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The Possession Paradigm: The Special Part and the Police Power Model of the Criminal Process

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1. Introduction

In *The Limits of the Criminal Sanction*, Herbert Packer distinguished between two models of the criminal process: the Due Process Model and the Crime Control Model. In the Due Process Model, criminal defendants enjoy the familiar procedural protections, including a presumption of innocence. In the Crime Control Model, by contrast, the suppression of crime is given priority over a fastidious concern for defendants’ rights. Effectiveness is key, rather than fairness.

In 1968, when Packer set up the contrast between these two models—ostensibly for analytic purposes—the Crime Control Model was seen as gaining ground on the Due Process Model. Packer’s book reads like a last stand against a creeping erosion of the time-honored principles of the Due Process Model, which he apparently regarded as preceding the Crime Control Model, though he never set out a detailed historical sequence of principles gained and lost.

Within a few years of the publication of Packer’s book, the Crime Control Model had come to dominate the American criminal process. More recently the Crime Control Model itself has given way to the Police Power Model, as the War on Crime of the past three decades has shifted the focus of the American criminal process from the control of interpersonal crime to the affirmation of state authority.

* Thanks to Antony Duff, Stuart Green, Jeremy Horder, Kevin McMunigal, and Sophie Dubber for detailed comments and suggestions. Tony Dillof gets credit for renaming the ‘Police Model’ the ‘Police Power Model’ for purposes of this essay, to avoid confusion between the traditional broad notion of police as a power of government and the modern narrow notion of police as an institution of law enforcement.


2 The role of the so-called victims’ rights movement in this transformation is explored in detail in Markus D Dubber, *Victims in the War on Crime: The Use and Abuse of Victims’
The Police Power Model derives its name from the power of government that is widely recognized as the foundation of criminal law, the police power.\(^3\) In the United States, it is a commonplace that the states’ authority to criminalize derives from their power to police.\(^4\) The power to police is also generally acknowledged to be the most comprehensive, and least limitable, power of government.\(^5\) It is ‘the power to govern men and things’;\(^6\) its origins can be traced back to the householder’s discretionary authority over his household resources, human and nonhuman, animate and inanimate alike.\(^7\) The most influential definition of police, cited by American courts and commentators until well into the twentieth century, can be found in Blackstone:

By the public police and oecconomy I mean the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners: and to be decent, industrious, and inoffensive in their respective stations.\(^8\)

The Police Power Model of the criminal process is, like the Crime Control Model, concerned with eradicating crime, but it operates with a different concept of crime. The Crime Control Model still conceives of crime as the

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\(^4\) Slaughter-House Cases, 83 US 36, 49 (1873) (police power ‘is, and must be from its very nature, incapable of any very exact definition or limitation’); ‘Constitutional Law’, Am. Jur. 2d, vol. 16A, § 317 (‘the most essential, the most insistent, and always one of the least limitable of the powers of government’).

\(^5\) License Cases, 46 U.S. 504, 583 (1847).

\(^6\) See generally Dubber, *The Police Power*, above n. 3.

The Special Part and the Police Power Model

in infliction of (criminal) harm by one individual upon another. The Police Power Model shifts the focus from protecting individual interests or rights to public interests. Chronically amorphous, public interests in turn require definition in the abstract and, at least as important, in each particular case. This task of definition, however, is performed by none other than the state. In the end, therefore, public interests are what the state considers public interests, and thus become functionally indistinguishable from the interests of the state itself. The criminal law process, then, is not concerned with the protection of individual rights, be they the offenders’ or the victims’, but with the protection of the authority of the state. The victim of criminal law is not the person, but the state.9

In short, the Police Power Model transforms criminal law from an institution for the regulation of interpersonal conflict to an administrative mechanism for the enforcement of state authority. Systematically, the Police Power Model prioritizes efficiency and is characterized by discretion and a general impatience for the principles of legality, including the principles of specificity, prospectivity, publicity, legislativity, and lenity, as well as the separation of powers, along with the ‘common law’ principles of procedural and substantive criminal law.

In procedural criminal law, the preferred disposition is the guilty plea. The preferred mode of trial is the plea bargain. The center of gravity lies at the front-end of the process; the prosecutor decides what to prosecute, what penalty to offer, and what concessions to demand. The defense attorney is a negotiator, rather than a trial attorney. In many cases, the best defense attorney is no defense attorney at all; the best advice a defense attorney can give her client is not to wait until he has spoken with an attorney, as the early bird gets the worm. The defendant who cooperates first is the defendant who stands to benefit the most, at the expense of other persons who may or may not be charged as co-defendants. The criminal process of the Police Power Model is neo-inquisitorial in that it consists of pleadings brought in secret before the prosecutor whose unreviewable decisions are then rubberstamped by a judge, who lends legal force to the executive judgment. Unlike the traditional inquisitorial model, the Police Power Model criminal process is not dominated by the judge, but by the prosecutor. The abandonment of the investigating judge has in fact had its desired effect; judges no longer assemble the evidence and then decide the case. Instead of judges, prosecutors now do the assembling and the deciding. The two functions thus are once again in the hand of one official; but the power of investigation and decision now lies not with the judiciary, but with the executive whose members have traditionally been—and so far remain—beyond external scrutiny.

In the general part of substantive criminal law, the Police Power Model has little use for the actus reus requirement, has few qualms about omission

9 See generally Dubber, Victims in the War on Crime, above n. 2.
liability or vicarious liability; the mens rea requirement likewise does not stand in the way of strict liability, or presumptions of intent. Defenses, such as self-defense, necessity, infancy and insanity, viewed as dispensations of sovereign mercy rather than as rights or entitlements, are labeled affirmative, curtailed or eliminated.

In the special part of criminal law, the Police Power Model prefers broad offense definitions, narrow defense definitions (if it doesn’t do away with a defense altogether), status offenses (over conduct offenses), conduct offenses (over result offenses), unlawfulness and lack-of-authorization offenses, inchoate offenses (over completed offenses), and endangerment offenses (over harm offenses). The scope of the special part is continuously expanded, not only for the sake of criminalization but also to provide prosecutors with ever greater discretion, to threaten, bring or dismiss charges in the plea process.

In this paper, I want to explore the role of the special part in the Police Power Model of the criminal process. To figure out how the special part in modern American criminal law works, I will focus on what I consider to be the paradigmatic offense of the Police Power Model: possession.\(^\text{10}\)

In the following, I will focus on New York criminal law, with occasional references to the Model Penal Code to broaden the scope of the inquiry. (There will be similarities: the New York Penal Law was based on the Model Penal Code.) Studies in the special part of criminal law are peculiarly parochial. They require careful attention to statutory language and structure. Comparative analysis of the special part is more difficult than comparative analysis of the general part. Underlying traditional work on the big issues of the general part, responsibility, mens rea, justification, excuse, and so on, is the assumption that there is a common theoretical foundation that undergirds these doctrinal concepts.\(^\text{11}\) No similar assumption of universality applies to the definition of murder, the distinction between larceny and fraud, or the list of controlled substances. There may be a general part of the special part, but it’s not obvious what it would contain.\(^\text{12}\) (After all, if an issue were truly of general application, presumably it would be in the general part.) One might investigate the various structural features of a special part, including the distinction between the general part and the special part, the grouping and ordering of offenses (and relatedly, the rights or interests to be protected by each offense and group of offenses),\(^\text{13}\) the types of offense


elements, the specificity of offense definitions, and so on. One might even consider the scope of the special part, and ponder the question of what sort of conduct deserves to be criminalized or, for existing offenses, which legal interest or right (its Rechtsgut, as the Germans would say) they are meant to protect. Perhaps there is even room for the study of criminal codification, once considered a worthy science by Bentham and, with less fervor, many other Enlightenment criminal law scholars. A science of criminal codification might consider such questions as whether to codify, what to codify, where to codify, and how to codify. The more emphasis is placed on the special part of criminal codes, however, the less room there would appear to be for comparative analysis involving legal systems that have not yet resolved the initial question of a science of codification, namely whether to codify. Perhaps, then, one effect of a move from the general part to the special part as an object of inquiry would be to align American criminal law more closely with continental systems, where criminal codes have long been the norm.

Much of this paper is an exercise in categorization. In order to develop a theory—or even a systematic account—of the special part, it would be helpful to put in a place a common vocabulary and to canvass the subject to identify topics for further investigation. Whether this taxonomical effort will serve any function other than itself remains to be seen. Perhaps there is little more to the study of the special part than jurisprudential botany. Partly this paper then represents an effort to see what a theory of the special part might contribute to the general project of a critical analysis of criminal law.

2. A Taxonomy of Possession

Varieties of Possession

Possession offenses play a central role in the police action against crime (also known as the ‘war on crime’, though to call it a war risks importing basic notions of chivalrous conflict and mutual respect, codified in the ‘rules of war’, that are foreign to the essentially hierarchical nature of the Police

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17 Note the limited ambitions of this essay. It contributes to the analysis of the criminal process in the hope that this analysis might lay the foundation for a normative critique of that process. It does not set out to provide this critique. For a critique of possession offenses in particular and of criminal law as police action in general, see Dubber, above n. 10; Dubber, Victims in the War on Crime, above note 2, pt. I; Dubber, above n. 3.
Power Model).\textsuperscript{18} In New York criminal law, for instance, there are over 150 possession offenses, ranging from a violation (punishable by $100 fine) to an A-I felony (punishable by life imprisonment).\textsuperscript{19} In 1998, over 100,000 possession arrests were made in New York and one in five prison or jail sentences were imposed for possession offenses.\textsuperscript{20} Possession is not only an independent offense, it also triggers presumptions attaching to other offenses, including importation, manufacture, and distribution. (Various presumptions attach to possession itself, most important proximity to the item possessed.) Possession also enhances punishment for other offenses.

Possession is easy to detect and, once detected, easy to prove. Driven by enforcement concerns, possession is built for speed. The annals of American jurisprudence are filled with cases that began with an innocuous—or not so innocuous—traffic stop or pat down, and end up as a possession conviction. Possession is the ideal fall-back, or charge-down, option in today’s criminal process. If nothing else sticks, possession will. A burglary suspect caught with the loot may escape a burglary conviction because of an inadmissible confession, but he will not be able to beat a conviction for possession of stolen property. And with suitable enhancements for being a ‘scourge of the community’, he will find himself in prison for life.\textsuperscript{21}

Every prosecutor worth his salt will, without much difficulty, find a possession offense that fits the crime, and more important, the criminal. Here is a (woefully incomplete) list of items the possession of which is proscribed by criminal law:

- firearms and other weapons,\textsuperscript{22} including toy guns,\textsuperscript{23} air pistols and rifles,\textsuperscript{24} tear gas,\textsuperscript{25} and ammunition;\textsuperscript{26}
- ‘instruments of crime’,\textsuperscript{27} including body vests,\textsuperscript{28} anti-security items,\textsuperscript{29} and burglary tools;\textsuperscript{30}
- stolen property;\textsuperscript{31}
- drugs,\textsuperscript{32} along with drug ‘paraphernalia’\textsuperscript{33} and drug precursors;\textsuperscript{34}

\textsuperscript{18} The distinction between a war on crime and a police action against crime, or rather against criminals, is further explored in Dubber and, ‘The New Police Science’, above n. 2. Of course, the war on crime has also been characterized by a depiction—and thereby exclusion—of offenders as enemies and the mobilization of bellicose sentiments against them For a brilliant early analysis of the criminal process as war, see G H Mead, ‘The Psychology of Punitive Justice’ (1918) 23 American Journal of Sociology 577.
\textsuperscript{19} N.Y. Penal Law § 220.21 (criminal possession of a controlled substance in the first degree).
\textsuperscript{20} State of New York, Division of Criminal Justice Services, Possession Related Offenses New York State (Feb. 4, 2000) (on file with author).
\textsuperscript{21} People v. Young, 94 NE2d 171 (N.Y. 1999).
\textsuperscript{22} N.Y. Penal Law §§ 265.01–.05; Model Penal Code §§ 5.06 (Instruments of Crime; Weapons), 5.07 (offensive weapons) (1985).
\textsuperscript{23} New York, N.Y. Admin. Code § 10-131(g).
\textsuperscript{24} Id. § 10-131(e).
\textsuperscript{25} Id. § 10-131(h).
\textsuperscript{26} Id. § 10-131(i).
\textsuperscript{27} Model Penal Code §§ 5.06 (Instruments of Crime; Weapons).
\textsuperscript{28} N.Y. Penal Law §§ 270.20, 400.05.
\textsuperscript{29} Id. § 170.47.
\textsuperscript{30} Id. § 140.35.
\textsuperscript{31} Id. §§ 165.40–.65; see also 625 III Comp. Stat. § 5/14-103(a)(1) (possession of stolen vehicle).
\textsuperscript{32} N.Y. Penal Law arts 220, 221.
\textsuperscript{33} Id. § 220.50.
\textsuperscript{34} Id. § 220.60.
• graffiti instruments;\textsuperscript{35}
• computer-related material;\textsuperscript{36}
• counterfeit trademarks;\textsuperscript{37}
• unauthorized recordings of a performance;\textsuperscript{38}
• public benefit cards;\textsuperscript{39}
• forged instruments,\textsuperscript{40} as well as forgery devices\textsuperscript{41} and credit card embossing machines;\textsuperscript{42}
• slugs,\textsuperscript{43} gambling devices,\textsuperscript{44} and gambling records;\textsuperscript{45}
• vehicle identification numbers\textsuperscript{46} and vehicle titles without complete assignment;\textsuperscript{47}
• usurious loan records;\textsuperscript{48}
• prison contraband;\textsuperscript{49}
• obscene material,\textsuperscript{50} obscene sexual performances by a child,\textsuperscript{51} and ‘premises which [one] knows are being used for prostitution purposes’;\textsuperscript{52}
• eavesdropping devices;\textsuperscript{53}
• fireworks;\textsuperscript{54}
• ‘noxious materials’;\textsuperscript{55}
• taximeter accelerating devices;\textsuperscript{56}
• spearfishing equipment;\textsuperscript{57} and
• undersized catfish (in Louisiana).\textsuperscript{58}

Possession, then, functions like a modern sweep offense that sweeps far wider than the original sweep offense, vagrancy, as every day there are far more criminal possessors than there are vagrants and packs a far greater punch, with maximum penalties for possession alone extending to life imprisonment without the possibility of parole,\textsuperscript{59} without mentioning the substantial possession enhancements for other crimes, as contrasted with the overnight jailings followed by a more or less formal order to ‘get out of town’ once common for those deemed vagrants.\textsuperscript{60}

\textsuperscript{35} N.Y. Penal Law § 145.65.
\textsuperscript{36} Id. § 156.35 (possessing illegal copies of computer data or programs).
\textsuperscript{37} Id. §§ 165.71–73.
\textsuperscript{38} Id. §§ 275.15–.45.
\textsuperscript{39} Id. § 158.40.
\textsuperscript{40} Id. §§ 170.20–.30.
\textsuperscript{41} Id. §§ 170.40–.50.
\textsuperscript{42} State v. Saice, 489 So. 2d 1125 (Fla. 1986).
\textsuperscript{43} N.Y. Penal Law §§ 170.55–.60.
\textsuperscript{44} N.Y. Penal Law §§ 225.30–35.
\textsuperscript{45} Id. §§ 225.00–.35, 415.00.
\textsuperscript{46} Id. § 170.70.
\textsuperscript{47} 625 Ill Comp Stat § 5/4–104(a)(2) (1976).
\textsuperscript{48} Id. § 190.45.
\textsuperscript{49} Id. § 205.25.
\textsuperscript{50} Stanley v. Georgia, 394 U.S. 557 (1969); N.Y. Penal Law §§ 235.05–.07.
\textsuperscript{51} N.Y. Penal Law § 263.11.
\textsuperscript{52} Id. § 230.40.
\textsuperscript{53} Id. § 250.10.
\textsuperscript{54} Id. § 270.00.
\textsuperscript{55} Id. § 270.05.
\textsuperscript{56} Id. § 145.70.
\textsuperscript{57} Delmonico v State, 155 So. 2d 368 (Fla. 1963).
\textsuperscript{60} For a vivid description of this practice in late nineteenth-century America, see C.G Tiedeman, \textit{A Treatise on the Limitations of Police Power in the United States Considered From both a Civil and Criminal Standpoint} (St. Louis: F.H. Thomas Law Book Co., 1886) § 49, at 124.
But how does possession perform this function? More specifically, how does possession fit into the special part of criminal law? Unlike vagrancy, possession does not stick out like a sore thumb. It does not wear its premodern origin on its sleeve, by breathlessly commingling acts with statues in colorful centuries-old language:

Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants...  

Possession offenses instead have all the trappings of a modern criminal offense. Rather than ‘deeming’ certain persons ‘possessors’, they set out the conditions under which a defendant is ‘guilty’ of ‘possession’. They even come in different degrees. The New York Penal Law, for instance, a concededly degree-happy criminal code, recognizes no fewer than six degrees of ‘criminal possession of a controlled substance’, ranging from seventh degree possession (an A misdemeanor) to first degree possession (an A-I felony). Possession offenses are integrated into articles and chapters dealing with a particular offense type. In the New York Penal Law, for instance, article 220 ('Controlled Substances Offenses') begins with a general definitional section, followed by seven sections on drug possession, six sections on drug distribution, one on possession, three on use, one on possession, and one on distribution.

And yet there is something odd about possession. A closer look reveals that possession does not fit comfortably within the taxonomy of the special part.

Conduct or Result Offense?

One common taxonomical device in the special part is the distinction between conduct offenses and result offenses. Possession, however, qualifies as neither a conduct nor a result offense. It is so heavy on attendant circumstances, and so light on result and conduct, that it instead might best be described as an attendant circumstance offense.

The Model Penal Code not only introduced the distinction between a general part and a special part to American criminal law, it also developed a quite sophisticated taxonomy of the special part. Having filtered general

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62 For whatever reason (perhaps a legislative oversight), there is no sixth degree criminal possession of a controlled substance.
principles (like actus reus, mens rea, and ‘defenses’) out of the special part, the drafters differentiated between three types of offense element, conduct, attendant circumstance, and result. They did not define these element types, but instead provided an illustration.

The ‘circumstances’ of the offense refer to the objective situation that the law requires to exist, in addition to the defendant’s act or any results that the act may cause. The elements of ‘nighttime’ in burglary, ‘property of another’ in theft, ‘female not his wife’ in rape, and ‘dwelling’ in arson are illustrations. ‘Conduct’ refers to ‘breaking and entering’ in burglary, ‘taking’ in theft, ‘sexual intercourse’ in rape and ‘burning’ in arson. Results, of course, include ‘death’ in homicide. 63

Possession offenses do not have a result element. Liability for possession does not require having caused harm or, in fact, any result whatever. Possession thus is a resultless (or harmless) offense (which is another way of saying it is not a result (or harm) offense). 64 To say that possession is a harmless offense is not necessarily to say that possession inflicts no harm in fact, but merely that possession is not defined so as to require the infliction of harm. Whether possession can be regarded as inflicting some harm in fact, if not in definition, depends on one’s concept of harm. In the Police Power Model of the criminal process, criminal harm is not limited to harm inflicted on particular persons, or even groups of persons. The ultimate victim of crime is the state. In this conception, possession is neither harmless nor victimless, as every violation of a state norm offends the state by challenging its authority. A violation of a criminal statute, a statute backed up by the most severe type of state sanction, represents a particularly serious affront against the dignity of the state.

But even if we disregard the definition of harm (and victim) characteristic of the Police Power Model, the connection between possession and individual (or group) harm is worth exploring. For that connection, it turns out, is exceptionally loose. This is not to say that the looseness of the connection between possession and individual harm is unrelated to the shift in the definition of harm from individual to state harm. Instead, once the connection between criminal offenses and individual harm is rendered so remote as to render individual harm insignificant, 65 the Police Power Model is no longer merely replacing individual harm with state harm as the characteristic harm of criminal law. Harm, having been relegated to a background consideration rather than a prerequisite for liability, becomes a surplusage that could be defined in whatever way the state sees fit.

One way of thinking about the (individual) harmlessness of possession is in terms of the distinction between endangerment offenses and harm

63 Commentaries § 5.01, at 301 n. 9 (emphasis added).
64 As we’ll see shortly, that’s not to say that possession qualifies as a conduct offense.
Possession is not a harm offense in that it does not require—and in fact cannot require—the infliction of harm. Endangerment offenses can be divided into two kinds, actual endangerment and abstract endangerment offenses. Actual endangerment offenses require the creation of danger. The reckless endangerment statute in the New York Penal Law is an example; it criminalizes ‘recklessly engag[ing] in conduct which creates a substantial risk of serious physical injury to another person’. Reckless endangerment thus defined is a specific actual endangerment offense; it requires endangering a particular person (or arguably a specific group of persons). By contrast, a general actual endangerment offense would require the creation of danger in general or to some undefined group (‘community’ or ‘public’).

Unlike actual endangerment offenses, abstract endangerment offenses make no reference to danger. The prevention of danger instead is thought to account for the existence (if not the actual adoption) of the offense in the first place. One reason why an offense might be classified as an abstract endangerment offense—even though it makes no mention of danger—is that the conduct in question is so inherently dangerous that a requirement and, more importantly, a showing of dangerousness in each individual case would be unnecessary. Another reason might be that proving actual endangerment of a particular person (or group of persons) in a particular case might be difficult, if not impossible, or at least time-consuming, or that the conduct in question is ordinarily dangerous, even if it needn’t be in each case. An experienced motorcycle rider who races down a deserted country road in the middle of nowhere may endanger no one (possibly excluding herself), but would be guilty of speeding nonetheless.

Now, possession clearly is not an actual endangerment offense. Whether it qualifies as an abstract endangerment offense would depend on the considerations motivating its adoption. There is some evidence that possession offenses are meant to prevent danger. Some American criminal offenses. Cf. Dubber, Victims in the War on Crime, above n. 2, at 21; Roxin, above n. 14, at § 2 VII.

67 N.Y. Penal Law § 120.20 (reckless endangerment in the second degree).

68 This distinction is familiar from the law of nuisance, which distinguishes between specific (private and civil) and general (public and criminal) nuisance. Cf. Dubber, above n. 3.

69 The New York reckless endangerment statute can also be distinguished from the Model Penal Code reckless endangerment provision (upon which the New York statute, along with many others, is based). The Model Penal Code defines reckless endangerment as ‘recklessly engag[ing] in conduct which places or may place another person in danger of death or serious bodily injury’, § 211.2 (emphasis added). While the creation of danger thus is an element of the Model Penal Code version of reckless endangerment, the potential creation of danger suffices for criminal liability in the alternative. In this sense, the Model Penal Code provision can be viewed as a potential actual endangerment offense, which in turn may come in specific or general varieties, depending on the object of the danger created. (Thanks to Antony Duff for alerting me to this feature of the Model Penal Code reckless endangerment provision.)

70 See, e.g., Roxin, above n. 14, at §§ 10-11.

71 Abstract endangerment offenses thus resemble potential actual endangerment offenses in that they do not require proof of the endangerment of a particular persons or group of persons. Unlike potential actual endangerment offenses, however, they make no mention of danger in their definition.
codes include possession offenses among the inchoate offenses (as opposed to completed, or object, or substantive, offenses). A common justification of inchoate (or preparatory or incomplete) offenses is that they prevent crime by identifying and incapacitating abnormally dangerous individuals. Strictly speaking, then, inchoate offenses target not dangerous acts, but dangerous actors. In fact, the modern trend in inchoate offense law has moved away from a focus on the act to a focus on the actor, as evidenced by the Model Penal Code’s ‘substantial step’ test in attempt law which replaced the ‘last proximate act’ or ‘dangerous proximity’ tests, among others. The point of inchoate offenses then is no longer (only) to prevent a specific harm inflicted by a specific act, but more broadly to remove dangerous individuals from a position where they can pose a danger to others (outside prison walls).

Possession doesn’t quite fit in among inchoate offenses, though in ways that are not necessarily inconsistent with its classification as an abstract endangerment offense. On its face, possession is not an inchoate offense, but a completed offense. It is not preparatory to any completed offense, as inchoate offenses are by definition (and often by name). Possession is a self-standing offense, rather than being parasitic upon another, substantive, crime. Possession liability does not derive from another, object, offense codified in the special part. It is no accident that possession offenses can appear in the general part and the special part of the same criminal code.

In fact, perhaps possession can be viewed as an abstract inchoate crime because it does not include a reference to any crime yet to be committed, in analogy to abstract endangerment crimes that make no reference to a specific danger. At the same time, however, possession is a completed crime to which the traditional inchoate crimes can attach themselves (attempted possession, conspiracy to possess, etc.). Possession is thus both the most and the least inchoate of inchoate offenses.

That possession is farther removed from the infliction of harm or danger (or the commission of some other substantive crime) than ordinary inchoate offenses also becomes clear when we locate it within the spectrum of dangerousness in attempt law. As we noted above, attempt traditionally drew the line of criminal liability rather close to the completion of the offense. A preparation did not become an attempt, and thereby generate criminal liability, until the ‘last proximate act’ had been committed. More recently that line has been pushed back considerably past the last

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72 See, e.g., Model Penal Code §§ 5.06 and 5.07.
73 See, e.g., Texas Penal Code ch. 15 ("Preparatory Offenses").
74 Compare Model Penal Code §§ 5.06 ("Possessing Instruments of Crime"), 5.07 (possessing offensive weapons) with Model Penal Code §§ 224.7 (possessing for use a false weight or measure), 230.3(6) (possessing with intent to sell abortifacients), 242.7 (innate’s possessing implements for escape), 251.4(2)(d) (possessing obscene material for purposes of sale).
75 See, e.g., People v. Murray, 14 Cal. 159 (1859) (attempt if conduct ‘would end in the consummation of the particular offense, but for the intervention of circumstances independent of the will of the party’).
proximate act to any behavior that amounts to a ‘substantial step’ toward completion of the crime.\textsuperscript{76} This extension was consistent with an incapacitationist approach to attempt law which saw no reason not to intervene criminally when sufficient evidence of an actor’s unusual dangerousness—in the form of a substantial step ‘strongly corroborative of his criminal purpose’—was available. Possession law moves the \textit{locus poenitentiae} yet farther away from the infliction of harm. For possession requires not even a substantial step for criminal liability. Possession is not preparation for another offense, nor an attempt to commit it. It is an offense in and of itself. The possession of some item already provides sufficient evidence of criminal dangerousness to warrant ‘peno-correctional treatment’.

Note that possession offenses may appear in both the special and the general part. Inchoate offenses too straddle the line between the general part and the special part of modern American criminal codes, but they appear in either one or the other, rather than in both at the same time.\textsuperscript{77} Traditionally, inchoate offenses like attempt and conspiracy were not offenses of general application. Only certain attempts were punishable. Conspiracy was an independent offense, rather than the inchoate version of some other offense. Much the same still holds in continental legal systems. While the German Penal Code, for instance, does define attempt in its general part, attempts to commit lesser offenses are punishable only if the offense defined in the special part says so.\textsuperscript{78} Conspiracy is a substantive crime in the special part, not an inchoate version of all crimes.\textsuperscript{79}

Perhaps, then, possession will go the way of attempt and be transformed into a general \textit{proto-inchoate offense} that would attach to any crime defined in the special part. Rather than continuing the current practice of supplementing other offenses with possession provisions (forgery vs. possession of forgery devices), the state could simply include a general possession section in the criminal code’s general part that criminalizes the possession of items for the purpose of using them to commit any crime. The Model Penal Code comes close:

\textbf{Section 5.06. Possessing Instruments of Crime}

(1) Criminal Instruments Generally. A person commits a misdemeanor if he possesses any instrument of crime with purpose to employ it criminally. ‘Instrument of crime’ means:

(a) anything specially made or specially adapted for criminal use; or

(b) anything commonly used for criminal purposes and possessed by the actor under circumstances which do not negative unlawful purpose.

\textsuperscript{76} See Model Penal Code § 5.01(1)(c) and (2); see also \textit{Commonwealth v. Denton} 439 Pa. Super. 406 (1995) (exploring ‘expansion of the crime of attempt’ under Model Penal Code standard).

\textsuperscript{77} Compare N.Y. Penal Law pt 3 tit G (anticipatory offenses) with Model Penal Code art 5 (inchoate crimes).

\textsuperscript{78} StGB §§ 22 and 23.

\textsuperscript{79} StGB § 129.
But possession offenses do more than function as proto-inchoate offenses. They operate not only prospectively, but retrospectively as well. Not only the possession of forgery devices is criminal, so is the possession of forged instruments. Possession provides evidence not only of future conduct, but also of past conduct. I may use the item in my possession in some harmful (or at least dangerous) way in the future, or I may have acquired the item in some harmful (or at least criminal) way in the past.

In fact, possession is not present conduct, but evidence of future or past conduct. Possession offenses lack not only a result element; they lack a conduct element as well. The absence of a conduct element, however, is more noteworthy than is the absence of a result element, for a conductless offense appears to fly in the face of the traditional act (or conduct) requirement in Anglo-American criminal law. That possession is not an act, but rather a status, or more precisely, a relationship between a person and an object, has been obvious enough for at least two centuries. Eighteenth-century English courts as a matter of course dismissed common law indictments for possession for that very reason.\(^80\) It was only when cases began to be brought under the growing number of possession statutes that courts acquiesced, on the ground that the common law principle of actus reus didn’t apply to statutory crimes.\(^81\) Ever since then the conflict between possession and actus reus has been considered a question of statutory interpretation—or legislative prerogative. The currently favored solution is to simply declare possession an act, by (statutory) definition. The Model Penal Code, for instance, in a section entitled, among other things, ‘Possession as an Act’, announces that ‘[p]ossession is an act…if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.’\(^82\) The New York Penal Law likewise declares that possession ‘means to have physical possession or otherwise to exercise dominion or control over tangible property’, and counts as a voluntary act ‘if the actor was aware of his physical possession or control…for a sufficient period to have been able to terminate it.’\(^83\)

Possession, then, is not conduct, but evidence of future or past conduct. More precisely, possession is a sort of doctrinal shorthand for the acquisition of an object or the failure to distribute it. Insofar as—at least by definition—possession makes reference to conduct, without constituting conduct itself, one might describe it as a constructive conduct offense. Rather than criminalizing future or past conduct (use or distribution and acquisition), possession punishes present status as evidence of that future or past conduct.

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\(^{80}\) Cf. Regina v Dugdale, 1 El. & Bl. 435 at 439 (1853) (Coleridge, J).

\(^{81}\) See, e.g., Rex v Leonard, 1 Leach 90 (1772) (applying 8 & 9 Will 3 c 26).

\(^{82}\) § 2.01(4).

\(^{83}\) N.Y. Penal Law §§ 10.00, 15.00(2).
Note also that possession in fact combines within itself commission and omission liability. It is both a (constructive) commission offense and a (constructive) omission offense; in short it’s a commission-omission offense. It is defined both in terms of the commission of acquisition and the omission of dispossession. Considered as an omission offense, possession straddles the familiar line between indirect and direct omission liability. Direct omission offenses, like tax evasion, explicitly criminalize the failure to engage in particular conduct, like failing to pay taxes. The theory of indirect omission, by contrast, transforms any commission offense into an omission offense by reference to a duty to act set out elsewhere. So the failure to get medical attention that results in death is homicide if the victim is the perpetrator’s child because parents owe their children a duty of care. Possession appears as an indirect omission offense if one focuses on the definition of each possession offense, which makes no mention of the failure to distribute the item possessed. At the same time, it might appear to be a direct omission offense in that the general definition of possession makes explicit reference to the failure to distribute. If it is regarded as an indirect omission offense, it would have to rely on some duty (to dispossess), elsewhere defined, the violation of which could give rise to indirect omission liability. Terminating possession to avoid possession liability—by avoiding having one’s relationship to an object be characterized as possession in the first place—turns out to be not as straightforward as it sounds. For the distribution of items the possession of which is criminalized tends to be criminal itself.

Presumptions, Explicit and Implicit

So far we have focused on the retro- and prospective aspects of the definition of possession. But not only possession itself is both retro- and prospective; functionally speaking it also provides evidence of other conduct in the future and in the past. Once it has been established what possession is, the next question is what it means. Here the idea is that what we are punishing when we punish possession isn’t ‘really’ possession itself but some objectionable future or past conduct, i.e. a particular form of distribution, use or acquisition. So possession really punishes importation (since all drugs originate abroad). Or possession really punishes distribution (since the

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85 See, e.g., People v Steinberg, 79 N.Y.2d 673 (1992) (finding common-law and statutory basis for parent’s duty of care toward child).
86 The most obvious example here is drug criminal law, which consists of prohibitions of distributing and possessing various ‘controlled substances’. Occasionally a defendant may find himself charged with distributing (as a principal) and possessing (as an accomplice) the same drugs. See, e.g., People v Manini, 79 N.Y.2d 561 (1992) (throwing out the possession complicity charge on the ground that possession is ‘necessarily incidental’ to distribution).
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possession of large amounts of drugs suggests that they are not kept for personal use. Or possession really punishes use (which—in the case of drugs, though not necessarily of guns—isn’t criminal itself, but is nonetheless harmful in some sense). 87

This evidentiary function of possession emerges most clearly in compound possession offenses. A compound offense is an offense that includes as one of its elements another offense, accompanied by some mental state (ordinarily, intent or purpose). Burglary (trespass with the intent to commit a felony) is a well-known example. Possession with intent to distribute is another. Possession with intent to distribute might be thought of as proto-inchoate distribution (proto-inchoate because it needn’t rise to the level of an attempt). That’s not to say, however, that simple possession offenses do not also serve this evidentiary function. In fact, possession of sufficiently large quantities of drugs is taken to be such convincing evidence of the intent to distribute that that intent is irrebuttably—and implicitly—presumed. Possession thus would give rise to a presumption of intent to distribute which, combined with possession, would provide sufficient evidence of future (or past) distribution. Simple possession of small, personal, quantities of drugs do not provide evidence of distribution, but instead bear the possibility of future use, which is said to have harmful primary and remote effects. 88

In addition to these implicit presumptions at work in possession offenses, modern criminal law has surrounded possession offenses with a number of explicit presumptions. These too work backward and forward. A traditional example of a backward presumption is the presumption of larceny based on possession of stolen goods. Other retrospective presumptions include those of importation, manufacture, and transfer. Forward presumptions include a presumption of an intent to use. 89 (Contemporaneously, possession can also create a presumption of knowing possession). 90 And of course possession itself can be presumed, say, on the basis of proximity, (even if the proximity isn’t itself criminalized). 91 In New York, as elsewhere, every occupant of

87 As a matter of fact, one cannot use drugs without possessing them. As a matter of form, however, legislatures generally do not punish drug consumption, but drug possession. Possession is quite literally the core concept of drug criminal law. It lies at the hub of an implicit regulatory web that reaches not only consumption (or other use), but also acquisition (which, like use, is not separately criminalized) and distribution (which is).

88 For a discussion of the remote harm caused—or threatened—by drug possession, see Harmelin v Michigan, 501 U.S. 957 (1991).

89 See, e.g., N.Y. Penal Law § 158.00 (possession of five or more public benefit cards presumptive evidence of intent to use them for fraudulent purposes), 265.15(4) (unlawful use of explosive substance), 270.00(2)(c) (sale of fireworks), 270.05(3) (use of noxious material); Model Penal Code § 5.06 (‘purpose to employ [weapon] criminally’).

90 Barnes v United States, 412 US 837 (1973) (possession of stolen property as presumptive evidence of knowledge that property was stolen); N.Y. Penal Law § 165.55, 170.71, 225.35; see also Id. § 265.15(6) (defacement).

91 See, e.g., Mass. Ann. Laws ch 94C, § 35 (‘Unlawful presence at a place where heroin is kept or being in company of person in possession thereof’).
a car, for instance, is presumed to knowingly possess any gun or controlled substance found in the car.\footnote{N.Y. Penal Law \S\ 220.25 ("The presence of a dangerous drug in an automobile…is presumptive evidence of knowing possession thereof by each and every person in the automobile at the time such drug was found").}

So not only is possession a retro- and prospective presumption, it can be presumed itself, and then give rise to other retro- and prospective presumptions. Here possession offenses challenge the distinction between the law of evidence and substantive criminal law. Presumptions have long been disfavored under Packer's Due Process Model because they risk hollowing out statutory definitions without doing away with them altogether. So instead of removing a mens rea requirement from a possession statute—as occurs quite frequently—the state might establish a presumption of knowledge or instead of criminalizing proximity to 'contraband'—as also happens—it might establish a presumption of possession based on proximity.

Presumptions are driven by considerations of prosecutorial convenience. As a sweep offense in the Police Power Model of the criminal process, it is no surprise that the law of possession is filled with presumptions. Possession itself is, after all, shorthand for a whole host of other offenses (and some types of noncriminal conduct as well, like drug use).

**Possession as Attendant Circumstance Offense**

While possession offenses lack both a conduct and a result element, they do have at least one \textit{attendant circumstance} element—the characteristics of the item possessed. In fact, many possession offenses consist almost entirely of a description of this attendant circumstance. Take, for instance, the definition of criminal possession of a controlled substance in the fourth degree, taken from the New York Penal Law:

\textit{Section 220.09. Criminal possession of a controlled substance in the fourth degree}

A person is guilty of criminal possession of a controlled substance in the fourth degree when he knowingly and unlawfully possesses:

1. one or more preparations, compounds, mixtures or substances containing a narcotic drug and said preparations, compounds, mixtures or substances are of an aggregate weight of one-eighth ounce or more; or
2. one or more preparations, compounds, mixtures or substances containing methamphetamine, its salts, isomers or salts of isomers and said preparations, compounds, mixtures or substances are of an aggregate weight of one-half ounce or more; or
3. one or more preparations, compounds, mixtures or substances containing a narcotic preparation and said preparations, compounds, mixtures or substances are of an aggregate weight of two ounces or more; or
4. a stimulant and said stimulant weighs one gram or more; or
5. lysergic acid diethylamide and said lysergic acid diethylamide weighs one milligram or more; or
6. a hallucinogen and said hallucinogen weighs twenty-five milligrams or more; or
7. a hallucinogenic substance and said hallucinogenic substance weighs one gram or more; or
8. a dangerous depressant and such dangerous depressant weighs ten ounces or more; or
9. a depressant and such depressant weighs two pounds or more; or
10. one or more preparations, compounds, mixtures or substances containing concentrated cannabis as defined in paragraph (a) of subdivision four of section thirty-three hundred two of the public health law and said preparations, compounds, mixtures or substances are of an aggregate weight of one ounce or more; or
11. phencyclidine and said phencyclidine weighs two hundred fifty milligrams or more; or
12. methadone and said methadone weighs three hundred sixty milligrams or more; or
13. phencyclidine and said phencyclidine weighs fifty milligrams or more with intent to sell it and has previously been convicted of an offense defined in this article or the attempt or conspiracy to commit any such offense; or
14. ketamine and said ketamine weighs four thousand milligrams or more.

Note that not even this detailed list of drug characteristics (quality and quantity) is exhaustive. The definitions of ‘controlled substance’ and ‘concentrated cannabis’ appear not in the Penal Law, but in the Public Health Law. In this sense, drug possession offenses exemplify an increasingly common type of offense, the multi-code offense. Multi-code offenses are a form of fragmented offense, whose elements are dispersed among various provisions. In the traditional type of fragmented offense, one might find the definition of certain elements common to several offenses in a separate ‘definitions’ provision—single-code fragmented offenses.

If we think of possession as an attendant circumstance (since it is not conduct, nor result) that describes a relationship between a person and a thing, assigning one the status of possessor and the other the status of possessed (or possession), then every possession offense provides a radical example of a single-code fragmented offense. For the very definition of possession appears not in offense definitions but in the general part of

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93 N.Y. Penal Law § 220.00(5) (citing N.Y. Public Health Law §§ 3302 and 3306).
94 A modest example of this type of offense is the crime of larceny as defined in section 584 of the 1865 draft of the New York Penal Code: ‘Larceny is the taking of personal property accomplished by fraud or stealth, or without color of right thereto, and with intent to deprive another thereof’. ‘Personal property’ then was defined in § 775 as including ‘every description of money, goods, chattels, effects, evidences of rights in action, and all written instruments by which any pecuniary obligation, right or title to property, real or personal, is created, acknowledged, transferred, increased, defeated, discharged or diminished, and every right and interest therein.’
modern criminal codes.\textsuperscript{95} Multi-code offenses blur the distinction between
criminal and noncriminal law insofar as an essential part—and in the case
of possession offenses, often \textit{the} essential part—of an offense is defined in
a noncriminal code. Consider, for instance, the element of unlawfulness
that can be found in many possession statutes. This element—which
can be viewed as an attendant circumstance attaching to the element of
‘possession’—is defined not in the criminal code, but in some noncriminal
code dealing with matters of ‘public health’: ‘Unlawfully’ means in violation
of article thirty-three of the public health law.\textsuperscript{96} In the Public Health Law,
one finds a section 3304, which explains, somewhat unhelpfully, that ‘[i]t
shall be unlawful for any person to…possess…a controlled substance
except as expressly allowed by this article.’ Possession of a controlled
substance, in other words, is presumptively unlawful—and therefore, given
the unlawful possession provisions in the New York Penal Law, also
criminal—unless certain ‘exemptions’ apply. The Health Law thus does
not set out the conditions for unlawfulness of possession of controlled
substances, but the conditions for its unlawfulness, provided the substance is
in fact ‘controlled’. We know already, however, that the Public Health
Law, and not the Penal Law, determines which substances are controlled
and which aren’t.

The offense elements supplied by the Public Health thus consist of two
lists, rather than definitions. The first list sets out the exemptions to the
general presumption of unlawfulness of the possession (and therefore
criminality); the second list sets out the conditions for ‘controlledness’ of
the substance possessed. I will excerpt only the former as the latter consists
of an even longer list of substances than that reproduced in section 220.09
above:

\textbf{Section 3305. Exemptions.}

1. The provisions of this article restricting the possession…of controlled
substances…shall not apply:

(a) to common carriers or to warehousemen, while engaged in lawfully
transporting or storing such substances, or to any employee of the same
acting within the scope of his employment; or

(b) official duties requiring possession or control of controlled substances; or

(c) to temporary incidental possession by employees or agents of persons
lawfully entitled to possession, or by persons whose possession is for the
purpose of aiding public officers in performing their official duties.

(d) to a duly authorized agent of an incorporated society for the prevention of
cruelty to animals…for the limited purpose of…possessing,…, ketamine
hydrochloride to anesthetize animals and/or sodium pentobarbital to
euthanize animals….

\textsuperscript{95} Possession thus would count as a \textit{multi-part single-code fragmented} offense. See N.Y.
Penal Law §§ 10.00 (definition of possession), 15.00(2) (possession as voluntary act); Model
Penal Code § 2.01(4) (possession as voluntary act).

\textsuperscript{96} N.Y. Penal Law § 220.00.
3. The commissioner is hereby authorized and empowered to make any rules, regulations and determinations permitting the following categories of persons to obtain, dispense and administer controlled substances under such conditions and in such manner as he shall prescribe:

(a) a person in the employ of the United States government or of any state, ... possessing ... controlled substances by reason of his official duties ... .

Here, then, we have the state declaring a substance controlled. Having declared it controlled, it then proceeds to declare its possession unlawful. Only at this point do we leave the realm of public health law and enter criminal law; for having declared possession of the substance unlawful, the state then declares its unlawful possession criminal.

Note that the quoted excerpt from the Public Health Law illustrates another variety of fragmented offense, the *multi-branch offense*. The commissioner for public health, the head of an agency in the executive branch, is authorized in a code passed by the legislative branch to supply a crucial definitional element of the crime of drug possession (and other drug crimes), through ‘rules, regulations and determinations permitting [certain] persons to obtain, dispense and administer controlled substances under such conditions and in such manner as he shall prescribe’.  

There are other types of multi-branch offenses of course. In the case of our drug possession example, the crime (of drug possession) still appears in the criminal code (though it is not exhaustively defined there). Yet more common are *noncriminal multi-branch offenses*, which appear in noncriminal codes. An example is the crime of ‘wilful violation of health laws’, defined in section 12-b of the New York Public Health Law:

1. A person who wilfully violates or refuses or omits to comply with any lawful order or regulation prescribed by any local board of health or local health officer, is guilty of a misdemeanor; ...
2. A person who wilfully violates any provision of this chapter, or any regulation lawfully made or established by any public officer or board under authority of this chapter, the punishment for violating which is not otherwise prescribed by this chapter or any other law, is punishable by imprisonment not exceeding one year, or by a fine not exceeding two thousand dollars or by both.

In a well-known case, *People v Coe*, a nurse at a senior citizens’ home was convicted under this provision for frisking an elderly patient with a history of heart disease, who died shortly thereafter. Coe was held to have violated

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97 See N.Y. Comp. Codes R. & Regs. tit. 10, § 80.2 (‘Exemptions’); see also *ibid.* §§ 80.3 (‘Exceptions, reclassification and exemptions of scheduled controlled substances’), 80.123(b) (‘Possession of a false or forged controlled substance prescription by any person other than a pharmacist in the pursuance of his profession shall be presumptive evidence of his intent to use the same for the purpose of illegally obtaining a controlled substance’).

section 2803-d(7) of the Public Health Law:

[And] any person who commits an act of physical abuse, neglect or mistreatment, or who fails to report such an act as provided in this section, shall be deemed to have violated this section and shall be liable for a penalty pursuant to section twelve of this chapter after an opportunity to be heard pursuant to this section.

‘Physical abuse’, in turn, was defined in a regulation as ‘inappropriate physical contact with a patient or resident of a residential health care facility’, where inappropriate physical contact includes, among other things, ‘striking’ and ‘shoving’. In the same regulation, ‘mistreatment’ is defined as ‘inappropriate use of physical... restraints on... a patient or resident of a residential health care facility’.\(^9\)

The crime in Coe, then, was defined entirely outside the criminal code. What’s more, while it appeared in a noncriminal code, several of its elements were defined not in a code, but in a set of executive regulations.\(^1\) In fact, the crime, as defined in section 12-b, would apply directly to violations of executive regulations, without an intermediary statutory provision like section 2803-d(7). Section 12-b is an expansive version of a *blanket law*, a law that provides for criminal punishment but does not set out the elements of a criminal offense itself, and instead leaves the definition of the offense to other norms and—in the case of executive regulations and order—officials.\(^2\) Executive officials, in fact, receive the backing of criminal sanctions not only for duly and centrally promulgated regulations, which are subject to procedural constraints of notice and comment and then published in a code of rules and regulations, but for any ‘order... prescribed by any... local health officer’.

Like many blanket statutes, section 12-b includes two limitations, one on the scope of the offense and the other on its punishment. It authorizes a maximum penalty of one year imprisonment and a $2,000 fine. These punishments are by no means negligible, but they do not approach the punishment for a multi-code fragmented offense like drug possession, which can extend to life imprisonment (in New York) and to life imprisonment without the possibility of parole (in other jurisdictions).\(^3\) Furthermore, the violation of a subsidiary norm referenced in the blanket law of section 12-b is criminal only if it is committed ‘wilfully’. Wilfulness has been interpreted to require some degree of notice.\(^4\) In Coe, for instance, the court held that in order to make out a wilful violation of section 12-b, the state had to

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\(^9\) 10 N.Y. Code Rules & Regulations § 81.1(a) and (b).

\(^1\) Coe thus illustrates that multi-branch offenses are not limited to those that are defined in the criminal code and some executive regulations; their legislative component may be found in noncriminal codes as well.


establish that the defendant ‘was aware that her conduct was illegal’. The court rejected a more onerous notice requirement, which would have limited willful violations to cases where the defendant ‘knew she was violating a specific statute or regulation’. In Coe the requisite awareness of illegality was present because the defendant had received a copy of the ‘Patient’s Bill of Rights’ (itself codified in the Public Health Law) and attended lectures regarding its content. The Patient’s Bill of Rights recognizes a patient’s right to be free from having his privacy invaded, physically or mentally abused, and being forced to do anything against his will. This notice requirement may not be particularly toothful; still, other fragmented offenses, such as the multi-code drug possession offenses, have no notice requirement of any kind, however undemanding.

Multi-branch offenses thus blur the line between norms originating in the legislative and executive branch, just as multi-code offenses straddle the distinction between criminal and noncriminal law. In Anglo-American law, the distinction—and competition—between legislative and nonlegislative criminal norms of course played a central role for centuries. Traditionally, however, the nonlegislative origin of criminal norms was judicial, not executive. The arguments against judicial criminal lawmaker are familiar. Judicial crime definition is thought to violate the principle of legality, which encompasses the principles of prospectivity, specificity, and publicity. Executive crime definition faces similar, but not identical, problems.

Judicial criminal lawmaker is always retrospective, at least in the Anglo-American view of the judicial role, which is limited to deciding live cases or controversies. ‘Advisory’ judicial opinions do not raise prospectivity concerns. Executive criminal lawmaker needn’t be retrospective, though it may be. The executive may decide to make its regulations prospective, but it is not required constitutionally to do so. It might be argued, in fact, that executive regulations are not criminal statutes and therefore are not subject to the principle of prospectivity in the first place. At any rate, executive regulations only become criminalized through the application of some blanket clause (like section 12-b of the New York Public Health Law). But the list of controlled substances, say, is not itself a criminal provision. It merely declares what substances are deemed ‘controlled’. As long as the provision setting out criminal liability, then, is not applied retroactively, executive regulations promulgated under it, or criminalized by it, could be retroactive. Or should the prospectivity requirement attach only if the regulation is used as the basis for a criminal prosecution, but not if it is merely applied civilly? Whether the blanket law itself (or some other provision in a noncriminal code that provides for criminal penalties, such as imprisonment) would be considered criminal, and therefore subject to the principle of prospectivity, is another matter, of course. Here it may be relevant whether the blanket law—unlike section 12-b—appears in a criminal code.
In some ways, multi-branch offenses can *enhance* specificity. Executive regulations and orders, after all, can be seen as spelling out broad legislative commands that, without executive specification, would be hopelessly vague. An offense defined as ‘unlawful possession of a controlled substance’ would provide neither sufficient notice nor sufficient guidance to law enforcement, the traditional components of a ‘void for vagueness’ inquiry in American constitutional law. But to say that executive regulations may serve the ideal of specificity in fact is not to say that they are subject to a (constitutional) principle of specificity. It may, for instance, be in the interest of the state to provide its executive with specific guidelines for enforcement for the sake of a more efficient operation of the state apparatus. The point of the specificity requirement, however, is not to make bureaucracies run more smoothly, but to provide notice to individuals about the criminality of their conduct and to prevent (or at least make more difficult) discriminatory or otherwise arbitrary, rather than incompetent, enforcement. The problematic presumption of notice that attaches to statutory texts is more fanciful when it is applied to executive regulations. Without a sophisticated dissemination and education campaign (as for instance a universal requirement of driving instruction by licensed instructors), not even the most detailed executive regulation buried in a code of rules and regulations can provide meaningful notice to anyone other than the sophisticated actor who operates in a specialized industry and has sufficient resources to devote to the monitoring of a fluid regulatory environment.

Whether executive regulations provide guidance to law enforcement officials if criminal statutes do not, is not quite clear. The problem here is not the lack of specificity of any particular regulation, but the mass of regulations as a whole. A blanket criminal law considerably, and with one stroke, expands the number of potential criminal violations. American criminal codes already feature a large, and growing, collection of criminal offenses; converting any and all executive orders or regulations promulgated by some member of the executive increases the discretion of executive officials not only in the creation of criminal norms, but also in their enforcement. Specificity only limits executive discretion if it is not achieved at the price of increasing the number of specific offenses. Today arbitrary enforcement is problematic not because of the arbitrary application of criminal norms, but because of the arbitrary selection of criminal norms among a virtually unlimited supply. In this way, the illusory specificity of executive regulations backed by criminal sanctions allows the state to make an end run around the concern with the uniformity—and therefore the legality—of executive participation in the criminal process that underlies the specificity requirement in the first place.

Publicity traditionally has been considered an important component of the principle of legality, and a significant weakness of judicial criminal lawmaker. It is doubtful that the publication of executive rules and regulations in ‘codes’ of rules and regulations is superior to the publication of judicial decisions in court reporters. Then again, it is difficult to fault executive regulations for their lack of publicity if legislatively enacted criminal statutes have essentially been exempted from meaningful publicity inquiry themselves.105

There is another aspect of the legality principle that raises concerns about executive and judicial criminal lawmaker alike. The principle of legislative intent insists that the criminal lawmaker power be limited to the legislature, on the basis of familiar concerns about democratic legitimacy (legislatures represent the constituents of the political community, they deliberate, they have staffs). One might suggest that executive criminal lawmaker is more consistent with the principle of legislativity than is judicial criminal lawmaker because the legislature explicitly delegated the task of criminal lawmaker to the executive when it declares, in a statute, that some administrative official is authorized to promulgate rules and regulations pursuant to some statute and that violations of these rules and regulations are deemed criminal (under certain circumstances). But does the fact of delegation resolve the theoretical (and constitutional) question of legitimacy? Presumably the problem of the illegitimacy of judicial criminal lawmaker could not be solved by the legislature passing a statute that authorized judges to create crimes. Perhaps the legislature might be allowed to instruct some agency charged with ‘environmental protection’ to set acceptable pollution levels, and then threatening exceeding these levels with punishment. But should it be permitted to simply declare any and all rules and regulations promulgated by that agency to constitute crimes?106

So much for the dispersed definition of attendant circumstances pertaining to the characteristics of the item possessed and of the possession itself. The attendant circumstances defining the possessor are perhaps more noteworthy still. Possession is, after all, a status offense. It requires not conduct, nor does it require a result. It instead defines the relationship of an individual with an object. That relationship is determined by the status of the possessor and of the possessed. Possession is an incapacitationist tool for the elimination of threats. The all-important status that lies at the heart of the crime of possession thus is dangerousness. Possession is criminalized if it poses a threat, and more precisely, under the Police Power Model of the criminal process, a threat to the authority of the state. Possessor and possessed are

106 A solid majority of the U.S. Supreme Court presumably would find no constitutional fault with this arrangement. See Mistretta v United States, 488 U.S. 361 (1989) (delegation of power to make punishment law to federal sentencing commission).
considered as a threat unit. The threat can either emanate from the possessor or from the possessed. Some objects are so dangerous that their being possessed is presumptively criminal. And some individuals are so dangerous that their possessing is presumptively criminal. The prime example of the possessed-driven possession offense is gun possession, which is criminal except for certain individuals deemed nondangerous to the state (through exemptions for state officials or licensing). The prime example of the possessor-driven possession offense is universal possession prohibition in high-security prisons, where inmates are prohibited from possessing any object unless possession of that object has been permitted by the prison authorities.

The presumption of dangerousness attaching to the possessor is either rebuttable or irrebuttable. In the case of gun possession, for instance, the presumption is irrebuttable if the possessor has the status of ‘felon’ or ‘alien’. Other possessors can rebut the presumption of dangerousness in various ways. One common method of rebuttal is the license. If the state finds that the possessor is ‘of good moral character’, then it may, in its discretion, grant him the license to possess a weapon. Receipt of the license is not a matter of right, but of grace. Another common method of rebuttal, often neglected, is attaining the status of state official. The state has granted to certain of its officials, including police officers and soldiers, permission to possess guns. The licensee and the state official are those whose status translates into an ‘exemption’ from the general prohibition of gun ownership. Much the same holds for drug possession offenses; there the status-based exemptions from the universal prohibition include state officials and licensed physicians.

The Possession Universe

Note, then, the complex structure of a possession offense. At first sight, possession offenses look straightforward enough: ‘A person is guilty of criminal possession of a weapon in the fourth degree when . . . [h]e possesses any firearm.’ Possession of a particular object is criminalized without any reference to (offender) status (or conduct). (The very detailed) definition

108 See Ted Conover, Newjack: Guarding Sing Sing (New York: Random House, 2000), 104–5 (prison contraband defined as ‘any article that is not authorized by the Superintendent or [his] designee’).
109 See, e.g., N.Y. Penal Law § 265.01(4) (convicted of a felony or serious offense); cf. United States v Lewiner, 31 F Supp 2d 23, 26–27 (D. Mass 1998) (‘Felons in Possession of a Firearm is the prototypical status offense.’).
110 Id. § 265.01(5).
111 N.Y. Penal Law § 400.00(1)(a).
112 Shapiro v New York City Police Dep’t (License Division), 157 Misc. 2d 28 (N.Y. 1993).
113 See N.Y. Penal Law § 265.20. This exemption attaches to persons, not acts. It therefore even applies to an off-duty police officer’s possession of a deadly weapon with the intent to use it unlawfully against another. See People v Desthers 343 NYS.2d 887 (N.Y. Crim. Ct. 1973).
114 N.Y. Penal Law § 265.01 (criminal possession of a weapon in the fourth degree).
of ‘firearm’, i.e. of the attendant circumstances that transform an object into ‘contraband’, appears elsewhere in the same article of the special part.\textsuperscript{115}

The all-important definition of the relationship between the person and the object (i.e. the part of the statute that would ordinarily be occupied by its conduct element) can be found not in the special part, but in the general part of the criminal code. There possession is defined, as we’ve seen, in two places. Possession means either ‘to have physical possession’ or ‘to exercise dominion or control over tangible property’.\textsuperscript{116} Possession, in other words, is either actual or constructive. Elsewhere possession is said to qualify as a voluntary act—and therefore as subject to criminal punishment—if ‘the actor was aware of his physical possession or control thereof for a sufficient period to have been able to terminate it’.\textsuperscript{117} In the Model Penal Code, possession also includes, in the alternative, ‘knowingly procur[ing] or receiv[ing] the thing possessed’.\textsuperscript{118}

Having thus pieced together the scope of the universal prohibition on possession, the special part further complicates matters by setting out ‘exemptions’ to that prohibition. These exemptions must be carefully distinguished from ordinary ‘defenses’. Not only do they not appear in the general part, but they are of a different quality altogether. Those who are exempt from criminal liability have no need to raise a defense. They are freed of even that prima facie criminal liability which ordinarily results from a match between one’s conduct and all the elements of some criminal offense. They are free of criminal liability by definition, so to speak. Only after reviewing the status-based exemptions can we determine whether someone has in fact committed an offense.

Ordinarily at this stage, we would proceed to investigate the lawfulness of the facially criminal conduct (justifiability), followed by an inquiry into the responsibility of the person engaging in it (excusability). We would, in other words, proceed from our inquiry into the special part to one into the general principles of liability laid out in the general part. Possession offenses, however, resist this familiar mode of analysis. They are, in a sense, a miniature code unto themselves, with their very own, truncated, versions of the doctrines that we ordinarily associate with the general part.

The definition of possession creates a sui generis type of voluntary act that is both commission (acquisition) and omission (failure to dispossess) and, in defining its actness, makes references to requisite mental states, including knowledge and awareness.\textsuperscript{119} Besides these miniature doctrines of actus reus and mens rea, the doctrine of possession features its own version of imputation, both as instrumentalization and as complicity. Constructive possession is established through control over a person or over an area. With

\textsuperscript{115} N.Y. Penal Law § 265.00(3).
\textsuperscript{116} \textit{Id.} 10.00(8).
\textsuperscript{117} \textit{Id.} 15.00(2).
\textsuperscript{118} § 2.01(4).
\textsuperscript{119} This commingling of actus reus and mens rea can create difficulties of interpretation, particular in strict liability possession offenses. \textit{See In re I.}, 121 Misc. 2d 271 (N.Y. Fam. Ct. 1983).
constructive possession there is no need to invoke traditional doctrines such as involuntary act (where one person’s conduct is so completely controlled by another as to render it involuntary) or duress (where one person’s conduct is sufficiently caused by another as to render it excusable) or imputation by instrumentalization (the flip-side of duress) or imputation by complicity (where one person’s conduct is sufficiently instigated or facilitated by another as to be imputed to the latter as his own).\footnote{120} It would be a mistake, however, to think of constructive possession as a form of vicarious or group liability in the traditional sense. While it radically simplifies traditional means of imputation, with their cumbersome actus reus and mens rea (purpose or at least knowledge) requirements, constructive possession turns on an altogether different type of imputation, from object to person, rather than from person to person. It is the connection with the object, and more precisely the match of the object’s dangerousness with the dangerousness of the person, that ultimately gives rise to criminal liability. How could indirect possession liability rely on imputing conduct from one person to another, if possession is not conduct?

The miniature version of the doctrine of justification is the element of unlawfulness. Lawful possession is not prima facie possession that is justified on the basis of one or another of the familiar grounds of justification (self-defense, necessity, and so on). The doctrine of justification has been folded into the element of unlawfulness, which is defined by the state not in the general part, but in a definitional section setting out what substance is ‘controlled’ or which possessor is ‘exempted’ from criminal liability. For that reason, courts have hesitated to recognize general defenses to a charge of possession. Self-defense may be a defense to murder, but not to possessing the gun used in the homicide because ‘a person either possesses a weapon lawfully or he does not’.\footnote{121} The justified self-defender thus may find herself acquitted of murder, but still convicted of gun possession, illustrating possession’s function as a universal fall-back (or Velcro) offense, the offense that will stick if no other will.\footnote{122} Put another way, the defense of consent, properly reconceptualized as state-based, becomes the one and only ‘justification’ for a possession offense. If the state consents to a person’s possession of an object the possession of which has been proscribed by the state, then no crime has been committed, as no offense has been taken.

\footnote{120}{See, e.g., \textit{People v Rivera}, 77 AD2d 538 (N.Y. App. Div. 1980) (defendant held to constructively possess a gun physically possessed by his brother because he had told him to get it).}

\footnote{121}{\textit{People v Almodovar}, 62 N.Y. 2d 126 (1984); see also \textit{People v Laramore}, 1 Misc. 3d 5, 764 N.Y.S.2d 299 (N.Y. App. Term 2003) (‘We cannot conceive of a situation where an intent to use a kitchen knife unlawfully can ever be justified’). Other—federal—courts have recognized, after much handwringing, a defense of justification to a gun possession charge ‘in only extraordinary circumstances’. \textit{United States v Deleveaux} 205 F.3d 1292 at 1297 (2000).}

\footnote{122}{See Dubber, \textit{Victims in the War on Crime}, above n. 2, at 52, 77–8.}
The law of possession thus is a closed universe that resists any attempt to connect questions of liability with a comprehensive account of criminal law, and thereby to subject it to critical analysis in light of the principles of the general part. Possession needs no general part; it comes with its very own special general part.

3. Conclusion

Possession, we have seen, defies traditional categories. Rather than struggle to shoehorn possession into the common law’s familiar analytic framework of actus reus, mens rea, and the like, we might be better off thinking of possession as representing a new paradigm of offense within a new model of the criminal law process, the Police Power Model. Possession offenses appear both in the general part (as a variety of inchoate liability) and the special part (attached to particular offense categories), as a single broad offense (such as possession of criminal instruments) and as several specific offenses (such as possession of drugs, guns, stolen property, and so on). They collapse the distinctions between offense and defense (more specifically, between offense definition and justification) by including, within their definition, the concept of ‘unlawfulness’, ‘illegality’, or ‘criminality’, along with separate ‘exemptions’. Possession offenses also do away with traditional notions of imputed (and ‘group’) liability, through the doctrine of constructive possession, which makes room for vicarious liability (through dominion over a person) and spatial liability (through dominion over an area). They are neither result nor conduct offenses and defy the traditional distinction between voluntariness and mens rea.

Possession offenses also straddle familiar distinctions among various aspects of the criminal process, definition, imposition, and infliction. Through the use of presumptions they incorporate procedural elements into substantive criminal law, thus breaking down the distinction between definition and imposition. Designed for ease of enforcement and imposition, possession offenses reflect an approach to criminal law that emphasizes crime control over just punishment, application over definition, results over rules, and ultimately the protection of state authority over the prevention and vindication of personal harm. In the possession paradigm, substantive criminal law (including its special part) is of instrumental significance as its traditional categories must give way to the exigencies of crime control.

Possession’s failure to fit in might give rise to critique, at least insofar as the categories of the substantive criminal law can claim normative, and not merely taxonomical, significance. Given that the time-honored principles of Anglo-American criminal law, however, are founded more on tradition than on any coherent theory of legitimacy, mere noncompliance hardly means
illegitimacy. The present analysis of possession offenses in the broader context of the Police Power Model of the criminal process is content to unearth new categories that may prove useful in assembling a more nuanced account of Anglo-American criminal law in general, and of its special part in particular.