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Restating the Architecture of Property

Henry E. Smith[1]

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Abstract: Property law has proven difficult to restate, with none of the American Law Institute's previous Restatements coming close to covering the full breadth of this area. In addition to trying to fill this gap, those working on the current Fourth Restatement aim to capture the architecture of property. In the terms of complex systems theory, a Restatement should reflect the arrangement and interactions, the groupings, and the coherence (sometimes) of property law, rather than treating it as a heap of full detachable rules and components. Conventional strong versions of the bundle of rights picture of property, reinforced by the nature of the Restatement process, make it difficult to address property as a complex system. Using examples of possession and the property torts, the paper shows how a Restatement can begin to incorporate property's architecture and why it matters to the operation and the development of the law.

Keywords: Property, Restatement, Complexity, System, Complex Systems, Possession, Trespass, Nuisance

JEL codes: B52, K11, K13

I. Introduction

The project for a "Restatement of the Law Fourth, Property" sounds deceptively staid. However, each of the elements of its name – "Restatement of the Law, "Fourth," "Property" – reflects a challenge. Property has been the laggard among areas of private law in receiving the Restatement treatment in the United States. Unlike contract and torts and even restitution, the First Restatement of Property was never finished and even lost the property torts to the Torts Restatement on account of excessive delay with the property project.[2] The Property Restatements started with an ambition to set the subject on a sounder, Hohfeldian footing, based on his scheme of jural relations—a vision that proved difficult to achieve for a variety of

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[2] Restatement (First) of Torts vii, intro. (1939).

reasons.[3] And subsequent Restatements have only taken up selected topics, and never with the idea of filling in all the many areas—including adverse possession, most of personal property, real estate transfers, recording acts, groundwater, and mineral rights—left untouched by the First Restatement. As I will argue, the Restatement process, despite its ostensible conceptualism, treated property law as a heap of detachable rules, whose effects are additive. Once one accepts this (inaccurate) picture, piecemeal treatment can be (wrongly) regarded as only mildly problematic. The process and its results were in keeping with the conventional wisdom of the twentieth century Century in the United States: that nothing really holds the area of property together in terms of conceptual structure or subject-matter.[4] Property is a bundle of sticks, and it is sticks all the way down.

In 2014 the American Law Institute approved a new project for a Fourth Restatement of Property.[5] That is, we're now on the fourth round of restating the law of property. And yet, if it succeeds, it would be the first Restatement that would cover the entire subject. And "Fourth" is not the only remarkable aspect of the project. We must still ask why Property and why a Restatement of the Law?

One might think that the very reasons why there has been no comprehensive Restatement of Property would prevent there from being one now. I was once of that view,[6] and I can't prove that it's not true (at least not yet). Certainly the dominance of the bundle-of-rights picture of property in the United States complicates the possibility of any comprehensive Restatement effort.[7] As I will argue, the bundle picture simplifies property law in some ways that make some aspects easier to restate and other more difficult.[8] By treating property as a heap of rules and

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[3] The Restatement relied heavily in its early sections on Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, (1913) 23 Yale Law Journal 16, 28–59 (setting out eight "fundamental jural relations"—right, duty, privilege, no-right, power, liability, immunity, disability—and their interrelations).

[4] Thomas W. Merrill & Henry E. Smith, Why Restate the Bundle? The Disintegration of the Restatement of Property, (2014) 79 Brooklyn Law Review 681.

[5] I am the Reporter, and the Associate Reporters are Sara Bronin, John Goldberg, Daniel Kelly, Brian Lee, Tanya Marsh, Thomas W. Merrill, and Christopher Newman.

[6] Ibid 708.

[7] On the status of the bundle picture as conventional wisdom in the United States, see eg Bruce A. Ackerman, Private Property and the Constitution (New Haven, Yale University Press, 1977) 26 (reporting that the bundle-of-rights conception of property is so pervasive that "even the dimmest law student can be counted upon to parrot the ritual phrases on command"); Edward L. Rubin, Due Process and the Administrative State, (1984) 72 California Law Review 1044, 1086 ("[P]roperty is simply a label for whatever 'bundle of sticks' the individual has been granted."); Joan Williams, The Rhetoric of Property, (1998) 83 Iowa Law Review: 277, 297 ("Labeling something as property does not predetermine what rights an owner does or does not have in it.")

[8] For a variety of views on the bundle picture, see Symposium, Property: A Bundle of Rights?, (2011) 8 Econ Journal Watch 193. For critiques of the bundle picture, see, eg J.E. Penner, The "Bundle of Rights" Picture of Property, (1996) 43 UCLA Law Review 711; Thomas W. Merrill & Henry E. Smith, What Happened to Property in Law and Economics?, (2001) 111 Yale Law Journal 357; Henry E. Smith, Property as the Law of Things, (2012) 125 Harvard Law Review 1691.

property interests as a collection of rights, privileges, duties, and so on, the bundle picture invites piecemeal treatment of the subject, making endurance the main factor in covering the entirety of property (whatever, on a nominalist view, that term is taken to cover). And yet, on the bundle view, the interconnection and interaction of the various components of property law are assumed away, making them all but impossible to capture in a Restatement. The coherence of the law and the doctrinal "how", in addition to the substantive "what" of property law, will inevitably get short shrift. Indeed on the bundle picture, comprehensiveness and coherence are not important goals at all.

Dissatisfaction with the limits of the bundle theory and its failure to deal well with complexity motivated me to start on the Restatement Project. More positively, the aim is to remedy these defects by capturing some of the architecture of property. The difference between a collection of rules and an architecture stems from the arrangement and interactions, the groupings, and the coherence (sometimes) of property law. In short, the need is for *system* in property law. To show why system is needed and point to the kind of system that could be developed, I will employ the concepts and tools of complex systems theory (CST). In CST, a system is complex if it has many parts with many interactions, such that it is difficult to infer the properties of the whole from the properties of the parts.[9] Put differently, the effect of the system, here property law, is not the additive sum of the effects of the parts, such as rules or interests. Linear additivity is exactly what the bundle picture leads us to expect and exactly what a Restatement should transcend.

All this is very aspirational. There are many ways one might "capture" the architecture of property – in articles, treatises, textbooks, and so on. Why a Restatement? Restatements are strange birds that are hatched from strange eggs. In this chapter I'd like to set out how the importance of architecture to the Restatement is almost exactly matched with the difficulty of implementing it in the Restatement process. Call it the "Paradox of Architecture" in restating law in general and property in particular.

Section II sketches what I mean by the architecture of property and give some examples from the law of possession and the property torts as we have been formulating provisions about them. In section III, I highlight how the Restatement process of drafting and its quasi-legislative aspirations make capturing the architecture of property more difficult. Section IV turns to the question of "So what?" Why is it important to capture the architecture of property in a Restatement, especially in the United States? I will conclude on a necessarily optimistic note.

II. Architecture in Property Law

What is architecture in property law? The architecture of property, like that of other systems, is shaped by the problem of complexity. The notion of complexity in CST points to the need to organize people's interactions with scarce things. It even helps explain why we need to treat things as things. This view of complexity differs from that which motivated the American

[9] See, e.g., Melanie Mitchell, Complexity: A Guided Tour (New York: Oxford University Press, 2011).; Herbert A. Simon, The Sciences of the Artificial 2d edn (Cambridge, Mass., MIT Press., 1981 [1969]).

Law Institute in adopting its program of restating the law. It also differs from the view implicit in strong versions of the bundle-of-rights picture of property, which in effect denies the importance of complexity in the sense of CST.

A. Architecture in the Complex System of Property Law

The words "system" and "systematic" are often tossed around in discussions of property law, both in a positive and negative sense. Before turning to how some of these favorable and unfavorable views of "system" intersect with the Restatement process, this Part will show how a specific sense of system will help sharpen the goals for a new Restatement.

Although the complexity of a system is hard to define, a common working definition in CST holds that a system is complex when it is difficult to infer the properties of the whole from the properties of its parts.[10] The reason is that the parts interact so strongly and interconnectedly that it is difficult to trace the combined effect of the parts and the net result. This leads to some properties of the system being emergent.[11] For example, it makes sense to deal with wetness and other properties of water as a whole without constant reference to the properties of oxygen and hydrogen atoms. Notions of emergence come in a variety of strengths, but for us a weak version is sufficient: the system effects are non-trivially related to the properties of the smallest constituents of the system, such that managing complexity requires us to speak in terms of system properties. We can engage in a holistic approach without giving up on reductionistic analysis where it is appropriate.[12]

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[10] See sources cited in n 9 above. Lon Fuller recognised the problem of complexity under the heading of "polycentricity, borrowed from Michael Polanyi. Fuller Lon L. Fuller, The Forms and Limits of Adjudication, (1978) 92 Harvard Law Review 353, 394-95 (introducing the concept of polycentric tasks); see also Eric Kades, The Laws of Complexity and the Complexity of Laws: The Implications of Computational Complexity Theory for the Law, (1997) 49 Rutgers Law Review 403, 406-24.

[11] How seriously to take emergence and how much of a challenge it poses to reductionism is a large debate in philosophy and science, and one which we can largely sidestep here. The point for purposes of law and its restatement is that a fully reductionist (or constructivist) approach is prohibitively costly. Thus, even if in principle one could analyze legal relations into micro constituents and could track their contributions to macro effects, it would not be cost-effective to do so. Thus, where strong (and controversial) statement are about the "ability" to reduce macro properties to micro foundations, we could more safely make statements about the "efficacy" of reducing legal relations in a similar fashion and trying to build the world of law up from them. Cf. P.W. Anderson, More is Different: Broken Symmetry and the Nature of the Hierarchical Structure of Science, (1972) 177 (4047) Science 393, 393 ("The ability to reduce everything to simple fundamental laws does not imply the ability to start from those laws and reconstruct the universe. . . . The constructionist hypothesis breaks down when confronted with the twin difficulties of scale and complexity. . . . [A]t each level of complexity entirely new properties appear. Psychology is not applied biology, nor is biology applied chemistry."); id 395 ("[W]e can now see that the whole becomes not merely more, but very different from the sum of its parts."). See also Henry E. Smith, Emergent Property, in James Penner & Henry E. Smith (eds), Philosophical Foundations of Property Law (Oxford, Oxford University Press, 2013) 320.

[12] See Simon n 9 at 195. Thus, insisting on reductionism in principle does not provide an argument against the practical indispensibility of legal concepts that rest on weak emergence. But cf Shane Nicholas Glackin, 'Back to Bundles: Deflating Property Rights, Again,' (2014) Legal Theory 1.

The need to manage complexity also shapes how we organize systems like the law. Systems are organised into components (modules) in order to manage complexity. Each module contains elements that interact much more strongly internally than they do with elements outside the module. In a car, the brake system need not interact with the windshield wipers. If in a system every element could in principle interact freely with any other, the problems of multiple interaction and complexity effects would soon become intractable.

Such system effects are essential to explaining how property law works. This kind of complexity implicates views about property in the United States in the most fundamental way. Since the days of Legal Realism, conventional wisdom has held that property is a bundle of rights, or more metaphorically, a bundle of sticks.[13] By this is meant that "property" is a meaningless label that does not denote any stable content. Property is not a right to a thing, because legal relations hold between persons, and not between persons and things. As for to content, legal relations can be mixed and matched, such that, in more extreme versions of the bundle of rights, the bundle is in principle quite plastic. The notion of things disappears altogether, and denying that property is about things at all is, along with a denial of the systemic aspects of property law, one of the most important articles of faith in Legal Realism and its progeny.[14] The bundle-of-rights picture is seen as more hardheaded, realistic, less metaphysical and in keeping with a more complex age.[15]

There is a great deal of irony in this. Although the bundle of rights as an analytical device has its uses, the more extreme versions that present themselves as a substantive theory of property have exactly the opposite effect to that intended when it comes to complexity.

The mainstream conception of property in the United States is at its weakest when it comes to issues of complexity. On the bundle of rights picture of property, "property" is only a label for some significant cluster of legal relations to which we choose to give that designation.[16] Instead of property being a right to a thing, with some special core status for the right to exclude or powers of licensing and transfer, we can instead mix and match various rights to use and exclude, powers to alienate, and so on. Such a theory also downplays the importance of the thing as well. The idea is that, because legal relations hold between persons, bilaterally, and not

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[13] For a classic statement, see Thomas C. Grey, The Disintegration of Property, in J. Roland Pennock & John W. Chapman (eds), Property: NOMOS XXII 69, 69 (New York: New York University Press1980) (citations omitted).

[14] See Grey, n 13 above, at 70. See also Felix S. Cohen, Transcendental Nonsense and the Functional Approach, (1935) 35 Columbia Law Reviw 809, 815 (decrying "the 'thingification' of property," which made possible a pretense that "courts are not creating property, but are merely recognizing a pre-existent Something").

[15] See eg Thurman Arnold, The Folklore of Capitalism (New Haven, Yale University Press, 1937) 114-116; see also eg James E. Herget, American Jurisprudence, 1870-1970: A History 147-58 (Houston, Rice University Press, 1990); G. Edward White, Patterns of American Legal Thought 139 (Indianapolis, Bobbs-Merrill Co., 1978).

[16] See eg Walton H. Hamilton & Irene Till, Property, in Edwin R.A. Seligman & Alvin Johnson (eds), Encyclopaedia of the Social Sciences Vol. 11, 528 (New York, Macmillan, 1937) 528 (declaring that property is nothing more than "a euphonious collocation of letters which serves as a general term for the miscellany of equities that persons hold in the commonwealth"); see also Grey, above n 13.

between persons and things, the thing must be unimportant. At most property is a set of legal relations with respect to a thing.

Downplaying things poses problems. On the bundle theory, the communication of legal relations through the thing is incidental to the way property works. In the real world, many property relations are communicated to a wide and impersonal audience through a thing.[17] In James Penner's famous car park, people generally know not to take or damage cars without needing to know anything about their owners or possessors: whether the car is on loan from the possessor's sister in law, whether it is subject to a security interest, etc.[18] And it is this need to communicate with a large and indefinite audience that forms a rationale for standardizing in rem rights, for example as reflected in the closed number of forms, the *numerus clausus* principle.[19]

The bundle picture presents two major problems, one static and one dynamic. Both the static and dynamic problems are magnified in the Restatement process.

The static problem is one of delineation and definition. If property is a collection of use rights, how far do we distinguish uses? Is every use a separate stick? Is farming a use? Is growing tomatoes the relevant use? If legal relations are bilateral, how do we capture the in rem aspect of property? More fundamentally, it is infeasible to delineate property relations by starting at the atomic or subatomic level.[20] Interestingly, recognizing this problem of delineation need not make us indifferent to how property is used or hostile to Hohfeld's analytical contributions. As Ben McFarlane and Simon Douglas argue, an appreciation of how property works points to the importance of rights to exclude as a wholesale and implicit way to protect

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[17] See eg, Smith, above n 8.

[18] See J.E. Penner, The Idea of Property in Law (Oxford, Clarendon Press, 1997) 75-76 ("As I walk through a car park, my actual, practical duty is only capable of being understood as a duty which applies to cars there, not to a series of owners. . . . The content of my duty not to interfere is not structured in any way by the actual ownership relation of the cars' owners to their specific cars.").

[19] See Thomas W. Merrill & Henry E. Smith, Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle, (2000) 110 Yale Law Journal 1, 12-20 (explaining the standardisation of property as a response to benefits and costs of communicating rights to different audiences; see also Bernard Rudden, Economic Theory v. Property Law: The *Numerus Clausus* Problem, in John Eekelaar & John Bell (eds), Oxford Essays In Jurisprudence: Third Series 239 (Oxford, Oxford University Press, 1987) 241 ("In all 'non-feudal' systems with which I am familiar . . . there are less than a dozen sorts of property entitlements."). The *numerus clausus* principle is discussed in a number of chapters in this volume: see eg, the contributions of Ben France-Hudson (Chapter 11) and Susan Pascoe (Chapter 10).

[20] See eg Brian Angelo Lee & Henry E. Smith, The Nature of Coasean Property, (2012) 59 International Review of Law and Economics 145; Thomas W. Merrill & Henry E. Smith, Making Coasean Property More Coasean, (2011) 54 Journal of Law and Economics, S77.

privileges of use.[21] Thus, the Hohfeldian framework can be adapted to a more systemic view of property, something that may not be out of keeping with Hohfeld's unfinished program.[22]

The dynamic problem with the conventional bundle of rights picture of property is directly related to system effects. Changes to one attribute of a thing or one stick in the bundle will affect some other attributes and sticks, and some more than others.

Let's focus on the basic question of thinghood in property. The world could fit anywhere along a spectrum of complexity. Things are made up of attributes, and bundles of rights are made of more basic relations (whether they are actually delineated in those terms or not). If we regard a thing as a bundle of attributes or ownership as a bundle (in some sense) of legal relations, what is the relationship between and among the attributes of the thing or between and among the legal relations in the bundle?

There are three possibilities, which are really segments of a spectrum of complexity.[23] One possibility is that the constituents of a thing and the strands of ownership do not interact. Thus, a stick can be inserted into or removed from the bundle in a highly predictable way. We could subtract a right to exclude hikers or add a right to sunlight in the United States, or vice versa in England. Because the sticks are additive, the problem of whether to include the stick or not can be analyzed in isolation form the rest of the bundle. In terms of improving the bundle, if we can be sure that the addition or subtraction of a stick makes an improvement on its own terms, we can be sure that we have improved the bundle overall. It is easy to see why this would appeal to legal interventionists, and it is no accident that the bundle of rights came to the fore in the New Deal era, and is in keeping with the high-modernist progressivism of the early twentieth century.[24]

Atthe opposite extreme, the law could be maximally complex: every pair of attributes in the thing, every pair of legal relations in the bundle, and every pair of rules could interact, leading to maximal complexity. The complexity is unstructured and irreducible. Changing one element, say one stick in the bundle, could have untold ripple effects, and even small interventions would be highly unpredictable in their effects.

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[21] Simon Douglas & Ben McFarlane, Defining Property Rights, in James Penner & Henry E. Smith (eds), Philosophical Foundations of Property Law (Oxford, Oxford University Press, 2013) 219.

[22] See Ted M. Sichelman, Very Tight 'Bundles of Sticks': Hohfeld's Complex Jural Relations (April 6, 2017), in Shyam Balganesh, Ted Sichelman & Henry Smith (eds), The Legacy of Wesley Hohfeld: Edited Major Works, Select Personal Papers, and Original Commentaries, (Cambridge University Press, 2019, Forthcoming), available at SSRN: https://ssrn.com/abstract=2947912.

[23] Lee Alston & Bernardo Mueller, Towards a More Evolutionary Theory of Property Rights, (2015) 100 Iowa Law Review 2255, 2262-72; Henry E. Smith, Complexity and the Cathedral: Making Law and Economics More Calabresian, European Journal of Law and Economics (2018), https://doi.org/10.1007/s10657-018-9591-x.

[24] Cf Grey, above n 13 at 81 (discussing how the Legal Realists "were on the whole supportive of the regulatory and welfare state, and in the writings that develop the bundle-of-rights conception, a purpose to remove the sanctity that had traditionally attached to the rights of property can often be discerned").

In the middle, between "additive" complexity and fully interactive and intractable complexity is what is sometimes referred to as "organised complexity."[25] Attributes interact more with some attributes than others, and similarly for legal relations and rules. This structure can be exploited to manage complexity and make for a more usable system of law. Attributes that are complementary and interactive should be gathered into things, which is often the case in everyday ontology and is reflected in legal delineation. Thus, when it comes to property in land, attributes like soil and water go together but high reaches of the atmosphere do not. When it comes to the bundle of legal relations, similarly sticks that interact should go together in a module and should interact more weakly with other sticks outside the module.[26] The internal cluster of privileges of a landowner are highly interactive but are left implicit and hidden behind the land boundary and protected by the relatively on/off character of trespass law. For important interactions outside the land module and its associated modular package of rights, the interface to other such packages is constituted in the law of nuisance, easements, covenants, and the like. Importantly, tinkering with such packages and things can be done in a controlled way with due regard to the potential but manageable ripple effects. Packages of rights can be combined, split up and interact with each other to produce predictable (and, one hopes, desirable) macro effects.[27]

An analogy to architecture in its literal sense is instructive. In architecture the various elements, at the building level and above and below, are characterised by structured complexity. Various theories of architecture take for granted this structure, deny it, or try to harness it.[28] One feature of the high modernism of the mid-twentieth century was a partial understanding of complexity, comparable in many ways to what inspired the Restatements and Legal Realism. Urban planning of the era and urban renewal in particular were not sensitive to how order might emerge organically or spontaneously. The effects were treated as additive. Sometimes, as in zoning from the era, uses were separated ruthlessly, reflecting a lack of appreciation for how uses interact. Thus, as Jane Jacobs and now the New Urbanists emphasize, a vibrant street life fostered by ground-level retail businesses contributes to the informal social interactions important in a residential area.[29] How to modularize architecture has been a much contested topic, but it must be done in a way that does not kill off important sets of interactions on the one hand and allows for some degree of organic development.[30] The problem of modularisation in

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[25] Warren Weaver, Science and Complexity, (1948) 36 American Scientist 536.

[26] See eg Carliss Y. Baldwin & Kim B. Clark, Design Rules: The Power of Modularity Vol. 1 (Cambridge, Mass.: MIT Press, (2000) 58–59, 236–37, 257; Simon, n 9 above at 210.

[27] Andrew S. Gold & Henry E Smith, Sizing up Private Law (Aug. 9, 2016), available at SSRN: https://ssrn.com/abstract=2821354; Smith, above n 8.

[28] See Herr, Christiane, Generative Architectural Design and Complexity Theory. International Conference on Generative Art (2018), available at: https://www.researchgate.net/publication/30870757/download.

[29] Jane Jacobs, The Death and Life of Great American Cities (New York, Random House, 1961); Peter Katz (ed), The New Urbanism: Toward an Architecture of Community (New York, McGraw-Hill, 1994).

[30] Modularity theory is most famously applied to architecture in the work of Christopher Alexander. See Christopher Alexander et al., A Pattern Language: Towns, Buildings, Construction (New York: Oxford University Press, 1977).

legal structures, especially "bundles of legal relations," is similar: what grain to define in terms of things and relations and what to encode directly in the law versus allowing for extralegal development. Like architecture, property law falls in the middle ground of structured complexity, which profoundly shapes each field.

Elsewhere I have argued that a variety of problems addressed by property law fall squarely in this middle ground of structured complexity.[31] Far from being a peripheral aspect of property law, the importance of interactions between the elements of the legal landscape is at the centre of why property law has the architecture it does. Why is property a law of things?[32] Why isn't the bundle of rights fully protean as many accounts would lead us to expect? Why has the drive since Legal Realism to make legal concepts in property and other areas as shallow and fact-bound not been more successful?[33] And why have law reform efforts—including Restatements—often caused the law to become more and not less unmanageable in its complexity?

A part of an answer to all of the above is the failure to recognize that law is a complex system, the easy assumption that effects are linear, and the consequent disdain for "metaphysical" doctrine. To begin with, the division of the world into legal things itself lends modularity to the system of property law.[34] If things are made up of attributes, which attributes are gathered together into a thing? Attributes that are highly complementary should go together and those that are not will tend not to. By defining legal relations like rights, duties, powers, and so on, over legal things, many of the internal aspects of things and their uses can be irrelevant to third-party actors. The laws of trespass to personal property and conversion do not depend on that information. Nor do those torts depend on the kind of engine the car has, whether it has leather seats, and on and on. In the case of personal property, the law can rely mostly on everyday ontology for what a thing is: chairs and pencils are things etc. In some borderline cases, the law will specify that a collection like a herd of animals can also be a thing.

When it comes to real property, the thing subject to possession and ownership is more artificially constructed – boundaries need to be marked and possibly registries to be created and maintained. Once parcels are defined this way, much activity – farming, parking cars, reading books – can take place with no relevance to duty bearers under the law of trespass. The legal definition of real property also includes the *ad coelum* principle – one who owns the surface owns to the heavens above and the depths below – and here we find sensitivity to what is complementary to the use of the surface and what is not. Airspace at cruising altitudes is useful for airplanes (these days) and is not complementary or very interactive at all with activities at the

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[31] See eg Smith, above n 23.

[32] Smith, above n 8.

[33] Henry E. Smith The Persistence of System in Property Law, (2015) 163 University of Pennsylvania Law Review 2055.

[34] Smith above n 8;Ted Sichelman & Henry E. Smith, Modeling Legal Modularity (draft 2017).

surface. Thus, with the advent of airplane overflights it is not surprising that courts have defined the airspace used for navigation ("avigation") as a separate resource.[35]

Architecture is the solution to the complexity problem in property law as in many other complex systems. Property law provides devices to manage complexity that could not be replicated by private contracting.[36] What I mean by the architecture of property and what I think a Restatement should capture are a reflection of a fundamental aspect of property law in any legal system – its complexity. The solution is not to throw out the idea of reform altogether or to abolish Restatements. Instead, Restatements in general and a Restatement of Property in particular can put us on the road back to an appreciation of system in property law and a rebuilding of the architecture that would better implement it.

B. Solving the Problem of Architecture

Before turning how to build architecture into a Restatement, it is worth considering what the system of property law requires. To see this, it is instructive to consider the very partial view of system and complexity that has characterised the Restatement process in the past.

There is a traditional notion of architecture in the law, which is only partly what I have in mind. Some would see architecture and system as an aspiration of the civil law, perhaps tracing back to what was received from Roman law.[37] "Architecture" and "system" are associated with conscious design and abstract conceptualism. In contrast, the common law would be more spontaneously created and lack any designed architecture or system.

Here is not the place to wade into these debates. Instead, what I mean by "architecture" and "system" are as true of the common as of the civil law. A complex system can arise spontaneously or as a mixture of spontaneous and direct development. The point is that its organisation into components and the manner of the interaction determine both how the system works statically and how it shifts dynamically. Both are major aspects of CST.

The architecture of property law is reflected in doctrine. One might think – and a strain of conventional wisdom I am associating with the legacy of Legal Realism does hold – that any architectural features that property law exhibits are a matter purely of doctrinal carry-over and

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[35] See Stuart Banner, Who Owns the Sky? The Struggle to Control Airspace from the Wright Brothers On (Cambridge, Mass., Harvard University Press, 2008).

[36] Lee & Smith above n 20; Henry E. Smith, Economics of Property Law, in Francesco Parisi (ed), The Oxford Handbook of Law and Economics, Volume 2: Private and Commercial Law (Oxford, Oxford University Press, 2017), 148-177, at 152; cf. Henry Hansmann & Reinier Kraakman, The Essential Role of Organizational Law, (2000) 110 Yale Law Journal 387, 406-07.

[37] This is different from the totality of Roman law, which was quite casuistic and equitable. See, e.g., Fritz Schulz, History of Roman Legal Science (Oxford, Oxford University Press, 1946); Alan Watson, The Spirit of Roman Law, Athens (Athens, Georgia, University of Georgia Press, 1995). The part of Roman law that traveled was more modular, and perhaps its modularity made it easier to adopt and adapt.

are decorative at best and distorting at worst. The architecture of property is something to overcome and not to celebrate.

This is mistaken and on a certain level clearly mistaken. Property has an architecture not because of blind adherence to tradition or false consciousness or the operation of hidden agendas. One can't rule out that some such may sometimes occur. However, as an explanation for all architectural aspects of property these nefarious sources and dismissible considerations fall far short of explaining why property has an architecture and why it should. For reasons familiar from CST that I will explore shortly, even in the absence of aesthetic and political considerations, a system that manages complexity is a necessity in property law. Especially in the United States, to say that property has an architecture one has to show why – on functional grounds – it has this architecture and why those reasons are good ones. A certain degree of functionalism is inescapable.

It is worth noting that uncertainty and complexity – paired together – were presented by the American Law Institute (ALI) as the reason for Restatements in the first place. The ALI commissioned a study in 1923, the Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law, which formed the blueprint for the ALI and the Restatements. The authors of the report cited the number of decisions, the number of potentially applicable laws, and the number of facts that could be relevant to a case as the causes of the increased complexity of the law.[38] What the report does not mention is the potential for interaction among cases, statutes, regulations, and facts that can potentially be far more important than mere numerosity to the problem of complexity in the law. If the effects of additional legal materials and facts are additive, then a doubling of the legal materials and facts will lead to a doubling in their contribution to the cost of resolving a case. But with interaction effects the effect can be much greater than linear: each new case, each new rule, each new fact can potentially interact with all the existing ones. If a system has 100 elements, the addition of one element that can interact with any of the existing elements increases the interactions by 100 (or by $n - 1$ for the addition of the nth element).

Because of these potential non-linear effects, the uncertainty in the law goes far beyond the kinds cited in the American Law Institute's 1923 Report. Interaction and nonlinear effects make inferences about the system as a whole – and how it bears on any situation – potentially more difficult to predict. This is a kind of uncertainty that dwarfs the problems of loose legal terminology and hard-to-find caselaw. It is also the kind of subtle effect that can be exploited by sophisticated actors. Consider an extreme example, tax law, where it is precisely the interaction of various provisions that provides the most fertile ground for tax evasion.[39] Only those who can afford expert help can make such a system work for them.

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[38] American Law Institute, Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law (1923) 71-78.

[39] David A. Weisbach, Formalism in the Tax Law, (1999) 66 University of Chicago Law Review 860, 871 (arguing that as response to evasion rules increase complexity because of their potential interaction, making standards often more attractive in tax law).

To illustrate how the incomplete view of complexity set forth in the 1923 ALI Report played itself out in the early parts of the Restatement (First) of Property, take the notion of an in rem right. In a conscious effort to follow Hohfeld, Harry A, Bigelow, the Reporter, couched the early Sections of the Restatement in terms of rights, duties, privileges etc., closely tracking Hohfeld's scheme. Although not using Hohfeld's term "multital," the Restatement did implicitly adopt the Hohfeldian view that what we call "in rem rights" are really congeries of many similar rights availing bilaterally between owners and others.[40] If this weren't clear enough, Bigelow was challenged at an ALI meeting by one of the members, a Mr. Beers, for failing to make mention of the idea that property "is a right against all persons, against all the world."[41] In Hohfeldian fashion, Bigelow replied that "I do not believe that there is any such thing as a right against the world at large, against everybody."[42] While there has been a lively discussion of what "a right availing against others generally" exactly means, one advantage of thinking in terms of in rem rights is that it reflects the economizing method of delineation that the law actually adopts: the law does not spell out in rem rights one by one as between each pair of members of society (much less with respect to each individual stick). Such a procedure would ignore the massive shortcut taken by delineating an in rem right wholesale: if someone has an in rem right, others generally have a duty unless they are specifically excepted.[43] Moreover, by acting as if in principle delineation occurred pair by pair and stick by stick, the door is opened to all sorts of complexity and intractability from the possible interaction of these fully articulated basic legal relations. In keeping with the ambition to capture rather than to tame complexity, Bigelow acknowledged that one person could hold a right against many people and the rights could be identical save in the identity of the duty bearer. Nevertheless, Bigelow cited the possibility of variation as the selling point for his Hohfeldian approach, on the grounds that the rights "may vary according to the man."[44] He went so far as to deny that "accurately speaking," there was "[any] such thing as a right against the world at large, or as the older authorities said, in rem."[45]

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[40] Hohfeld analyzed "in rem" rights as a collection of bilateral rights. Where conventionally one would speak of an in rem right, Hohfeld said the right was "multital," which meaning one of a cluster of many "unital" or one-on-one right-duty pairs, availing against many others. Instead of in personam rights, Hohfeld saw "paucital" rights, which were no different from in rem rights except in being paired with few similarly unital rights. Wesley Newcomb Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 26 (1917) Yale Law Journal 710, 718–33. For discussion, see Thomas W. Merrill & Henry E. Smith, The Property/Contract Interface, (2001) 101 Columbia Law Review 773, 780-89.

[41] Ibid 211.

[42] Harry A. Bigelow & Richard R. Powell, Discussion of Property Tentative Draft No. 1, 7 A.L.I. PROC. 199, 207 (1929), 215.

[43] Albert Kocourek, Rights in Rem, (1920) 68 University of Pennsylvania Law Review 322, 322; Andrew S. Gold & Henry E. Smith, Scaling Up Legal Relations (December 21, 2017), in Shyam Balganesh, Ted Sichelman & Henry Smith (eds), The Legacy of Wesley Hohfeld: Edited Major Works, Select Personal Papers, and Original Commentaries (forthcoming, Cambridge University Press, 2019), available at SSRN: https://ssrn.com/abstract=3091652.

[44] Bigelow and Powell (n 42 above) 215.

[45] Ibid. He went on to say that there is:

> nothing but a series of rights against various specified individuals and ordinarily while it is accurate to say you have got a right against everybody, against the world at large, yet when you come to the Restatement where it becomes essential to analyze your right more carefully, I do not want to find ourselves committed

In the attempt to be accurate and perhaps to capture the complexity of modern life, the role of rules, the generality of the in rem right, and the converse generality of the duty to respect other's in rem rights that is facilitated by their impersonality are completely suppressed. This partial view of complexity has the perverse effect of leaving complexity completely untamed. Ironically given its emphasis on context and complex social reality, the Restatements and the then-nascent American Legal Realism do a relatively poor job of dealing with the complexity of the law.[46]

The field of complex systems is suited to filling the gap left by traditional notions of legal complexity like that set out in the ALI's 1923 Report. Numerosity of legal rules, facts, and sources of law are important but are only part of – and maybe the less important part of – the problem of complexity in the law. It is the interactions *between and among* rules, facts, and legal sources that make complexity so hard to deal with. The methods of dealing with this complexity include modular systems and concepts that organize this mass of interactions. The question then becomes how to implement these devices in a Restatement.

III. Restating: The Process

Restating architecture is a tall order because restating is itself not just a result but a process. That process includes meetings with advisory groups that go through sections one by one sequentially. Drafts are then evaluated and approved by the Council and eventually the membership on a basis that is hardly more wholesale. The model is legislative and the goal is judiciousness. There is a lot to admire in this process, and it is designed to reflect a consensus. Consensus can be a mixed blessing: sometimes in the past it has been easy for those with intense preferences – reformers and industry lobbyists – to convince a sometimes academically-driven enterprise to adopt too easily cumbersome multifactor balancing tests and vague standards.[47] And it is unlikely that a Restatement can provide detailed solutions in the absence of the on-the-ground knowledge that would be required, leading again to over-reliance on vague standards.[48] To the extent that those with real-world knowledge are at the table, many areas can devolve into interest-group contests that are familiar from actual legislatures.

Let me highlight one less high-profile problem – or challenge – in the Restatement process for the area of Property. If the big problem with the received wisdom on property is the naïve bundle-of-rights picture, there is a lot in the Restatement process that reinforces it.

> to the proposition that there is such a thing as a right against the world at large or against an indeterminably large number of people.

Ibid.

[46] On complexity and realism, see Henry E. Smith, On the Economy of Concepts in Property, 160 (2012) University of Pennsylvania Law Review 2097; Smith, Making Calabresian, above n 23.

[47] Alan Schwarz & Robert E. Scott, The Political Economy of Private Legislatures, 143 (1995) University of Pennsylvania Law Review 595.

[48] Alan Schwartz & Robert E. Scott, The Common Law of Contract and the Default Rule Project, 102 (2016) Virginia Law Review 1523, 1527-32.

Restating the law section by section makes it easy to think of the law in rule-by-rule terms. Everything is detachable and debatable in isolation. More specifically, the guidelines for Restatements have wound up focusing on "selecting" the "better rule," presumptively the "majority rule" among American jurisdictions, or the "minority rule" if a trend toward it can be discerned or good reasons for choosing it over the majority rule can be advanced.[49] At least insofar as the bundle of rights is concerned, the Restatement process and the vision of property implicit in the bundle picture go hand in hand.

There is some irony in this. The bundle-of-rights picture was espoused and entrenched in conventional wisdom by the Legal Realists of the 1920s and '30s, who were nothing if not sceptical of legal concepts. Indeed, some Realists poured scorn on the first generation of Restatements for being a conceptualist and therefore inherently reactionary enterprise (the Realists were prone to accusing anyone they disagreed with of conceptualism and formalism), but other Realists were not so negative especially after the Restatements themselves took a more Realist turn.[50] The Restatement enterprise could be accommodated to Realist ends, at least up to a point.

The common element between the Restatements and Realism is a disaggregated bundle-of-rights view. The First Restatement adopted a Hohfeldian framework (not carried through consistently), and the Hohfeldian framework was the inspiration for the bundle of rights.[51] It may well be that Hohfeld himself had planned to capture the unity of the law ("aggregate relations"), but when he died his system could be taken to be one of reductionism and disaggregation. Even as it stands, there are those who have employed Hohfeld's scheme in a more systematic and less reductionistic fashion,[52] but the Restatements were not among them. Partly, again, the Restatement process reinforced the reductionism of the bundle of rights. Restating rule by rule, interest by interest, as reflected in section-by-section drafting discussion and to some extent voting, meant that a disaggregated and linearly aggregated version of property was almost an inevitable product of the process. As a result, the Restatements, however conceptualistic they might at first have appeared to some Legal Realists, shared with Realism a lack of appreciation of the unity and system in the common law of property.

Another facet of the Restatement process contributes to the flattening of the law: the search for direct solutions. Once the process focuses on problems in property law on a section-by-section, rule-by-rule basis, the search for solutions is pushed into this mold. The kinds of solutions sought are direct ones that can be formulated in one or more sections. Thus, in the Restatement (Second) of Torts, different definitions of possession are offered and immediately

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[49] The American Law Institute, Capturing the Voice of the American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work (rev. edn. 2015) 5-6.

[50] Kristen David Adams, Blaming the Mirror: The Restatements and the Common Law, (2007) 40 Indiana Law Review 205.

[51] Merrill & Smith, above n 4.

[52] Sichelman, above n 22; McFarlane & Douglas, above n 21.

used for purposes of defining real and personal property torts.[53] Because of the incompleteness of the Restatement, the commonalities of possession between real and personal property possession and many of the implications of possession for other aspects of property law were not addressed. Moreover, this treatment makes possession looks less dependent on extralegal standards – what counts as control, what will be taken as objective manifestations of the intent to control – than it really is. Instead, each legal area is treated as a package of disconnected rules – separate from other areas of property law and lacking in much internal structure. The emphasis is more on finding solutions to problems than on providing a platform for private ordering. (This is even more of a problem in the related areas of contracts.)

Relatedly, when community standards and an articulated area of law are flattened, the tendency has been for Restatements to formulate the law as a series of balancing tests. Famously, the Restatement (Second) of Torts formulated the law of nuisance in this way.[54] Earlier law employed the locality rule and some adjustments to it based on considerations like ease of relocation.[55] The basic idea was a second-order adjustment of the mutual rights and duties of landowners in light of the conflict in order to come up with a set of symmetric rights that maximised the freedom of a generic landowner.[56] This process was reflected in the common law maxim, *sic utere ut alienum non laedas* ("use what is yours so as not to harm another's"), which, not surprisingly, the Realists treated as an empty and conclusory slogan.[57] Taken as a first-order test it is. But seen in a more articulated – architectural – light, the maxim neatly expressed the process of conducting such a second-order adjustment. And the traditional mutual second-order adjustment and the "modern" balancing test can differ substantively. Under the Restatement (Second) of Torts and in keeping with Realism, one can imagine a highly valuable land use not counting as a nuisance even if it causes substantial physical damage, because the

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[53] Restatement (Second) of Torts § 157 (1965) ("Definition of Possession" of land); ibid § 216 ("Definition of Possession of Chattel"). The First Restatement offers substantially similar definitions in to places. Restatement (First) of Property (1936) § 157 ("Definition of Possession" of land); Restatement (First) of Torts § 216 (1934) ("Definition of Possession of a Chattel").

[54] Restatement (Second) of Torts §§821D, 821F, 822 (1979).

[55] See Campbell v. Seaman, 63 N.Y. 568, 576-77 (1876).

[56] John C.P. Goldberg & Henry E. Smith, Wrongful Fusion: Equity and Torts (forthcoming in John C.P. Goldberg, Peter Turner & Henry E. Smith (eds), Equity and Law: Fusion and Fission, Cambridge: Cambridge University Press).

[57] Hale v. Farmers Elec. Membership Corp., 99 P.2d 454, 456 (N.M. 1940) (holding that although *sic utere* is a good moral precept, it is useless as a grounds for decision because it does not determine any right or obligation, and citing cases and commentary to this effect); see also Oliver Wendell Holmes, Privilege, Malice, and Intent, (1894) 8 Harvard Law Review 1, 3 ("But whether, and how far, a privilege shall be allowed is a question of policy. Questions of policy are legislative questions, and judges are shy of reasoning from such grounds. Therefore, decisions for or against the privilege, which really can stand only upon such grounds, often are presented as hollow deductions from empty general propositions like *sic utere tuo ut alienum non laedas*, which teaches nothing but a benevolent yearning, or else are put as if they themselves embodied a postulate of the law and admitted of no further deduction, as when it is said that, although there is temporal damage, there is no wrong; whereas, the very thing to be found out is whether there is a wrong or not, and if not, why not."). For a latter-day version, see Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031 (1992) (criticizing invocation of *sic utere* maxim as conclusory).

activity is more valuable, passes a cost-benefit test, or the like. On the traditional approach, which requires symmetry in the landowners' rights against each other, such a result is hard to reach, because it seems rather empty to say that one should put up with physical damage arising from the operation of a factory on one's neighbour's land because one has a symmetric right to open up a valued factory on one's own land too too—unless the area is one in which factories are prevalent or generally expected.

Finally and more speculatively, the Restatement process may be tilted against system because abstractions are hard to track. The point of employing concepts in an architectural fashion is that the concept can link together and manage interactions in the system. The nature of the complexity problem is that interactions are hard to foresee. A modular system makes interactions and systems effects easier to track. However, modularity is not inevitable. One can adopt the pseudo-solution of denying the problem of complexity and flattening out the law, making it cumbersome and ill-equipped to serve its purposes. Eliminating interlocking concepts means that advisors, Council members, and those voting at an annual meeting can evaluate sections in isolation without worrying about unseen effects. Indeed, those functioning in these capacities might be suspicious that an abstraction might hide a hidden agenda – that an unseen interaction effect would produce a substantive outcome that the proponents are after but are hiding – and that the evaluator might not like. To me, this concern, which is a real one, is a reason to bring out the system latent in traditional law and to be explicit when deviating from it. Especially where the system is designed to be facilitative rather than to implement solutions, a crabbed and suspicious attitude to anything that looks at all abstract is misplaced.

IV. The Stakes in Restating

Let us turn finally to the question of stakes in restating property's architecture. Why does any of this matter? To ask this question in the UK might seem a little strange. In the UK, it is taken for granted that doctrine is important. Nonetheless, even in the UK, it is less clear how receptive lawyers and judges would be to drawing attention to the connective tissue of property law and how it all fits together. A common view of the common law is that the system involved in the common law is implicit, that the common law develops incrementally and semi-spontaneously. If so, then explicit attention to systemic aspects of the common law starts looking like incipient codification and a creeping civilian approach to law. Alternatively, one might think that in a common law system architecture is implicit and it is best to leave it that way, especially in formulating the law – as opposed to theorizing about it. Indeed, in the late nineteenth century the organic development of the common law was cited as a reason to resist codification.[58]

Although I have much sympathy with the empirical or inductive view of the common law, I think there is not only value but great value in putting architecture front and centre in an American Restatement of Property. In an ideal world, the law might undergo its organic growth and theoreticians would study it with a deep appreciation of its systemic aspects. That is decidedly not our world, especially in the United States.

[58] Alan Rodger, The Codification of Commercial Law in Victorian Britain, (1992) 109 Law Quarterly Review 570, 570-75.

Let me use some property torts as illustrations of how a Restatement can capture the architecture of property. I will focus on trespass to real property and trespass to personal property (although we are covering nuisance and conversion as well). Trespass to real property appears at first to be much simpler and less controversial than nuisance, and trespass to personal property has been a backwater until the recent rise of the Internet and the possibility of trespass to computer equipment and websites. Appearances are deceiving here.

Take trespass to real property first. The tort involves an interference with possession and it involves a boundary. Trespass turns out to harbour quite a number of difficult issues. First of all, like any kind of trespass it depends on the notion of possession. In the Restatement (Second) of Torts, each kind of trespass came with its own definition of possession.[59] And yet there is a sense in which real property and personal property both involve a legal thing that can be possessed.[60] In the case of personal property we can rely more easily on everyday ontology, whereas with land we need something like the *ad coelum* principle and demarcated boundaries to define the legal thing in question. Further, although there is great variation in the control of which land and various kinds of personal property are susceptible, it is possible and desirable to give a unified definition of possession, one that does not try to spell out what control and signs of intent to control are socially recognised as possession. Possession is different from the right to possess, which is a more purely legal construct.

More surprisingly, it turns out that defining trespass to land is not easy, because courts offer different definitions for different purposes – "gist" and "elements" definitions. At the macro level, courts sometimes offer a "gist" definition, based on the interest protected and the purpose of the tort. For example, courts will define trespass in terms of a gist based on possession: "The gist of an action of trespass to real property is in tort for the alleged injury to the right of possession."[61] A little more specific is the idea of an invasion that interferes with possession: "[T]he gist of the action is the invasion of the plaintiff's possession."[62] Such a definition is not fully operationalised: how do we know what constitutes an injury to the right of possession or even for that matter what an invasion that interferes with possession?

Here is where elements definitions come in. Elements definitions often echo (even if faintly) the older forms of action. Courts offer such definitions in specifying the tort in detail, Courts zoom in on the element that is relevant in a given case. Courts don't really have an

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[59] See above n 53.

[60] J.W. Harris stresses the role of things in property and their close relationship to trespassory rules. J.W. Harris, Property and Justice 30–32, 119–61 (Oxford, Oxford University Press, 1996). For Harris, the "essentials of a property institution are the twin notions of trespassory rules and the ownership spectrum." These trespassory rules are defined in part in terms of things, ibid 5, or "a resource," ibid 25, and "purport to impose obligations on all members of society, other than an individual or group who is taken to have some open-ended relationship to a thing, not to make use of that thing without the consent of that individual or group," ibid 5.

[61] McNeill v. Rice Eng'g & Operating, Inc., 229 P.3d 489, 492 (N.M. 2010) (citation omitted).

[62] Thurston v. McMillan, 108 Me. 67, 78 A. 1122, 1123 (1911).

interest in spelling out what trespass is across the board. So a fairly general elements style definition would be: "The elements of a cause of action sounding in trespass are an intentional entry onto the land of another without justification or permission, or a refusal to leave after permission has been granted but thereafter withdrawn."[63] However, most courts offering elements definitions focus in on one kind of trespass at a time. Some trespasses are boundary crossings, some are overstaying one's welcome, and some involve failing to remove an object for which one is responsible. One could say that all of these involve being responsible for some object visible to the naked eye (including one's person) being on the wrong side of a land boundary without permission. Such a definition would elegantly cover the cases, but courts don't define trespass in such a general way. Cases come to courts as boundary crossings, overstayings, and failures to remove. Nevertheless, an elements definition is distinct from a gist definition, and occasionally a court will present them simultaneously: "On the merits, a trespass claim represents an injury to the right of possession, and the elements of a trespass cause of action are an intentional entry onto the land of another without permission."[64]

And then there is the further question of whether lack of permission is part of the main case or is a defence. This is a surprisingly muddled issue in the United States, and what authority there is on the question is split, with permission as a defence the more usual approach.[65] Neither solution is entirely satisfactory.

Our tentative solution is to offer two kinds of definitions, a gist definition and an elements definition. The gist definition comes first:

§ 1. Trespass to Land

A trespass to land is an intentional physical intrusion upon land possessed by another that interferes with the other's interest in exclusive possession.[66]

This definition defines trespass in terms of the interest protected. By invoking the notion of intrusion, it also implicitly includes a notion of lack of permission, without the need to elevate this into an element of the plaintiff's main case. Why is this important? In a sense, the only difference between lack of permission in the main case and permission as a defence would arise in a badly argued case where a defendant loses almost by default. And yet it bothers many – including many Advisors on the Restatement project—that we would all be presumptive trespassers most of the time unless we can provide a defence. So if one has permission or authorisation, an entry (or an overstaying or a failure to remove) is not really a trespass, even if (as we will see) one might reserve the permission issue for the defence phase. The gist definition captures this important everyday intuition about trespass. Moreover, even if the elements

[63] Volunteer Fire Ass'n of Tappan, Inc. v. Cty. of Rockland, 956 N.Y.S.2d 102, 105 (App. Div. 2012) (citations omitted).

[64] Ivory v. Int'l Bus. Machines Corp., 116 A.D.3d 121, 129, 983 N.Y.S.2d 110, 116 (2014) (citations omitted).

[65] W. Page Keeton et al., Prosser and Keeton on the Law of Torts 5th edn (St. Paul, West Publishing Co., 1984) § 18, at 112 & n.2

[66] Restatement of the Law Fourth, Property (Preliminary Draft No. 3, September 15, 2017), at 23.

definition has to distinguish between kinds of trespass—boundary crossings, overstayings, and failures to remove – the gist definition brings them all under one notion, that of "intrusion"—which captures the unity of the tort.

When it comes to the elements definition, we are more concerned with who has to prove what and when. It is tempting to think that because this is where the rubber hits the road, this is the only kind of definition that matters. As we will see, it is as important as one might think, but not exclusively so. Our tentative elements definition of trespass to land is:

§ 2. Trespass to Land: Prima Facie Case

An actor is subject to liability to another for trespass to land if the actor intentionally:

(a) enters or causes entry of a person or thing onto land in the other's possession, or

(b) remains on land in the other's possession, or fails to remove a thing that the actor is duty-bound to remove from land in the other's possession.[67]

Here we have grouped together overstayings and failures to remove—both involving trespasses that are based not on crossing a boundary. The definition here is much more precise and provides a roadmap for plaintiffs (and defendants). Instead of general intrusion as in the gist definition, the elements definition is framed in terms of familiar tort concepts of causation and intent as well as possession. The elements definition leaves the issue of permission to a defence. Here an actor "is subject to liability" but may not be actually liable if the actor had permission for the activity in question (the boundary crossing, the remaining, or not removing a thing).

Why two kinds of definition? Here we get into at least a small architectural or systematic aspect of the law of property torts. There may be something systematically better about having two kinds of definition than one. The two kinds of definition serve different purposes: one gives a general sense of the tort, provides a direct line to its purpose, and provides a bridge to everyday intuitions, especially moral intuitions about wrongful behavior. The elements definition puts defendants on notice and sharpens the issues for litigation. Each can do what it does better because it doesn't try to do what the other does. A definition that provides elements and also captures the purpose of the tort might have to be very long and involved – quite complex. Perhaps more importantly, the two kinds of definition work in tandem – they interact productively. The elements definition should be read in light of the gist definition and vice versa. Thus if a question comes up at the borderline of the elements definition or a court wants to consider modifying the elements definition, reference can be made to the gist definition. Conversely, the elements definition gives a sense of what kinds of activity count as an intrusion; so not just statically but also dynamically, the two definitions may allow for a combination of flexibility and precision that is not possible with one integrated definition. At the very least it is an empirical question whether multiple definitions undermine each other and create excessive looseness or whether, as argued here, they allow for a combination of tightness, accuracy, and fidelity to purpose not possible in any other way. That courts historically have offered both kinds of definition is suggestive evidence in favor of such an approach. It also should count for something when doing a Restatement.

[67] Restatement of the Law Fourth, Property (Preliminary Draft No. 3, September 15, 2017), at 26-27.

V. Conclusion

Restating property can be a test of different ideas about the nature of property law. Previous Restatements have suffered from the same deficiency as general discussions of property in the United States: a partial and misleading view of the complexity of property law. The greater complexity of modern life calls not for greater complication in the law's formulations or for more vagueness to avoid the issue altogether. What is needed is to manage complexity, and for that, the law already supplies some tools in its latent architecture. It is not too late to bring those tools out into the open.