WORKING DRAFT

BAILMENT
AND
THE PROPERTY/CONTRACT INTERFACE

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I. INTRODUCTION

Bailment is a puzzle. The first comprehensive treatise to be written on bailment doctrine described it as having “produced more contradictions and confusion, more diversity of opinion and inconsistency of argument, than any other part, perhaps, of juridical learning[.]”1 Authorities have oft and insistently characterized bailment as a species of “contract,”2 yet have also acknowledged that it imposes duties not based on any expressed meeting of the minds.3 Similarly, while bailors and bailees have a great deal of freedom to define the scope of the bailee’s duties and liability, commentators have been vexed by cases in which bailees’ liability seems to exceed anything they expressly agreed to shoulder.

The puzzle appears to arise largely because bailment straddles a key boundary line in private law doctrine—that between “contract” and “property.” Bailment looks like “property law” because it governs certain rights and obligations that people have with respect to an identified object of ownership. It looks like “contract law” because, broadly speaking, the parties choose whether to enter into the relationship and how to define the scope of the attendant duties.

On one commonly held view of the relationship between property and contract, this ought to be entirely unproblematic. Under this view,

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1 SIR WILLIAM JONES, AN ESSAY ON THE LAW OF BAILMENTS 2-3 (1813). Coming as it does from a man whose primary claim to fame was deciphering Sanskrit, this is not an assertion to be taken lightly.

2 Jones at 1 (describing “that contract, which lawyers call Bailment”); JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS 4 (1846) (defining bailment as “a delivery of a thing in trust…upon a contract, express or implied, to conform to the object of purpose of the trust.”); 8 C.J.S. Bailments §1 (“The term "bailment" in its ordinary legal sense signifies a contract resulting from delivery of a thing by the bailor to the bailee on condition that it be restored to the bailor in accordance with his or her directions as soon as the purpose for which it was bailed is satisfied.”).
property law merely defines baseline “entitlements,” which are then freely reallocated by means of “contract.” Owners begin with a certain “bundle of sticks,” and then they transfer those bundles (or particular sticks, or particular pieces of sticks) via contract to create new configurations of entitlements. On first blush, this sounds like a useful model of the world of property transactions. Upon attempting to apply it rigorously, important difficulties emerge. First is that, unless we are talking about plenary transfers of ownership (like the conveyance of a fee simple), the “sticks” metaphor breaks down as soon as you begin to analyze what the “stick” actually stands for. When A grants an easement over Blackacre to B, what A gives up and what B gets can’t be described analytically as the same set of Hohfeldian jural relations.

Then there’s ambiguity as to what it means to “reallocate entitlements by means of contract.” This is reflected in the way we divide up doctrinal topics among first year courses. Gifts are covered (if at all) as part of property law, while sales transactions are covered as part of contract law, lumped in with the broader category of enforceable bilateral executory promises. The implication is that while the validity of a gratuitous transfer of ownership may governed by “property law,” sales are purely a matter of “contract law.” This obscures the distinction between a sales contract, composed of reciprocal promises to sell and to buy, and a transfer of title through which the seller’s end of that contract is fulfilled. The latter is not merely a matter of contract: contract law may be satisfied that a seller’s obligation to transfer title is now perfected and owing, and yet there may be no effective transfer of title unless and until the seller performs acts prescribed by property law. If he does not, the disappointed buyer’s action is for breach, not conversion. Reallocations of property entitlements then—even those occurring as the fulfillment of contractual obligations—do not really take place “by means of contract.” Unless, that is, we are now using a concept of “contract” much broader than the one usually taught to 1Ls.

In their article The Property/Contract Interface, Thomas Merrill and Henry Smith provide a useful way of approaching the problem. In this article I build on their work, seeking to qualify and extend their model of property and contract by way of friendly amendment. The result, I believe, is a picture of bailment doctrine that resolves a number of problems prior laborers in this field have found vexing.

A. The Property/Contract Interface

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In their article (building both on Wesley Hohfeld and on Smith’s earlier work), Merrill and Smith provide a framework for thinking about the role of information costs in imposing mandatory features on certain types of private transactions. Their analysis focuses on rights, and divides them into different “modalities,” depending on two characteristics of the respective sets of rightsholders and dutyholders whose relations are to be governed by a given right. The two characteristics are the relative number of persons in the group and the extent to which their identities are knowable. Though each of these characteristics varies along a continuous spectrum, to simplify the analysis and exposition we describe each of them in binary terms: the group is either “small” or “large”, and its members are either “definite” or “indefinite.” This yields four possible types of groups and rights: small and definite (“paucital”), large and definite (“compound-paucital”), small and indefinite (“quasi-multital”), and large and indefinite (“multital”).

When the groups of rightsholders and dutyholders are paucital (as in a one-on-one, face-to-face transaction), it is feasible for them to acquire specific information about ends and risks and to tailor rights accordingly. Such rights are “in personam”—they “attach directly to specific persons.” By this we mean that both the right and the correlative duty are defined in terms of an identified person. For example, in a contract, obligee A has a right specifically against obligor B, whose duty is defined as a performance owed specifically to A. When the groups are multital, no such specificity is possible, and the rights governing their relations are “in rem”—they attach to persons, but only “through their relationship to particular things.” Thus, when I encounter your car in a public parking lot, I do not need to know who you are in order to have (and understand) a duty with respect to it. My duty is simply not to interfere with the car, and from my perspective it is owed “to the owner of the car, whoever that may be.” Similarly your right to have your car left alone is not addressed to me specifically, but to “whoever might encounter my car.”

A key feature of the analysis is that the amount of flexibility accorded to transacting parties in choosing the form and content of rights varies as we move from in personam to in rem relations. When rights are in personam, we tend to leave the affected parties fairly free to design and define them as they wish. At this end of the spectrum—what we might call the “contract” end—the rights created govern relations between persons who are able to make informed decisions about them, and therefore creation of these rights is constrained only by certain default rules that seek to conserve on information costs and ensure meaningful consent. When it comes to rights that are to govern in rem on the other hand (the “property”

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6 Property/Contract Interface at 787.
7 Id. at 783.
end of the spectrum), we use formalistic rules to define objects of entitlement in easily ascertained ways and to protect them by imposing negative duties of abstention that are uniform and easy to understand. In addition, we treat these rules as immutable, meaning that they are not subject to modification by contract.

Between the two ends of the spectrum is a middle ground, in which increasing numerosity and indefiniteness begin to give rise to problems of incomplete information, leading to greater structural constraint on the ways in which parties define rights. Merrill and Smith identify two strategies that are introduced in this realm. One is the “notice strategy,” which seeks to force the disclosure of information that could be cost-effectively produced by a party lacking incentive to do so. Where, for example, there is a possibility that one party will transfer an asset (deliberately or inadvertently) to an unknown party, the law will force disclosure of this intention/risk to the non-transfering party. The other strategy is “protection,” in which some aspect of the relationship is standardized because it is not cost-effective to produce the missing information. This may be done, for example, to prevent a single repeat player from taking advantage of numerous individuals on the other side of a transaction about which it has superior information.

B. The Problem With The Interface

As I noted above, Merrill and Smith tell us that: “[T]he substantive rights and duties associated with in rem rights will typically be immutable, meaning that they are not subject to revision by agreement.” As stated, this assertion needs important qualifications if it is not to become extremely perplexing. Isn’t the whole point of in personam transactions precisely to revise the substantive rights and duties associated with in rem norms? When I invite you to enter my land, am I not revising the substantive duty associated with my in rem right (i.e., “keep out”) to one that now says instead only “leave if he asks you to”?

Here we encounter what I will suggest is a shortcoming of Merrill & Smith’s account, one that I attempt to rectify herein by way of friendly

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8 For lengthy discussion of this aspect of in rem rights, see Christopher M. Newman, Transformation in Property and Copyright, 56 Villanova Law Review 251 (2011).
9 As for example in the rule requiring a landlord to provide notice in the lease if he wants to make it terminable upon sale of the premises. (This is the “quasi-multital” scenario.)
10 Here an example is the non-waivable implied warranty of habitability in landlord-tenant law. (This is the “compound-paucital” scenario.)
11 Property/Contract Interface at 802.
amendment. The framework of *The Property/Contract Interface*, though built on a Hohfeldian foundation, ignores all jural relations except right-duty.\(^\text{12}\) We are thus left with a transactional picture of the world in which it appears that duties can only be piled atop duties. You start with a duty to exclude yourself from my land, and when I invite you in…what? It would appear that upon entering you are still a trespasser, because your *in rem* duty to exclude yourself is after all “immutable.” My invitation, then, can function only as an assumption of *in personam* duty not to sue you for your trespass.\(^\text{13}\) And if I wish to place restrictions on the specific activities that you undertake while on my land, each of those would have to be an additional *in personam* duty imposed on you, entirely unrelated to the *in rem* duty to exclude yourself entirely (which you are continually violating). Each of these use restrictions, moreover, appears to fall necessarily into the category of “contract,” which raises the question whether I need your consent to make them binding on you. This analysis, in short, fails to integrate the crucial transactional concept of license.\(^\text{14}\)

Integrating license into the analysis raises complexities that require additional elaboration of the theory. In particular, I draw a distinction between transactions (discrete interactions) and relations (ongoing interactions) that may be characterized as either *in rem* or *in personam* (depending on the nature of the information the parties have about each other at the time), and jural relations (rights, duties, privileges) that can be characterized in these ways, based on whether they arise via personal interaction or are grounded in baseline property norms. The distinction matters, because *in rem* norms do not cease to become relevant and applicable the moment we enter into *in personam* transactions. Rather, they continue by default to govern every aspect of the interaction not specifically altered by contract or license.

As a test case to show how my revised version of the framework has greater explanatory power than the original, I will discuss the law of bailment, a topic that also surfaces as an example at various points in Merrill and Smith’s article. It is not surprising that bailment problems should be prominent in this context, because the doctrine of bailment lies at

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\(^\text{12}\) By my count, the term “right” occurs in the article 644 times, while the word “privilege” appears only 7. The term “license” appears 11 times, mostly in footnotes.


\(^\text{14}\) I do not, of course, mean to suggest that Merrill and Smith were actually somehow unaware of the function of license, see, e.g., *Property/Contract Interface* at 795 & n.77 (discussing a hypothetical in personam grant of license), only that the overall exposition of the theory on the face of the article omits any explanation as to how license privileges fit in.
ground zero of the property/contract interface. Bailments are at once *in rem*, in that they create relationships that attach to the parties only through a piece of property, and *in personam*, in that they seem to involve some form of actual or constructive agreement, often between identified persons. Merrill and Smith also locate aspects of bailment law within each of the intermediate categories as well: “compound-paucital” when a commercial bailee (like a coat check or valet) deals with numerous bailors, and “quasi-multital” to the extent that there is risk of misdelivery of the bailed item.\footnote{This last seems strange, because modalities of rights are supposed to correspond to the characteristics of the groups of rightholders and dutyholders. The people in a “quasi-multital” relationship are the bailor and the unknown misdeliverer, not the bailor and the bailee. Yet it is the bailor’s right against the bailee that is being modified in response to the situation.}

I will argue that bailment theory has long been confused by the ill-fitting characterization of bailment as a form of contract. What we call a “contract of bailment,” I suggest, is not really a contract in the usual sense of that term. It is an *in personam* transaction, but one whose primary function is not to impose new duties of the parties’ choosing, but rather to modify (through license) the content of the bailee’s preexisting *in rem* duties with respect to the bailor’s property. Unlike the contract theory of bailment, my approach provides a consistent explanation of both constructive and actual bailments, and clarifies other aspects of bailment doctrine that commentators have found anomalous, such as the nonwaivable strict liability applied in cases of so-called “contract deviation.” This article thus attempts both to contribute to the overall structural analysis of private law, and thereby to help clarify the theory and doctrine of bailment.

The article will proceed as follows:

Part II sketches a general account of the nature and informational structure of private law, and in particular of the role played therein by *in rem* norms. I suggest that we regard property norms as being arrayed in a form of modular protocol, so that dutyholders can minimize the amount of information they need to process in order to comply with their duties in a given context. To merely avoid violating the rights of others, you need not have specific information about their identities or preferences. If you wish to make use of encountered resources however, you take on higher burdens of processing information to determine how you may do so without violating rights. Such information is gained through *in personam* transactions, but this does not mean that the result is to substitute *in personam* norms for *in rem* norms. Rather, the baseline *in rem* norms (and the strict liability through which they are enforced) continue to govern, except to the extent that licenses have altered their content. Parties may also choose to bind themselves *in personam* to perform duties not imposed...
Part III applies this framework to bailment, attempting to provide a clear account of the ways in which the *in rem*/*in personam* distinction plays out in creating various types of bailment relationships. In Part III.A, I argue that the paradigmatic case of bailment is actually the so-called “constructive bailment,” in which the bailee assumes possession of property in the owner’s absence. While the duties of a constructive bailee make little sense under a contract framework (given the entire absence of *in personam* transaction), they can be understood as a simple application of the general *in rem* norm of non-interference with property interests as applied to someone who has a valid reason for taking possession. I argue that the bailee’s duties to preserve and return the bailed item can be understood as contextual implications of the general negative duty. I then discuss the origins of the notion that a bailment is a contract, arguing that this is true only in the limited sense that it is a form of assumpsit.

Part III.B. turns to bailments that involve *in personam* transactions, also called actual bailments. I argue that even here, the primary duties of the bailee are *in rem* and follow simply from the fact that he assumes possession of the bailor’s property. The only necessary element of what we call a “contract of bailment” is mutual understanding that the transfer of possession does not signify a transfer of ownership. This will necessarily involve some understanding as to the purpose for which the transfer is being made, and this will in turn give rise to an implied license permitting the bailee to take actions necessary to that purpose. Actions beyond that license remain acts of conversion. They do not violate any duty created by the bailment transaction, but rather constitute actions as to which the bailee’s position is no different from someone with no right to possession at all. While the core of the bailment relationship is not contractual, the parties may add contractual elements to it by agreeing to assume *in personam* duties of their choosing. The bailor may also grant licenses that alter the baseline duties of care and compensation imposed by *in rem* norms. This section also contains a brief detour into the controversy over software licenses, viewing it as a case study in the question as to what verification rules should be required to distinguish deliveries that transfer ownership from those that do not.

Part III.C. addresses the problem of so-called “contract deviation” that bothered R.H. Helmholz as well as Merrill and Smith. I argue that the framework provided here renders this area of the doctrine much more straightforward than prior discussions have made it sound. The key is to realize that even though courts describe themselves as looking for a “material breach of the bailment contract,” what they are really doing is construing the outer bounds of the bailee’s implied license, to determine
whether the bailee stepped beyond them. If he did, his action constitutes conversion for which he is strictly liable, regardless of whether he was acting in good faith or ever contracted to refrain from the action in question.

Part IV.D. discusses the related issue as to why the strict liability in these situations is not waivable, pointing out that an \textit{ex ante} waiver of liability for unspecified acts of conversion would simply contradict the bailor’s continued status as owner of the item. The bailor can always waive strict liability for \textit{specified} acts of conversion \textit{ex ante}—that’s precisely what we call granting a license—but actions outside the scope of the bailee’s license constitute conversion and are by logical necessity outside the scope of any contract terms limiting liability.

\section*{II. TOWARDS A THEORY OF PRIVATE ORDERING\textsuperscript{16}}

Private law seeks to regulate human interaction in such a way that society becomes a positive rather than negative sum game. This result depends upon people’s ability and mutual willingness to refrain from certain actions that injure others. These foregone actions impose opportunity costs that must be justified from the perspective of each individual expected to bear them. If I believe that the cost of restraining my own behavior exceeds the value of the freedom of action I enjoy as a result of others doing the same, I will be less likely to do so. The cost of restraining my own behavior includes both the opportunity cost of the specific actions foregone and whatever effort I must expend in order to identify those actions as ones that I am obliged to forego.

The fundamental task of private law is therefore twofold. It must identify duties of restraint such that the costs of compliance borne by each individual are exceeded by the benefits gained through the universal compliance of others. And it must define and communicate those duties in such a way that the costs of recognizing them do not tip the balance against compliance. This means that any baseline duties with which we are expected to comply as routine default rules will have to be defined in fairly clear categorical terms that can be applied with fairly low levels of information. When our interest in a specific interaction becomes greater than that of mere compliance with baseline duties (i.e. mere avoidance of injury to others), it may become both necessary and cost-justified to move beyond the broad categorical definition of the duty and engage with underlying finer-grained rules that are more attuned to the nuances of the specific case and therefore more costly to apply.

\textsuperscript{16} [As should be clear from the foregoing, this section is my attempt to reframe and flesh out somewhat an approach to thinking about private law that draws extensively on numerous works of both Merrill & Smith and solo Smith. The final version will contain extensive citations to those works; the present draft does not.]
Because we are physical beings, many categories of actions likely to injure us involve interaction with specific objects in which we have an interest. For example, every individual has an intense and unquestionably legitimate interest in his or her own body, and the most basic, least controversial norms of private law are those prohibiting interference with the body of another. Norms having this form are property norms. Property norms seek to protect an individual’s interest in exercising control over a thing, by means of a categorical duty imposed on all others to refrain from actions interfering with that thing. As we move from claims to control over our own bodies to claims over external objects, the justification for, and proper scope of, the interest in exclusive control becomes more complex. Nevertheless, most of the baseline duties we recognize to be binding take the form of property norms, in that they define a category of forbidden actions in relation to their effects on a defined category of object in which others are deemed to have a protected interest. The object may be physical (like a car) or abstract (like a reputation). Property norms are regarded as binding on everyone, without the need for any consent to be so bound. Taking an action forbidden by property norms subjects one to strict liability for any injury caused, and to compulsion if needed to reinstate the owner’s exclusive control over the object interfered with.

Note that property norms are not the only baseline norms that mediate relations between multital parties. A primary example is the general duty to refrain from harming others through negligence. This duty governs relations every bit as multital as those governed by property norms, because I often do not know who may be harmed by my negligence, or by whose negligence I may be harmed. It therefore raises the same problem of information costs to which Merrill and Smith attribute the structure of property law, but addresses this problem differently. The duty of care imposed by negligence doctrine is one whose content cannot be defined by reference to specific objects. Instead, the informational burden to multital dutyholders is managed by use of a contextual rule of reason that varies with a dutyholder’s expected level of information and expertise concerning the likely consequences to others of his action or inaction, and with the extent to which he has placed himself in the position of being a likely causal agent of harm to others.

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17 As evidenced by the miniscule amount of time spent in most tort law courses (other than bar exam prep courses) on assault and battery.
18 See Merrill & Smith, The Morality of Property, 48 Wm. & Mary L. Rev. 1849, 1851 (2007) (suggesting that “[h]uman rights, including rights of bodily security and integrity” have more in common with “property rights” than is commonly supposed). I would go further. They are property rights.
A. The Property Protocol

All of the above is stated at a high degree of abstraction. Operationalizing it is no simple task. Even the so-called “broad categorical” duties imposed by property norms require significant acculturation and mental effort to process. To the extent that I wish to avoid violating the property rights of others, each time I encounter a thing in my daily life (which is quite often) I am faced with a protocol that might be spelled out in something like the following terms:

1. You have encountered a thing. Do you have any need/desire to interact with it? (Would avoiding interaction cost you anything?)
   a. If no, then just avoid interacting with it and you will not violate any rights.
   b. If yes, goto 2.

2. Does anyone own the thing?
   a. If no, then you are free to do what you like with it, including appropriating ownership for yourself.
   b. If yes, goto 3.

3. Are you the owner?
   a. If yes, then you are free to do what you like with it.
   b. If no, goto 4.

4. Is your desired interaction with the thing a possessory use?
   a. If no, then you are free to engage in the desired interaction.
   b. If yes, either forego the interaction or goto 5.

5. Has the owner given any express or implied permission generally permitting people to interact with the thing in the way you wish to?\(^{19}\)
   a. If yes, then you are free to interact with the thing in that way, unless and until the owner or its agent tells you to stop.
   b. If no, either forego the interaction or goto 6.

6. Has the owner given you personally any express or implied permission to interact with the thing in the way you wish to?
   a. If yes, then you are free to interact with the thing in that way, unless and until the owner or its agent tells you to stop.
   b. If no, either forego the interaction or goto 7.

\(^{19}\) I list this before Step 7 because there are times when it is possible to answer it even without knowing the identity of the owner, as for example in the case of a store that is clearly held open to the public.
7. Can you identify and communicate with the owner without losing the opportunity to engage in the desired interaction?
   a. If yes, goto 8.
   b. If no, then you must refrain from the interaction unless it is a matter of necessity.

8. Have you already communicated with the owner to seek permission?
   a. If no, you should do so and then goto 6.
   b. If yes, then you must refrain from the desired interaction.

Thankfully, most of us most of the time have no need to consciously process every one of these steps for each thing we encounter in our daily lives. By the time we reach adulthood, assuming we have been socialized to respect property rights, the answers to the dispositive questions are frequently obvious and intuitive for most things we encounter. Depending on the thing, the context, and the information presented to us, one or another of the steps in the protocol may either become salient, requiring conscious consideration, or else drop out of view entirely. Any of the steps I have listed could be expanded into longer decision trees that might be needed to answer the questions posed or complete the tasks prescribed, in contexts that bring to the fore ambiguities glossed over (or caveats omitted) in my simple descriptions.

Any time one of the steps requires effort to process, it imposes costs on me. If I am scrupulous about respecting property rights, then any time the cost of processing the next step is greater than the cost of foregoing use, I will simply forego use. If I am somewhat less scrupulous, I may decide that (for example) even though the answer to question 4 is yes, the likely actual harm to the owner from my desired activity is too small to justify processing the next step of the protocol or foregoing the use. Shortcuts of this nature are commonplace and generally accepted so long as the resulting exceptions are reciprocal and de minimis; but they can sometimes shade into mere rationalizations for refusal to comply with property claims.

B. In rem relations and in rem duties

We can describe the entire protocol as the modular specification of a single unitary in rem duty to respect property rights. Each step represents the content of that duty in a particular informational context. Steps 1-4

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20 A process which is not automatic or costless, as anyone who has raised children can attest.

21 To give just one example, Step 2 necessarily includes the question “Is this the sort of thing that can be owned?”

22 Epstein on “live and let live” rule.
have several features in common: None of them requires the would-be user of a thing to have any specific knowledge about either the identity of any other person or any specific preferences that another person might have as to use of the thing. To process these steps, one need only employ information that is accessible either from the appearance or immediate context of the thing itself, or from deduction based on cultural norms.

Consider Step 2. If the thing is a product of nature, I need only determine whether it (or the larger area in which I have encountered it) has been somehow marked off or developed so as to have been placed under some person’s control. If the thing is manmade, I can assume that it is owned unless there is some reason to think it has been abandoned. To answer these questions will require cultural knowledge concerning the requirements for reducing something to one’s control in a manner that others are obliged to recognize, or the circumstances indicating that this control has ceased to be operative. It will involve drawing inferences as to the existence of some other person who has intentions with respect to the thing, but only with regard to whether any such person intends to (and does in fact) exercise control over it. There is no need to know anything about the specific ends to which that control is directed, or the manner in which the thing is to be employed in service of those ends. Similarly, Step 4 requires identification of neither owners nor ends. We assume categorically that possessory uses of a thing interfere with the owner’s control of it, regardless of the fact that in many instances no actual conflict would arise between the use and the owner’s ends.23

Another characteristic of Steps 1-4 is that they require only very limited information about the specific properties of the thing. Step 1 calls for enough information about the thing to know whether I have any motivation to do more than ignore or avoid it. Steps 2 and 3 require investigation sufficient to perceive whatever superficial attributes of the thing might function as indicia of ownership. None of these steps, however, requires any information beyond this about the thing’s characteristics or the uses to which it can be put. Indeed, given the stricture against possessory use applied in Step 4, it is important that one be able as far as possible to process Steps 2 and 3 without exercising more than de minimis possession of the thing.

As a practical matter, many relations between people and things are

23 If the thing is land, we also prohibit actions that, though they do not involve possessory use, nevertheless interfere with an owner’s use and enjoyment. Here too however, we judge this not based on whether the actual owner’s actual subjective enjoyment is impaired, but on whether the activity in question alters the conditions of use in a manner that we regard as objectively and unreasonably harmful under the circumstances. See Newman, Patent Infringement As Nuisance.
governed purely on the basis of Steps 1-4, with the result that people either decide they are free to use things, or decide that they are not and forego use because they have no desire to process the subsequent steps. We can refer to the range of the protocol embodied in Steps 1-4 as governing purely in rem relations. Applied at this level of specification, in rem duties permit people to adjust their activities to each other so as to avoid conflict, without requiring any direct personal communication between them. This feature enables in rem duties to effectively govern relations between a single individual and a group of people whose members are numerous and whose identities are unknown to the individual. This is true whether the individual stands in the position of an owner or of a person encountering a thing he may wish to use. The owner wishes to be protected against interference in her use of the things she owns, and such interference could come from an indefinite set of other persons. The would-be user wishes to know whether his desired use will violate a property right, and such a right might be asserted by an indefinite set of other persons. In addition to governing relations between numerous and indefinite classes of people, they also govern relations between individuals and indefinite classes of things. While my need to comply with property rights will usually arise in connection with specific identified things, the content of my duties does not usually depend on any fine-grained categorization of various types of things or their possible or actual uses.

The informational advantages of in rem duties parallel (and, in fact, provide the underlying basis for) the informational advantages of a price system identified by Friedrich Hayek. A price system coordinates people’s selection of their own productive projects so as to result in allocation of resources to their highest valued ends, even though none of the individual actors has information about all the alternative ends for which any given resource can be used. Similarly, in rem duties permit people to arrange their activities so as not to interfere in the productive projects of others, even though they lack information as to what those projects actually consist of. Just as the price system compresses all relevant information into a single piece of quantitative information, the system of in rem duties compresses all relevant information into relatively simple binary qualitative determinations: Owned or unowned? Owned by me or someone else? Possessory use or not? Because most (ownable) things we encounter can be assumed to be owned by someone, and most uses that interest us are

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24 Property/Contract Interface at 788.
25 Id. (“[E]ach dutyholder also confronts a world containing a large and indefinite class of owned things.”)
27 The main exception is things (like air) that we do not recognize as being owned at all.
possessory in nature, most of property law as experienced day-to-day can be expressed in the phrase, “If it’s mine I can do whatever I want with it. If it’s yours I can’t.”

C. The interplay between in personam relations and in rem duties.

If you want to make possessory use of a thing owned by someone else, then you have to ask. If you do, you will be asking for one of two outcomes. One possibility (not reflected in the protocol described above) would be to have the current owner transfer ownership of the thing to you. In order for such a transfer to take place, it is necessary for you to identify and communicate with the owner, and for the owner to form and communicate a specific intent with respect to you as an identified individual and pertaining to an identified thing. In other words, you will have to enter into a transaction carried out in personam. If all of this occurs however, you will become the thing’s new owner, and all your future interactions with it (and with the previous owner) will revert to being governed exclusively by the same in rem relations as before—it’s just that now your answer to Step 3 will be different. Plenary transfer of ownership is therefore only a transitory detour from the sphere of in rem relations into personal ones.

The other possibility is that you will not seek a plenary transfer of ownership to the thing, but only the authorization to engage in specific uses. Like the transfer of ownership, this will require that you and the owner identify each other and the thing, and form and communicate a specific intent with regard to future relations between the three. Unlike the transfer of ownership, this transaction will also require you to identify specific ways in which the thing can be used, and to delineate the authorized ones in ways that will let both you and third parties distinguish them from others. Most importantly, the end result of this transaction will not be simply to place you back in the sphere of purely in rem relations. You will not regain the ability to govern your activities based solely on Steps 1-4 of our protocol. Going forward, for as long as you wish to continue using the thing you will have to incur the additional information costs of processing Steps 5-8. The question whether you are permitted to use the thing in a given way will not be answerable based solely on the binary status determination “owner or nonowner.” It will have to be answered by an ongoing process that takes into account the specific nature of your use and the expressed preferences of the owner.

The need to consult the preferences of another person and to differentiate between different possible uses of the thing distinguishes the decision process of the licensee from that of the would-be user who never moves beyond Step 4. The licensee is now engaged in an in personam
relation, and as a result must bear higher information costs. Nevertheless, it is not the case that the duties binding the licensee have now become in personam ("contractual") ones in lieu of in rem ("property") ones. Remember, the entire protocol is the specification of a property norm, arranged in modular fashion so that one can avoid incurring information costs unless it becomes worthwhile to do so. Licenses add content to the question of what activities the norm permits in a given context, but they do not alter the nature of the underlying duty to refrain from unlicensed activities. Thus, even though in rem norms are designed to be able to govern relations among multital parties without any personal interaction, they do not cease to govern even where identified individuals actually engage in such interaction. Licensees remain subject to in rem duties even though they have taken on the informational burdens of in personam relations.

This feature of in rem norms—their persistence even in the context of in personam relations—itself serves a crucial function in the reduction of information costs. Any in personam relation assumes as a premise that the preexisting in rem duties of both parties will continue to govern except to the extent that they are specifically altered, and that preexisting privileges will continue to be exercised except to the extent they are specifically curtailed by newly assumed (i.e., contractual) duties. In the absence of such an assumption, the costs of departing from baseline expectations would be prohibitive, because the parties doing so would be forced to negotiate and define from scratch all the norms to govern future transactions between them. Thus only the new duties and privileges created by means of these transactions are in personam; the remaining residual ones continue to be in rem.

In personam relations can be divided into two essential types: licenses and contracts. Either type of transaction places one party (licensor or obligor) in a less advantageous position, and the other (licensee or obligee) in a more advantageous one, than was the case before. In either case, it is the disadvantaged party whose deliberate action is necessary to effect the alteration. The type of action required to trigger the change will

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28 Or to put it another way, the “exclusion strategy” and the “governance strategy” are not two mutually exclusive regimes. Governance is just a more nuanced use of exclusion.

29 There are in rem privileges as well. They are the flip side of in rem duties, expressed in the maxim, “if it’s mine I can do what I want with it.” Or to be more precise, an in rem privilege with regard to an object is an absence of any duty to comply with the discretionary use preferences of any other person with regard to that object. Vested use privileges are as essential to property ownership as are vested rights to exclude the interference of others, though they have not fared as well, except where the object in question is one’s body. (See, regulatory takings.)

30 The licensor must take some act signifying permission to use; the obligor some
depend on the seriousness of the burden imposed by the disadvantage and how easily reversible it is to be, and will range from express and highly formalized statements of intent\textsuperscript{31} to non-express actions that are deemed in context to signify such intent.\textsuperscript{32} The difference between contracts and licenses is that absent a specific contract, the default is a privilege, while absent a specific license, the default is a duty. Failures to comply with contractual duties call for remedies defined by contract law, which is governed by the intentions of the contracting parties.\textsuperscript{33} Failures to respect the boundaries of license privileges call for remedies defined by property law, which is governed by more rigid rules of universal application.

III. DISENTANGLING PROPERTY AND CONTRACT IN THE LAW OF BAILMENTS

I now want to apply this somewhat reframed version of Merrill and Smith’s in rem/in personam distinction to articulate a reframed understanding of bailment law, one that I think will help to shed light on certain questions they (and others) have found troublesome.

A. Bailment as in rem duty.

1. The case of constructive bailment.

The first key point is that even though bailment is usually described as a form of contract,\textsuperscript{34} the key duties to which a bailee is subject do not arise contractually, if by “contractually” we mean “as the result of a communicated agreement between persons to be bound by duties of their own choosing.”\textsuperscript{35} A bailment arises any time one person deliberately act signifying consent to be bound.

\textsuperscript{31} Such as the written statement of agreement necessary to assume a contractual duty falling within the statute of frauds.

\textsuperscript{32} Such as a constructive bailee’s physical exercise of possession over the bailed item.

\textsuperscript{33} Though not entirely. One might also say that contracts do not really “create” duties, but merely add content to a general baseline duty to fulfill the terms of one’s contracts, if any. Since this baseline duty binds everyone, it too has structural features that are “immutable,” even though any given application of them impacts only the contracting parties. Examples would be the rules concerning reasonable foreseeability of expectation damages, or limitations on the enforceability of liquidated damages and availability of specific performance.

\textsuperscript{34} See 8 C.J.S. Bailments §1 (“The term "bailment" in its ordinary legal sense signifies a contract resulting from delivery of a thing by the bailor to the bailee on condition that it be restored to the bailor in accordance with his or her directions as soon as the purpose for which it was bailed is satisfied.”); §3 (“A bailment is generally regarded as a contractual relationship.”).

\textsuperscript{35} See Story, supra n. __ at 13 (“The general principles of law with respect to bailments are founded upon the absence of any positive engagements between the parties (for an express contract of the parties may vary or supersede those derived from the law),
assumes exclusive possession of an object that he knows to be owned by another. In an “actual bailment,” the bailee receives the object via delivery from the owner. In a “constructive bailment,” the bailee takes possession in the owner’s absence. I want to suggest that, contrary to usual practice, the right place to start in understanding the nature of bailment is the “constructive” case, not the “actual” one. As legal scholars from Williston to Helmholz have recognized, the notion that a bailment is a contract does not square with the way in which constructive bailments come into being. There is no communication or agreement between the constructive bailee and the owner, who in most such cases is in fact unknown. Nor is there any need for consideration or expectation of reward. The duties that attach to the bailee do so only via his possession of the object, and are owed to the constructive bailor only qua owner of that object. In other words, constructive bailment is a purely in rem relation.

Nevertheless, constructive bailments, like all bailments, impose what might normally be termed a positive duty of care—to keep the bailed item safely and restore or deliver it to the owner. This appears to contradict A.M. Honoré’s view that in rem rights impose only negative

36 See James Schouler, Treatise on the Law of Bailments 4 (1880) (“The simple fact of knowingly holding possession of property which belongs to another will oblige the possessor, no matter how he came by it, to apply a certain care and diligence, and stand to a certain bailment accountability.”); 8 C.J.S. Bailments §2 (“When a person comes into lawful possession of the personal property of another without an underlying agreement, the possessor may become a constructive bailee.”).

37 See Wentworth v. Riggs, 159 A.D. 899, 143 N.Y.S. 955 (Sup.Ct.N.Y. 1913) (“A constructive bailment arises where the person having possession of a chattel holds it under such circumstances that the law imposes upon him the obligation of delivering it to another.”); American Ambassador Cas. Co. v. City of Chicago, 563 N.E.2d 882 (Ct.App.Ill. 1990) (police department was constructive bailee of automobile it impounded); Hadfield v. Gilchrist, 538 S.E.2d 268 (Ct.App.S.C. 2000) (towing company was constructive bailee of car it towed).

38 See R.H. Helmholz, Bailment Theories and the Liability of Bailees: the Elusive Uniform Standard of Reasonable Care, 41 U. Kan. L. Rev. 97, 98, 101 (1992). See also Schouler, supra n. __ at 7: “And upon the knowing possession of another’s chattel, rather than upon the mutual consent of the parties, the law appears to operate. Yet our jurisprudence, it must be confessed, overfond of making contracts the complement of real estate, is wont to treat bailment as a branch of contracts; whence the confusing definition sometimes found, that bailment delivery is ‘upon a contract express or implied.’”

39 See 8 C.J.S. Bailments § 16 (“A bailment may exist which is for the sole benefit of the bailor.”)

40 See infra n. 46.
duties. One might respond to this conflict by simply denying that the distinction between positive and negative duties is tenable. Honoré’s version of the distinction contrasts a negative duty to “abstain from certain types of interference with a thing or status” with a positive duty to “perform something.” This has some intuitive appeal, but a duty to abstain from interference necessarily requires proactive efforts to identify the property claims of others and to alter one’s own behavior in accordance with them. Why is processing the first four steps of the protocol outlined above each time one encounters an object not a type of “performance?” We might maintain a logical distinction by defining a negative duty as one that cannot be violated by simple inaction, but as a practical matter people cannot live without taking actions and will thus necessarily bear positive burdens of care.

I will suggest rather that we define a “negative duty” as one that enjoins the dutyholder to avoid acting as a causal agent in some specified alteration of the status quo, while a positive duty enjoins him to bring about such an alteration. Either type of duty requires “positive” efforts on the part of the dutyholder to comply (i.e., imposes costs on him), and one can easily construct examples of negative duties that are more onerous than positive ones. Nevertheless, negative duties are generally less burdensome than positive ones because the set of actions that will bring about any specified alteration X is usually smaller than the set that will not. In most circumstances, then, compliance with a negative duty will leave available a wide range of permitted actions (as well as the option of inaction), while compliance with a positive duty will rule out inaction and constrain action within a fairly narrow set of possible compliant paths. When it comes to property rights, the set of actions that are likely to result in direct interference with an owner’s use and enjoyment of a given object (i.e., in an alteration to the status quo that physically renders such use and enjoyment more difficult) is usually much smaller than the set of actions that are not.

Constructive bailment occurs only when you assume possession of an owned item in the owner’s absence. When you first encounter the object, your only duty is the general negative one of refraining from possessory use. If you nevertheless take possession, there are two possibilities. One is that you are a converter, either unaware of the owner’s rights or deliberately usurping them. The other is that your assumption of

41 See Property/Contract Interface at 788-89 (adopting A.M. Honoré’s assertion to this effect).
43 E.g., “do not consume any ambient oxygen” v. “emit CO₂.”
44 See 90 C.J.S. Trover and Conversion § 32:
Any unauthorized use or disposition of the personal property of
possession, while unauthorized, was not wrongful,\textsuperscript{45} and is not intended to deprive the owner of her ownership. In order for that to be true however, you must be taking possession with the purpose of preserving the item in order to restore it to the owner. In other words, you must intend that your possession not alter the status quo by making the owner’s recovery of the item in its present condition any less likely than if you had just left it there. Any other intention makes you a converter. Any exercise of good faith possession is therefore necessarily governed by duties of care and redelivery.\textsuperscript{46}

This baseline duty not to render the owner’s recovery less probable explains the various categories into which the law has traditionally divided items discovered outside the possession of any owner. The key question in such scenarios is whether the owner can be expected to come look for the property in the place where it was found. “Lost” property has been defined as that which has been “casually and involuntarily parted with, so that the mind had no impress of and could have no knowledge of the parting.”\textsuperscript{47}

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Misplaced property, on the other hand, is that which the owner “had
voluntarily and intentionally placed and then forgotten.” In either case, the finder who takes possession does so as a bailee of the true owner, and assumes a duty to use at least ordinary care for the preservation of the thing. The difference between the two is that while the finder of lost property has a right to possession good against anyone but the owner, the finder of mislaid property has a duty to deliver it to the owner of the premises. Even where the property is lost, the owner of the premises will have the superior right to possession where he is regarded as being in actual or constructive custody. In both instances, the point is that the owner of the premises is the person in the best position to return the item to its owner, and is therefore the best choice of constructive bailee. A finder who fails to deliver the item to the owner of the premises under such circumstances is deliberately making recovery less likely and thus violating his in rem duty.

Likewise, the bailee’s duty to preserve the item in its current condition fits within my definition of a negative duty, for it amounts to a duty not to serve as the causal agent of any deterioration. If your exercise of possession has the consequence of subjecting the item to forces that damage it, you are a causal agent of that damage. The bailee’s duty to preserve the item is thus no different in principle from the non-bailee’s duty to refrain from damaging another’s property without ever taking possession of it. As a practical matter the bailee’s duty of preservation is more onerous however, because once you take possession you become causally responsible for any consequences that follow and must therefore expend effort to foresee and prevent damage to the item. So long as you are acting as a good faith bailee however, you are not subject to strict liability for damage resulting from your possession. As with the standard of care imposed by the baseline general duty not to harm others through negligence, the duty of the bailee is calibrated so as to require more or less effort depending on the nature of the relationship between bailor and

\[48\] Id.

\[49\] As the finder has no way to read the mind of the owner, he must infer the status of the property from the objective circumstances. Items found in a seemingly random or clearly unsafe place may be presumed to have been lost, while items disposed in such a way as to suggest deliberate placement are presumed to be mislaid. See id. at 69-70 (distinguishing between property found on the floor of a booth in a public place from property found in a folder that had been placed on a rack attached to the wall of a booth in a place to which there was restricted access).

\[50\] See Dolitsky at 68: “Thus if a chattel is discovered anywhere in a private place where only a limited class of people have a right to be and they are customers of the owner of the premises, who has the duty of preserving the property of his customers, it is in the possession of the owner of the premises.”

\[51\] See Sir William Jones, supra n. ___ at 5 (“[A]s the bounds of justice would, in most cases, be transgressed, if he were made answerable for the loss of it without his fault, he can only be obliged to keep it with a degree of care proportioned to the nature of the bailment[.]”) (emphasis in original). If you fail to redeliver at the bailor’s demand, however, you become strictly liable for any loss. Id. at 81.
As a constructive bailment is necessarily gratuitous, it subjects the bailee to the low standard of gross negligence. Even so, this duty is more onerous than the ones described in Steps 1-4 of our protocol, but if you do not wish to undertake it, you can simply decline to assume possession in the first place, thus leaving the owner no worse off.

The duty to deliver the item when asked sounds at first blush like a positive duty, as it results in an alteration of the status quo from one in which the owner lacks possession to one in which she has it. On the other hand, what we call “redelivery” usually amounts to nothing more than refraining from further possessory action under circumstances that permit the owner to retake possession. Once the owner arrives and seeks redelivery, the circumstances that had rendered non-wrongful the constructive bailee’s initial possession cease to exist. To persist in possession after that point would alter the status quo from one in which the bailee is not obstructing the owner’s possession to one in which he is. What we call “redelivery” then, is really just an application of the general negative duty to refrain from unauthorized possession, not a new positive duty imposed on bailees.

2. The notion of bailment as founded on contract.

I have thus given an account of constructive bailment that explains the duties of the bailee as arising, not from any contract or other in personam transaction, but simply from application of the same in rem principles governing all interactions with the property of others. The duties of a bailee are just another subroutine in the property protocol, a specification of what the norm requires in a given context—namely, the context where you come into possession of someone else’s property. Why, then, does so much black letter law insist on referring to a bailment as involving a contract?

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52 CJS BAILMENTS § 58 (“The degree of care required of a bailee depends on whether the bailment is for the benefit of the bailor or the bailee or both, and by the amount of benefit each party derives from the bailment.”).
53 CJS BAILMENTS § 79.
54 See Tomko v. Sharp, 87 N.J.L. 385, 388, 94 A. 793 (Sup. Ct. 1915) (“Now, the rule is that no legal responsibility rests on one who declines to become a bailee, though he had gratuitously agreed to do so.”).
55 See, e.g., WILLIAM FREDERICK ELLIOT, A TREATISE ON THE LAW OF BAILMENTS AND CARRIERS 1 (1914) (“A bailment may be defined as a contract by which the possession of personal property is temporarily transferred from the owner to another for the accomplishment of some special purpose.”); JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS 4 (1846) (“[A] bailment is a delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust.”); 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 451 (1753) (“A delivery of goods in trust upon a contract express or implied,
The conception of bailment as contract seems to go back to the seminal case *Coggs v. Bernard.* 56 Bernard undertook to transport several barrels of brandy belonging to Coggs. The undertaking was gratuitous; no compensation was offered. As the brandy was being unloaded, a barrel was staved and 150 gallons were lost. Coggs brought (and won) an action on the case, to which Bernard objected that there was no basis for the duty of care imposed on him given the absence of either consideration or any allegation that he was a common carrier. Chief Judge Holt offered three rationales for enforcing such a duty, which leave ambiguous the extent to which the bailee’s duty is based in contract.

First, Holt suggests that negligence in one’s duties as a bailee is a form of fraud, because the bailor is induced to entrust the goods to the bailee by his “pretence of care.” 57 Second, Holt says that to the extent consideration is the issue, the owner’s entrustment of the goods is sufficient consideration. 58 Neither of these rationales, of course, works for constructive bailments in which there is no deliberate entrustment by the bailor. Nor are they terribly satisfying even as applied to the actual bailment at issue. A bailee who takes possession intending to exercise due care but then fails to do so has made no fraudulent misrepresentation. And why should the gratuitous entrustment of goods count as consideration, given that a gratuitous bailee (much less a constructive one) neither bargains for nor derives any benefit from such entrustment? Holt’s third explanation is somewhat more helpful:

Indeed if the agreement had been executory, to carry these brandies from one place to the other such a day, the defendant had not been bound to carry them. But this is a different case, for *assumpsit* does not only signify a future agreement. [B]ut in a case such as this, it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though no body could have compelled him to do the thing. 59

Thus, the rationale is not really that the bailor’s act of entrustment constitutes consideration for a binding promise by the bailee. It is undisputed that even if the owner comes to tender entrustment of the goods, the carrier can still refuse to accept possession and his earlier promise to do so will remain unenforceable *nudum pactum.* It is only the bailee’s act of entering into possession (“taking the trust upon himself”) that triggers the

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57 2 Ld Raym at 919.
58 *Id. See also* Story, supra n. ___ at 4-5 & n.1 (defending this view).
59 *Id.*
duty of care. As Holt explains, such an undertaking falls within the traditional category of *assumpsit*, but it is not a “contract” in the contemporary sense of a binding executory agreement.\(^{60}\) A promise with consideration (or other duty-creating special relationship) is needed to render you liable for nonfeasance, but liability for misfeasance arises whenever you undertake a course of action such that failure to exercise care may result in harm to another.\(^{61}\) Taking possession of another’s property is such a course of action, and the duty of care imposed on the gratuitous bailee is akin to that imposed on the good Samaritan who offers aid that he could not be held liable for simply failing to offer.\(^{62}\)

One can characterize the bailee (or the Samaritan) as making and being held to an implicit promise, but this merely muddies the waters without any explanatory benefit. One might as well say that my duty not to assault you stems from an implicit promise of mine (made by virtue of my participation in society) which is binding because you implicitly rely on it in not preemptively shooting me on sight. There is a sense in which this is true, but it is clear that we would enforce my duty not to assault you even if I went around announcing loudly my intention to do so, thus destroying any reasonable reliance on your part. If it is practically impossible to do X without being conclusively deemed to have promised Y, Occam’s razor counsels us to dispense with the promise and simply say that action X incurs duty Y.\(^{63}\) The category of duties grounded in promise should be saved for situations in which I am permitted to take action X while remaining free to elect whether or not I shall be bound by duty Y. I have no such freedom with regard to whether or not I shall respect your property rights, and have no option to assume possession of your property while unilaterally declining to assume the duties of care and redelivery.

B. Bailment as in personam transaction.

1. Actual bailment is still founded on *in rem* duty.

Now we can move to the case of “actual bailment.” The basic elements of an actual bailment are said to be (in one formulation): “the

\(^{60}\) On the evolution of *assumpsit* into modern contract doctrine, see E. ALLEN FARNSWORTH, CONTRACTS §1.6 (1990).

\(^{61}\) See PROSSER AND KEATON, THE LAW OF TORTS 373-75 (5th ed. 1984) (“Liability for ‘misfeasance,’ then, may extend to any person to whom harm may reasonably be anticipated as a result of the defendant’s conduct, or perhaps even beyond; while for ‘nonfeasance’ it is necessary to find some definite relation between the parties, of such a character that social policy justifies the imposition of a duty to act.”).

\(^{62}\) See id. at 375-82.

\(^{63}\) Another way to say this is that even if all duties to others are ultimately grounded in a “social contract,” that does not should not mean they should all be analyzed as arising from contract within the framework of private law doctrine.
delivery of personal property from one person to another for a specific purpose, the acceptance by the transferee of such delivery, an agreement that the purpose will be fulfilled, and an understanding that the property will be returned to the transferor or dealt with as the transferor directs.”

Clearly, any actual bailment arises from an in personam transaction. Does this mean that, unlike the duties of the constructive bailee, the duties of the actual bailee should be characterized as being purely in personam as well? I think not.

Let’s start with the most basic kind of gratuitous actual bailment. Say I leave my car with a valet. I have now delivered possession to him, for the specific purpose of having the car moved to a safe parking area, kept there for a few hours, and then returned to me. By accepting my delivery of possession for that limited purpose, the valet undertakes the role of bailee. By taking possession, I contend, he automatically triggers the same logic described above, by which the broad baseline duty of non-interference, as applied in this context, implies the corollary duties to take care of my car and to return it to me. Even though we have engaged in an in personam transaction, that transaction has not created any idiosyncratic obligations on his part that would not bind him equally had he taken possession without ever seeing me or knowing my identity. He has not assumed any in personam duty (i.e., one whose contents are elected by agreement and made binding by specific consent). I owe him nothing, and all he owes me is compliance with his baseline in rem duties. In this case, the specific purpose of the bailment is coextensive with those in rem duties—to take care of the car (which probably implies parking it somewhere reasonably safe), and then give it back to me when I ask. These duties apply to him not qua “person who has promised me to take care of my car,” but simply qua “person who has taken possession of property owned by another.” They are owed to me, not qua “person to whom he made a binding promise,” but qua “owner of an item in his possession.” We may in fact know more about each other than those descriptions contain, but so long as our transaction results in no additional duties, I contend that there is no contract (in the usual sense of that term) between us at all. We have an in personam relationship, but have not moved beyond the realm of in rem obligations.

64 8 C.J.S. Bailments § 18.
65 8 C.J.S. Bailments § 3:
Bailment, however, does not necessarily and always depend on a contractual relation. Rather, it is the element of lawful possession, however created, and the duty to account for the thing as the property of another that create the bailment, regardless of whether or not such possession is based on contract in the ordinary sense
66 Id.; Schouler, supra n. 38.
2. What is a “contract of bailment”?

Nevertheless, there is a sense in which the actual bailee’s duties do stem crucially from a meeting of the minds. For the valet to assume the role of bailee, it must have been mutually understood that when I delivered possession of the car to him, I wasn’t just giving it to him as a gift. A transaction founded on such an understanding, I would suggest, is the root of what we mean by a “contract of bailment.” It’s not a contract in the sense of “transaction in which parties consent to be bound by reciprocal in personam duties of their own choosing.” Rather, it is a “contract” in the sense that it is an in personam transaction—i.e., one involving communicated intent concerning relationships between specific people and objects—that has the result of triggering duties prescribed by baseline property norms. We have a “contract of bailment” any time I give you something of mine and you take possession of it with the understanding that you do so as a nonowner. This is what it means to list as elements of bailment both the acceptance of a delivery “for a specific purpose” and with “an understanding that the property will be returned to the transferor or dealt with as the transferor directs.” These elements specify the minimum content of the understanding that one is a nonowner and that the bailor continues to be the owner entitled to control how the object is used. By taking possession with that understanding, the valet triggers the in rem duties that follow from it, as well as the costs of processing Steps 5-8 while he remains in possession. All of this is more costly to him than staying in Steps 1-4, and so the law is that he cannot be made a bailee without his knowledge and consent.

I suggest, then, that at a root a “contract of bailment” is nothing more than a transaction in which possession of property is transferred from one person to another with the shared understanding that the transferee is not acquiring ownership. As such transactions trigger the baseline duties of a bailee, the question arises how we are to distinguish them from ones in which the recipient does acquire ownership. Doctrinally, there is very little in the way of prescribed formality to help us distinguish between an actual bailment and a gift. Both transactions are composed primarily of acts of delivery and acceptance. The only verification rule used to distinguish

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67 At least, it need not be. As discussed below, the parties can also create such duties if they wish.
68 Id. § 22 (“[O]ne cannot ordinarily be made a bailee without his or her knowledge or consent.”).
69 CJS GIFTS § 10 (elements of a gratuitous transfer of ownership (i.e., inter vivos gift) are donative intent, delivery, and acceptance). See also elements of bailment discussed above.
70 See Henry Hansmann & Reinier Kraakman, Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights, 31 J. Legal
between the two is the intent accompanying those acts. For a gift, we focus entirely on the donor’s intent. This is because a gift disadvantages only the donor, not the donee. The intent required of the donor is entirely unilateral and subjective, and though its object (an irrevocable present transfer of title) is prescribed, there are no specific formalities that govern the manner in which that intent is made manifest.\(^7\)

As we have already seen, bailment too requires a particular intent on the part of the bailor, this time an intent to achieve some specific purpose other than present transfer of title. Because acceptance of delivery as a bailee imposes significant burdens however, now we require some form of knowledge and consent on the bailee’s part as well. But the type of mutual intent required here is not formalized in the same manner as contractual offer and acceptance, and the bailee’s consent need not be signaled by any act other than physical acceptance of the delivery. The essential thing is for the bailee to understand that if he accepts delivery, he does so as a nonowner of the chattel, which means he understands that there is some specific purpose of the bailor for the furtherance of which he has been given possession. In handing my keys to the valet, I don’t need to spell out and get his express assent to these elements; much can be inferred from context in a face to face interaction. The familiar valet transaction, for example, enables us to infer the intentions of both bailor and bailee with a high degree of confidence—we have no reason to believe that either party would construe the transfer of possession as a gift.

Where, on the other hand, the delivery occurs impersonally—as for example if someone mails an unsolicited sample or other item—then we tend to require some more affirmative evidence of the recipient’s intent to accept the status of bailee. In other words, we impose a standard default rule holding that a delivery of possession that involves neither face to face contact nor prior mutual communication concerning the nature and purpose of the delivery constitutes a gift unless the recipient expressly agrees to regard it otherwise.\(^2\) This is a form of protection strategy, designed to

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\(^7\) CJS GIFTS § 16:
The intention of the donor need not be expressed, and no specific language is required to reflect the donor's present intent to make a gift. It may be manifested by acts or words or both, or it may be inferred from the relation of the parties and from all the facts and circumstances. In other words, in determining whether a donor intended to make an inter vivos gift, the facts and circumstances surrounding the parties, their relationship, and the direct expressions of the donor should all be taken into consideration.

\(^2\) See UMG Recordings, Inc. v. Augusto, 628 F.3d 1175, 1182 (9th Cir. 2011) (owner conveyed title rather than license to promotional music CDs that were distributed
prevent people from imposing duties on others by means of distributing chattels bearing notices of intent to retain ownership that the recipients cannot see until after they have accepted possession of the item.

Similarly, if a delivery takes place in the context of a transaction in which the recipient makes a payment in exchange for possession, there is a default rule construing this as a sale which transfers title. We can regard this default rule as both majoritarian (because that is usually what people mean to accomplish in such transactions) and a penalty default rule, forcing the deliveror to communicate and obtain express consent to his desire to make the deliveree a bailee. A mere notice affixed to the item is at best an expression of intent on the part of someone who possessed the item earlier; it is not sufficient to prevent the passage of title without express agreement by the recipient. Ownership of an object means that I am entitled to ignore, detach, or deface any notice that may be attached to it, and outside the sphere of intimate personal relations, the act of sale is the usual threshold between the status of nonowner and owner.

a. Bailment formation: The controversy over software licenses.

While the line between sale and bailment is not usually the stuff of sexy legal controversy, there is a current hot button topic that brings it into play. Software companies have developed a practice of characterizing the transactions by which they transfer possession of copies of their works to end users as “licenses” rather than “sales.” The purpose of this is to avoid triggering the “first sale doctrine,” which relieves the owner of a lawful copy of a copyrighted work from the baseline duty imposed by copyright law to refrain from public distribution of such copies. In order to prevent the emergence of secondary markets and preserve their ability to engage in price discrimination, software companies wish to avoid triggering their customers’ first sale rights, which means that they need to avoid permitting their customers to become owners of the copies by which they make use of the software.

A noncontroversial way to do this would be to “rent out” copies of

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73 Bobbs-Merrill v. Straus.

74 See 17 U.S.C. §109(a). For software this provision does not relieve you of the duty to refrain from engaging in commercial rental, lease or lending of the disc, §109(b), but you are free to gift or sell it. A similar provision also permits the owner of a lawful copy of software to make certain copies of the software in connection with its use, an act that would otherwise constitute infringement of the exclusive reproduction right. See 17 U.S.C. §117. Because software cannot, as a practical matter, be used without making such copies, a purchaser of software who does not acquire ownership of the purchased copy—and hence cannot invoke section 117—still cannot use the program except insofar as the copyright owner grants him a license to do so.
the software which customers were then expected to return. Rental transactions are a salient exception to the default expectation that exchange of money in exchange for transfer of possession results in a sale. In a rental transaction, the renter is required to expressly agree to terms governing permissible uses of the property, including a set period of time within which he must return the property or incur additional charges. He is usually also required to give the renter personal information or some other form of security against the property’s eventual return. All of these features serve to make it clear to the renter that he is not acquiring ownership of the rented item. In the software context however, the cost of creating new copies is less than the cost of tracking and retrieving existing ones, and software companies have no interest in ever recovering possession of the copies they provide to end users. Instead, their only interest is in prohibiting those end users from ever transferring the copies without authorization to do so. They wish to retain control of the market without incurring the costs of recovering possession of the goods.

The dominant trend in the courts has been to enforce the software companies’ construction of these transactions, treating them as “licenses” rather than sales so long as the vendor “(1) specifies that the user is granted a license; (2) significantly restricts the user's ability to transfer the software; and (3) imposes notable use restrictions.” A software purchaser who accepts such terms prior to passage of title can be said to understand that the transfer of possession is “for a specific purpose” (i.e., licensed uses) and that the property is to be “dealt with as the transferor directs” (i.e., not

75 The term “bailment” has not generally been used in connection with these transactions, but they are based on the legal premise that the software company gives the customer a limited (albeit not temporally) right to possession of a physical chattel (such as a CD) while still retaining ownership of it. If that is what occurs, the result is a bailment. As will be discussed below, all actual bailments also include licenses, but the two are distinguishable from each other. Use of the term “license” in this context has become confusing, because whereas the general meaning of “license” is a grant of privilege to engage in actions that would otherwise be forbidden by property law, in software transactions the “license” functions first as a means of denying the end user privileges he would otherwise expect to acquire from a transaction that looks like a “purchase,” in order to then grant back some subset of those privileges.

76 See, e.g., Vernor v. Autodesk, Inc., 621 F.3d 1102, 1111 (9th Cir. 2010); DSC Communications Corp. v. Pulse Communications, Inc., 170 F.3d 1354 (Fed. Cir. 1999).

77 Which is not necessarily the moment one pays and receives possession. See Jeanne L. Schroeder, Death and Transfiguration: The Myth That The UCC Killed “Property”, 69 Temp. L. Rev. 1281 (1996) (arguing that in modern transactions, a sale is not a discrete event but a process); id at 1312 (“[O]ne can locate “Title” in the seller before the sale, and “Title” in the buyer after the sale, but it is meaningless to speak of the location of “Title” during the sales process.”). See also ProCD v. Zeidenberg, 86 F.3d 1447, 1452-53 (7th Cir. 1996) (construing the purchaser’s acceptance of goods under UCC 2-606(1)(b) (and hence the passage of title) as occurring only upon acceptance of the license terms enclosed with the good) (“Terms of use are … a part of “the product””).
resold outside the license), which is all the common law requires for an actual bailment.\textsuperscript{78} Critics, however, question whether shrinkwrap or clickwrap licenses containing such terms result in meaningful assent by the purchaser,\textsuperscript{79} and contend that absent a return requirement, even actual assent will fail to prevent the passage of title, making the restrictions contractual at best.\textsuperscript{80} A complete vetting of this dispute is beyond the scope of this article, but a few observations are in order.

First, the question whether unread boilerplate can be binding as a contractual matter is not identical to the question whether it can turn a transaction that in all other respects looks like a sale into a bailment. The former affects only \textit{in personam} relations, while the latter has \textit{in rem} effect on third parties, who need to identify owners if they wish to make use of the object without becoming liable for infringement.\textsuperscript{81} Embracing return as a necessary formal requirement of bailment arguably reduces information costs to third parties, as it decreases the likelihood that abandoned or transferred chattels will come into the stream of commerce burdened with ownership claims that are not readily apparent.\textsuperscript{82} Second, if asserting use

\textsuperscript{78} See supra n. 64 and accompanying text.
\textsuperscript{80} See e.g. Brian Carver, Why License Agreements Do Not Control Copy Ownership; First Sales and Essential Copies, 25 Berkeley Tech. L.J. 1887 (2010); John A. Rothchild, The Incredible Shrinking First-Sale Rule: Are Software Resale Limits Lawful?, 57 Rutgers L. Rev. 1 (2004). The most forceful judicial expression of this view came in Softman Products v. Adobe Systems, where Judge Pregerson stated:


\textsuperscript{81} In other words, the real question is not whether such license agreements are enforceable contracts, but whether perpetual bailment is an enforceable form of property right under \textit{numerus clausus} doctrine. See Thomas W. Merrill & Henry E. Smith, \textit{Optimal Standardization in the Law of Property: The Numerus Clausus Principle}, 110 YALE L.J. 1(2000).

\textsuperscript{82} One can frame this question using the form of analysis suggested by Hansmann and Kraakman as an alternative to Merrill & Smith. See Hansmann & Kraakman, supra n. 70. First we would ask whether recognizing perpetual software bailments imposes nonuser and system costs that are significantly higher than those already imposed by temporally limited ones. \textit{Id.} at __. If so, then the question is whether it also leads to a commensurate increase in the value of assets that justifies recognizing such bailments, and if so how stringent a verification rule we need to ensure this. \textit{Id.} at __. For what it’s worth, Hansmann and Kraakman suggest recognition is likely to be warranted if the rights have high value to their users and are used frequently, \textit{id.} at __, which is apparently the case for software licenses.
restrictions can create a bailment in chattels even without any return requirement, the instrument doing the asserting should at least make clear that the restrictions and withholding of ownership apply specifically to the physical objects in which the copies of the program are embodied. Some software license agreements are ambiguous at best on this point. 83

Despite these valid concerns, bailment law does not appear ever to have adopted a rule requiring bailors to limit the bailee’s possession to some definite period of time84 or even to seek redelivery at all.85 The

83 See, e.g. Adobe Software License Agreement, available at http://www.adobe.com/products/eulas/, at 1.9: “Software” means (a) all of the information with which this agreement is provided, including but not limited to: (i) all software files and other computer information; (ii) any proprietary scripting logic embedded within exported file formats or used in an Adobe Online Service; (iii) sample and stock photographs, images, sounds, clip art and other artistic works bundled with Adobe software or made available by Adobe on Adobe’s website for use with the Adobe software and not obtained from Adobe through a separate service (unless otherwise noted within that service) or from another party (“Content Files”); (iv) related explanatory written materials and files (“Documentation”); and (v) fonts; and (b) any modified versions and copies of, and upgrades, updates, and additions to, such information, provided to Customer by Adobe at any time, to the extent not provided under separate terms (collectively, “Updates”). Note that even though subsection (b) of the definition refers to “copies” within the category of “Updates,” subsection (a) refers only to “information” and “files,” neither of which terms encompasses the physical medium in which they are embodied. Arguably then, the disc on which the original copy is made available to the consumer is outside the defined term “software,” which is the subject of all the restrictions contained in the agreement. Even if one thinks the software industry’s use of perpetual bailments is generally value-producing, it may be that the governing “verification rule” should require clearer and more salient efforts to signal to purchasers and third parties that the company is asserting an ongoing claim of ownership in the relevant physical chattels. See supra n. 82.

84 See 8 C.J.S. Bailments § 118 (2013) (duration of a chattel bailment is governed by the same principles as contract law, and has not traditionally been subjected to fixed limits on duration); see also, e.g., Martin v. Briggs, 663 N.Y.S.2d 184 (N.Y. App. Div. 1997).

85 8A AM. JUR. 2D Bailments § 138 (2013) (“In lieu of redelivering the bailed property, the bailee may be allowed to satisfy his or her obligation to the bailor by accounting for the property in some manner permitted by law or by the terms of the bailment contract.”).

Indeed, even when it came to leases of real property, despite the numerus clausus limitations on their form, the common law did not recognize any uniform or fixed limit on their duration. See RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT §1.4, comment f (1977); see also Conley v. Gaylock, 108 S.E.2d 675, 679 (W.Va. 1959) (holding that lease terminable only by failure to pay rent or tenant’s decision to move business was valid despite indefinite and potentially limitless duration). Nor are such numerus clausus limitations as do exist with regard to real property generally applied to personal property. See Thomas W. Merrill & Henry E. Smith, Optimal Standardization in the Law of Property: The Numerus Clausus Principle, 110 YALE L.J. 1, 18-19 (2000); see also, e.g.,
classic descriptions of bailment turn on fulfillment of some purpose of the bailor, not on whether that purpose contemplates eventual redelivery. Blackstone defined it as “a delivery of goods in trust, upon a contract, expressed or implied, that the trust shall be faithfully executed on the part of the bailee.” Another oft-cited statement says: ‘Bailment is the delivery of goods for some purpose, upon a contract, express or implied, that after the purpose has been fulfilled they shall be redelivered to the bailor, or otherwise dealt with according to his directions, or kept till he reclaims them.’ No time period need be prescribed for such reclaiming—indeed, common law suggests that the finder of mislaid property may remain a bailee indefinitely, absent a statute that vests ownership after some fixed period upon compliance with prescribed efforts to locate the owner. Generally speaking, the terms of an actual bailment have been left to the discretion of the parties, and it would seem strange to hold that a bailor can enforceably direct the bailee to destroy the item (thus ending its useful life) but not permit him to keep and continue to use it until such time as its

Hood Farm v. Roberts, 5 N.Y.S.2d 513, 515 (N.Y. App. Div. 1938) ("The continuing in possession of personal property after the expiration of a lease does not act as a renewal of the lease and the rule is not the same for personal property as it is for real estate."). Leases of chattels are not, for example, governed by the protective landlord-tenant principles applied to leases of real property, but are rather simply subject to the common law of bailments. See 8 C.J.S. Bailments § 4, n. 5 (2013) ("Lease for personal property is merely an agreement creating common-law bailment for hire that mutually benefits both parties; consequently, common-law principles of bailment apply."); Walton Commercial Enters., Inc. v. Assocs., Conventions, Tradeshows, Inc., 593 N.E.2d 64, 67 (1990) (same).

86 See SIR WILLIAM JONES, supra n. ___ at 1 (defining bailment as “A delivery of goods on a condition, express or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose for which they were bailed, shall be answered.”) (emphasis added.) But see CJS Bailments §:

In drawing a distinction between a bailment and other transactions it is recognized that if personal property is delivered by one person to another under an agreement that the same property is to be returned to the person delivering it in the same or altered form, the contract is one of bailment. On the other hand, if either by the contract or otherwise, there is no obligation to restore the specific property, and the bailee is at liberty to return another thing of equal value or the money value the transaction is not a bailment. (footnotes omitted).

This passage does not directly address the type of transaction contemplated here, in which there is neither an obligation to return the bailed item nor a right to terminate the bailment (and thus acquire ownership) by substituting payment.

87 Blackstone Commentaries Vol I at 451.


90 See 1 Am. Jur. 2d Abandoned, Lost, and Unclaimed Property § 31 (Lost-property statutes).

91 See e.g., U.S. v. James, 353 F.3d 606 (8th Cir. 2003) (instruction to bailee to destroy property did not constitute abandonment).
useful life terminates naturally. 92

3. When bailment contracts create *in personam* duties and privileges.

I have argued thus far that the only “meeting of the minds” needed to create a “contract of bailment” is one recognizing that a given transfer of possession does not result in a transfer of ownership. I have also argued that such a transfer triggers baseline duties on the bailee’s part that are *in rem* in nature. Of course, bailors and bailees often wish to depart from these baseline duties. I may want the valet to do something with my car while he has it—say, wash or repair it—that his baseline *in rem* duties of preservation and redelivery wouldn’t require him to do. He may want to actually get paid for his trouble. Such exchanges are pure *in personam* transactions that create *in personam* duties. Inclusion of such provisions will cause the “bailment contract” to have the kinds of effects we usually identify as contractual. This is where the element of “agreement that the purpose will be fulfilled” comes into play. At this point, our relationship has become more complex, and is governed by both the baseline *in rem* duties he incurred by taking possession, and the *in personam* contractual duties we have chosen to add. It will not be surprising if we refer to all these duties indiscriminately as forming part of the “bailment contract,” but it remains the case that they are not all contractual in nature. 93

If the parties wish, they may also vary the bailee’s *in rem* duty of care. 94 The default standard of care imposed by this duty, like the standard of care imposed by the baseline general duty not to harm others through negligence, is calibrated so as to require more or less effort depending on

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92 Given that the commercial life of software generally does not exceed ten years (if that), it would hardly seem worth the candle to require that software companies impose a return requirement to avoid sale. The “rental term” could easily be set so as to be both unassailably finite with regard to the lifespan of the leased chattel (the storage medium) and yet long enough to have the same effect on secondary markets for the software as a perpetual license. See generally Tetsuo Tamai & Yohsuke Torimitsu, Software Lifetime and its Evolution Process over Generations, Proceedings Conference on Software Maintenance 63 (1992) (finding an average software lifespan of 10.1 years based on a 95 survey samples); see also Yipeng Liu et al., Optimal Software Pricing in the Presence of Piracy and Word-of-Mouth Effect, 51 Decision Support Systems, 99, 102 (2011) (“prior literature estimates the average lifespan of a software package to be between 3 and 7 years”).

93 Accord, Schouler supra n. __ at 21 (treating “special contract” as a means, not of creating bailment obligations, but of creating “[e]xceptions to the general doctrine of bailment”); Cf. Newman, supra n. 13 (urging a distinction between license grants and contractual duties that may both form part of the same transaction).

94 See Story, supra n. ___ at 34 (“[A]s the legal responsibility of a bailee . . . may be narrowed by any special contract, either express or implied, so it may in like manner be enlarged.”).
the nature of the relationship. 95 If the parties’ chosen standard is more
stringent than the baseline, it means the bailee is assuming a contractual
duty to take efforts beyond what the baseline demands. If the standard
chosen is less stringent, it means the bailor is granting the bailee a license
privilege to exert less effort than the in rem duty would require. A
monetary cap on compensation for loss is also a license, to refrain from
complying with the full scope of one’s in rem duty of compensation under
certain circumstances.

While an actual bailment may or may not involve the creation of
contractual duties, it always involves the creation of license privileges. As
a default matter, the valet remains bound by the same in rem duty that
governs everyone, telling him not to make any possessory uses of my car
that I have not authorized. By delivering possession to the valet however,
I give him a license to exercise possession and to engage in those actions
with respect to my car that are necessary to effect the purpose of the
bailment. Doing those things, therefore, does not violate his in rem duty not
to make unauthorized possessory use. If he takes my car joyriding
however, he commits conversion—a violation of my in rem property rights
that subjects him to strict liability for the entire value of the car if he
damages it, or even if I just refuse to take it back. 96 It would be no answer
for him to object that the bailment contract did not specifically prohibit
joyriding. It didn’t have to, because the baseline in rem norms already did,
and nothing in the bailment license (whose scope, if not specified, is
implied by the purpose of the bailment) purported to alter this. 97 In
joyriding, the valet stands in the same position as someone who took my car
from the parking lot without my ever having authorized him to take
possession of it.

If on the other hand the valet remains within the terms of the license,
driving my car only to and from the parking area, but fails to keep it safe
while doing so, then he is liable only if he violated his duty of care. I
cannot seek to evade any agreed limits on the valet’s liability by arguing

95 CJS BAILMENTS § 58 (“The degree of care required of a bailee depends on
whether the bailment is for the benefit of the bailor or the bailee or both, and by the amount
of benefit each party derives from the bailment.”).
96 See R.H. Helmholtz at 121-22 (“Traditional bailment law holds, however, that it
is for the bailor to say how the property shall be used, and any act by the bailee which
presumes to exceed that purpose constitutes an exercise of dominion inconsistent with the
rights of the bailor.”); CJS TROVER §§ 32, 130, 147; Merrill & Smith, Property/Contract
Interface at 817-19.
97 See Sir William Jones, supra n. __ at 92 (although he has a limited property
interest in the bailed goods, a bailee may not “use them on any account without the consent
of the owner, either expressly given, if it can possibly be obtained, or at least strongly
presumed[.]”); Schouler, supra n. __ at 62 (“For misappropriation of the thing bailed to
him, even the bailee without reward makes himself strictly answerable.”).
that I never authorized him to damage or lose the car. I authorized him to
drive the car to and from the parking spot in accordance with the specified
standard of care. If the damage or loss occurred for reasons not traceable to
either an act outside the scope of the license or a failure to exercise the
applicable standard of due care, then the in personam modifications to his
liability govern. 98

C. The “contract deviation” problem

Richard Helmholz identifies a set of bailment cases involving what
he terms “deviation” from the contract.99 These all appear to involve
actions by the bailee that are not obvious acts of conversion, in that they
were arguably taken in good faith pursuit of the purpose for which the
bailment was made, but which were not expressly licensed and may not
have been contemplated by the bailor.100 A typical example might be the
watch-repairer who sends a client’s watch off-premises for service without
having informed the client that this would be done.101 Where such an action
results in damage or loss of the bailed property, the question arises whether
the bailee should be strictly liable, or only if the deviation was somehow
negligent. The answer to this question appears to depend on whether the
court regards the deviation as a “material breach of the bailment contract,”
as interpreted in light of the information given to the bailor at the time of
delivery and his knowledge of customary norms.102 If it is a “material
breach,” the bailee may be held strictly liable as a converter.103

Helmholz finds these cases troubling, because the application of
strict liability can seem to saddle a bailee with the role of insurer where it
does not appear that he agreed to take on that role.104 If the repair shop was
acting reasonably and in good faith, and it never undertook contractually to
insure the watch against any possible loss in connection with the service,
why should it be strictly liable? Moreover, how can sending the watch off-
site be a “material breach” of the contract, if the contract contains no
express clause forbidding this?

The framework developed above renders the logic of these cases

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99 Helmholz at 113-18.
100 Id. at 113-18. A typical example would be the watch-repairer who sends a
client’s watch off-premises for service without having informed the client that this would
be done.
1984).
102 Helmholz at 116.
103 Id. at 111.
104 Helmholz at 111.
more straightforward. The starting point is to recognize that upon assuming possession, bailees are automatically bound by two default \textit{in rem} duties: 1) a duty to refrain from any non-authorized use of the property on pain of strict liability, and 2) a duty to comply with the applicable standard of care when making authorized use. The role of the \textit{in personam} “bailment contract” is thus not to impose duties,\textsuperscript{105} but to tell us which uses are authorized. When courts construe the bailment contract to decide whether a deviation is a “material breach,” they are really construing the scope of the \textit{license} granted as part of the bailment. Limitations on the scope of a license are not \textit{in personam} contractual duties to which the licensee must give assent to be bound. Rather, the license is a carve-out from the bailee’s preexisting \textit{in rem} duty, one that must be affirmatively granted by the bailor. This distinction is crucial, and explains why the bailee is strictly liable where there is no evidence of clear intent to forbid the activity in question. The duty to refrain is the default; it is the license to act that has to be proven.

This is not to say that license privileges must be expressly granted. Any actual bailment is for a “specific purpose,”\textsuperscript{106} and necessarily includes an implied license to take any actions that are necessary for fulfilling that purpose. Where there are several ways of fulfilling the purpose, the scope of the implied license is more difficult to decide. If no representations about means are made by either side, presumably the implied license will include at least any that are customary. If, on the other hand, the bailor was given reason to expect that a particular means would be used, our ability to infer authorization may be bounded by that expectation. Cases discussed by Helmholtz in which the bailee’s action constitutes a “material breach” seem to fall into one of two categories: either the bailee’s action, though perhaps taken in good faith, was not reasonably necessary to the purpose of the bailment as actually expressed by the bailor,\textsuperscript{107} or the bailee had created specific expectations on the bailor’s part as to how the bailment would be carried out, thus narrowing the scope of the implied license to those specific actions.\textsuperscript{108}

\textsuperscript{105} Though as stated above, it may also do this if the parties wish to add duties on top of the default \textit{in rem} ones.

\textsuperscript{106} Supra n. 64.

\textsuperscript{107} E.g. Burnett v. Edward J. Dunnigan, Inc., 4 P.2d 829 (Wash. 193) (cited by Helmholtz at 115) (person who borrowed car to take people to train station drove them instead to their ultimate destination when they missed the train); Fryer v. Cooper, 220 N.W. 486, 487 (S.D. 1928) (lessee of stallion for a year of stud duty used it as part of plough team in order to give it “exercise”). See also Coggs v. Bernard, 2 Ld. Raymond at 915 (“[I]f a man should lend another a horse, to go Westward, or for a month; if the bailee go Northward, or keep the horse above a month, if any accident happen to the horse in the Northern journey, or after the month, the bailee will be chargeable; because he has made use of the horse contrary to the trust he was lent to him under[.]”).

\textsuperscript{108} E.g., Nathan v. Tremont Storage Warehouse, Inc., 102 N.E.2d 421 (Mass.
The latter category of cases is more troubling, because it tends to involve actions to which the bailor would likely not have objected if informed ex ante that they would take place. The results are consistent, however, with the principle that *in rem* norms are designed to rule out the need for (and hence the permissibility of) speculation as to an owner’s use preferences. If the circumstances do not permit us to say that the bailor gave express or implied consent to a given possessory act, engaging in that act remains a violation of *in rem* duty—conversion, or at least trespass—subjecting the bailee to strict liability. The negligence standard that Helmholtz wants to apply is appropriate only for actions that are within the scope of the use license and hence do not constitute breaches of *in rem* duty. This explains why courts in these cases seem to resolve doubtful cases in favor of the bailor even where this imposes liability that the bailee would probably not have agreed to assume. The results seem dubious only because of the misleading categorization of a bailment as a “contract.”

### D. In what sense is bailee liability “immutable”?  

Merrill and Smith focus on another seeming anomaly in the “contract deviation” cases: where the bailee is found to be in “material breach,” the court will disregard express contract terms that seek to limit its liability. Again, this seems strange because if one thinks the bailee’s duties are contractual, one would expect the parties to be able to waive the default rule imposing strict liability for breach. Merrill and Smith view the parties’ inability to do so as showing that the rule has been made “immutable,” which means that it should be explainable as a form of “protection strategy.” Their suggested explanation is as follows: We want to discourage bailees from “acting toward the property in such a way as to create the appearance of ostensible ownership,” so as to avoid creating confusion among third parties who deal with the bailee, the bailor, or the

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109 Arguably the types of unauthorized acts at issue in “contractual deviation” cases should often be regarded not as conversion but as trespass, because the bailee exercises possession rightfully, and the actions are not usually such as to signal “complete defiance of the [owner’s] title and … an intent permanently to deprive him of his property therein.” See *Jeffries v. Pankow*, 112 Or. 439, 229 P. 903 (1924). The distinction between trespass and conversion, however, only matters if the question is whether the plaintiff can bring an action for trover rather than damages, *see id.*, and this is moot where the chattel has been lost or destroyed.

110 Property/Contract Interface at 819.

111 Property/Contract Interface at 817-19.
property. Such confusion is a problem because third parties who wish to move beyond Step 4 need to know who the owner is. If they are wrong, they may find themselves in violation of their in rem duties despite good faith efforts, and be required to forfeit possession of an item they believed themselves to have acquired legitimately. In other words, the argument is that we place strict liability on bailees because deviant use of bailed items raises “measurement costs” to third parties.

The problem with this is that by recognizing bailments at all, we have already eviscerated the one clear signal third parties might be expected to rely on as evidence of ostensible ownership: possession itself. The possibility of bailment (like that of theft) makes the inference from possession to title a risky one. Discouraging bailees from acting outside the strict limits of their license, however, doesn’t seem to reduce this uncertainty much. How is the third party supposed to know the terms of the bailment, so as to distinguish between actions on the part of the bailee that are licensed and those that imply ownership? Unless we are going to impose numerus-clausus-like limitations on the purposes for which it is legitimate to make a bailment, and hence on the types of actions it is possible for bailees to engage in permissibly, third parties will usually have no way to discern “contract deviation,” let alone be misled by it.

Here too, I think there is a more straightforward explanation. As explained above, “contract deviation” is really just conversion in cases involving liminal issues of license interpretation. There is no disagreement that bailees should be strictly liable for conversion. On that score, Merrill and Smith quote approvingly Helmholz’s statement that “[i]n such circumstances, bailees will have committed an intentional act entirely inconsistent with their undertaking as a bailee, and it would be unjust to allow them to pay less than the full value of the goods in consequence.”

112 Property/Contract Interface at 819.
113 Merrill and Smith use the following example: “[I]t is not implausible that in many cases—for example where a museum allows a gallery to exhibit a painting of which the museum is merely a bailee—there is a problem of ostensible ownership”. Property/Contract Interface at 818. I can only assume that people more immersed in the art world than myself know it to be highly unlikely that the terms of a museum’s bailment contract would ever permit this.
114 Merrill and Smith recognize this as a possible way of understanding these cases, though they appear to regard it as counter-intuitive. Property/Contract Interface at 818:

Somewhat less obviously, the contract deviation cases can also be seen as entailing a direct violation of the bailor's retained in rem rights . . . . These cases involve bailees who have used the property in ways not contemplated by the bailment contract.

115 Property/Contract Interface at 819. See also Sir William Jones, supra n. at 12 (“[A]n agreement, that a man may safely be dishonest, is repugnant to decency and morality, and as no man shall be presumed to bind himself against irresistible force, it is a
But wait—unjust? To whom? The question we are discussing is whether the bailor should be permitted to enforceably waive liability. Since the bailor is the one suffering the injustice, why shouldn’t she be able to waive the liability if she chooses? If she were to sign an agreement stating unequivocally “the bailee shall have no liability for loss of the item, even that resulting from the bailee’s own act of conversion,” why shouldn’t we enforce it?

Once you frame the question this way, it seems to me obvious that it is based on a conceptual error. What on Earth would it mean to waive liability for conversion? Conversion is defined as a category of actions taken with regard to the object that defy and contradict the owner’s rights—a failure to comply with the in rem duty imposed on all non-owners. To waive someone’s liability for conversion is simply to renounce your ownership in their favor. An owner actually does have the ability to identify in advance specific actions on the bailee’s part for which strict liability will be waived, but by doing so she is licensing the bailee to engage in those acts, subject either to a contractual duty of care or baseline negligence norms. That’s what a license is—a selective waiver of someone’s in rem duty not to take certain actions, and consequently of the strict liability that enforces it. Once the act is licensed, it isn’t conversion. To hold that an action is conversion, on the other hand, is necessarily to hold that it falls beyond the scope of any contract term imposing an alternate duty of care or limiting liability. The “immutable nonwaivability” of strict liability for conversion thus turns out to be based not in policy but tautology. It amounts to saying, “You can’t license someone to do things you don’t license them to do.”

I think my view is borne out by the single case Merrill and Smith cite for the proposition that “liability for conversion cannot be waived by contract.” Mrs. Goldsmith had entered into a bailment contract for storage of a fur coat that limited the company’s liability “in case of loss or damage” to the declared value of $100. The storage company, having been authorized to repair and clean the coat, sent it for this purpose to an outside contractor from whom it was stolen. The trial court had found just rule that every bailee is responsible for fraud, even though the contrary be stipulated, but that no bailee is responsible for accident, unless it be most expressly so agreed.” (emphasis in original); Schouler, supra n. at 21 (“[F]undamental morality forbids that a bailee should stipulate for immunity against his own wilful misconduct, and American courts have denied, even to bailees without recompense, the privilege of being as negligent as they please[,]”)

117 Id.
118 76 N.E. 2d at 406. Whether this amounted to conversion or not depended on whether it was in fact customary for coats to be dealt with in this way, and the appellate
the defendant liable for conversion, but then limited damages to the $100 cap. The appellate court reversed, holding that the contractual limitation on liability applied only to “damages that might be sustained in carrying out the terms of the contract and not where the damage claimed is for the value of the property in an action for conversion.” The court went on to explain that the conversion action “is not founded upon the provision of the bailment contract but rather is based on the tortious conduct of the defendant and the measure of damages is the value of the goods taken.”

The court does not construe the cap as intended to encompass “loss or damage” resulting from conversion, and then hold this to be nonenforceable. Rather, it holds that acts of conversion are by definition outside the subject matter of any bailment contract. To stipulate a $100 cap on liability for conversion would amount to an offer to sell the item for $100 at the bailee’s arbitrary discretion. Who in their right mind thinks that was Mrs. Goldsmith’s intent with regard to her fur coat?

One can make a similar point about “misdelivery,” which Merrill and Smith (again, following Helmholz) treat as yet a different subcategory of bailee misfeasance whose “nonwaivable” subjection to strict liability requires independent explanation. To say that a bailee has “misdelivered” is to say that he has purported to transfer rightful possession to someone other than the owner without the owner’s authorization—a paradigmatic act of conversion. It may be harsh to hold bailees strictly liable even where they misdeliver in good faith, but it is exactly the same harshness that holds trespassers strictly liable even when they cross boundaries unknowingly.

On the other hand, the increased likelihood of good faith misdelivery differentiates it somewhat from other forms of conversion. Generally the only way to convert without doing so either intentionally or through culpable lack of attention is where one has a reasonable but mistaken belief as to the identity of the owner (or the lack of one). Where one receives an actual bailment from the true owner no such mistake is possible, and so where we find the bailee to have converted it will be because he has taken actions that under the circumstances he should have court held that it had been error for the trial court to exclude the defendant’s evidence on the existence of such a custom. Id. at 407.

119 Id. at 408.
120 Id.
121 Id.
122 Property/Contract Interface at 815-17; Helmholz, Bailment Theories at 131.
123 90 C.J.S. Trover and Conversion § 32; Helmholz, Bailment Theories at 125.
124 87 C.J.S. Trespass § 4 (“It is not necessary that the trespasser intend to commit a trespass even though the act will constitute a trespass. . . . A trespasser is liable for all the detriment proximately caused by the trespass whether or not acting in good faith and with reasonable care.”).
known he was not authorized to take. A bailee who comes out on the wrong end of a “contract deviation” case may not have intended to harm the owner’s interests, but he nevertheless failed to scrupulously respect the owner’s exclusive right of control. Yet a bailee may take all reasonable precautions and still be deceived or mistaken into handing over the property to the wrong person. It would not therefore be contradictory for a bailor to agree \textit{ex ante} that, so long as the bailee satisfied some standard of care in verifying the identity of the deliveree, his damages in the event of error would be waived or limited. While one can conceive of such a waiver in theory however, it is unsurprising that we do not usually see attempts to use them in practice. Take Merrill and Smith’s hypothetical of a dry cleaner’s shop in which customers are asked to agree to a standard of negligence for misdelivery in exchange for lower cleaning rates. Most of the time the risk of misdelivery is too low to be salient to customers, and offering them such a deal where other cleaners do not might merely raise red flags as to the shop’s reliability. Whereas the group of customers whose consigned articles are valuable enough to make misdelivery a matter of salient concern will probably want more assurance rather than less from the bailee.

Helmholz reports that “when violation of the bailment contract through … misdelivery can be shown, attempts to take advantage of statutes or contract terms limiting the bailee's liability have generally failed.” Merrill and Smith take this to be evidence that here too the law has adopted a protection rather than a notice strategy. I read these cases differently, and find none of them to imply that an expressly worded waiver of liability for non-negligent misdelivery would be unenforceable. There is a difference between refusing to enforce a waiver clause that expressly addresses the risk of misdelivery, and refusing to let a bailee “take advantage” of one that doesn’t. The courts are applying a notice strategy, and finding that notice has not been given.

\footnote{125 See \textit{Property/Contract Interface} at 816-17 (discussing hypothetical use of such waivers by a dry cleaning shop).}
\footnote{126 Helmholz at 131.}
\footnote{127 \textit{Property/Contract Interface} at 816 & n.133-34 (noting that this is “puzzling”).}
\footnote{128 See Helmholz at 131 & n.158, 161 (citing \textit{Shamrock Hilton Hotel v. Caranas}, 488 S.W.2d 151 (Tex. Civ. App. 1972), \textit{Wabco Trade Co. v. S.S. Inger Skou}, 482 F. Supp. 444 (S.D.N.Y. 1979), \textit{Information Control Corp. v. United Airlines}, 140 Cal. Rptr. 877 (Cal. Ct. App. 1977); \textit{St. Paul Fire & Marine Ins. v. Federal Express Corp.} 548 N.Y.S.2d 422 (N.Y. Civ. Ct. 1989)). Helmholz discusses \textit{Shamrock Hilton} in text, portraying the case as one in which the court used a theory of negligence to avoid applying a statute that would otherwise limit liability for misdelivery. \textit{Id.} Yet the case reveals that the statute itself contained a proviso declaring that for the limitation to apply, “the loss must not occur through the negligence of the hotel,” and that the jury had found the hotel negligent. 488 S.W.2d at 153. See also \textit{Wabco Trade Co}, 482 F. Supp at 448 (contractual limitation on liability was not applicable because the parties had terminated the contract by mutual consent prior to the loss); \textit{Information Control Corp.} (contractual deviation); \textit{St. Paul Fire}, 548 N.Y.S.2d at 806 (liability based on breach of contractual duty to provide surveillance).}
The foregoing discussion highlights a feature of *in rem* logic that runs through all these scenarios, however one may characterize them on the “paucital-multital” spectrum: The way *in rem* duties are defined serves to reduce information costs to nonusers whose only concern is compliance with property rights, but the flip side is that it requires would-be users to bear the costs of identifying owners and verifying permissions, along with the risk of strict liability for having failed to do so correctly if they then engage in possessory use. Whether you mistake the location of a boundary line, get permission from someone not authorized to give it, purchase from someone not possessing title, use the thing in a way not authorized, or misdeliver it to someone other than the owner, you are likely to be held strictly liable, even if you were acting in good faith. We could relax the rule of strict liability for such lapses, but only at the cost of rendering property rights less secure. There is an inevitable trade-off between protecting the rights of owners and making it easy for people to verify that they have obtained (and are acting within) valid privileges.\footnote{See Henry Hansmann & Reinier Kraakman, Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights, 31 J. Legal Stud. 373 (2002); see also The Owner’s Intent and the Negotiability of Chattels: A Critique of Section 2-403 of the Uniform Commercial Code, 72 Yale L.J. 1205, 1207-08 (1963) (author not named) (contrasting the choices made in this regard by Roman Law, which never permitted passage of title against the will of the owner, with the French Civil Code, which virtually always favors the purchaser of chattels).}

IV. CONCLUSION

The approach to private law theory pioneered by Merrill and Smith has great promise in helping us to understand and clarify doctrine in a variety of areas. I have sought to further this enterprise by explaining how we might integrate the crucial transactional concept of license into the *in rem/in personam* framework. Through my discussion of bailment, I have sought to illustrate how a consistent application of this framework can generate useful insights into existing doctrine, resolving what had been regarded as troubling anomalies into straightforward application of first principles.