that tangible things are archetypical objects. Nothing could be further from the philosophical notion of objectivity. The term “object” refers to the philosophic concept of anything that is other than the subject, which the subject can negate as not himself. Among the examples given by Hegel of potential objects of property are “[i]ntellectual [geistige] accomplishments, sciences, arts, even religious observances (such as sermons, masses, prayers, and blessings at consecrations), inventions, and the like, become objects [Gegenstände] of contract.” In continental philosophical discourse, the word “external” contains no implications of physicality, generally, or physical separation from the subject, specifically. In other words, although tangible things can be objects, it is not their tangibility that establishes their objectivity; rather, it is negation by the subject that does it. Hegel argued that possession is a necessary element of property because it is the way that the abstract person becomes identified with individuating characteristics and, therefore, becomes recognizable by other persons. Because objects cannot

179. See Schroeder, Bundle-O-Stix, supra note 2, at 239.
180. HEGEL, supra note 178, § 43. One should note that, although Hegel thought that the concept of a full property necessarily included exclusive rights to possess, use, and alienate the object of property, this did not mean that every empirical manifestation of property had to as well. For example, although Hegel believed that our bodies are objects in which we have a property, he argued that we do not have the absolute right to alienate our bodies by selling ourselves into slavery, id. §§ 65-68, or committing suicide, id. § 70.
182. The other two Hegelian elements required for a full property are enjoyment and alienation. See HEGEL, supra note 178, §§ 52-53; SCHROEDER, THE VESTAL AND THE FASCES, supra note 2; Schroeder, The Vestal and the Fasces, supra note 2, at 858; Schroeder, Virgin Territory, supra note 2, at 133.
be limited to, or even typified by, tangible things, the Hegelian element of possession cannot be reduced to, or even typified by, sensuous grasping, even though the abstract concept of possession might occasionally be empirically manifested in the sensuous grasp of specific tangible things. Possession is the more general concept of an objectively recognizable identification of a specific object as being owned by a specific legal subject with the right and power to exclude others from the object. Because the logic of property, according to Hegel, is to make the owner recognizable by others, the claim to ownership that is possession cannot be totally subjective in the sense of private to the so-called owner. Rather, it must be somehow public and objective in the sense that possession is intersubjectively recognizable by the relevant legal community.

Unfortunately, as we have seen, the UCC, and much contemporary legal scholarship, usually conflates the more general English term "possession" with its more narrow meaning of

One occasionally finds statements that Hegel's theory of property is one of occupancy and that Hegel thought first occupancy served as justification of individual property rights. See, e.g., JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 386-89 (1988). This is a major misunderstanding. Indeed, it is a strawman which is set up solely for the purpose of criticizing the Hegelian theory of property. This misunderstanding comes from a misreading of the following sentence: "That a thing [Sache] belongs to the person who happens to be the first to take possession of it is an immediately self-evident and superfluous determination, because a second party cannot take possession of what is already the property of someone else." HEGEL, supra note 178, § 50 (footnote omitted).

Although, at first blush, this might seem to be a concept of justification based on occupancy, the sentence has a very different meaning read in context. It is merely a truism following from the definition of possession as "first-in-time, first-in-right."

In Elements of the Philosophy of Right, Hegel argues for the logical necessity of a property regime. In order for abstract persons to become subjects—the first step on the road to individuality and freedom—they must own some property. Unlike Locke, however, Hegel does not have a theory of the justification of the property rights of any specific individual. Specific allocations of property are a matter of Gesetz, positive law determined by practical considerations, rather than by logic. That is, when Locke argued that a person who commingles her labor with a physical thing obtains a property right in that thing, he argued that the owner's property is rightful. When Hegel states that a person who possesses property has the right to possession enforceable against other persons, he is merely giving a partial definition of the right of possession—it is more than the mere accidental holding of a thing by a person, it is enforceable against rival claimants. He does not argue that such possession is rightful.
physical custody, preferably in the form of sensuous grasp. The English word “possession,” like its German cognate “Besitz,” is more expansively defined as occupancy or ownership. Indeed, the English word might be even less physicalist than the German used by Hegel.

“Besitz” is derived from the same root as “Sitz” (sitting or seat) and implies occupancy, in the sense of the place where one physically sits or camps. German mythographer Erich Neumann suggests that the concept of possession as sitting derives from the nomadic nature of ancient German tribes who only temporarily possessed any specific piece of land by camping.

The English word “possession,” on the other hand, derives from a root meaning “power” and is etymologically related to such concepts as possibility and potency. In this light, pos-


184. Neumann, who has a Jungian perspective on mythology, goes further and suggests that Besitz also invokes images of the mother goddesses worshipped by the Germans and displayed in their camps. See NEUMANN, supra note 123, at 98. The Sitz was not just the generic concept of seat; it also referred specifically to the king’s throne, which, in turn, was identified with the mother’s lap. See id. at 98-99. German gods and German kings were depicted seated in the lap of the great mother goddess in the same way as the Egyptians depicted Horus seated in the lap of his mother Isis and Catholics depict Jesus seated in Mary’s lap. See id. at 99. This identification is specifically reflected in religious terminology. Isis, the name of the great ancient Egyptian goddess, means throne. Id. at 98-99. Even today, one of the Blessed Virgin’s traditional titles is “Seat of Wisdom.”

Neumann’s point is that we confuse the source of power in property. The king thinks that his seat is a throne because he is a king, whereas he is only king because he sits on the throne. Similarly, men speak of possessing women in intercourse, but the man who thinks he possesses the woman is, in fact, possessed by his desire.

In other words, from the Jungian perspective, in possession, the object controls the subject, not the other way around. This is consistent with Hegel’s analysis. The subject does not preexist the legal concept of property; rather, it is constituted through property. We do not possess things because we are subjects; we are subjects because we possess things that make us recognizable to others.

Possession standing alone, however, is inadequate to the function of property in the development of the individual and the actualization of freedom. The possessor is dependent on her objects and, therefore, is not free. Consequently, Hegel argues that the owner must assert mastery over the object through enjoyment and ultimately assert her indifference to the object through alienation. See HEGEL, supra note 178, §§ 59-70. Through alienation in contract, the person substitutes interdependence with other human subjects for dependence on objects, thereby achieving subjectivity, community, and the opportunity for human development.

185. See JOSEPH T. SHIPLEY, THE ORIGINS OF ENGLISH WORDS: A DISCURSIVE DIC-
session relates not to physicality per se but to the power of the subject with respect to the objects and other subjects. Consequently, the Supreme Court’s terminology in *Benedict v. Ratner*—dominion (from *dominus*, lord)—may in fact be more appropriate because it does not carry the unfortunate modern physicalist connotation of possession.

Thought of in this way, sensuous grasping cannot epitomize or otherwise serve as the archetype of possession. Hegel makes clear that, although the sensuous grasp of tangible things is one of the most determinative forms of possession, it is simultaneously the most contingent and, therefore, the least adequate form. Mere sensuous grasping has the advantage of being easily recognizable, but it can be destroyed by a thief or bully—a brute fact subject to brute force. The very fact that we tar the person who wrongfully wrests goods from the sensuous grasp of the rightful owner with the conclusory pejorative “thief” indicates that we do not identify possession with the grasping itself; rather, grasping is at most a specific manifestation of the more general concept of the right to possession. This, of course, is precisely my and Phillips’s point as to the lack of information conveyed by custody. In other words, by possession, Hegel meant any relationship of a subject with respect to a thing that causes others to recognize the individual’s relationship—such as changing or marking the thing as the individual’s own in a way that is recognizable and legally recognized by others.

The most full form of property is the complete, unfettered, and exclusive rights of possession, enjoyment, and alienation. Probably the only true example of this type of property in our legal system is the alodial estate, which the sovereign theoretically holds in realty. Most parties have lesser manifestations of property. Under Hegelian analysis, both the debtor and secured party to a security interest have property rights, although they do not have the most full and adequate manifestations of property. In a hypothecation, the debtor has possession, in the sense of

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187. 4 THE OXFORD ENGLISH DICTIONARY, supra note 183, at 949.
188. HEGEL, supra note 178, § 52.
189. Id. § 58.
the right to have physical custody of a tangible object, or is otherwise recognized as the owner of an intangible object. She has the right to enjoy the object in the sense of using or collecting it. Article 9 gives her the power to alienate her equity interest and sometimes the secured party's interest in the collateral, despite contractual restrictions to the contrary. These rights are all immediate and contingent, however, in that their continued existence is subject to the condition that she satisfy the secured obligation. The secured party's rights of possession (through repossession), enjoyment (through collection or strict foreclosure), and alienation (through foreclosure sale) are inchoate because they are all contingent upon a future default by the debtor that may never occur. Consequently, the secured party's rights remain merely contractual in nature unless they are somehow immediately objectified. An unperfected security interest is objective only to a very small class of people—the debtor and parties with actual notice. Consequently, unperfected security interests are enforceable against certain knowledgeable buyers and against the debtors' donees, who do not act as independent legal subjects but inherit the status of their donor. The necessity for objectification explains the requirement of perfection as a condition of enforceability against other parties.

191. Id. § 9-503.
192. Id. §§ 9-502, -505(2).
193. Id. §§ 9-504 to -505.
194. Id. § 9-301(1). Section 9-301(1) provides that unperfected security interests are subordinate to, among others, buyers of farm products, buyers out of the ordinary course of business of other goods, and certain assignees of accounts and assignments to the extent they give value and do not have knowledge of the security interest. Id. By negative pregnant, such purchasers with knowledge take subject to the security interest under the general derivation principle of UCC § 9-201.
195. Donees take subject to an unperfected security interest granted by their donor-debtor under the general derivation principle of UCC § 9-201. Id. § 9-201. Under Hegelian theory, a donee is not asserting her subjectivity, i.e., acting as an end to her own means; rather, she passively serves as the means to the ends of the donor. HEGEL, supra note 178, §§ 71, 76-77, 80; see also Brudner, supra note 174, at 34 (noting that only an exchange in which donor and donee simultaneously recognize each other as an end is a donor's claim to exclusive control authoritatively validated).
3. Hegelianism and Pragmatism

The Hegelian dialectic only purports to explain the abstract logic of concepts and structures but does not answer specific, concrete questions of legal policy or daily life. This is why pragmatism is a necessary correlate of Hegelian idealism. In other words, although Hegel would argue that the general concept of property logically requires the element of possession—in the sense of an objectively recognizable claim of ownership by a subject of an object with the right to exclude others—the actual form of possession in any given society falls within the province of positive law. In this interpretation, perfection of a security interest through filing of a financing statement would be a form of possession through marking recognized by the positive law of the UCC. Filing is not a second-best substitution for possession as exemplified in the norm of sensuous grasping; rather, through positive law, filing itself becomes a form of possession.

In this analysis, regardless of whether the drafters of the UCC thought that they were disaggregating title, the system they created does not necessarily require a rejection of the unitary view of title. The imagery of disaggregation is captured in the familiar metaphoric cliché that modern property is merely a “bundle of sticks.” One can interpret custody as a special case, or even as a paradigmatic case, of one of the indicia of unitary title. For the purposes of the priorities of security interests vis-à-vis other creditors, analogies to custody or grasp are permitted, but they are not necessary for the function of possession to be satisfied. Further, insofar as the secured party has that property interest called a security interest, it does have an enforceable right of possession, actually or metaphorically through dominion, but it is subject to the condition precedent of...

196. As Richard Hyland has written in the context of discussing Elements of the Philosophy of Right:

Hegel described what he believed to be the ever-recurring forms of self-reflection, at an individual and societal level. He did not dream of dictating to us either their substantive content or the resolution of conflicts between the individual and society. Hegel’s theory leaves us free to resolve these issues for ourselves.


197. I explore this metaphor in Schroeder, Bundle-O-Stix, supra note 2, at 283-90.
default.

In other words, the alternate mode of perfection by filing can be seen as a reaffirmation of the unitary view of title. Property does not consist of a bundle of unrelated rights that can be disaggregated and reassembled at will. Property consists of an identifiable whole, but the elements of the whole can move at different temporal speeds as long as the parties anticipate that the whole will eventually or potentially be reassembled. Perfection through filing does not represent a separation of the property rights of possession and the property rights of title. Rather, it reflects a theory that all property rights need some form of possession—objectively recognizable identification of the object to the subject with the right to exclude others. This theory does not conflate the Symbolic possession of the property interest in the object with sensuous grasp of the Real object itself.

The Hegelian concept of possession can be used both to explain and critique some areas of property law that seem anomalous when considered within ostensible ownership doctrine. Probably the most obvious of such apparent anomalies, as raised by Baird and Jackson, is the lack of any perfection requirement for leases and other arrangements in which a noncustodial party has enforceable property rights. From a Hegelian viewpoint, the continued existence of this apparent anomaly can be explained if the lessor's noncustodial interest is otherwise objectively manifest, in the sense of being observable or at least discoverable by a third party creditor of the custodial lessee from evidence other than the self-serving subjective statements of the custodial party.

Mooney suggests just such a defense for leases. If a creditor wishes to take a security interest in equipment or other goods in the custody of a debtor, it can investigate the

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198. See supra notes 44-46 and accompanying text.
199. Baird and Jackson assert that there is no objective way for a creditor to learn of a leasehold or other bailment. In the case of leases, "third parties have no easy way of discovering these divisions." Baird & Jackson, supra note 16, at 178. In the case of purchase money security interests, "the financer of the inventory had no independent means of learning about the contractual arrangements between [the bailor and the bailee/debtor]." Id. at 200.
200. Mooney, supra note 26, at 748-51.
equipment's provenance or chain of title. The potential creditor can demand from the debtor some evidence of the origin of the equipment, such as a bill of sale or other receipt. The creditor can then question the source of the equipment about the nature of the transaction by which the debtor obtained custody. In this way, the potential creditor has some ability to ascertain the existence of an adverse interest that is not totally dependent on the subjective statements of the debtor. The same reasoning could explain in part the traditional solicitude for purchase money financiers—at least when the financer is the seller, rath-

201. Id.
202. In the teacher's manual to their casebook, which I assume from its style consists mainly of their lecture notes, Baird and Jackson flippantly dismiss this approach:

   But what if you want to buy a personal computer sitting in my office. How do you know its mine—that is, how do you know if you pay for it, some company won't swoop down later and take it away, saying the computer belonged to it, and that I had no right to sell it? You might ask for the bill of sale. But I'm a careless guy, and I might not have it any more. What else? You look to see that I have it in my office. Anything else? No.

DOUGLAS G. BAIRD & THOMAS H. JACKSON, TEACHER'S MANUAL TO ACCOMPANY CASES, PROBLEMS, AND MATERIAL ON SECURITY INTERESTS IN PERSONAL PROPERTY 9 (2d ed. 1987).

They do not consider, as Mooney implicitly does, that, even in the absence of a bill of sale, the potential buyer could ask the computer holder for the name of his seller and then ask the seller about the nature of the transaction. Of course, if the computer holder cannot produce this evidence, the potential buyer can still protect itself by lowering the price he will offer or put a portion of the purchase price in escrow for whatever time the buyer deems sufficient to smoke out any competing claimant.

In other words, Baird and Jackson's snide comment does not go to the validity of Mooney's point that provenance can be, and often is, investigated. Indeed, such investigation is a standard part of the "due diligence" undertaken in large corporate mergers and acquisitions. Moreover, various forms of "hold-backs" and escrows are customarily used to protect buyers against undiscovered potential risks such as rival claimants. For example, fine arts is an industry that has developed elaborate systems for investigating and evidencing provenance.

The valid issue Baird and Jackson implicitly raise, however, is the pragmatic one of whether this is the better way of protecting the competing interests of buyers, sellers, and third party claimants. Lower prices and escrows will only be imposed by the buyer if the seller is "a careless guy" who does not keep his bills of sale. Economic theory, however, would indicate that, if careless sellers will receive a lower purchase price or have part of the purchase price escrowed, there will be a strong incentive to be careful and keep records of provenance. Nevertheless, there might be cheaper and/or less burdensome ways of achieving this purpose.
er than financier, of the collateral. It cannot, however, justify the nonperfection of other forms of noncustodial security interests. An investigation of the past chain of title of an object will not reveal the existence of a nonpurchase money hypothecation.

Note that although my Hegelian approach can explain the minimum logic for a property regime, it cannot answer the pragmatic question of whether we, as a society, judge this specific legal regime adequate. In my example, one might decide on an abstract logical basis that the unperfected interests of lessors are theoretically objective and, therefore, property. Nevertheless, society might pragmatically decide that investigation of provenance is too difficult, time consuming, and subject to fraud by dishonest debtors, who can forge fake receipts or collude with dishonest suppliers to be considered sufficiently objective to justify enforcement of all leases against all competing interests. In other words, leases that can be discovered through investigation of provenance might be minimally objective and possessory in a Hegelian sense, but they are not necessarily the most adequate or full form of possessory interests.

Moreover, if lease financing is a significant rival for secured financing in some industries, it might also make pragmatic sense to require the same form of objectification for all property interests. We might, therefore, pragmatically decide that, with respect to some industries, or some types of collateral, creditors should have to engage in only one form of search to discover all potentially rival interests. Why make creditors search both the secured financing records and investigate provenance if it would not impose significant hardship on lessors also to record their interests on a certificate of title? On my Zabar's principle, although it might be logical to locate bagels with other baked goods, smoked salmon with other appetizers, and cream cheese with other cheeses, customers hungry for a traditional New York brunch might prefer to be able to take one number to purchase bagels, smoked salmon, and cream cheese rather than having to wait in three lines on Sunday morning.

For example, we have decided to require perfection formalities for all property interests—ownership, leasehold, and security interests, custodial as well as noncustodial—in aircraft and airplane engines and equipment, which are frequently financed
by sale-leasebacks and secured credit. Similarly, although the UCC does not require that leases in automobiles be perfected as a condition of enforceability against creditors, both the interests in lessors (as owners) and secured parties (as lienholders) must be noted on automobile certificates of title under many state certificate of title statutes. In other industries, however, we may decide that the expense imposed on the noncustodial party would not justify the investigative cost savings to third parties.

Of course, these pragmatic decisions depend on precisely the type of difficult to verify empirical questions that I have been seeking to avoid. But this is an inevitable characteristic of all pragmatic decisions. All we can do is develop a logical structure to help frame the type of pragmatic questions we need to ask, and to develop a theory of political legitimacy for the process by which the pragmatic decision will be reached. Traditionally, in our political system, such decisions are considered to be within the competency of the legislature. My criticism of Baird and Jackson is not so much that they raise a hypothesis that requires empirical investigation but that they assume the very empirical data on which a demonstration of their hypothesis depends.

4. Perfection: Filing and Control

Another example of using pragmatic reasoning to require more than minimum objectification to accomplish a more adequate form of possession is the proposed priority regime for security interests in investment securities contained in revised Articles 8 and 9. Revised Articles 8 and 9 permit a variety of liberalized perfection alternatives for security interests in investment securities. If the debtor is a broker-dealer, perfection can be automatic. Filing is permitted in the case of other types of

204. See, e.g., UNIF. MOTOR VEHICLE CERTIFICATE OF TITLE AND ANTI-THEFT ACT §§ 20-22 (1955).
205. See supra note 145 and accompanying text.
debtors. Both of these are examples of a minimum form of Hegelian possession through positive law—intersubjectively recognizable identification of object to subject.

In the case of automatic perfection, objectification consists of the general knowledge of the lending industry that securities held by broker-dealers are customarily subject to multiple competing noncustodial property claims. Note, however, that the intersubjective knowledge that is objectively known by the lenders goes only to the existence of competing interests generally, rather than to any specific property interests of any identified party. Consequently, revised Articles 8 and 9 only make these interests generally, but not specifically, enforceable. All security parties who rely only on automatic perfection and do not take one of the other objectifying acts permitted by the statute therefore share pro rata.206

Perhaps more interestingly, the revisions further provide that secured parties who take control of investment securities have priority over security interests perfected by alternate means (such as automatic perfection).207 “Control” is defined as a variety of devices that give the secured party power to dispose of the property without the further cooperation of the debtor.208 As we have seen, although physical custody can be a form of Hegelian possession, it is not the archetype of possession.209 Similarly, although actual physical custody of a securities certificate can be an element of control, it is not the archetypical form of control. Indeed, when a certificate is registered in the name of a specific person, mere physical custody does not even constitute control unless it is accompanied by the appropriate indorsements.

It is also significant that the forms of control defined by the revisions are all intersubjectively recognizable. For example, one form of investment property governed by the revisions is a new property interest known as a security entitlement.210 For the

207. Id. § 9-115(5)(a). A “controlling” secured party who is not the debtor’s securities intermediary, however, will be subordinate to the securities intermediary who is always deemed to have “control.”
208. Id. § 9-115(1)(e).
209. See supra note 188 and accompanying text.
210. “Security entitlement” means the rights and property interest of an entitle-
purposes of this Article, it is sufficient to say that this security entitlement is the property right that an investor has when she owns her securities indirectly through her broker or other financial intermediary, the normal form of securities holding in this country. If control by a secured party is thought of only as the power to dispose of the collateral without the further act of the debtor,\textsuperscript{211} then, theoretically, a debtor could give a secured party control by signing an irrevocable power of attorney to give instructions to the broker or other financial intermediary.\textsuperscript{212} Such an arrangement, however, could be kept entirely private between the debtor and the secured party until such time as the secured party chose to use its power. Consequently, such private arrangements do not fall within the defined term "control" for the purposes of the revisions. In order for a secured party to obtain control over a securities entitlement, the financial intermediary with whom the securities entitlement is maintained must agree to obey such instructions.\textsuperscript{213} In other words, at least one third party must know of the arrangement and be able to answer questions asked by other third parties.\textsuperscript{214}

The drafters, in effect, made a pragmatic judgment that security interests perfected by control are more public and unambig-

\textsuperscript{211} Obtaining 'control' means that the purchaser has taken whatever steps are necessary, given the manner in which the securities are held, to place itself in a position where it can have the securities sold, without further action by the owner." Id. § 8-106 cmt. 1.

\textsuperscript{212} Id. § 8-106; Schroeder, \textit{Is Article 8 Finally Ready This Time?}, supra note 4, at 393-95.

\textsuperscript{213} U.C.C. § 8-106(c).

\textsuperscript{214} Id. § 8-106(g). The system is not perfect. Under the revisions, the financial intermediary has no statutory duty to respond to the inquiries of others, although it does have to obey instructions from its customers. Once again, this is a purely pragmatic decision to protect financial intermediaries from being forced to act like a county clerk and be subject to liabilities to third parties. Nevertheless, when securities are held indirectly in the form of securities entitlement, creditors are at least on notice of the financial intermediary and can make inquiry of the financial intermediary. If a financial intermediary refuses to respond to such a third-party response and the debtor refuses to instruct the financial intermediary to respond, the creditor should be suspicious.
uous than those perfected by automatic perfection and, therefore, should be given priority. Similarly, although filing, by virtue of its public nature, is given the status of perfection by positive law, it does not as adequately serve the possessory function of excluding others as does control; consequentially, secured parties who perfect by filing are subordinate to perfection by control. In other words, although security interests in investment securities may be minimally objectified through notoriety or filing, control prevails because it is a more adequate form of objectification.

5. Benedict v. Ratner Redux

A Hegelian analysis might also offer an aphysicalist reinterpretation and partial rehabilitation of some aspects of the apparently physicalist legal doctrines such as ostensible ownership and the Benedict v. Ratner rule. The traditionalist view, as expressed by Baird and Jackson, is that property rights are epitomized in the sensuous grasping of physical things.\textsuperscript{218} Property rights that are not so physically manifest are so misleading as to be presumptively void. Consequently, nonphysical property rights must be cured by being given fictive physicality so that they may be sensuously grasped through the physical metaphor.\textsuperscript{216} An apparent alternative analysis, offered by Mooney,\textsuperscript{217} suggests that the common law has not been traditionally obsessed with physicality per se but rather with fraud. In a number of notorious cases that smelled of actual but unproven fraud, the courts identified certain recurring fact patterns that seemed particularly susceptible to fraudulent manipulation.\textsuperscript{218} Consequently, heightened judicial scrutiny is generally not appropriate to nonphysical property interests but may be specifically appropriate to hypothecations and nonrecourse, non-notification assignments. Although Mooney’s conclusion is much narrower than Baird and Jackson’s, it shares the view

\begin{flushleft}
\textsuperscript{215} See \textit{supra} note 54 and accompanying text. \\
\textsuperscript{216} See \textit{supra} notes 61-67 and accompanying text. \\
\textsuperscript{217} See \textit{supra} notes 47-50 and accompanying text. \\
\textsuperscript{218} See 1 GILMORE, \textit{supra} note 67, §§ 2.1-.5 (discussing cases).
\end{flushleft}
that it is the aphysicalist element of hypothecations and certain assignments that is problematic.

An alternate Hegelian analysis would ask: what does it mean to say that a hypothecation or assignment has created a property interest in the underlying collateral in favor of the secured party/assignee? Under contemporary commercial law theory, substance is supposed to control over form. Courts are not supposed to look solely to the parties’ self-serving characterization of their legal relationship.

Contemporary case law applying the form over substance standard in the characterization of security interests tends to arise when the parties try to avoid Article 9’s perfection requirements and limitations on remedies or attempt to achieve favorable tax or accounting treatment by giving a transaction, which is in substance a security interest, the name and form of another type of transaction, such as a lease, a consignment, or a repo. These are all cases in which it is fairly clear that one party has some form of property interest in the underlying object but in which disagreement exists as to what type of property interest.

But there are other cases where the parties may wish to characterize their transaction as an assignment of some other form of security interest. This tends to arise when there is a question as to whether any property interest has been created at all. On the one hand, contract claims are always inchoate property claims in that the claimant can obtain a lien on the debtor’s property once the claim is reduced to judgment. On the other hand, present property claimants are treated more favorably than contract claimants when there is scarcity, such as when the debtor goes bankrupt before the contract claimant has obtained a judgment lien. Stated crudely, property remedies tend

219. See, e.g., U.C.C. § 9-102(1) (1977) (stating that Article 9 “applies . . . to any transaction (regardless of its form)”; see also id. §§ 2-401(1), 9-202 (stating that title to secured transactions may pass from the seller to the buyer in any manner agreed on by the parties and regardless of whether title to collateral is in the secured party or in the debtor).

220. See Mooney, supra note 26, at 690 & n.24 (stating that, in recent years, many reported decisions and commentators have grappled with the lease-security interest dichotomy).
to include the equitable right to the underlying asset and a high priority claim to payment of its full value, whereas contract remedies tend to be limited to money damages payable pro rata among all the other general creditors. A debtor who both wishes to maintain unrestricted control over her assets and to prefer certain favored creditors or friends or to hurt certain unfavored creditors, has an incentive to disguise general credit arrangements and future gifts as present transfers of property.

This, of course, characterizes one form of the classic fraudulent conveyance or transfer as described by the Uniform Fraudulent Conveyance Act,\textsuperscript{221} the Uniform Fraudulent Transfer Act,\textsuperscript{222} and section 548 of the Bankruptcy Code.\textsuperscript{223} There is reason to think that this also describes the situation of the landmark ostensible ownership cases of \textit{Clow v. Woods}\textsuperscript{224} and \textit{Benedict v. Ratner}.\textsuperscript{225}

\begin{footnotesize}
\begin{enumerate}
\item 5 Serg. & Rawle 275 (Pa. 1819).
\item 268 U.S. 353 (1925). In \textit{Clow}, the debtor purported to hypothecate most of his assets to two accommodation parties the day before the issuance of a judgment against the debtor in favor of his ex-partner. \textit{Clow}, 5 Serg. & Rawle at 275. The debtor still had physical custody of the property a year later when the sheriff tried to execute the ex-partner's judgment. \textit{Id.} Although the Supreme Court did not find actual fraud in \textit{Benedict}, 268 U.S. at 364-65, the facts raise suspicions. The corporate debtor purported to assign all of its accounts receivable to the father of the corporate president four months and three days prior to the debtor's bankruptcy, at a time when the preference period was four months. \textit{Id.} at 357. The Court in \textit{Benedict} considered the date of the assignment agreement to be the relevant date for determining whether a preference was given with respect to both existing and after-acquired accounts. \textit{See id.} at 359-60. Under current law, a transfer cannot occur until a debtor acquires rights in property. 11 U.S.C. § 547(e)(3) (1988); U.C.C. § 9-203(1)(c) (1994). Consequently, each account would be deemed a transfer for preference purposes at the time it arose. Pursuant to Bankruptcy Code § 547(e)(3), a transfer of receivables within the preference period will nevertheless not be voided if the secured party does not improve its position during that period. The father-assignee in \textit{Benedict} did not notify the account debtors, collect, ask for an accounting, or attempt to assert any rights in the accounts until after the debtor went bankrupt. \textit{See id.} at 359-60. Nevertheless, as the Court of Appeals noted, the trial court found that "[t]here is nothing in this record to warrant even a suggestion of fraud." \textit{In re Hub Carpet Co.}, 282 F. 12, 14 (2d Cir. 1922), rev'd sub nom. \textit{Benedict v. Ratner}, 268 U.S. 353 (1925).

Baird and Jackson also raise the possibility that there might have been actual fraud in \textit{Benedict}. \textit{BAIRD & JACKSON, supra} note 29, at 56. They carefully point out,
The courts in those cases chose to describe the transactions as either presumptively or conclusively fraudulent against creditors because of their form. Alternatively, the courts could have asked whether the arrangements created property interests as a matter of substance. Contract is relatively subjective, and property is relatively objective, in that the former is primarily a two-party transaction, whereas the latter always concerns third parties because it is enforceable against "the world." Consequently, just because two parties to a contract self-servingly characterize the transaction as hypothecation, an assignment, or another form of property interest, it ain't necessarily so. It could just be a promise to prefer a creditor, to assign an asset in the future, or to grant a call option on the asset exercisable in the future. Because property rights affect third parties directly, the characterization should be objectively determinable by third parties.

This means that we need to define the essential elements of property in order to identify when a bona fide, enforceable transfer of a property interest has occurred. This, in turn, requires an identification of the minimum elements of a property interest. I have taken the Hegelian approach, which argues that there must be an element of possession, in addition to the elements of enjoyment and alienation, for a legal interest to be considered a full property. The Hegelian concept of possession involves the publicly recognizable identification of a specific object to a specific legal subject with some rights to control, and exclude others from, the object. Similarly, the liberal concern with personal autonomy supports a rule whereby a contract must be objectified as a condition of enforcement as property against noncontracting third parties. Only practical reasoning, not dialectic logic, can determine what can constitute possession (objectification) in any given fact situation.

however, that the facts are consistent with other interpretations. "On the other hand, when an enterprise is near collapse, sometimes the only people willing to lend it money (on any terms) are insiders." Id.

226. See supra notes 70-91, 225 and accompanying text.
227. See supra note 178 and accompanying text.
228. See supra notes 182, 189 and accompanying text.
229. See supra notes 174-76 and accompanying text.
What the court labeled "dominion" in Benedict v. Ratner might be reinterpreted as an attempt to identify what it means to have a property interest in an intangible—did the purported assignee have any publicly recognizable right to possess, enjoy, or alienate the accounts? Perhaps an effective assignment of the accounts had not been made because the father's (i.e., the assignee's) rights to the accounts were not possessory: they were totally subjective, in the sense of being private, and not objective, in the sense of being publicly recognizable. As there was no objectification, the creation of a property interest was never completed. As the arrangement was private, between two persons, and was not recognizable by third persons, any rights that the father had should be considered contractual in nature—an executory agreement to convey a property interest in the future. Under this reasoning, one does not need to invent theories of constructive fraud in order to refuse to enforce an inchoate transfer that was never consummated.

This interpretation is consistent with some of the language of Benedict v. Ratner. Although the Court held that failure of an assignment constituted fraud in law, it found that "[i]t does not raise a presumption of fraud. It imputes fraud conclusively because of the reservation of dominion inconsistent with the effective disposition of title and creation of a lien."230 Later, the Court characterized the precedent as pointing "out that a reservation of full control by the mortgagor might well prevent the effective creation of a lien in the mortgagee."231 The Court also spoke of "reserving dominion" as being "inconsistent with the effective disposition of title."232 This language is consistent with a Hegelian analysis. The opinion can be read to have identified "dominion" as one of the bare minimum elements of property. Failure of a secured party to take dominion would be inconsistent with the creation of a security interest by definition because a security interest is a property interest and dominion is a necessary element of property. The Court may have intuitively required dominion not merely to prevent fraud in the sense of

231. Id. at 364.
232. Id.
misplaced reliance, the concern of traditional perfection policy, but also to change the subjective contractual relationship between a debtor and secured party into an objective legal interest that would fall within the definition of property, the concern of my neo-Hegelian perfection analysis. That is, like Llewellyn, they were concerned with distinguishing a conveyance of property from the contract to convey the property.

The drafters of the UCC claim to have rejected the rule of Benedict v. Ratner. In my reinterpretation, this characterization is an overstatement. The drafters contradicted Benedict v. Ratner, in the sense that the Supreme Court voided non-notification assignment of accounts that are not sufficiently policed by the assignee. The UCC expressly provides that such assignments are valid and enforceable as Article 9 security interests. The UCC does not, however, reject the underlying concept that, to be an enforceable present property interest in accounts rather than a mere contract right to future assignment of accounts, the assignment must be possessory in the Hegelian sense (i.e., objectified). The UCC drafters merely created a new form of objectification—public filing. Article 9 provides that most assignments of accounts fall within the defined term "security interest" whether the assignment is an outright sale or only an assignment as security. Security interests are not enforceable against most third parties (i.e., are not legally recognizable as full property interests) unless they are perfected. The formality required for perfection of assignments of accounts is public filing. In other words, in order for there to be an en-

233. The Official Comment to § 9-205 states:

[T]his section provides that a security interest is not invalid or fraudulent by reason of liberty in the debtor to dispose of the collateral without being required to account for the proceeds or substitute new collateral. It repeals the rule of Benedict v. Ratner ... and other cases which held such arrangements void as a matter of law because the debtor was given unfettered dominion or control over the collateral.


234. Id. § 9-102(2).

235. Id. §§ 1-201(37), 9-102.

236. Id. § 9-301.

237. Such formality is required in addition to satisfaction of all of the elements of attachment. Id. §§ 9-203, 9-302.

238. Id. § 9-302. There is a de minimis exception that allows automatic perfection.
forceable property right created in accounts, the identification of the account to the assignee must be intersubjectively recognizable (i.e., possessory).

Most interestingly, the concept of control proposed in the 1994 revisions of Articles 8 and 9 bears a strong family resemblance to the Benedict rule's requirement of dominion. In Benedict, the problem was that the secured party/assignee allowed the debtor/assignor to retain absolute dominion over the collateral. Dominion over intangibles (in this case, accounts) was defined as the power to sell the collateral and to deal with the proceeds. Under revised Articles 8 and 9, a secured party obtains control over collateral by means of a number of statutorily prescribed methods by which the secured party obtains the power to sell the collateral without further cooperation from the debtor. That is, control can be seen as both dominion by the secured party and at least partial restraint on dominion by the debtor.

That is not to say that Benedict's dominion is identical to revised Articles 8 and 9's control. Rather, I am suggesting that the Court in Benedict may have implicitly and intuitively anticipated the revised UCC approach, albeit in a confused and imperfect way. The Benedict opinion, as we have seen, spoke in terms of fraud, whereas revised Articles 8 and 9 not only give substantive rules of law; they affirmatively reject investigations into the mental state of buyers in the indirect holding system.

239. See supra notes 85-87 and accompanying text.
240. See supra notes 207-10 and accompanying text.
241. One of the most striking changes in the revisions is the rejection of the traditional bona fide purchaser rule for securities held indirectly through brokers. Under the old Article 8, a buyer of securities took subject to the claims of prior owners unless the buyer could establish that she was a bona fide purchaser for value. The bona fide standard required a showing of lack of notice and good faith. U.C.C. § 8-302 (1977). This is the familiar pattern of all other Articles of the UCC, whereby the derivation rule applies unless an negotiability exception can be established. Schroeder, Is Article 8 Finally Ready This Time?, supra note 4, at 351-56.

In contradistinction, under revised Article 8, a buyer of securities in the indirect holding system will take free and clear of the interests of any prior claimant who held the securities indirectly through a broker unless the prior claimant can show, among other things, that the buyer actually colluded with the broker-dealer in violating the claimant's rights. U.C.C. § 8-502 (1994). In other words, there is no pretense that buyers rely on or are defrauded by the acts of the prior claimants who
over, *Benedict* is more absolutist than the revisions. On the one hand, some of the language in the *Benedict* decision can be read to suggest that the law would void any arrangement in which dominion was left with the debtor.\(^2\) Indeed, it contains dicta that it would do so even if the assignee had objectified his property interest through recordation.\(^3\) On the other hand, other language suggests that it might be permissible to allow the debtor to retain some dominion (the right to sell collateral) if sufficient dominion (the right to control and account for proceeds and to maintain a constant amount of collateral) is given to the secured party.\(^4\) Consequently, *Benedict v. Ratner* did not destroy non-notification financing but just resulted in strict policing requirements (decreasing the degree of dominion or control of the debtor and increasing the dominion or control of the secured party) that resulted in the professionalization of the lending industry.\(^5\)

Under the proposed revisions, both the debtor and the secured
gave custody of their securities to brokers—buyers take free not because they were fooled when they acted in good faith but because that is the rule of the market. Schroeder, *Is Article 8 Finally Ready This Time?*, *supra* note 4, at 351-56.

A weakened bona fide purchaser rule will continue to apply to securities held directly by investors, although it will be watered down to a “protected purchaser” standard that eliminates the good faith requirement of existing law. U.C.C. § 8-303 (1994).

\(^2\) For example, the rule “rests not upon seeming ownership because of possession retained, but upon a lack of ownership because of dominion reserved.” *Benedict v. Ratner*, 268 U.S. 353, 363 (1925).

\(^3\) See supra note 88 and accompanying text.

\(^4\) As the Court stated:

> There must also be the same distinction as to degrees of dominion. Thus, although an agreement that the assignor of accounts shall collect them and pay the proceeds to the assignee will not invalidate the assignment which it accompanies, the assignment must be deemed fraudulent in law if it is agreed that the assignor may use the proceeds as he sees fit. *Benedict*, 268 U.S. at 364 (footnote omitted).

\(^5\) In other words, the required policing techniques may have been impracticable for amateur lenders—such as the father-assignee in *Benedict*. A specialized section of the lending industry, however, was able to set up enforceable non-notification financing facilities. As is well-known, Grant Gilmore (one of the primary drafters of original Article 9) later in life had second thoughts about the UCC’s rejection of the *Benedict* rule because it made it too easy for secured parties to tie up all of a debtor’s assets. Grant Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 GA. L. REV. 605, 621-27 (1981).
party can have control over the same assets if, for example, the securities intermediary holding the assets agrees to obey sell instructions from either the debtor or the secured party.\textsuperscript{246} Moreover, the proposed revisions recognize that objectification is a relative concept. Even if we decide dominion in the secured party is a more adequate mode of objectifying a security interest, it is not the only way. We can, therefore, allow for other forms of objectification—such as through filing or, in the case of automatic perfection, notoriety of industry practices. In this view, the question of relative adequacy is relevant not to enforceability against all third parties generally (i.e., perfection) but as to enforceability among a specific class of rival secured parties (i.e., priority).

To put this another way, the three Hegelian elements of property are distinct as a theoretical matter, but not mutually exclusive as an empirical one. This is particularly evident in the case of intangible rights to payment. Possession (in the sense of an objectively recognizable claim to ownership and exclusion) threatens to merge with enjoyment (in the sense of the right of collection), and enjoyment (in the sense of realization of value through collection) threatens to merge with alienation (in the sense of realization of value through sale to another).\textsuperscript{247} The Court in \textit{Benedict v. Ratner}, in effect, made possession (objectification) of accounts equivalent to alienation (the right to sell) and enjoyment (the right to deal with the proceeds). It is a truism that the most complete objectification of property would include complete and exclusive rights of possession, enjoyment, and alienation because this is the definition of the most complete form of property—ownership. Insofar as our legal system recognizes lesser property interests, such as security interests, however, it must also recognize lesser ways of objectifying possession.

In other words, even as the UCC rejected the specific holding of \textit{Benedict v. Ratner}, Article 9 also arguably adopted its incho-

\textsuperscript{246} U.C.C. § 8-106 (1994).
\textsuperscript{247} Theoretically, collection and sale of an account should be economically equivalent because the purchase price is based on the discounted present value of the expected payments under the account.
ate general principle—security interests should not be enforceable against third parties (i.e., be recognized as property) unless they are made objectively recognizable by third parties, and the 1994 revisions adopt a variation of dominion as the most adequate mode of objectifying the relationship by giving the secured party the power to deal in the collateral.

IV. CONCLUSION

The doctrine of ostensible ownership cannot be used to justify the continuation of a perfection regime. It is based not on observations of actual commercial practice but on unverified and unrealistic presumptions as to creditor behavior and empty accusations of actual or constructive fraud. Most significantly, it incorporates implicitly the physical metaphor that visualizes the archetypical form of property as the sensuous grasp of a tangible. This hopelessly conflates a human, legal, and Symbolic relationship of legal subjects with respect to the possession, enjoyment, and alienation of external objects with the animalistic, prelegal, and Real fact of a subject's physical contact with an object. Whether this metaphor served as a crude, but useful, tool for analyzing property relationships in a premodern agrarian economy, or even a modern commercial economy in which, arguably, most valuable forms of personal property in fact consisted of tangibles, it is wholly inept for a postmodern information economy. The use of the physical metaphor as a basis for the law of intangibles has already proven to be unworkable in the case of investment securities.

In order to analyze modern property relations, we need to consider the functions and logic of property and reexamine the presumptions underlying traditional ostensible ownership doctrine. If we do so, we will see that neither sensuous grasp nor physical custody are, as previously thought, the normal or archetypical manifestations of property against which all other property interests must be compared. Rather, physical custody should be seen as only one concrete example, and not even the most adequate example, of the abstract, yet essential, element of an enforceable property interest traditionally known as "possession." Under a Hegelian property analysis, abstract possession is the objectification of a property claim, in the sense of making it
discoverable by the persons against whom it is to be enforced. The specific concrete ways in which abstract possession as objectification will be manifested cannot be derived by formal logic, but can be determined pragmatically through actual custom and positive law. Under this analysis, the provisions of the existing Article 9 of the UCC allowing for perfection by filing, and the provisions of revised Articles 8 and 9 permitting automatic perfection and perfection through control should be seen not as substitutes for the norm of possession through physical custody but as examples of possession as objectification. Only by analyzing perfection in terms of possession by objectification can we hope to escape the grasp of the physical metaphor and start to imagine new imagery appropriate to noncustodial property relations and property in intangibles.