
ARTICLE

THE RIGHT TO ABANDON

LIOR JACOB STRAHILEVITZ[†]

The common law prohibits the abandonment of real property. Perhaps it is surprising, therefore, that the following are true: (1) the common law generally permits the abandonment of chattel property, (2) the common law promotes the transfer of real property via adverse possession, and (3) the civil law is widely believed to permit the abandonment of real property. Because the literature on abandonment is disappointingly sparse, these three peculiarities have escaped sustained scholarly analysis and criticism. This Article aims to provide a comprehensive analysis of the law of abandonment. After engaging in such an analysis, this Article finds that the common law's flat prohibition on the abandonment of corporeal interests in real property is misguided. Legal rules prohibiting abandonment ought to be replaced with a more permissive regime in which both the value of the underlying resource and the steps that the abandoning owner takes to ensure that would-be claimants are alerted to the resource's availability are what matters. Furthermore, the law of abandonment ought to be harmonized for real property and chattels. Finally, this Article criticizes the

[†] Professor of Law and Walter Mander Teaching Scholar, University of Chicago Law School. The author thanks Sandra Lloyd and James Tierney for providing helpful family history concerning the *Pocono Springs* case; Eduardo Peñalver for his generous collegiality and insight as we each tried to make headway on the issue of abandonment; Adam Badawi, Douglas Baird, Shyam Balganes, Eric Biber, Anu Bradford, Anupam Chander, Rosalind Dixon, Joel Dobris, Bob Ellickson, Chris Elmendorf, Lee Fennell, Tom Ginsburg, Bernard Harcourt, Paul Heald, Dick Helmholz, Alison La-Croix, Brian Leiter, Saul Levmore, Anup Malani, Jeremy Meisel, Adam Muchmore, Adam Samaha, Henry Smith, Madhavi Sunder, and Josh Tate; workshop participants at the University of Chicago, the University of California Davis, Washington University in St. Louis, and the University of Colorado's Property Works in Progress Conference for helpful comments and suggestions; Ben Foster and Katie Heinrichs for energetic research assistance; and the Morton C. Seeley Fund and the John M. Olin Foundation for research support.

law’s preference for adverse possession over abandonment as a means of transferring title in cases in which these mechanisms might function as substitutes.

In the course of analyzing the law of abandonment and offering a qualified defense of the practice, this Article provides the first workable definition of resource abandonment, suggests that the abandonment of positive-value real and intellectual property is surprisingly widespread by providing multiple examples, and analyzes the costs and benefits associated with abandonment. This Article explores at some length the factors that will determine whether an owner opts for abandonment or other means for extinguishing his rights to a resource, as well as the considerations that should drive the law’s receptivity to these efforts. The latter considerations include the decision, transaction, decay, confusion, sustainability, and lawless-race costs associated with abandonment. In addition, readers will be exposed to pertinent tidbits concerning the social norms of geocaching, the anthropology of “making it rain,” the unfortunate decline of municipal bulky-trash pickup, Mississippi’s misguided livestock laws, and the dubious parenting choices of Jean-Jacques Rousseau.

- INTRODUCTION356
- I. UNDERSTANDING ABANDONMENT360
 - A. Taxonomy of Abandoned Properties 362
 - B. Costs of Abandonment 372
 - C. Abandonment’s Comparative Appeal 375
- II. THE LAW OF ABANDONMENT390
 - A. Permissive Regimes 390
 - B. Escheat 394
 - C. Prohibition 398
 - D. Licensing 402
 - E. Promoting Abandonment?..... 404
- III. A PROPOSAL FOR RATIONALIZING THE LAW OF ABANDONMENT...405
 - A. Negative-Market-Value Property..... 405
 - B. Positive-Market-Value Property 407
 - C. Is Land Different?..... 412
- CONCLUSION.....419

INTRODUCTION

On an ordinary Wednesday in August of 2008, there were sixty-one separate listings in the “Free Stuff” section of Chicago’s Craigslist

directory.¹ The belongings made freely available ranged from highly desirable items (an entertainment center in great condition, a working “Gilbranson [sic] organ,” televisions, and microwave ovens) to those that might be useful to a niche population (a Hewlett-Packard inkjet cartridge, VHS tapes of the motion pictures *Free Willy* and *Free Willy 2*, and wooden doors from a colonial house built in 1938) to the nearly worthless (a broken refrigerator, one cubic yard of dirt from a landscaping project, and “Tons of River Rocks”). All were offered by their owners on a first-come, first-served basis. In most cases, the items were kept inside the owner’s home, and a claimant would need to make arrangements with the owner to haul off the property. But the owners were not picky—the first claimant with the ability to do so could take the advertised property home. In a few cases, such as that of the broken refrigerator, the item had been left by the owner in an alley or another easily accessible place, and the Craigslist advertisement described its location.²

Craigslist is hardly alone in pairing would-be abandoners with potential claimants. Another national organization, the Freecycle Network, offers a similar service with high levels of participation, and BookCrossing is a global service that facilitates the abandonment and finding of books. In recent years, communities of “freegans” have sprouted up in urban areas around the world, eating, cleaning, and wearing resources that other people have discarded.³ As a testament to the prevalence of abandonment and the value of the resources abandoned, it appears that some of these freegans are able to live essentially pleasant, middle-class lives.⁴ As the American economy has slid into a significant recession, states like Florida and South Carolina are dealing with hundreds of abandoned boats that are clogging local waterways, left by owners evidently unable to find buyers and unwilling to pay slip fees.⁵ Moreover, it is not only personal property that is widely abandoned. In rural, sparsely populated areas of Kansas, Ne-

¹ Chicago Free Stuff Classifieds—Craigslist, <http://chicago.craigslist.org/zip/> (Aug. 14, 2008) (on file with author).

² See Posting to Chicago Free Stuff Classifieds—Craigslist, <http://chicago.craigslist.org/chc/zip/795812089.html> (Aug. 13, 2008) (on file with author) (stating that a broken refrigerator was available in the alley at “51st & Mobile”).

³ See Steven Kurutz, *Not Buying It*, N.Y. TIMES, June 21, 2007, at F1 (explaining the culture of “freegans,” who live off of consumer waste to minimize their support of corporations and their environmental impact).

⁴ See *id.*

⁵ David Streitfeld, *Too Costly to Keep, Boats Become Castaways*, N.Y. TIMES, Apr. 1, 2009, at A1.

braska, and North Dakota, local governments have made free land available to anyone willing to build a house on it and move in.⁶ In urban centers, the problem of abandoned dwellings is significant, accounting for 23,000 dwelling units in New York City in 1996 and 1.3% of all urban residential housing units in fifty-eight cities in the northeastern United States in 1975.⁷

Given the ubiquity of abandoned property and its presumptive economic importance, one would expect there to be a large legal literature exploring the contours of abandonment law. Such a supposition turns out to be unduly optimistic. There is very little legal writing on the abandonment of property. When legal scholars tackle the issue, they tend to focus on specific issues, like abandoned shipwreck cases, abandoned oil and gas interests, or abandoned rail lines.⁸ The leading property casebooks either ignore abandonment entirely or give it brief attention.⁹ For whatever reason, legal scholars have nearly

⁶ See, e.g., Laura Bauer, *Trying to Halt the Population Slide: Towns Tout Free Land to Lure New Residents*, KAN. CITY STAR, Jan. 29, 2007, at A1, available at 2007 WLNR 1679726 (detailing the free-land program in Kansas); Kansas Free Land, <http://www.kansasfreeland.com> (last visited Nov. 15, 2009).

⁷ Benjamin P. Scafidi et al., *An Economic Analysis of Housing Abandonment*, 7 J. HOUSING ECON. 287, 288 (1998).

⁸ See, e.g., David J. Bederman & Brian D. Spielman, *Refusing Salvage*, 6 LOY. MAR. L.J. 31, 32 (2008); Ronald W. Polston, *Mineral Ownership Theory: Doctrine in Disarray*, 70 N.D. L. REV. 541, 561-64 (1994); Michael L. Stokes, *Adverse Abandonment: Toward Allowing the States to Condemn or Dispose of Unneeded Railroad Land*, 31 TRANSP. L.J. 69, 79-81 (2003).

⁹ See, e.g., BARLOW BURKE ET AL., *FUNDAMENTALS OF PROPERTY LAW* 18-24 (2d ed. 2004) (limiting its treatment of abandoned property to *Eads v. Brazelton*, 22 Ark. 499 (1861), a case involving an abandoned shipwreck, *Haslem v. Lockwood*, 37 Conn. 500 (1871), a case involving abandoned manure, and a few brief notes); JOHN E. CRIBBET ET AL., *PROPERTY: CASES AND MATERIALS* 109-13 (9th ed. 2008) (providing, in five pages, the most detailed treatment of the subject among leading casebooks, focusing mostly on the abandonment of chattels and including *Eads*); JESSE DUKEMINIER ET AL., *PROPERTY* 793-96 (6th ed. 2006) (including *Pocono Springs Civic Ass'n, Inc. v. MacKenzie*, 667 A.2d 233 (Pa. Super. Ct. 1995), which concerned the abandonment of land, and focusing on affirmative covenants' relationship to the abandonment of real property); JOHN P. DWYER & PETER S. MENELL, *PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE* (1998) (ignoring the abandonment of real property outside of the landlord-tenant context); PAUL GOLDSTEIN & BARTON H. THOMPSON, JR., *PROPERTY LAW: OWNERSHIP, USE, AND CONSERVATION* (2006) (ignoring the issue of abandonment); THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 518-23 (2007) (focusing on the abandonment of real property, and including the *Pocono Springs* case); JOSEPH WILLIAM SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* 92-96 (4th ed. 2006) (including *Charrier v. Bell*, 496 So. 2d 601 (La. Ct. App. 1986), a case involving the legal treatment of buried Native American artifacts).

abandoned the topic and remained oblivious to its charms.¹⁰ This Article fills that gap in the property literature by examining the law of abandonment in a comprehensive way. Perhaps unsurprisingly, in light of the dearth of attention that abandonment law has received, this Article finds the law of abandonment wanting and suggests doctrinal improvements.

Part I examines the motivations behind decisions to abandon real and personal property, developing a taxonomy of abandonment along the way and demonstrating that positive-market-value property is abandoned with some frequency. Part I also highlights some of the social costs of abandonment, which form a basis for laws restricting the practice. The Part concludes by comparing abandonment to the primary competing methods of disposing of property—sales, gifts, and destruction. Much can be learned from this comparison. For example, one danger of rules that unduly restrict the abandonment of positive-value resources is that owners will be left with little choice but to destroy those resources instead. Part II describes and analyzes the law of abandoned property, identifying five basic approaches that courts and legislatures have taken and assessing the rationales and merits of these approaches. Part III proposes a framework for rationalizing the law of abandonment. In the place of a common law regime that prohibits the abandonment of real property and regulates abandonment in the context of chattels, this Article suggests a unified regime that is pegged to the underlying market value of the resource and the social costs of abandonment. More precisely, the law likely ought to permit the abandonment of positive-market-value resources if owners take steps to advertise the availability of such property. Such advertisement will minimize most of the social costs associated with abandonment. With respect to negative-market-value resources like contaminated land or rotting garbage, a prohibition on abandonment usually makes sense in both the real property and chattel property contexts, at least in nations where the baseline level of law-abiding behavior is high. In short, this Article presents a qualified defense of the right to abandon property.

The Article concludes by contrasting American law's receptiveness to adverse possession and its hostility to the abandonment of real property. Such a regime makes sense in a world where differentiating between positive- and negative-value real estate lies beyond the institu-

¹⁰ An important recent exception is Eduardo M. Peñalver, *The Illusory Right to Abandon* (Cornell Law Sch. Legal Studies Research Paper Series, Research Paper No. 09-015, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1428517.

tional competencies of courts. However, as long as judges can adequately assess the value of real estate based on comparable sales, the case for permitting adverse possession of real estate while prohibiting the abandonment of real estate collapses. If anything, the concerns that explain the common law's resistance to the abandonment of real property would be better alleviated by prohibiting the adverse possession of real estate by bad-faith adverse possessors than by maintaining the prohibition on abandoning real estate. Put simply, whereas new information technologies mitigate the problems associated with the decay or waste of an abandoned resource during the period in which it remains up for grabs, the doctrine of adverse possession ensures that a knowing trespasser will not put property to its highest-value use during the entirety of the statute of limitations period.

I. UNDERSTANDING ABANDONMENT

It will be helpful to begin with a definition. In the case of abandonment, a simple and elegant definition is readily available. Abandonment means *any unilateral transfer of ownership*. The word "unilateral" is doing much of the heavy lifting here.¹¹ Other means of transferring property—sales, gifts, bequests, releases, forfeitures, foreclosures, and adverse possession—require that a third party assume ownership of the property or agree to do so.¹² An owner who wishes to dispose of property unilaterally has just two options: abandonment or destruction. Logically, then, abandonment can be defined with reference to what it is not: it is a unilateral, nondestructive means of ridding oneself of ownership. The destruction of a resource is not a transfer, because there is no transferee.

In offering this definition at conferences and workshops, I have received some push back from property scholars who reject the idea

¹¹ The clearest articulation of this point in the case law is found in *Bright v. Gineste*, 284 P.2d 839 (Cal. Ct. App. 1955), in which the court stated that

to constitute an abandonment in the strict legal sense there must be a parting with title that is unilateral, the owner must leave the property free to the acquisition of whoever wishes to claim it, and [be] indifferent as to what may become of it. A transfer of property from one person to another cannot be effected by abandonment, and abandonment cannot be made to a particular individual.

Id. at 842 (citation omitted).

¹² A zero-price sale is *not* abandonment under this definition. A zero-price sale of a resource requires that a purchaser agree to take possession of the item before title is transferred. With abandonment, title is relinquished at the moment the prior possessor relinquishes control, regardless of the actions of any would-be recipient.

that abandonment can be a transfer. They have likened abandonment to the destruction of a legal estate and the creation of a new one, which is what occurs with adverse possession. But this characterization of abandonment is erroneous. As we shall see, one of the key attributes of abandonment is that the abandoning owner can “change her mind” and reclaim the abandoned resource so long as she does so before another person claims it. If abandonment were to entail the destruction of an estate (and the elimination of third-party security interests in the resource), then owners of encumbered properties would have an easy avenue for eliminating those encumbrances: abandoning the resource for a moment, then reclaiming it immediately free and clear. This possibility explains why we must conceive of abandonment as a transfer, albeit one with a temporal lag built into it. Where abandonment is permitted, the transferor relinquishes ownership immediately, the property remains up for grabs for some period of time, and the transferee eventually claims possession. The state, by regulating the law of abandonment, essentially dictates the circumstances under which it is willing to let a resource owner place it up for grabs. Nothing in the law of property requires that a transferee take possession from a transferor immediately—abandonment cases are the exception to the general rule.

Why would someone abandon property? That question lies at the core of any serious inquiry into this body of law. As discussed below, there may be a number of reasons why an owner might regard abandonment as an attractive strategy for transferring property. The most significant advantages of abandonment are that it allows an owner to avoid the transaction costs associated with a consensual transfer and the decision costs associated with determining the identity of the most appropriate transferee. Other reasons why abandonment might prove attractive include altruistic or reciprocal motivations, a desire to sell ancillary goods, and efforts to enhance one’s reputation or derive entertainment value.¹³ The Sections that follow describe some of the more common forms of property abandonment.

¹³ These are the private benefits of abandonment, and such private benefits will enhance social welfare. In isolated cases, there may be disconnected social benefits from abandonment. For example, abandonment might signal a shift in underlying property values that helps transition land to its most appropriate use, which in some cases may be a commons. See Saul Levmore, *Two Stories About the Evolution of Property Rights*, 31 J. LEGAL STUD. S421, S425 (2002) (explaining how rampant crime may lead people to abandon a town’s property to “open access”).

A. Taxonomy of Abandoned Properties

It is widely assumed that property is only abandoned when it becomes worthless or when the transaction costs of transferring the property exceed its market value. For example, Tom Merrill and Henry Smith identify the core condition that leads to abandonment as an asset possessing negative value.¹⁴ They then ask whether there would ever be a context in which owners abandon property that does not have negative value.¹⁵ Although they do not respond to this question, it has an affirmative answer. The case law reflects numerous instances in which property with positive-market-value is abandoned, and contemporary experience, summarized below, suggests that this behavior remains common. By exploring the different types of non-negative-value properties that are nevertheless abandoned, we will make headway in determining precisely what the law of abandonment ought to say.

We can describe property, be it real, chattel, or intellectual, using a four-box matrix. The two relevant variables are (1) value to the existing owner (subjective value) and (2) market value.¹⁶

Figure 1: Value and Abandonment

<p>Positive Subjective Value, Positive Market Value Medium-low abandonment frequency (Examples: geocaching, major league baseballs, making it rain)</p>	<p>Positive Subjective Value, Negative Market Value Very low abandonment frequency (Example: tyrannical heirlooms)</p>
<p>Negative Subjective Value, Positive Market Value Medium-high abandonment frequency (Examples: property associated with ex-lovers, cultural objects predating owners' taste changes, some pets)</p>	<p>Negative Subjective Value, Negative Market Value Very high abandonment frequency (Examples: refuse, contaminated land, badly damaged chattels)</p>

¹⁴ MERRILL & SMITH, *supra* note 9, at 522; cf. Douglas G. Baird, *A World Without Bankruptcy*, LAW & CONTEMP. PROBS., Spring 1987, at 173, 190 (1987) (noting that a trustee's "abandonment power exists because some kinds of property are not worth keeping").

¹⁵ MERRILL & SMITH, *supra* note 9, at 522.

¹⁶ The divergence between subjective value and market value is a well-established trope in the academic literature on the law of takings and the question of just compensation. See, e.g., Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 962-65 (analyzing the compensated and uncompensated value of land in an eminent domain taking); Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 678 (2005) (questioning the accuracy of fair market valuation and its impact on takings).

Property that is devoid of both subjective value and market value is likely to be abandoned unless forbidden by law. In the overwhelming majority of forfeiture cases involving New York City real estate, the property in question had liens that exceeded the market value of the underlying property at the time of its seizure by the government to pay off tax liens.¹⁷ It seems plausible that most abandoned real estate has this characteristic as well. Nobody wants this property in its present form, and the cost of paying off tax liens exceeds the market value that the property would have if repaired or bought free and clear. In some contexts, such as the environmental-contamination setting, the law must impose the clean-up costs on someone—either the owner of the negative-value asset, the polluter, the neighbors who are suffering from the pollution, or the taxpayers.¹⁸ Speaking more generally, an asset that has no economic value to anyone should be repaired, recycled, unbundled, or destroyed.¹⁹

Repairing, recycling, unbundling, and destroying are of course not costless. Hence the law will limit an individual owner's ability to impose such costs on the public at large. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)²⁰ and the Resource Conservation and Recovery Act (RCRA)²¹ provide statutory frameworks for imposing environmental remediation costs on the owners of negative-value property. Various laws at the state and local level prohibit the nonconsensual dumping of waste on public and private property.²² Municipalities may provide public trash

¹⁷ See Scafidi et al., *supra* note 7, at 293, 297 (using data from the New York City Department of Finance to conclude that ninety-eight percent of the studied abandoned properties had a lien-to-value ratio of greater than one). Although the authors refer to these units as “abandoned” property, *id.* at 293, most of the units described in their paper are more accurately characterized as foreclosed. At no point is the real property placed up for grabs to a finder, as is the case with legally abandoned property. See *supra* note 11 and accompanying text (discussing the definition of abandonment).

¹⁸ The law typically imposes these costs on the polluter if collection from her is possible. See Baird, *supra* note 14, at 187-91 (presenting cases in which states attempt to impose clean-up costs on polluters that have filed for bankruptcy).

¹⁹ See *infra* Section I.C.

²⁰ 42 U.S.C. §§ 9601–9675 (2006).

²¹ *Id.* §§ 6901–6992k. On the relationship between CERCLA and RCRA, see, for example, J. Stanton Curry et al., *The Tug-of-War Between RCRA and CERCLA at Contaminated Hazardous Waste Facilities*, 23 ARIZ. ST. L.J. 359, 370-94 (1991).

²² See, e.g., ALASKA STAT. § 46.06.080 (2008) (prohibiting littering but capping fines at \$1000); CAL. PENAL CODE § 374.3 (West 2009) (distinguishing personal dumping from commercial dumping and imposing fines up to \$10,000 for commercial

cans in parks or on city streets, and people wishing to rid themselves of negative-value assets will try to abandon them there. Nonetheless, it is not irrational for the government to assume the costs of destruction or recycling in these cases. The city might rationally conclude that in the absence of these trash receptacles, people will abandon their property in the parks or streets themselves, creating unsightly litter and public health hazards. Note, however, that cities cap the costs associated with the intake of abandoned property by prohibiting the dumping of household waste in public trash cans and by limiting their size.²³ Based on casual empiricism, it is my impression that public dumpsters are rarely situated in urban parks or near sidewalks, in part because their presence will invite individuals to dispose of large negative-value assets therein. As a general matter, individuals and firms have to arrange with private entities or public sanitation departments to lose possession of negative-market-value property. Once such a contract is entered into or tax revenue is dedicated to this purpose, it is no longer appropriate to describe the waste in question as having been abandoned. Rather, it is consensually transferred by one party to another for the purposes of disposal.

A second category of property that is regularly abandoned has negative subjective value and positive market value. Property that is associated with an ex-lover is often abandoned by an owner despite its positive market value. A popular-press how-to book that instructs readers on making money by purchasing abandoned properties suggests that divorce frequently causes the former spouses to abandon the family home and also that people who inherit properties where a loved one died sometimes abandon the land so as to avoid dealing with painful memories.²⁴ More trivially, an adult may decide that the

dumping); TEX. HEALTH & SAFETY CODE ANN. § 365.012 (Vernon 2008) (creating a carefully graded punishment regime dependent on the amount of waste dumped).

²³ Several years ago, a Washington, D.C. lawyer threw away a FedEx mailing slip, which provided his residential address, in a public trash can and was fined thirty-five dollars for violating the District's prohibition. Marc Fisher, *When It Comes to Waste, D.C. Is Priceless*, WASH. POST, May 24, 2004, at B1.

²⁴ CHANTAL HOWELL CAREY & BILL CAREY, MAKE MONEY IN ABANDONED PROPERTIES: HOW TO IDENTIFY AND BUY VACANT PROPERTIES AND MAKE A HUGE PROFIT 15 (2006). Much of the Careys' advice seems as dubious as the title of their book. They state that they have purchased multiple high-value properties that were in the process of being abandoned by their owners, but they provide no documentation. *See id.* at 7-12. Their account should be taken with a fistful of salt. Nonetheless, scenarios like the ones described by the Careys are reflected in the case law. *See, e.g.,* Yourik v. Mallonee, 921 A.2d 869, 871-72 & n.1 (Md. Ct. Spec. App. 2007) (considering a quiet title action brought after a home was purchased for a newlywed couple who then separated);

objects associated with her youth do not belong in her residence any longer but would surely make some child happy, so she may leave them in a publicly accessible place for the first interested passerby.

A third category of property, entailing positive subjective value and zero or negative market value, is extremely unlikely to be abandoned. In these cases a transfer of the resource in question makes society worse off. Indeed, in these cases abandonment will almost invariably result from imperfect information. Either the owner underestimates her own attachment to the property or the owner overestimates its market value and mistakenly believes herself to be abandoning a positive-subjective-value, positive-market-value resource. Examples of this category are somewhat difficult to imagine, but perhaps they might include “tyrannical heirlooms.” Quintessential tyrannical heirlooms are property that an individual received from a relative that were valued by the donor but detested by the recipient. Nevertheless, the recipient felt duty-bound to keep and maintain the heirloom in question out of affection for the donor.²⁵ The presence of such a relationship makes it far more likely that we will see this sort of transfer in the testamentary context than anywhere else, because the recipient has no opportunity to express dissatisfaction with the bequest to the decedent. Such transfers will not occur via sales because no one will step forward to purchase the items. They will occur via inter vivos gifts only occasionally. The law of gifts requires acceptance as an element,²⁶ but the recipient may accept an item she does not truly want out of a desire to avoid hurting the donor’s feelings.²⁷ It is hard to imagine abandonment as a domain for such transfers because (1) people will be reluctant to abandon property they value to total strangers; (2) total strangers who do not want such property will be reluctant to take possession of it; and (3) there is little reason to think that the finder of such undesirable property will feel any sense of kinship with the abandoner, such that he will willingly take possession. On reflection, then, if they occur at all, these sorts of transfers are surely quite rare.

As a perusal of Craigslist will attest, positive-market-value assets are abandoned with some regularity. These are the most interesting ab-

Mickens v. Mickens, 385 P.2d 14, 15-16 (Wash. 1963) (evaluating a woman’s claim for relief after her husband abandoned her home).

²⁵ See Joyce Wadler, *The Tyranny of the Heirloom*, N.Y. TIMES, June 26, 2008, at F1.

²⁶ See, e.g., *In re Sipe’s Estate*, 422 A.2d 826, 828 (Pa. 1980) (“The requirements for a gift are intent, delivery and acceptance in all cases.”).

²⁷ This sentiment accurately describes the attitude of the author and his spouse toward a fantastically unattractive wedding gift received from a distant relative.

andonment cases, and they will get the fullest treatment here. For starters, take baseballs hit into the stands at major league ballgames. Thanks to *Popov v. Hayashi*, the Barry Bonds home run ball controversy, we now have clear case law holding that a baseball is the property of Major League Baseball at the time the pitcher throws it but that it becomes abandoned property the moment it flies off a hitter's bat and out of play.²⁸ Some of these baseballs have significant monetary value. For example, Mark McGwire's seventieth home run ball sold for over \$3 million,²⁹ the ball at issue in *Popov* sold for \$450,000,³⁰ and the foul baseball that Cubs fan Steve Bartman deflected into the stands in the 2003 National League Championship Series fetched more than \$113,000 at auction.³¹ We might therefore wonder why Major League Baseball does not retain title to balls hit into the stands, as the National Basketball Association and National Football League evidently do. The answer is straightforward—the league seems to have concluded that the opportunity to capture abandoned baseballs at ballparks induces fans to attend games. Thus, by abandoning valuable property but limiting the potential claimants of that property almost entirely to paying fans,³² Major League Baseball plausibly maximizes its own profits. Major League Baseball is not the only entity to recognize that abandonment might lend itself to profit maximization by opening up ancillary revenue streams. One clever Craigslist poster offered a free HDTV that was in need of expensive repairs and noted, “As an added bonus, you can buy the [TV] stand for 50 bucks!”³³

Now for some less straightforward cases. Devon, England, has been celebrating the Hot Pennies Ceremony for over 750 years. During the ceremony, town residents throw buckets of coins from build-

²⁸ *Popov v. Hayashi*, No. 400545, 2002 WL 31833731, at *3 (Cal. Super. Ct. Dec. 18, 2002).

²⁹ See Douglas Martin, *This Shot Going, Going, Gone for \$3 Million*, N.Y. TIMES, Jan. 13, 1999, at D2.

³⁰ See Ira Berkow, *73rd Homerun Ball Sells for \$450,000*, N.Y. TIMES, June 26, 2003, at D4.

³¹ See Monica Davey, *Long-Suffering Cubs Fans Hope Blasted Ball Puts End to Curse*, N.Y. TIMES, Feb. 27, 2004, at A16.

³² The modifier is included because at some ballparks, such as Chicago's Wrigley Field or San Francisco's AT&T Park, home run balls are hit out of the stadium with some regularity, landing on public streets outside Wrigley or public waterways outside AT&T Park. See Joe Capozzi, *He's Written the Book on Snagging Baseballs*, PALM BEACH POST, June 22, 2008, at 1A, available at 2008 WLNR 11793430 (describing experienced ball chasers who catch baseballs that fly out of AT&T Park or Wrigley Field).

³³ See Posting to Chicago Free Stuff Classifieds—Craigslist, <http://chicago.craigslist.org/nwc/zip/795820052.html> (Aug. 13, 2008) (on file with author).

ings into the streets, where they are scooped up by the crowds below.³⁴ Although the ceremony has now become a successful tourist attraction—consistent with the Major League Baseball explanation of abandoned baseballs—its origins were rather different. Although debate exists, some believe that the items tossed into the streets were initially coins that had been heated to high temperatures “so that rich people could amuse themselves by witnessing poor people burning themselves.”³⁵ In an updated echo of this ancient ceremony, athletes, musicians, models, and other public figures have gained notoriety by tossing large-denomination bills into the air in public places. In hip-hop culture the practice has been referred to as “making it rain,” and media accounts have popped up around the globe describing the practice, with one sports columnist referring to it as a “tradition” among athletes.³⁶ Boxing champion Floyd Mayweather Jr. has become famous for the practice of tossing stacks of hundred-dollar bills into the air so that he can watch fans scramble for them.³⁷ Likewise, football player Adam “Pacman” Jones was arrested after allegedly sending tens of thousands of dollars airborne at a Las Vegas strip club, sparking a violent melee.³⁸ In homage to Jones, Comedian George Lopez tosses one thousand dollars in twenty-dollar bills into the crowd at a golf tournament each year.³⁹ Even purportedly cash-strapped collegiate athletes have gotten into the act, triggering brawls at nightclubs.⁴⁰ Making it rain has even worked down-market, with models from the clothing line Shmack getting press coverage for tossing four hundred

³⁴ See Bradley Gerrard, *Town Cashes in as Hot Pennies Rain Down on a Money-Mad Crowd*, EXPRESS & ECHO (Exeter, Eng.), July 23, 2008, at 3, available at 2008 WLNR 13754625.

³⁵ *Id.* In America in the 1960s, something similar happened to the father of Vice President Joe Biden, causing him to quit a job. See David Brooks, Op-Ed., *Hoping It's Biden*, N.Y. TIMES, Aug. 22, 2008, at A19 (“Once, when Joe Sr. was working for a car dealership, the owner threw a Christmas party for the staff. Just as the dancing was to begin, the owner scattered silver dollars on the floor and watched from above as the mechanics and salesmen scrambled about for them. Joe Sr. quit that job on the spot.”).

³⁶ See Tom Knott, *Blatche Following Pro Athlete Tradition*, WASH. TIMES, June 6, 2008, at C1 (describing making it rain as a “rite[] of passage with professional athletes”).

³⁷ Norm Clarke, *Waxworks Visitor Casts Vote Early*, LAS VEGAS REV. J., Nov. 12, 2006, at 4A, available at 2006 WLNR 19743500; Paul Hayward, *A Fight for Survival?*, DAILY MAIL (London), June 23, 2007, at 115, available at 2007 WLNR 11869796.

³⁸ See Dave Anderson, *He's Here to Talk About the Past*, N.Y. TIMES, June 8, 2008, (Sports) at 5.

³⁹ See Scott Ostler, *Lopez Says No Feud with Murray—Seriously*, S.F. CHRON., Feb. 6, 2008, at D1, available at 2008 WLNR 2221539.

⁴⁰ See Dick Weiss, *2 Tales Make for Great Final Four*, N.Y. DAILY NEWS, Apr. 6, 2008, at 47, available at 2008 WLNR 6505221.

one-dollar bills into a crowd after a fashion show,⁴¹ around the same time that an unidentified Albany basketball fan threw fifty one-dollar bills into the crowd at a high school basketball game, causing a disturbance that forced the game's cancellation.⁴² The practice of abandoning specie is, in short, a strategy for accomplishing any number of rational objectives: garnering attention, signaling wealth, or being entertained (for people with perverse entertainment preferences).

In the last few years, however, the abandonment of positive-value property has become mainstream and organized by a group far removed from the hip-hop set, thanks to an emerging outdoor activity called geocaching. Geocaching was invented by David Ulmer in 2000.⁴³ Shortly after highly precise GPS receivers were first made available to ordinary consumers, Ulmer "hid a treasure near his home, posted the coordinates on the web, and challenged people to find it."⁴⁴ Other owners of GPS receivers soon followed suit, hiding their own treasures in waterproof containers and posting their coordinates on www.geocaching.com, a web site that contained 915,752 active caches as of October 6, 2009.⁴⁵ There are active geocaches in more than one hundred countries and on every continent.⁴⁶ Caches typically include inexpensive items, like coins, carnival prizes, Match Box cars, or rubber erasers, and the expectation is that each geocacher who finds the cache will take the contents and leave another cache in the same place for the next geocacher to find.⁴⁷ Individuals setting up geocaches sometimes spend substantially more on the contents of a cache, however. Music CDs, concert and sporting event tickets, books, and costume jewelry are commonly left in caches.⁴⁸ Some geocachers leave a webcam at the specified location, permitting the person who finds it to pose for a picture that can then be sent to the person who

⁴¹ See Malcolm Venable, *The Beautiful People Overheard*, VIRGINIAN-PILOT, Dec. 2, 2007, at E12, available at 2007 WLNR 23785053.

⁴² James Allen, *Thrown Bills Led to Ruckus at Game*, TIMES UNION (Albany), Dec. 8, 2007, at C1, available at 2007 WLNR 24301128.

⁴³ Barbara Elwood Schlatter & Amy R. Hurd, *Geocaching: 21st-Century Hide-and-Seek*, 76 J. PHYSICAL EDUC., RECREATION & DANCE 28, 28 (2005).

⁴⁴ *Id.*

⁴⁵ See Geocaching—The Official Global GPS Cache Hunt Site, <http://www.geocaching.com> (last visited Nov. 15, 2009).

⁴⁶ Deborah J. Chavez et al., *The Social-Psychology of a Technology Driven Outdoor Trend: Geocaching in the USA I* (2003) (unpublished manuscript on file with author).

⁴⁷ Schlatter & Hurd, *supra* note 43, at 29.

⁴⁸ Chavez et al., *supra* note 46, at 3.

hid the webcam.⁴⁹ Experienced geocachers will often carry a few luxury items with them, so that they can leave an equal or higher value item for the next geocacher if they discover a high-value cache themselves.⁵⁰ Whenever a high-value item is left in the cache, whether it is something like a webcam that is not meant to be taken away or a cache that is intended to be carried off by a finder, the creator of the cache runs a real risk that the property will be taken by someone who leaves nothing behind—or “plundered,” to use the term that geocachers prefer.⁵¹ When this happens, a disappointed geocacher typically notes on a geocaching web site that the cache needs maintenance, and the person who established it typically will restock it.⁵²

Despite the common adherence to the norm dictating that someone who finds a geocache should leave a trinket of equal or greater value behind for the next geocacher, there is evidently no legal requirement that this be done. As a formal matter, a geocache left on public land is abandoned property, and the first person who finds it is entitled to take the entirety of the cache. This raises the questions of why geocaching has thrived, and why individuals spend time and money establishing caches to begin with. In a survey of geocaching participants, Chavez, Schneider, and Powell found that a narrow majority of geocachers had never set up a geocache of their own. More than a third had created one to five geocaches, and a little more than five percent had set up more than ten geocaches.⁵³ It appears that a desire to gain reputational benefits drives relatively little of the geocaching behavior. When the researchers asked geocachers about the benefits of the activity, the desire to meet others was identified as the least important motivation for their participation.⁵⁴ Geocachers frequently go on treasure hunts with family and friends, however, which suggests that that there is a social dimension to looking for treasure,⁵⁵

⁴⁹ Schlatter & Hurd, *supra* note 43, at 30.

⁵⁰ See Cacheopedia, http://cacheopedia.com/wiki/Trade_items (last visited Nov. 15, 2009) (explaining the trading etiquette for geocachers).

⁵¹ See Posting of Dr. Bunsen Honeydew to Groundspeak Forums, Geocaching Terms and Lingo, <http://forums.groundspeak.com/GC/index.php?showtopic=48706> (June 30, 2003).

⁵² See Long Island Geocaching Organization, Geocaching Etiquette, http://www.ligeocaching.com/index.php?option=com_content&task=view&id=22&Itemid=1 (last visited Nov. 15, 2009).

⁵³ Chavez et al., *supra* note 46, at 7 tbl. 3.

⁵⁴ *Id.* at 10 tbl.4.

⁵⁵ See *id.* at 9 tbl.4 (illustrating that some geocachers are motivated by spending time with family or others who enjoy the same things they do).

but the reasons why individuals leave caches evidently have more to do with general altruism and a sense of ethical reciprocity than a desire to enhance one's reputation among strangers.⁵⁶

Surveying the identified categories of abandoned property with positive perceived value to the abandoner, we can identify three distinct types of motivations for abandonment. First, the owner may abandon property for profit-maximizing purposes, seeking to acquire revenue streams for services that those claiming the abandoned property will need to purchase. It is conceivable that a GPS manufacturer like Garmin could pursue a similar strategy with respect to geocaching by seeding geocaches all over the country as an inducement to purchase its products. To my disappointment, I have been unable to turn up any evidence that Garmin has pursued this strategy.⁵⁷ Second, the owner may abandon property for reputation-enhancing purposes. Third, the owner may abandon property for more altruistic reasons, which may have some connection to entertainment value (as in making it rain) or norms of reciprocity (as in geocaching).

More broadly, abandonment may provide an attractive alternative to other means of ridding oneself of positive-value property. Abandonment is advantageous because it enables an owner to rid herself of property while incurring neither the transaction costs of a bilateral

⁵⁶ There are some parallels between geocaching and dedications of valuable copyrighted works to the public domain. On the latter, see, for example, Séverine Dusollier, *The Master's Tools v. The Master's House: Creative Commons v. Copyright*, 29 COLUM. J.L. & ARTS 271, 274 & n.9 (2006), and sources cited *infra* note 143. In both cases the valuable resource is being left up for public use, but, in the former case, the prior owner's expectation is that the resource will become another's private property, whereas in the latter case no individual will be entitled to establish private property rights in the work. In recent years, organizations like Creative Commons have arisen to facilitate the dedication of copyrighted works to the public domain. See, e.g., Creative Commons—Copyright-Only Dedication or Public Domain Certification, <http://creativecommons.org/licenses/publicdomain> (last visited Nov. 15, 2009) (providing language for a public domain license). Even the model licenses that Creative Commons features most prominently on its web site, however, fall short of a public domain dedication and provide for restrictions requiring users to provide attribution to the creator, limiting commercial use of the work, or limiting the right to create derivative works. See Licenses—Creative Commons, <http://creativecommons.org/about/licenses> (last visited Nov. 15, 2009) (explaining different licenses offered with a Creative Commons license). Many authors dedicating work to the public domain understandably would bristle at the idea that another person might take credit for creating the work in question or profit by distributing the dedicated work or derivative works.

⁵⁷ Perhaps deep-pocketed Garmin is concerned that seeding a number of caches might expose the company to liability if geocachers are injured or trespass while searching for the treasure.

transfer nor the decision costs associated with a gift.⁵⁸ In that sense, abandonment represents another property right designed to expand the owner's freedom of action. This brings to mind J.E. Penner's justification for abandonment, which is rooted in an individual's autonomy interest:

One ought not to be saddled with a relationship to a thing that one does not want, and an unbreakable relation to a thing would condemn the owner to having to deal with it. It would indeed be a funny turn of events if . . . property in essence gave the things a person owned a power over him.⁵⁹

On Penner's account, there is symmetry between a system of laws that gives an individual the freedom to choose whether and when to acquire, and whether and when to be rid of, property.⁶⁰

Penner's discussion of the relationship between abandonment and autonomy is insightful, but he pulls one important punch. It is precisely the unilateral nature of abandonment that makes it and the right to destroy the most powerful manifestations of an individual's autonomy interest in the bundle of property rights.⁶¹ By letting an individual abandon property, the state is essentially saying to the owner, "We will allow you to rid yourself of a resource regardless of what anyone else has to say about the matter." As with its cousin, the right to destroy, this unilateral empowerment of the abandoning owner raises the prospect of disempowerment of everybody else. Penner sensibly recognizes that there are autonomy interests on both sides of the abandonment calculus:

[W]hile the interest underpinning property incorporates the interest in getting rid of things one no longer wants, people also have an interest in not being harmed by the way that people deal with their things. This is both an interest that all individuals have, and a social interest, in that the maintenance of the environment is a collective good. The rules of title,

⁵⁸ See *infra* text accompanying notes 77-128.

⁵⁹ J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 79 (1997).

⁶⁰ Property typically does not find its way into an owner's hands by accident. Rather, the owner's earlier decisions to purchase, produce, or take possession of property result in its acquisition. Penner's autonomy interest might then appropriately be cast as a measure to protect the autonomy of individuals against the economic consequences of decisions made by their earlier selves. See generally DEREK PARFITT, *REASONS AND PERSONS* 117-91 (1984) (exploring the implications of such a philosophical framework). In that sense, the abandonment of negative-value property is a kindred spirit to bankruptcy or some information-privacy protections.

⁶¹ See Lior Jacob Strahilevitz, *The Right to Destroy*, 114 *YALE L.J.* 781, 794-96 (2005) (discussing the right to destroy's importance as the most extreme right in the property bundle).

specifically the rule that one's title is not extinguished unless another takes possession and acquires his own title, either gratuitously or for a fee, provide a means of ascribing responsibility to a person for the harms which his property may cause, even though he might wish to sever his relation to it. . . . [B]y relinquishing possession he may not avoid responsibility for the effects of his ownership, say the creation of hazardous industrial wastes.⁶²

Some acts of abandonment may have the effect of saddling third parties with property that *they* do not want. The next Section considers this and other potential problems with permitting abandonment.

B. *Costs of Abandonment*

Having considered the types of properties that are commonly abandoned and the benefits that flow to their abandoners, it is worth assessing the costs that abandonment imposes on society. Although signaling, reciprocity, and altruism may explain some abandonment of positive-market-value properties, the primary benefits associated with abandonment are reduced transaction and decision costs. Similarly, there are two leading problems associated with the abandonment of positive-value resources. First, abandonment may create confusion as to the state of ownership of property. Second, abandonment may result in the deterioration of an asset's value while it remains unowned. In some cases involving worthless property, abandonment may also externalize disposal costs onto society. In other cases involving valuable property, abandonment may spark violent squabbling among would-be claimants.

Let us consider the confusion problem first. The legal treatment of abandoned property differs from that of lost or mislaid property. Abandoned property belongs to the first person to find it and take possession.⁶³ The finder of lost property typically prevails over anyone other than the true owner or a prior possessor.⁶⁴ Finally, mislaid property typically goes to the landowner on whose property the item in question was found for safekeeping.⁶⁵ When an individual stumbles

⁶² PENNER, *supra* note 59, at 79-80.

⁶³ *See* Popov v. Hayashi, No. 400545, 2002 WL 31833731, at *3 (Cal. Super. Ct. Dec. 18, 2002) (noting that an intentionally abandoned baseball became the property of the first possessor).

⁶⁴ *See, e.g.*, *Ganter v. Kapiloff*, 516 A.2d 611, 614 (Md. Ct. Spec. App. 1986); *Armory v. Delamirie*, (1722) 93 Eng. Rep. 664, 664 (K.B.).

⁶⁵ *See, e.g.*, *McAvoy v. Medina*, 93 Mass. (11 Allen) 548, 549 (1866) (noting "a distinction between the case of property . . . placed by the owner and neglected to be removed, and property lost").

upon chattel property, it can be difficult to discern whether it is abandoned, lost, or mislaid, and thus challenging for the finder to determine his rights and responsibilities.

Similarly, there are a number of noteworthy property cases in which courts had to confront substantial ambiguity over whether a resource owner abandoned personal property or incorporeal interests in real property. In *Eads v. Brazelton*, the court struggled with the question of whether title to a shipwreck on the Mississippi River had been abandoned or retained by its owner.⁶⁶ In *Haslem v. Lockwood*, the court vacillated in its discussion of whether piles of manure left overnight had been abandoned.⁶⁷ In the macabre case of *Hays v. Montague*, the court had to decide whether the rifle that James Earl Ray left at the crime scene after murdering Martin Luther King had been abandoned.⁶⁸ In *Hawkins v. Mahoney*, the majority and dissent sharply disagreed over whether personal property left in a jail cell by an escaped inmate had been abandoned.⁶⁹ And in *Strong v. Detroit & Mackinac Railway Co.*, the court held that a railway's explicit reference to its own "abandoned" railway line in a public document did not amount to abandonment of its incorporeal interest in the property.⁷⁰ Disputes about intent and abandonment can even make their way into international headlines. During the most recent presidential campaign, a property controversy arose in Israel after Barack Obama deposited a note in Jerusalem's Western Wall asking God to protect him and his family. A yeshiva student standing nearby grabbed the note and gave it to an Israeli newspaper, which published it.⁷¹ The lesson here is that abandonment causes confusion, and confusion engenders social costs—it may spark controversy, moral qualms, and unnecessary investments in determining the status of property. Ex ante, confusion may deter finders from claiming valuable property that they discover, resulting in welfare losses. As this analysis indicates, one goal of abandonment law should be to reduce the associated confusion costs. I will take up this issue in Part III.

The deterioration problem is also nearly universal in cases of abandonment. Insofar as property forms a portion of a jurisdiction's tax

⁶⁶ 22 Ark. 499, 505-16 (1861).

⁶⁷ 37 Conn. 500, 505-07 (1871).

⁶⁸ 860 S.W.2d 403, 408 (Tenn. Ct. App. 1993).

⁶⁹ 990 P.2d 776, 780 (Mont. 1999).

⁷⁰ 423 N.W.2d 266, 269 (Mich. Ct. App. 1988).

⁷¹ See Jonathan Mark, *A Purlloined Letter in 'God's Mailbox'*, N.Y. JEWISH WK., Aug. 1, 2008, at 3, available at 2008 WLNR 15878385.

base, abandonment may result in an ownership lag, whereas gifts, sales, and bequests do not. The lag also means that a productive societal asset generates no value for a period of time. This lag is particularly troublesome in the case of an asset whose quality or value will decline the longer it remains unpossessed by an owner. The classic example is abandoned homes, which may experience burst pipes, vandalism, vermin infestations, fixture stripping by scavengers, and icy sidewalks, or which may become dens of criminality, if they remain unoccupied for a significant period of time.⁷² Once again, with most abandoned assets, the goal of law should be to reduce the time during which property remains up for grabs. I shall consider this interest in Part III as well.

Two mutually exclusive costs of abandonment are disposal costs (in the case of negative-market-value property) and lawless-race costs (in the case of positive-market-value property). The former are best exemplified in the context of environmentally contaminated real property, where CERCLA tries to impose cleanup costs on owners who try to abandon their land. Examples of the latter include the *Popov v. Hayashi* and “Pacman” Jones disputes referenced earlier. If particularly valuable property is to be abandoned, one can expect that many claimants will invest in capturing it, and those who seek to do so may try to obtain some advantage over their competitors by engaging in violent or other unlawful acts.⁷³ That said, lawless races may engender

⁷² See *Briglia v. Mondrian Mortgage Corp.*, 698 A.2d 28, 30-31 (N.J. Super. Ct. App. Div. 1997) (denying plaintiff's claim arising from a fall on the icy sidewalk in front of an abandoned home); Scafidi et al., *supra* note 7, at 288 (describing the negative effects of abandoned housing); Note, *A Nuisance Law Approach to the Problem of Housing Abandonment*, 85 Yale L.J. 1130, 1132-33 (1976) (recording the “negative externalities” such as crime, vandalism, and fire danger imposed by an abandoned building). Note, however, that all of those problems also have been documented in the foreclosure context, where a home is not abandoned but is in the process of being transferred by a mortgagor to a mortgagee. Even if a homeowner undergoing foreclosure is occupying the premises, her incentive to maintain it appropriately will be substantially diminished because of the risk that the benefits of that maintenance will be captured by the lender.

⁷³ See *Popov v. Hayashi*, No. 400545, 2002 WL 31833731, at *6 (Cal. Super. Ct. Dec. 18, 2002); *supra* text accompanying note 38. In the *Popov* case, where the baseball in question was valuable enough to be claimed by someone in short order and was likely going to be found in a finite space, there was no need to have twenty thousand fans in position to track down the ball. This may imply inefficiently high levels of entry into the race. A few dozen spectators could have covered the outfield bleachers and McCovey Cove adequately while still ensuring that the ball in question would be located. (This sets aside the considerable entertainment value associated with having a chance to take possession of the ball.) In the case of other valuable abandoned property whose location is harder to pinpoint, such as most ancient shipwrecks, the optimal number of finders is less certain.

harms even if there is no outbreak of violence. Many communities throughout California had to cancel “bulky trash day,” when homeowners were permitted to abandon large items for collection at curbside, because scavengers inevitably rummaged through abandoned property and made off with the valuable items before government and nonprofit-affiliated salvagers arrived. This increased the costs of sorting through and collecting what remained.⁷⁴ Finally, as discussed elsewhere in this Article, permitting abandonment may encourage unsustainable uses of a resource⁷⁵ and may prompt welfare losses if an owner erroneously overestimates demand for property she is considering abandoning.⁷⁶

C. *Abandonment's Comparative Appeal*

Although “unilateral transfer of property” provides a straightforward conceptual description of abandonment, such a definition provides little help to a court that must determine whether a particular set of actions and circumstances amount to a transfer. The common law

⁷⁴ Kara Platoni, *What's Killing Bulky Trash Day? The Popular Neighborhood Event—Lifeblood of Nonprofits, Artists, and Scavengers—Is on Its Way to the Rubbish Heap*, EAST BAY EXPRESS (Oakland), June 30, 2004, available at http://www.eastbayexpress.com/news/what_s_killing_bulky_trash_day_/Content?oid=287432. Platoni describes these lawless-race costs in detail:

When residents leave out donations in opaque garbage bags, the scavengers will rip them open to see what's inside and toss the contents everywhere. And Ryan gets stuck with the cleanup. The scavengers, he says, “take most of the good stuff and leave a big old mess.”

This, it turns out, is the main reason local governments no longer love bulky trash day, and why so many have decided to get rid of it. In past years, most cities in Alameda County cities [sic] hosted these neighborhood spring cleanings, and several had programs like Ryan's that gave the nonprofits first dibs. Now Ryan's Contra Costa reuse program is the last of its kind in the East Bay, and Orinda is one of just a handful of local cities that still does neighborhood-wide pickups. The pro scavengers simply got so good at the game that they would routinely beat the nonprofits to the punch. Sanitation workers, meanwhile, were tired of dealing with the mess, and homeowners were getting creeped out by the strangers sifting through their belongings.

So this spring, Berkeley, Oakland, El Cerrito, and Livermore all quietly nixed their bulky trash days in favor of appointment-only systems in which residents must call the city for a pickup. Alameda, Hayward, San Leandro, and Richmond already made this switch in recent years. The cities hope that the scavengers, no longer knowing when and where lucrative piles will appear, will simply give up.

Id.

⁷⁵ See *infra* text accompanying notes 188-91.

⁷⁶ See *supra* text accompanying note 25.

requires that the party seeking to demonstrate abandonment of property establish two elements. First, the owner must have intended to relinquish all interests in the property, with no intention that it be acquired by any particular person. Second, there must be a voluntary act by the owner effectuating that intent.⁷⁷ If property is abandoned, it belongs to the first person who subsequently takes control of it.⁷⁸ Although it need not be part of the definition, the use of a public or communal space to effectuate a transfer is often a hallmark of abandonment.⁷⁹ Notably, the abandoner can reclaim possession of the abandoned property if she does so before any other person appropriates it.⁸⁰

Although it is the second element that often looms large in abandonment litigation, the first is worth emphasizing for analytical purposes. True abandonment entails an individual relinquishing property to *no one in particular*.⁸¹ Abandonment thus provides a property owner with a low-cost way to “roll the dice” as to the identity of the subsequent owner. In this way, it differs from virtually all other forms of uncompensated relinquishment, where the subsequent taker or class of takers is identified with particularity.⁸² This “roll of the dice”

⁷⁷ See, e.g., *Campbell v. Cochran*, 416 A.2d 211, 221 (Del. Super. Ct. 1980) (defining abandoned property as “that to which the owner has voluntarily relinquished all right, title, claim and possession, with the intention of terminating his ownership, but without vesting ownership in any other person, and with the intention of not reclaiming any future rights therein”); *Griffis v. Davidson County Metro. Gov’t*, 164 S.W.3d 267, 272 (Tenn. 2005) (“[A] complainant . . . must show both intent to abandon for the stated limitations and some external act or omission by which the intent to abandon is effectuated.”).

⁷⁸ See *Haslem v. Lockwood*, 37 Conn. 500, 506-07 (1871).

⁷⁹ At least one court has imposed a public-place test as part of its definition of property abandonment for the purposes of the Fourth Amendment. See *State v. Reed*, 641 S.E.2d 320, 323 (N.C. Ct. App. 2007) (“[F]or abandonment to occur, the discarding of property must occur in a public place; one simply cannot abandon property within the curtilage of one’s own home.”).

⁸⁰ See *Hawkins v. Mahoney*, 990 P.2d 776, 779 (Mont. 1999).

⁸¹ See, e.g., *Martin v. Cassidy*, 307 P.2d 981, 984 (Cal. Dist. Ct. App. 1957) (holding that the abandoning owner must be “entirely indifferent as to what may become of [the property] or as to who may thereafter possess it” (internal quotation marks omitted)); *Miller v. Dallas County*, 158 S.W.2d 828, 837 (Tex. Civ. App. 1941) (Bond, C.J., dissenting) (“Abandonment, accordingly, is the relinquishment of a right, a total desertion, the giving up to no one in particular of something to which one is entitled.”), *rev’d*, 166 S.W.2d 922 (Tex. Comm’n App. 1942); see also *Cutone v. Cutone*, 285 S.E.2d 905, 909 (W. Va. 1982) (holding that a widow does not abandon her right to quarantine—the right to occupy the family residence during the period between a husband’s death and the assignment of dower—unless she “has demonstrated an apparent indifference to what would become of the property”).

⁸² It is possible to design a future interest in property in such a way as to approximate abandonment. For example, “I leave my Rolex watch to the first person who

element is important, because it means that a great deal of what is commonly called “abandonment” in the law is actually better deemed forfeiture.⁸³ For example, when the record owner of a property with tax liens that exceed its market value “abandons” the property, she is not placing the resource up for grabs.⁸⁴ Instead, she is enabling another party that already holds an interest in the property to take possession of it. The forfeiting owner’s fractional ownership interest has seen its value lowered to zero, but the resource as a whole likely retains positive value. The transfer is not unilateral but rather a voluntary transfer from one record owner to another specifically contemplated at the time the relevant property interests were created.⁸⁵ Similarly, when the beneficiary of an easement releases it, there is no abandonment because the transfer necessarily benefits the owner of the servient tenement. “Abandonment,” as used in the Bankruptcy Code, likewise does not count as abandonment for our purposes because the trustee necessarily abandons property “to the debtor” or another party with an interest in the property.⁸⁶

Insofar as it necessarily entails a “roll of the dice,” abandonment has something in common with most sales. A generally underappreciated attribute of an auction or other sale is that the seller typically rolls the dice as to the identity of the subsequent owner. Sellers are usually indifferent to the identities of subsequent owners because that indifference is likely to maximize the sale price.⁸⁷ With abandonment,

stumbles upon it after it is deposited by my executor in a hidden location in Central Park in January of 2009.”

⁸³ See *Bright v. Gineste*, 284 P.2d 839, 842-43 (Cal. Ct. App. 1955) (distinguishing abandonment from relinquishment or surrender on the basis that abandonment must be unilateral).

⁸⁴ See *supra* note 17 and accompanying text.

⁸⁵ The same analysis applies to widely publicized recent cases of “jingle mail,” in which a homeowner with a property whose value is exceeded by the outstanding balance of a mortgage mails the keys to the mortgage lender and voluntarily moves out. See Vikas Bajaj, *Mortgage Holders Find It Hard to Walk Away from Their Homes*, N.Y. TIMES, May 10, 2008, at C1 (explaining the practice of “jingle mailing”). Colloquially, the homeowner’s actions amount to abandonment. Legally, they are forfeiture. For further discussion, see *infra* text accompanying notes 130-31.

⁸⁶ 11 U.S.C. § 554 (2006); see also Jack F. Williams, *The Tax Consequences of Abandonment Under the Bankruptcy Code*, 67 TEMP. L. REV. 13, 28-29 (1994) (stating that in bankruptcy law, property is transferred only to those holding a possessory interest in the property).

⁸⁷ There are important exceptions, where a seller cares a great deal about the identity of a subsequent purchaser. See, e.g., Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437, 444-52 (2006) (analyzing exclusivity premiums in racially homogenous neighborhoods and Manhattan cooperative apartments); Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104

randomization must serve some different purpose. At first glance, the randomization that abandonment entails seems to undermine distributive justice. But compared with the viable alternatives, abandonment holds up reasonably well. Some charities, like OxFam, for example, may specialize in trying to get resources to the places where they will do the most good, but bilateral market transactions will rarely achieve this end because ability to pay constrains willingness to pay. Other charities, like elite universities or well-endowed symphonies, make no pretense of being the most deserving recipient of donor largesse; rather, they tap into notions of reciprocity or offer signaling benefits so as to attract donors. Inter vivos gifts probably fare worse still on distributive grounds because social networks tend to be heavily stratified by socioeconomic class. Thus, rich people may have few interactions with the poor people who would be the most deserving recipients of their charity.⁸⁸ Abandonment of chattel property, by contrast, might fare reasonably well from a distributive justice perspective, especially if poorer people are more likely to be traveling through public spaces where property is abandoned and richer people, freegans notwithstanding, are less likely to claim abandoned property in public spaces.⁸⁹ Of course, the location of the abandonment will have distributive justice implications—abandoning an item inside a gated community necessarily limits the universe of possible claimants.

Upon close reflection, then, there appear to be several degrees of dice rolling, and a spectrum of randomization emerges in the various sorts of abandonment that we observe. The literature refers to two aspects of a randomization decision—the size and composition of the “pool” of potential recipients, and the use of a weighted or un-

MICH. L. REV. 1835, 1851-59, 1894-97 (2006) (examining situations in which a real estate developer might try to exclude particular homeowners despite their willingness to pay the market price for units in the development). Franchise sales are another classic case where one would not expect to see seller indifference, given the substantial network effects and reputational spillovers.

⁸⁸ Cf. Arthur C. Brooks, *Does Social Capital Make You Generous?*, 86 SOC. SCI. Q. 1, 2-4, 9-12 (2005) (discussing the association between social capital and charitable giving); Bruce Rankin, *How Low-Income Women Find Jobs and Its Effects on Earnings*, 30 WORK & OCCUPATIONS 281, 283-85 (2003) (explaining the stratification of low-income workers' social networks and how their lack of network ties to high-income workers may constrain their employment prospects).

⁸⁹ The first assumption seems plausible and the second probable. Affluent Americans are less likely to bring abandoned property into their residences or workplaces because they are better able to purchase a newer substitute in better condition and may be more sensitive to the stigma that can be associated with claiming abandoned property in poor condition. Indeed, this assumption helps solidify the status of freeganism as a countercultural movement. See Kurutz, *supra* note 3, at F1.

weighted lottery.⁹⁰ Theoretically, pure randomization would entail a pool consisting of every living person and an unweighted system for allocation. It would be impossible for abandonment to achieve this degree of randomization because of population clustering and disparate abilities among the populace to discover and capture abandoned resources.⁹¹ Abandonment more typically entails impure randomization with a geographically confined pool and a weighted lottery within that pool. The property owner leaves property in a particular spot, to be claimed by the first person who finds and wants it. Obviously, if the property is abandoned in San Francisco, right outside the abandoner's home, then a San Francisco resident has a much better chance of claiming the property than someone from Little Rock. Geocaching, discussed earlier, is less random still. Someone who leaves behind a cache almost certainly has a fellow geocacher in mind as the subsequent owner, though the geocacher does incur the risk that a passerby may claim the property instead.⁹² Similarly, the sort of abandonment that most typically shows up in Craigslist advertisements reflects impure randomization. The owner will give the property to the first person who shows up at her home or workplace requesting it. In these cases, the abandoner has no particular recipient in mind, but there may be "warm glow" associated with the physical handover of the property to a particular person who self selects.⁹³ In such instances, the transfer is something of a hybrid between abandonment and gifting.⁹⁴ Severely pool-restricted randomization transactions occasionally

⁹⁰ For a characteristically clear and rich analysis of randomization's variables, see Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1, 8-17 (2009).

⁹¹ An able-bodied rural scavenger on a Vespa stands a better chance of claiming an abandoned resource than a bedridden child suffering from the chicken pox in Brooklyn.

⁹² See *supra* text accompanying note 51. In this sense, geocaching resembles a reciprocal charitable enterprise like a blood bank. Here, it is abandonment's unilateral transfer element, rather than its randomization attribute, that distinguishes the cases.

⁹³ See generally James Andreoni, *Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving*, 100 ECON. J. 464 (1990) (explaining that charitable acts are influenced by the utility that is gained by such behavior).

⁹⁴ The law probably would characterize such a transaction as a gift, not abandonment. If someone steals the property from the owner's home after an advertisement has been posted on Craigslist but before anyone has shown up to claim it, the homeowner might have a cause of action for conversion. See *infra* text accompanying notes 145-53. That is not true for property left in the alleyway. See *Schmidt v. Stearman*, 253 S.W.3d 35, 42 (Ark. Ct. App. 2007). On the other hand, if a claimant showed up to claim the property abandoned on Craigslist and the owner who posted the advertisement refused to surrender it, the would-be claimant might pursue a legal claim under an abandonment theory or equitable estoppel. Cf. *Helms v. Vaughn*, 467 S.W.2d 399, 401 (Ark. 1971) (noting that, in order to divest oneself of property in the real property context, "cir-

appear in the “free stuff” section of Craigslist. For example, one owner of a working piano offered it for free to a needy church that wanted it.⁹⁵ By specifying a needy church as the recipient, the owner substantially limited the extent to which subsequent distribution was randomized. When a transaction has such a limited degree of randomization, it is inappropriate to characterize the transfer as abandonment. Rather, it more closely resembles a class gift of the sort commonly seen in trusts and estates law.

An owner might prefer to randomize with respect to the identity of the property’s subsequent owner because of a desire to reduce decision costs. Seen in these terms, abandonment has significant social value as a way to gratuitously transfer property while minimizing the costs of deciding that a particular person is the most appropriate recipient. Although the stakes are obviously quite different, analogizing to adoption or organ donation may be helpful here. In both instances, individuals wishing to donate a precious resource have two options: they can either specify a recipient or elect to roll the dice.

The Bible contains perhaps the best known instance of child abandonment, when Jochebed placed the infant Moses in a basket on the Nile in the hopes that he would be spared from being subjected to an edict putting all Jewish male newborns to death.⁹⁶ Acts like Jochebed’s are not the mere stuff of legend, however. Indeed, hers would have been a tale to which many of the Bible’s earlier audiences could relate. Not long ago in western civilization, the relinquishment of newborns by their birth parents was startlingly commonplace. John Boswell’s definitive study of child abandonment presents some stark statistics:

[I]n the late eighteenth century in Toulouse, one child in every four was *known* to have been abandoned. In poor quarters the rate reached 39.9 percent; even in rich parishes the rate was generally around 15 percent. In Lyons between 1750 and 1789 the number of children abandoned was approximately one-third the number of births. During the same period in Paris children *known* to have been abandoned account for between 20 and 30 percent of the registered births. . . . In Florence it ranged from a low of 14 percent of all baptized babies at the opening of the eighteenth

cumstances of estoppel” must accompany abandonment in the absence of a “legal deed of conveyance”); *Fencil v. City of Harpers Ferry*, 620 N.W.2d 808, 817 (Iowa 2000) (finding that a plaintiff, having established abandonment, could rightfully claim equitable estoppel).

⁹⁵ See Posting to Chicago Free Stuff Classifieds—Craigslist, <http://chicago.craigslist.org/sox/zip/795845097.html> (Aug. 13, 2008) (on file with author).

⁹⁶ See *Exodus* 2:3 (recounting how Jochebed “took for him an ark of bulrushes, and daubed it with slime and with pitch, and put the child therein; and she laid *it* in the flags by the river’s brink”).

century to a high of 43 percent early in the nineteenth. In Milan the opening of the eighteenth century witnessed a rate of 16 percent; by its closing it was 25. . . . Comparable figures are not available for other nations, although fragmentary evidence suggests very similar urban abandonment rates ranging from 15 to 30 percent of registered births.⁹⁷

These disturbing statistics overstate the prevalence of abandonment as the term is used in this Article. They include both literal abandonment—where babies and children were left up for grabs in public places—and instances in which babies were sold or left with people or institutions that were to take care of them.⁹⁸ It appears that until the late Middle Ages, the abandonment of babies in public places was quite common, as the public setting was viewed as the locale most likely to cause the newborn to be noticed and taken in by a stranger—hopefully to be adopted, perhaps to be enslaved.⁹⁹

Over time, and apparently beginning in the late fourteenth century in Rome, foundling homes emerged to take in the large number of unwanted children, and they were often built with “a revolving door in a niche in the wall which allowed a parent or servant to deposit a child safely without being observed.”¹⁰⁰ They remained an important part of European life for the next several centuries. Rousseau deposited *five* of his children in a foundling hospital in the mid-eighteenth century.¹⁰¹ His subsequent explanation, written in code, contained a myriad of rationales for his cold-hearted conduct.¹⁰² Fascinatingly, he began by differentiating his own conduct from true abandonment: “He claimed that since the children had been formally deposited, they were not really abandoned (*déposés*, not *trouvés*).”¹⁰³ His distinction was quite right as a matter of property law, though perhaps less persuasive during an era when seventy percent of the infants deposited at French

⁹⁷ JOHN BOSWELL, *THE KINDNESS OF STRANGERS: THE ABANDONMENT OF CHILDREN IN WESTERN EUROPE FROM LATE ANTIQUITY TO THE RENAISSANCE 15-16* (1988) (footnotes omitted).

⁹⁸ *Id.* at 24.

⁹⁹ *See id.* at 429-33. Because of the stigma associated with infertility, couples often were reluctant to advertise their willingness to adopt unwanted infants. Upon finding an abandoned child or being brought one discreetly, the childless couple often pretended the infant was its own offspring. Abandonment in a public place was in some cases a rational strategy for poor parents hoping to improve the lot of their offspring in the Middle Ages. *Id.*

¹⁰⁰ *Id.* at 433.

¹⁰¹ LEO DAMROSCH, *JEAN-JACQUES ROUSSEAU: RESTLESS GENIUS 191* (2005).

¹⁰² *See id.* at 193-95 (“In a letter to Mme de Francueil he gave not just one explanation but several . . . in what a psychoanalyst would call a case of overdetermination.”).

¹⁰³ *Id.* at 193.

foundlings died within the first year of their lives.¹⁰⁴ Rousseau's second excuse echoed Penner's autonomy-based defense of abandonment while missing entirely Penner's recognition that abandonment can impose costs on third parties:¹⁰⁵ Rousseau's "hopes of doing important work would have been ruined by the need to provide for a family."¹⁰⁶ Finally, Rousseau's ultimate effort to excuse his unfathomable actions reveals some attraction to the idea of dice rolling when it came to the placement of children in families: "Clearly the foundling hospital was the best choice: it would raise the children to be sturdily self-sufficient, 'not gentlemen but peasants or workers,' Didn't Plato argue that children should be brought up by the state with no knowledge of their parents?"¹⁰⁷ In short, for much of European history, the impulse to abandon infants was powerful, as social and religious norms largely tolerated the practice—or, in the case of illegitimate offspring, even encouraged it.¹⁰⁸ Indeed, abandonment was sometimes the primary alternative to infanticide or baby selling.

The revolving doors of early foundling houses have contemporary echoes in modern Europe and America.¹⁰⁹ During the Gilded Age,

¹⁰⁴ *Id.*

¹⁰⁵ See *supra* text accompanying notes 61-62.

¹⁰⁶ DAMROSCH, *supra* note 101, at 193.

¹⁰⁷ *Id.* at 193-94. There was, of course, a possibility that the infants would be placed with well-off families, but Rousseau was accurately gauging the odds.

¹⁰⁸ *Id.* at 192.

¹⁰⁹ See JULIE MILLER, ABANDONED: FOUNDLINGS IN NINETEENTH-CENTURY NEW YORK CITY 226-27 (2008) (noting that during the early 1880s, an average of 2041 infants per year were left or born at one of four foundling hospitals in New York City); Elisabetta Povoledo, *Updating an Old Way to Leave the Baby on the Doorstep*, N.Y. TIMES, Feb. 28, 2007, at A4 (discussing the introduction of high-tech foundling wheels in Europe). Consider also American laws that provide parents with the opportunity to abandon babies at fire stations and other designated places without fear of criminal liability. See Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403, 1458 & n.253 (providing an example of a law that allows parents to abandon their babies in designated places); Cynthia Dailard, *The Drive to Enact 'Infant Abandonment' Laws—A Rush to Judgment?*, GUTTMACHER REP. ON PUB. POLY, Aug. 2000, at 1 (describing state laws that immunize parents against criminal liability when they leave babies with authorized personnel); Erik Eckholm, *Law's Effect: An Iowa Girl Is Abandoned in Nebraska*, N.Y. TIMES, Oct. 9, 2008, at A21 (noting that Nebraska's safe-haven law applied to all children up to age nineteen). These laws for the most part have not been terribly efficacious. See Dailard, *supra*, at 2 ("In the case of public abandonment [sic], the women are often not mature enough to thoughtfully weigh their options or the consequences of their actions' [S]ince the Texas law took effect, 12 infants have been illegally abandoned—and not one was turned in under the terms of the law."). An exception was Nebraska's short-lived abandonment statute, which, due to poor drafting, permitted parents to abandon any child under nineteen at hospitals with impunity. Eckholm, *supra*. Three dozen children, including many teenagers from out of state, were aban-

Americans celebrated what one might call reverse Rousseauian dice rolling: stories of abandoned babies being adopted by wealthy elites.¹¹⁰ In contemporary America, only about 1.5% of newborns are placed up for adoption,¹¹¹ but the impulse to roll the dice with respect to placement of a child has not dissipated fully. Closed adoptions, where the birth parents have no say in the placement of their offspring and remain anonymous, were long the norm in the United States, though that is quickly changing.¹¹² The shifting practices may result from the desire of most birth parents to exercise greater control over the identities of their children's adoptive parents. Many birth parents, interviewed after the fact, "expressed incredulity that they entrusted their child to strangers," and nearly half of the birth parents interviewed described the decision to give their children up for adoption as a mistake they wished they could undo.¹¹³ Yet rolling the dice remains attractive to a minority of birth parents. This is particularly true for parents wishing to avoid the complexity of relationships with a child they have relinquished and a new set of parents who have displaced them.¹¹⁴ Not surprisingly, all birth parents choosing to give up their children for adoption insist on some restrictions on the composition of the pool of adoptive parents—individuals choosing closed adoptions typically hand over their newborns to adoption agencies or local authorities for placement with adoptive parents.¹¹⁵ Nor are birth

done in Nebraska before the legislature modified the law to apply only to infants. *See California Teen Is Last to Be Abandoned Under Law*, L.A. TIMES, Nov. 23, 2008, at A28 (noting that the Nebraska safe-haven law was revised to limit abandonment to infants); Nicholas Riccardi, *State Revamps Haven Law*, L.A. TIMES, Nov. 22, 2008, at A10 (discussing the teenagers who were abandoned under Nebraska's safe-haven law).

¹¹⁰ MILLER, *supra* note 109, at 237-38.

¹¹¹ BOSWELL, *supra* note 97, at 16.

¹¹² *See* Marianne Berry et al., *The Role of Open Adoption in the Adjustment of Adopted Children and Their Families*, 20 CHILD. & YOUTH SERVS. REV. 151, 151-52 (1998).

¹¹³ Phyllis R. Silverman et al., *Reunions Between Adoptees and Birth Parents: The Birth Parents' Experience*, SOC. WORK, Nov.-Dec. 1988, at 523, 523, 527. The same was true for Rousseau, who tried unsuccessfully to discover the whereabouts of his first abandoned child ten years after the fact. *See* DAMROSCH, *supra* note 101, at 191-92.

¹¹⁴ *See* Adrienne D. Kraft et al., *Some Theoretical Considerations on Confidential Adoptions, Part I: The Birth Mother*, 2 CHILD & ADOLESCENT SOC. WORK 13, 18 (1985) (suggesting that adolescent birth mothers in particular may find a relationship with the child and adoptive parents too complex).

¹¹⁵ There will occasionally be horrific contemporary circumstances in which a newborn is abandoned in a dumpster, public restroom, or other public place—abandonment resulting in death or killing of a newborn occurs approximately 85 times per year in the United States. *See* Marcia E. Herman-Giddens et al., *Newborns Killed or Left to Die by a Parent: A Population Based Study*, 289 J. AM. MED. ASS'N 1425, 1427 (2003) (examining the incidence of newborn infants abandoned or killed, using North Caro-

parents clamoring for adoption agencies to make placement decisions on a purely random basis—fit and match are part of an agency’s calculus about where a particular child is most likely to thrive.¹¹⁶ Still, the birth parents’ delegation of the wrenching decisions as to which adoptive parents are most deserving or can provide the best home is a way for the biological parents to reduce the psychological bond with their offspring and perhaps help protect their anonymity.¹¹⁷ Rolling the dice to some degree makes it easier for the biological parents to move on.

Similarly, in the organ-donation context, pure randomization does not exist. The pool of potential recipients is limited to people in need of a transplant. But this wrinkle is not unlike abandonment of other forms of property—like geocaching—where the claimant of positive-market-value property will surely be someone who wants it and expends some effort to take possession. Live kidney donations to relatives and acquaintances are far more common than live donations to strangers.¹¹⁸ Indeed, many transplant centers refuse to accept kidney donations in the absence of a genetic or social relationship between the donor and donee.¹¹⁹ The few transplant centers that permit indi-

lina as the sample). In the contemporary context, these instances often do not approximate true abandonment. A newborn is sufficiently fragile that being left alone for any significant amount of time may result in its death, so these acts seem more akin to attempted murder or manslaughter. *See id.* at 1427 (discussing cases in which abandonment resulted in murder or manslaughter charges). Moreover, such babies are not deemed “up for grabs” by either the law or social norms. Birth parents presumably recognize that the finder will almost certainly notify law enforcement upon finding that baby.

¹¹⁶ *See* Mary E. Cedarblade, *Dual Representation of Adoptive and Birth Parents: Conflict of Interest or Ethical Expedience?*, 4 LEGAL MALPRACTICE REP., 1993, at 12, 12-13 (1993).

¹¹⁷ *Cf.* Elsbeth Neil, *The Reasons Why Young Children Are Placed for Adoption: Findings from a Recently Placed Sample and a Discussion of Implications for Subsequent Identity Development*, 5 CHILD & FAM. SOC. WORK 303, 312 (2000) (discussing possible motivations for choosing adoption).

¹¹⁸ *See* Antonia J.Z. Henderson et al., *The Living Anonymous Kidney Donor: Lunatic or Saint?*, 3 AM. J. TRANSPLANTATION 203, 203 (2003) (“In the last two years, 31 anonymous donations . . . out of a total of 11672 living donations . . . were performed in the US . . .” (citations omitted)); Daniel Akst, *Taste: The Kindness of Strangers*, WALL ST. J., July 25, 2008, at W11 (describing one of the 534 Americans since 1984 who has “given a kidney away without a recipient in mind”).

Interestingly enough, the donor profiled by Akst, a securities trader named Anthony DeGiulio who wanted his kidney to go to a stranger, was someone the journalist “met in the spring of 2006 when he advertised some free mulch on Craigslist. . . . Subsequently, after clearing some land, he gave away thousands of dollars of firewood to all comers.” *Id.* Perhaps the lists of Craigslist abandoners and kidney abandoners overlap significantly.

¹¹⁹ *See* Bernard S. Kaplan & Karen Polise, *In Defense of Altruistic Kidney Donation by Strangers*, 14 J. PEDIATRIC NEPHROLOGY 518 (2000) (discussing some of the reasons why

viduals to donate a kidney anonymously to the top person on the kidney waiting list performed a little over a hundred such transplants in the United States as of 2003.¹²⁰ In the context of bone marrow donation, where the costs of being a donor are lower than those associated with surrendering a kidney but higher than those associated with donating blood,¹²¹ donation to a stranger is more common but still unusual.¹²² Most blood is donated to strangers, though relatives may bank blood to be used by a loved one before an operation.¹²³ The trend with donations of biological material appears to be, then, that random transfers are very uncommon when the donor is most reluctant to part with the resource in question and become more common as the donor approaches indifference as to whether or not to part with the resource.¹²⁴ Seen in this light, some biological parents' willingness to roll the dice somewhat with respect to the identities of adoptive parents makes more sense. These birth parents' motivation to part with their offspring is quite strong.

Plainly, the decision costs associated with the abandonment of a child or the relinquishment of a transplantable organ will dwarf the decision costs associated with the abandonment of most property. As suggested above, relinquishing a child often results in significant re-

transplant centers will not accept anonymous organ donations). Evidently, these policies are based on a refusal to believe that such donations are genuinely altruistic. Of course, there is reason to be concerned that many directed kidney donations within families are coercive, but these donations tend not to be closely scrutinized. See N. Scheper-Hughes, *The Tyranny of the Gift: Sacrificial Violence in Living Donor Transplants*, 7 AM. J. TRANSPLANTATION 507, 507-09 (2007) (suggesting that social and familial pressures are often responsible for directed donations within families).

¹²⁰ Cheryl L. Jacobs et al., *Twenty-Two Nondirected Kidney Donors: An Update on a Single Center's Experience*, 4 AM. J. TRANSPLANTATION 1110, 1114 (2004).

¹²¹ See Galen E. Switzer et al., *Understanding Donors' Motivations: A Study of Unrelated Bone Marrow Donors*, 45 SOC. SCI. MED. 137, 139 (1997).

¹²² See Roberta G. Simmons et al., *The Self-Image of Unrelated Bone Marrow Donors*, 34 J. HEALTH & SOC. BEHAV. 285, 288 (1993) (noting that 965 people donated bone marrow to a stranger through the National Marrow Donor Program between 1987 and 1991).

¹²³ See Theresa W. Gillespie & Christopher D. Hillyer, *Blood Donors and Factors Impacting the Blood Donation Decision*, 16 TRANSFUSION MED. REVS. 115, 120 (2002) (noting that ten percent of blood donors surveyed were giving blood "to cover their own potential needs in the future" and that fifty percent were motivated by the potential need of a family member); Simone A. Glynn et al., *Motivations to Donate Blood: Demographic Comparisons*, 42 TRANSFUSION 216, 218-21 (2002) (reporting that most blood donors stated that they donated "because it was the right thing to do").

¹²⁴ Even a directed kidney donation reflects some randomization: someone had a bad kidney, someone else had a good kidney, and the donor and recipient happened to share a social or familial tie. Abandonment is interesting, not because randomization does not exist elsewhere, but because it reflects a conscious choice to increase the prevalence of randomization in the system.

gret and psychological trauma. But one need not equate the magnitude of these costs in order to recognize the similarities. Deciding to abandon property is no easier than deciding to donate it, but having decided on abandonment the owner need no longer worry about the identity of the subsequent recipient.¹²⁵ Historical and contemporary practice suggests that this benefit was substantial in the case of very high-stakes resources, and there is little reason to think that the benefits of reduced decision costs would not manifest themselves in lower-stakes contexts, too.

The transaction-costs savings associated with abandonment also can be significant. Suppose an owner has a positive-market-value asset that she no longer wants. Consider the alternatives to abandonment. A sale will bring the owner revenue but may also require the expenditure of time, money, and effort. If the market for a product is well-developed, then the owner will be drawn toward a sale. For that reason, the rise of eBay probably resulted in a large decline in the prevalence of abandoned property.¹²⁶ But even in a nation of ubiquitous eBay access and scores of eBay drop centers, many owners still put chattel property on the sidewalk. From this we can infer that the transaction costs of even eBay sales are not negligible. In order to auction a product on eBay, sellers must compose an advertisement for the product, specify a duration for the auction, communicate with the winning bidder about payment and shipping, arrange for delivery, and run the risk that the buyer will defraud them.¹²⁷ A repeat seller may well find it worth her while to “lawyer up” as well, so as to reduce the risk that she will be sued if buyers emerge from their transactions unhappy or if the property sold injures its purchaser.

The transaction costs of gifts are not negligible either. In deciding upon a recipient for a gift, the donor must evaluate that donee’s preferences and existing assets. No one wants to be the resented gift giver who donates a tyrannical heirloom to a loved one—a gift that

¹²⁵ For a discussion of the relationship between randomization and decision costs in adjudication, see Samaha, *supra* note 90, at 30-34. A provocative discussion concerning randomization in criminal investigations and punishment appears in Bernard E. Harcourt, *Post-Modern Meditations on Punishment: On the Limits of Reason and the Virtues of Randomization* (A Polemic and Manifesto for the Twenty-First Century), 74 SOC. RES. 307, 330-35 (2007).

¹²⁶ See generally David Lucking-Reiley et al., *Pennies from eBay: The Determinants of Price in Online Auctions*, 55 J. INDUS. ECON. 223, 224-25 (2007) (discussing the mechanics of auctions on eBay).

¹²⁷ *Id.*

the recipient does not want but feels guilty discarding.¹²⁸ Then, having decided upon a recipient, the donor must arrange for delivery, which again will entail the costs and inconvenience of a trip to the post office or to the recipient's home.

A recent exogenous shock illustrates some of these transaction costs. Recently, most major American airlines have begun charging their customers for bringing checked luggage on flights. This new pricing policy has almost certainly increased the prevalence of property abandonment.¹²⁹ Suppose a family is going on a two-week vacation and renting a condominium that does not provide infant cribs. A two-week crib rental typically exceeds the cost of a travel crib purchase, so the rational traveler will simply buy a travel-crib upon reaching her destination, use it for two weeks, and then abandon it at the conclusion of the trip. Surely, the crib purchaser would prefer to donate the crib to a needy family, but the costs of locating a local needy family and arranging for delivery on the last day of a vacation will be prohibitively high. The cost of bringing the crib home in checked luggage will exceed the crib's market value. Destruction of the crib seems wasteful, so abandonment is almost certainly going to be the most sensible option for our vacationers.

In short, both sales and gifts are bilateral transactions, and such transactions necessarily entail transaction costs. In some cases, the property to be transferred is sufficiently valuable that these transaction costs are easily overcome. The odds that the owner will opt for a unilateral means of relinquishment increase in certain situations (e.g., if the property does not have a particularly high value, the nature of the property raises potential transaction costs, or the possessor wishes to hide the fact of her possession).

Once we recall that the universe of unilateral relinquishment is limited to abandonment and destruction, we develop a better understanding of the dangers of restricting abandonment too much. With respect to a positive-market-value asset, society is generally better off if the owner opts for abandonment over destruction. Permitting destruction and forbidding abandonment of these assets is folly. With respect to a negative-market-value asset, the reverse is usually true. Even this simple axiom about negative-market-value property, however, is subject to two caveats.

¹²⁸ See *supra* notes 25-27 and accompanying text.

¹²⁹ For an assessment of other consumer behavior changes in response to this fee structure, see Susan Stellin, *Passengers Learn to Live with Airlines' Bag Fees*, N.Y. TIMES, Dec. 23, 2008, at B1.

First, note that there are two kinds of negative-value assets. The first sort is a resource with negative intrinsic value, such as a rotting pineapple, a broken stapler, or a sound recording by William Hung. For these assets, society certainly prefers that the owner destroy the asset rather than abandon it, which would externalize the disposal costs to society. The second kind is a resource that comes bundled with a liability that exceeds its positive intrinsic value. Consider a house worth \$50,000, with tax liens against it totaling \$75,000. Recall that such an asset's negative value stems entirely from the bundling of different sticks in the bundle of property rights, such that unbundling will yield a positive-value resource.¹³⁰ Here, destruction of the underlying asset is extremely undesirable, because it eliminates a productive resource and imposes a \$75,000 loss on the lien holder. Permissive abandonment—a rule that would allow the owner to walk away from the resource and the liability—is not as bad, because it preserves the intrinsically valuable asset while imposing the same loss on the lien holder. A rule permitting such abandonment may well spark a lawless race. The superior rule in these instances would prohibit abandonment and require the lien holder to foreclose on or otherwise take possession of the property and force its sale. This is precisely what U.S. law does.¹³¹ The lien holder can now auction off an unencumbered asset, presumably fetching a \$50,000 return, resulting in a loss of only \$25,000. Foreclosure thus dominates permissive abandonment because it forestalls a lawless race and provides the lien holder with some security in the event of a default, which will increase a lien holder's willingness to extend credit *ex ante*.

Second, recall our concern over lawless-race costs. If abandonment of a positive-value asset causes a large number of people to engage in violent jostling or other tortious behavior to be the first to retrieve the asset, then society suffers. It is conceivable that, with respect to valuable property where the expected disposal costs are low, the transaction costs of a bilateral transfer are high, and the risk of a lawless race is high; destruction—rather than abandonment—maximizes social welfare.¹³² Though these cases are likely to be rare, this analysis suggests that society's openness toward abandonment should be a function of its baseline level of antisocial behavior.

¹³⁰ See *supra* text accompanying notes 83-85.

¹³¹ See *supra* text accompanying note 84-85.

¹³² Sales and gifts, like destruction, avoid the costs that may be associated with a lawless race. This explains the reference to transaction costs in the above sentence.

There are other important considerations that bear on the question of whether the law should attempt to nudge owners toward either abandonment or its alternatives. Abandonment is the method of intentionally relinquishing property that most frequently gives rise to confusion costs. That is a legitimate reason for curtailing the practice. Sales and gifts are rarely confusing, though it might not seem that way to law students and legal academics because cases involving ambiguity are a staple of law school casebooks.¹³³ There can be no confusion about the ownership of property that has been destroyed. But historically, when property has been abandoned, the result is ambiguity that imposes costs on the third parties who are charged with respecting in rem rights.¹³⁴ To push the point further, as the fraction of seemingly unpossessed property that is abandoned rises, the odds that lost or mislaid property will be returned to its rightful owner fall.¹³⁵

Mistakes may also arise more frequently in the abandonment context. Whereas the negotiation involved in a sale and the communication typically associated with a gift provide a property owner with valuable information about how third parties assess the value of an asset, the unilateral nature of abandonment deprives the resource owner of this information, raising the odds of a mistake. Notably, however, abandonment dominates destruction on this score because the latter is irrevocable and the former is not. If nobody claims property that an owner has abandoned, the prior owner is as entitled as anyone else to retake possession.

One can imagine a regime taking a hard line against both abandonment and destruction. Deprived of both unilateral means of relinquishment, how might we expect property owners to behave? They might fall back on the gift or sale strategies. Or, quite possibly, they might allow property to gather dust. This is another common, and generally undertheorized, property right. When exercised, it removes

¹³³ See, e.g., *Gruen v. Gruen*, 496 N.E.2d 869, 872 (N.Y. 1986) (discussing the ambiguity in a famous gifts case); *Newman v. Bost*, 29 S.E. 848, 848-49 (N.C. 1898) (same); *Raffles v. Wichelhaus*, (1864) 59 Eng. Rep. 375 (Exch.) (addressing ambiguity in a famous contracts case).

¹³⁴ See, e.g., *Poggi v. Scott*, 139 P. 815, 816 (Cal. 1914) (holding that the owner of a building who sold barrels, which he in good faith thought to be empty and abandoned, was liable for conversion when it turned out that the barrels were filled with two thousand dollars worth of wine and had been stored pursuant to a contract with the building's prior owner).

¹³⁵ Finders of lost and mislaid property do not become its owners. Rather, they have duties to return the property to its true owner, a prior possessor, or, in some cases, the owner of the land on which the property was found. Finders of abandoned property have no such duty. See *supra* notes 63-65 and accompanying text.

productive assets from the economy, contributes to clutter, and can impose significant costs on next of kin when the property remains in storage until the owner's demise. Contrasted with this alternative, abandonment and perhaps even destruction seem rather attractive.

II. THE LAW OF ABANDONMENT

In the United States there are a variety of statutes governing abandonment. All are subject-matter specific. We can identify five basic approaches that manifest themselves in American law: (1) permissive regimes, (2) prohibition regimes, (3) escheat regimes, (4) licensing regimes, and (5) encouragement regimes.

A. *Permissive Regimes*

As the name implies, a permissive regime is one in which the abandonment of property by its owner is typically lawful, and the first person who takes possession of the property becomes its new owner, with rights good against the entire world. Setting aside pets and hazardous waste, this is the rule that governs most abandoned chattel property. While there may be time, place, and manner restrictions on such abandonment (e.g., via antilittering laws, attractive-nuisance causes of action in tort, or restrictions on abandoning a car in the middle of the road), the law is appropriately characterized as permissive. Hence, a newspaper publisher may leave two thousand copies of its newspaper in a publicly accessible place, to be picked up by whoever wants some free reading materials,¹³⁶ and consumers may happily drink free beverage samples at a grocery store without worrying about being confronted with a bill or violating the law.¹³⁷

The trademark regime under the Lanham Act is perhaps the most widely known example of a permissive abandonment regime. Under section 45 of the Lanham Act, a mark is considered abandoned if its "use has been discontinued with intent not to resume such use."¹³⁸ The statute further provides that nonuse for three years constitutes

¹³⁶ See *Right Reason Publ'ns v. Silva*, 691 N.E.2d 1347, 1351 (Ind. Ct. App. 1998) (holding that student journals, once deposited in distribution stands, are abandoned and thus free for anyone to take).

¹³⁷ See *Greenville Dairy Co. v. Pa. Milk Control Comm'n*, 68 Pa. D. & C. 597, 607-08 (Ct. Com. Pl. 1949) (holding that the giving away of free milk samples is a permissible practice).

¹³⁸ Lanham Act § 45, 15 U.S.C. § 1127 (2006).

prima facie evidence of abandonment.¹³⁹ As interpreted by the courts, “intent not to resume such use” is a lower standard than “intent to abandon,” with the result being that if a trademark holder intends to resume use at some point in the indefinite future, a finding of statutory abandonment is appropriate.¹⁴⁰ The permissive nature of the abandonment regime stems from the policies underlying trademark law. Trademark is an intellectual property regime in which rights are conferred upon firms for the benefit of consumers. Trademark rights are like water rights or the right to remain in rent-controlled housing, and unlike fee-simple rights, in that use is a condition of continued ownership.¹⁴¹ Truly permanent ownership of a mark may, therefore, be more achievable in theory than in practice. In the trademark context, the user removes a word, phrase, or symbol from the public domain, but in so doing lessens the likelihood of consumer confusion, permits the user to invest in good will, and lowers consumer search costs.¹⁴² When a trademark falls into disuse, there is no longer any justification for impoverishing the public domain, however slightly, so the mark is returned to the commons where it can be appropriated by any other firm that wishes to use it in commerce. Note that in this important sense copyright diverges from trademark. Once a copyrighted work is dedicated to the public domain, it can never be privately owned again.¹⁴³ Copyright “abandonment” is therefore in some sense an in-

¹³⁹ *Id.* For a review of the law of trademark abandonment, see generally Christopher T. Micheletti, *Preventing Loss of Trademark Rights: Quantitative and Qualitative Assessments of “Use” and Their Impact on Abandonment Determinations*, 94 TRADEMARK REP. 634 (2004).

¹⁴⁰ See *Silverman v. CBS Inc.*, 870 F.2d 40, 45-47 (2d Cir. 1989) (holding that twenty-one years of nonuse of the Amos & Andy trademark amounts to abandonment of the mark, despite the trademark holder’s intent to resume use if “the social climate become[s] more hospitable”).

¹⁴¹ See Daphna Lewinsohn-Zamir, *More Is Not Always Better than Less: An Exploration in Property Law*, 92 MINN. L. REV. 634, 657 (2008).

¹⁴² See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 34 (2003) (holding that trademark law makes purchasing decisions easier); Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1163 (arguing that trademark law “reduce[s] search costs and provide[s] incentives for the production of high quality goods”). For a provocative argument that expands on this rationale for trademark protection, see Shahar J. Dilbar, *Famous Trademarks and the Rational Basis for Protecting “Irrational Beliefs,”* 14 GEO. MASON L. REV. 605, 628-30 (2007).

¹⁴³ See *Nat’l Comics Publ’ns v. Fawcett Publ’ns*, 191 F.2d 594, 597-98 (2d Cir. 1951) (stating that an owner of a copyright abandons it if she allows the public to copy her work); Dennis W.K. Khong, *Orphan Works, Abandonware and the Missing Market for Copyrighted Goods*, 15 INT’L. J.L. & INFO. TECH. 54, 62-63 (2007) (discussing abandonment of software copyrights); Robert A. Kreiss, *Abandoning Copyrights to Try to Cut Off Termination Rights*, 58 MO. L. REV. 85, 92-101 (1993) (noting abandonment as a valid defense

apt phrase in the same way that “abandonment” of incorporeal interests in land and bankruptcy “abandonments” are misnomers.¹⁴⁴ There is no “roll” of the dice following the abandonment of a copyright—ownership of an abandoned copyrighted work is necessarily public.

A good example of the permissive approach being embraced by the common law courts, despite the possibility of negative externalities associated with abandonment, is *Long v. Dilling Mechanical Contractors*.¹⁴⁵ In that case, Dilling placed trash in an unlocked dumpster on its personal property, two feet from the sidewalk.¹⁴⁶ Long, a labor organizer hoping to unionize Dilling’s workplace, removed several bags of trash from Dilling’s dumpster, hoping to find the names and contact information of Dilling employees so that he could contact them.¹⁴⁷ After learning about this conduct, Dilling alleged that Long had stolen its property—which it asserted had not been abandoned but rather left in the dumpster to be taken away by a trash-hauling company with which Dilling had contracted.¹⁴⁸ Dilling sued Long for civil violations of Indiana’s laws against theft, burglary, criminal trespass, and corrupt business practices.¹⁴⁹ The appellate court reversed a finding of liability against Long under Indiana law, holding that the trash had been abandoned successfully when Dilling placed it in the dumpster.¹⁵⁰ Implicit in this analysis is the idea that it would have been proper for Dilling to abandon its refuse in a dumpster, even if it had ceased paying a waste-removal company to empty the dumpster at particular intervals. Such a rule might pose problems if the waste piles up because no one comes along to remove the refuse voluntarily—a situation that recently plagued Naples, Italy.¹⁵¹ But the *Long* court presumably thought that nuisance law could kick in at that point, particu-

to copyright infringement); Lydia Pallas Loren, *Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright*, 14 GEO. MASON L. REV. 271, 319-20 (2007) (recognizing the accepted notion that once a work is abandoned, it is no longer afforded copyright protection).

¹⁴⁴ See *supra* text accompanying notes 83-86.

¹⁴⁵ 705 N.E.2d 1022 (Ind. Ct. App. 1999).

¹⁴⁶ *Id.* at 1023.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 1025.

¹⁴⁹ *Id.* at 1023.

¹⁵⁰ *Id.* at 1025-27.

¹⁵¹ See Ian Fisher, *European Commission Sues to Force Italy to Take Out the Garbage*, N.Y. TIMES, May 7, 2008, at A6 (describing the backlog of trash piling up on the streets of Naples).

larly in the case of an owner who dumped trash on her own property.¹⁵² In *Sharpe v. Turley*, a recent case very similar to *Long* factually, a Texas court parted ways with *Long*, holding that trash left in a dumpster was not abandoned. The court held that a party depositing its trash in a dumpster does not intend to leave the property to whomever wishes to take possession of it, but rather wishes to transfer it to a waste-hauling firm for disposal.¹⁵³ The *Sharpe* court seemed to think it was decisive that the property owner and waste-hauling firm had a contract requiring that the latter remove the former's waste. But it is not clear whether this contract's existence or terms resolved the issue one way or another. The contract could well have been construed to require the waste-hauling firm to remove only that waste which had not been disposed of by a third party prior to the hauling firm's arrival upon the premises.

Both *Long* and *Sharpe* nicely illustrate the stakes in abandonment cases. In both cases, the ambiguity surrounding the act of depositing trash at the curbside, combined with the contested social meaning of that act, contributed to confusion and opportunistic behavior. In both cases, the party disposing of its waste tried furiously *ex post* to restrict the pool of potential claimants from a nearly infinite group (would-be claimants of abandoned property) to a solitary eligible claimant (the waste hauler). And in both cases, the plaintiffs overwhelmingly preferred destruction of the resource to abandonment, precisely because of the positive economic value that the rubbish would have to entities with competing economic interests. The lack of a clear legal rule across jurisdictions on an issue that people encounter every day—can a stranger rifle through my household waste and take what she wants?—is at least disconcerting.¹⁵⁴ If someone in Indiana (the relevant state in *Long*) or anywhere the law is ambiguous

¹⁵² *Long* is in some ways reminiscent of Fourth Amendment case law deciding whether a property owner retains a reasonable expectation of privacy in the contents of trash bags left at curbside. The answer is no, although the Supreme Court has arguably rejected the rationale that putting trash at curbside entails property abandonment in favor of a view that the person depositing the trash perhaps retains a property interest, but not a privacy interest, in the rubbish. See *California v. Greenwood*, 486 U.S. 35, 49-52 (1988) (Brennan, J., dissenting). But see *United States v. Scott*, 975 F.2d 927, 929 n.1 (1st Cir. 1992) (rejecting this reading of *Greenwood*).

¹⁵³ See *Sharpe v. Turley*, 191 S.W.3d 362, 368 (Tex. Ct. App. 2006) (holding that leaving an item in a dumpster is not evidence that it has been abandoned and is free for the taking).

¹⁵⁴ Such causes of action appear not to be actionable under the common law of invasion of privacy. See, e.g., *Danai v. Canal Square Assocs.*, 862 A.2d 395, 400-03 (D.C. 2004); *Froelich v. Werbin*, 548 P.2d 482, 484 (Kan. 1976).

wants to be safe, the law shrugs its shoulders and refers its citizens to self-help via shredders and fireplaces.

The conventional understanding within the American legal academy is that the abandonment of both real and chattel property is permitted under the civil law.¹⁵⁵ It turns out that the truth is more complicated with respect to real property. The German Civil Code provides that “ownership of a piece of land may be relinquished by a declaration of relinquishment tendered by the owner to the Land Registry Office and by registration of the relinquishment in the Land Register.”¹⁵⁶ Evidently, under German law, the state may, but need not, claim subsequent ownership.¹⁵⁷ The German civil law regime therefore represents a true permissive regime of abandonment with respect to both chattel and personal property. Other civil law regimes, however, deviate from the German approach. They are appropriately characterized as escheat regimes, which are discussed in the following Section.

B. *Escheat*

Several civil law regimes permit an owner to relinquish land but only to the state. This act may constitute abandonment in the colloquial sense, but it does not satisfy the narrow definition of abandonment used here.¹⁵⁸ More broadly, an escheat regime is one in which abandoned property automatically becomes the property of the jurisdiction in which it is abandoned or in which the abandoning owner resides. It is worth mentioning that an escheat regime, by its nature, entails no “roll of the dice,” at least if the abandoning owner is informed of the law. Put another way, we might conceptualize abandonment in an escheat jurisdiction as a gift to the state.¹⁵⁹

¹⁵⁵ See James C. Robertson, *Abandonment of Mineral Rights*, 21 STAN. L. REV. 1227, 1228 n.13 (1969) (“The civil law has long permitted the abandonment of land, apparently without undesirable consequences.”). For a discussion of the Roman law approach to real property abandonment, see Randall Lesaffer, *Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription*, 16 EUR. J. INT’L L. 25, 38-46 (2005).

¹⁵⁶ BÜRGERLICHES GESETZBUCH [BGB] [Civil Code] Aug. 18, 1896, as amended, § 928(1), translated in THE GERMAN CIVIL CODE: REVISED EDITION 174 (Simon L. Goron trans., 1994).

¹⁵⁷ *Id.* at § 928(2).

¹⁵⁸ See *supra* notes 11-12 and accompanying text.

¹⁵⁹ Query whether the abandoning owner ought to be entitled to a tax deduction if the asset has positive market value.

Polish law permits an owner to relinquish real property via a notarized deed with the consent of a local government official,¹⁶⁰ but this act transfers title to the local government rather than render the land “up for grabs.” French law similarly provides that the commune in whose territory abandoned land is situated has the first right of refusal to abandoned land, and if it waives this right, the land becomes part of the public domain—the national government’s property.¹⁶¹ Italian law is similar, providing that “[i]mmovable property that is not owned by anyone is included in the patrimony of the State.”¹⁶² The laws of several Latin American countries follow the Polish approach more closely than the German one. Argentina, Chile, and Ecuador permit the abandonment of chattel property but provide that any real property abandoned by its owner becomes the property of the state.¹⁶³ Brazilian law granted title to the first possessor of abandoned chattels but provided that abandoned land “shall be held as vacant property . . . and shall pass, after ten years, to the dominion of the State.”¹⁶⁴

Interestingly, although civil law countries generally embrace escheat for real property, their rules regarding chattels are appropriately described as permissive: the first claimant of abandoned personal property becomes the new owner.¹⁶⁵ In the United States, by contrast, escheat is employed for certain abandoned chattels. The

¹⁶⁰ See PRAWO CYWILNE [P.C.] [Civil Code] art. 179, § 1 (Pol.), translated in THE POLISH CIVIL CODE 30 (Danuta Kierzkowska et al. eds., Olgierd A. Wojtasiewicz trans., 1997); Stanisława Kalus & Magdalena Habdas, *The Notion of Real Estate and Rights Pertaining to It in Selected Legal Systems*, in 3 MODERN STUDIES IN PROPERTY LAW 251, 263 (Elizabeth Cooke ed., 2005) (stating that, in Poland, renunciation of land ownership is permissible, with a local authority becoming the new owner).

¹⁶¹ CODE CIVIL [C. CIV.] art. 713 (Fr.), translated in Legifrance, <http://195.83.177.9/code/liste.html?lang=uk&c=22&r=382> (last visited Nov. 15, 2009).

¹⁶² CODICE CIVILE [C.C.] art. 827 (Italy), translated in 3 THE ITALIAN CIVIL CODE AND COMPLEMENTARY LEGISLATION 4 (Mario Beltramo et al. trans., 2007).

¹⁶³ CÓDIGO CIVIL [CÓD. CIV.] art. 2376, ¶ 1 (Arg.), translated in THE ARGENTINE CIVIL CODE 367 (Frank L. Joannini trans., 1917); CÓDIGO CIVIL [CÓD. CIV.] art. 590 (Chile); CÓDIGO CIVIL [CÓD. CIV.] art. 605 (Ecuador).

¹⁶⁴ CÓDIGO CIVIL [C.C.] Jan. 1, 1917, arts. 589, § 2, 592 (Braz.), translated in THE CIVIL CODE OF BRAZIL 131-32 (Joseph Wheless trans., 1920). A new Brazilian code became effective on January 6, 2006, but it has not yet been translated into English. See CÓDIGO CIVIL E LEGISLAÇÃO CIVIL EM VIGOR (Theotonio Negrão & José Roberto F. Gouvêa eds., 2006).

¹⁶⁵ See, e.g., CÓD. CIV. art. 2559 (Arg.) (“The apprehension of movable things having no owner, or abandoned by the owner, made by a person capable of acquiring things with the intent of appropriating them, constitutes a title for the acquisition of the ownership thereof.”); CÓD. CIV. art. 606 (Chile); C.C. art. 923 (Italy) (“Movable things that are not the property of anyone are acquired by occupation.” (citations omitted)).

leading American example of an escheat regime is the Uniform Unclaimed Property Act of 1995, which has been enacted in all fifty states and provides a framework by which unclaimed property is transferred to state governments after a specified period of time. The Act provides, for example, that travelers' checks become the property of the state fifteen years after issuance, and the same happens to money orders after seven years.¹⁶⁶ The contents of a safe deposit box belong to the state five years after the expiration of the lease for the box, provided the owner has not reclaimed them in the interim.¹⁶⁷ The Act provides that states must advertise the availability of the unclaimed property at least three weeks prior to offering it for sale.¹⁶⁸ This sale is supposed to take place within three years of the state taking possession of the property, and, in most cases, the state may then keep the proceeds.¹⁶⁹ Critically, there is no inquiry into the owner's intent under the statute. Even if an owner has forgotten about, lost, or mislaid property, it will be presumed abandoned at the end of the applicable statutory term.¹⁷⁰ The chief advantage of uniformity here is that it facilitates the creation of a national registry of unclaimed property. This registry is readily searchable on the Internet, where one popular clearinghouse contains data about unclaimed property in forty-four states.¹⁷¹

The rationale for state ownership of chattels, then, is to increase the chances that the lost, mislaid, or forgotten property will be reunited with its original owner by enabling the growth of a single database where original owners can recover their belongings.¹⁷² It is likely, however, that state ownership is not optimal in this regard—besides passively making information about lost property available to people who are savvy enough to search for it and incurring storage costs (usually trivial in the case of currency or other paper assets), the states appear to do little to justify their possession of the property. States have returned an estimated four percent of the unclaimed property

¹⁶⁶ UNIF. UNCLAIMED PROP. ACT § 2(a) (1995).

¹⁶⁷ *Id.* § 3.

¹⁶⁸ *Id.* § 12(a).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* § 2.

¹⁷¹ See ACS Unclaimed Property Clearinghouse, <http://www.missingmoney.com/GeneralHelp/Help.cfm?Type=WhoWeAre> (last visited Nov. 15, 2009).

¹⁷² A similar rationale explains Japan's well-developed system of government lost-and-found centers. For a fascinating exploration, see Mark D. West, *Losers: Recovering Lost Property in Japan and the United States*, 37 LAW & SOC'Y REV. 369 (2003).

obtained under the Act to its original owners.¹⁷³ Almost certainly, private firms given financial incentives to track down owners could achieve a better success rate. Perhaps the argument for state ownership is that it is the least bad of the alternatives—returning the property in question to the bank, landlord, or gift-certificate-issuing vendor might encourage that party to take steps to increase the odds that the property will be unclaimed.¹⁷⁴ That is a strategy that ought not to be particularly successful in a competitive marketplace, however, if consumers are well-informed and will avoid doing business *ex ante* with companies that have less forgiving policies in this regard. It may be that the stakes are sufficiently low, optimistic bias is sufficiently prevalent, or the perceived salience of the unclaimed property issue is negligible, which would help buttress the justification for the escheat regime. Indeed, it is worth wondering whether the goal of reunifying individuals with property they have forgotten about is a worthy one; perhaps the law should encourage owners to take more precautions with their travelers' checks and money orders.

Another well-established domestic escheat regime is the Federal Abandoned Shipwreck Act of 1987 (ASA).¹⁷⁵ The Act provides that any abandoned ship embedded in or located on the submerged lands of a state¹⁷⁶ is the property of that state.¹⁷⁷ The meaning of abandonment under the Act is quite similar to the common law meaning of property abandonment—the owner has deserted it and manifested an intention of relinquishing ownership.¹⁷⁸ Intent, which is ignored in the Uniform Unclaimed Property Act, therefore becomes quite important under the ASA. To show abandonment, it is not necessary that the original owner actively disclaimed title, unless the vessel was a military or other governmental ship.¹⁷⁹ The typical posture of ASA litigation is that someone has found an undiscovered shipwreck and

¹⁷³ Ellen P. Aprill, *Inadvertence and the Internal Revenue Code: Federal Tax Consequences of State Unclaimed Property Laws*, 62 U. PITT. L. REV. 123, 125 n.9 (2000).

¹⁷⁴ See, e.g., *Azure Ltd. v. I-Flow Corp.*, 77 Cal. Rptr. 3d 463, 468 (Ct. App. 2008) (concluding that, in a system where the goal is to reunite people with their unclaimed property, it would be irrational to provide immunity to a corporate issuer that mischaracterizes a shareholder's stock as escheated and fails to notify that shareholder of the transfer of that stock to the state).

¹⁷⁵ 43 U.S.C. §§ 2101–2106 (2006).

¹⁷⁶ This is defined under as land extending into the ocean up to three miles from shore. *Id.* § 1301(a)(2).

¹⁷⁷ *Id.* § 2105(a)–(c); see also Roberto Iraola, *The Abandoned Shipwreck Act of 1987*, 25 WHITTIER L. REV. 787, 790-92 (2004).

¹⁷⁸ Iraola, *supra* note 177, at 807-15.

¹⁷⁹ *Id.*

purchased any claims to it from the successors of the vessel's owner (usually an insurance company).¹⁸⁰ The government then argues that the vessel was abandoned, whereas the discoverer argues that it was not. The primary criticism of the ASA suggests that it inadequately incentivizes the socially useful task of finding abandoned shipwrecks and prompts some salvaging companies to fail to report their finds.¹⁸¹ Its defenders argue that states have stronger incentives to ensure that abandoned shipwrecks will be preserved for historical and archeological purposes rather than stripped of valuable assets in a hasty way.¹⁸² Yet this defense rings hollow as a matter of policy. The state can regulate uses of property without taking title to that property.

C. Prohibition

Prohibition regimes sometimes arise in the context of chattel property. For example, most American states explicitly categorize the abandonment of pets or livestock as animal cruelty, punishable as a misdemeanor.¹⁸³ One rationale for the prohibitory rule is that an unowned animal may create negative externalities by spreading disease, breeding strays, or colliding with motor vehicles. The primary explanation for the prohibitory rule, however, likely stems from an animal's status as a living thing that is capable of suffering. The abandonment of an animal typically diminishes its welfare. The criminal prohibition against abandonment thus encourages owners to relinquish owner-

¹⁸⁰ See, e.g., *Yukon Recovery, L.L.C. v. Certain Abandoned Property*, 205 F.3d 1189, 1192-93 (9th Cir. 2000) (affirming the award of exclusive salvage rights to a recovery company that executed a salvage contract with the insurance company that insured a sunken vessel).

¹⁸¹ See, e.g., Christopher Z. Bordelon, *Saving Salvage: Avoiding Misguided Changes to Salvage and Finds Law*, 7 SAN DIEGO INT'L L.J. 173, 194-99 (2005) (examining the aspects of the ASA that discourage salvage activity); Paul Hallwood & Thomas J. Miceli, *Murky Waters: The Law and Economics of Salvaging Historic Shipwrecks*, 35 J. LEGAL STUD. 285, 285-86 (2006) (comparing the incentives to discover shipwrecks under traditional admiralty law and current U.S. law).

¹⁸² See, e.g., Shelly R. McGill, *Are Criticisms of the Abandoned Shipwreck Act Anchored in Reality?*, 29 ENVIRONS ENVTL. L. & POL'Y J. 105, 117-23 (2006) (analyzing the incentives and ability of the states to encourage the discovery of abandoned shipwrecks).

¹⁸³ See, e.g., ALA. CODE §§ 13A-11-14, -240 (LexisNexis 2005) (classifying abandonment of animals as cruel neglect and, as such, a misdemeanor); ARIZ. REV. STAT. ANN. § 13-2910 (2001) (establishing intentional, knowing, or reckless abandonment of an animal as a misdemeanor); ARK. CODE ANN. § 5-62-101 (2005) (requiring knowing abandonment); CAL. PENAL CODE § 597.1(a) (West 1999) (establishing animal abandonment as a misdemeanor); COLO. REV. STAT. § 18-9-202 (2008) (stating that intentional abandonment of an animal is a misdemeanor).

ship in a manner that will be less harmful to the animal in question by donating the animal to a shelter.

Prohibition regimes are most prominent in the context of real estate at common law. The leading case here is *Pocono Springs Civic Ass'n v. MacKenzie*, which held that perfect title to real property cannot be abandoned.¹⁸⁴ Note, however, that lesser interests in land are treated differently. The conventional account holds that at common law, corporeal hereditaments like fee simple interests could not be abandoned but incorporeal interests (e.g., easements, mineral interests, and licenses) could.¹⁸⁵ This account is incorrect if abandonment is to be defined coherently.¹⁸⁶ In any event, the common explanation for the distinction in the legal treatment of corporeal and incorporeal interests is historical. Essentially, in the English feudal system, the crown could not tolerate the nonownership of land between the time of abandonment and reclamation because no feudal incidents would be paid in the interim. As one commentator notes,

The continuing validity of the policy against voids and gaps in the chain of title may be open to criticism insofar as its only function was to protect a certain political relationship of the feudal system that is no longer in existence. The services, or incidents, that a tenant was required to perform for his lord were not personal obligations, but obligations that ran with the land. The rule against abandonment . . . was designed to protect the lord by ensuring that he would always have a tenant to whom he could look for performance of the incidents.¹⁸⁷

Superficially, these feudal incidents appear to have a contemporary analogue that would justify the law's antagonism toward the abandonment of real property. Real property taxes are the modern-day equivalent of feudal incidents. Hence, state and local governments

¹⁸⁴ 667 A.2d 233, 235-36 (Pa. Super. Ct. 1995).

¹⁸⁵ Roberton, *supra* note 155, at 1228. Texas once was, and Idaho evidently remains, an exception. See *Hawe v. Hawe*, 406 P.2d 106, 113 (Idaho 1965) (citing *O'Brien v. Best*, 194 P.2d 608 (Idaho 1948)) (holding that one can abandon real property in Idaho, though not noticing that *O'Brien* actually dealt with railway rights of way); *Harris v. O'Connor*, 185 S.W.2d 993, 1012 (Tex. Civ. App. 1944) (pointing out that real property could be abandoned in Texas, under the remaining Mexican civil law, prior to the 1840 adoption of the common law in Texas).

¹⁸⁶ Because the abandonment of real property necessarily entails indifference as to the identity of the subsequent owner, it is wrong to refer to the abandonment of an incorporeal hereditament. When such an interest is "abandoned," the interest in question reverts to the owner of the previously burdened estate. For example, if an oil and gas interest is abandoned, any deposits on the land come to be owned by the fee simple owner. It is thus accurate to say that real property cannot be abandoned under the common law. Forfeited yes, abandoned no. See *supra* note 11 and accompanying text.

¹⁸⁷ Roberton, *supra* note 155, at 1228 n.13 (citation omitted).

might conclude that, for some period of time, there will be no one to pay a tax bill on an abandoned parcel, even though the parcel presumably requires some expenditure of state resources (e.g., for preventing crime on the property or maintaining nearby roads). In theory, the same policy argument could preclude the abandonment of chattel property. But chattel property is not typically subject to state and local property taxes—at least not in the United States. Hence, the interim period when there is no record owner ordinarily does not directly deprive the government of revenue.

Under scrutiny, however, this static argument for the common law rule breaks down. Abandoned real property, like abandoned chattel property, often has negative market value, in which case the state should not be levying taxes against it. To the extent that the state does levy taxes, it does so on the basis of outdated information about the resource's value or an unwillingness to foreclose on its tax liens. If the property in question has positive market value, it should be taxed by the state, but it should also be claimed by a new owner in short order. If nobody claims such property, this suggests the presence of severe informational asymmetries. Namely, would-be owners of the land may not know of its availability, may worry about whether it has actually been abandoned, or may infer from the fact of abandonment that the property in question is actually a negative-value asset. As Part III will show, the correct legal response to this situation is not a blanket prohibition on the abandonment of real property, but an effort to supplement the information available to those who would like to take ownership.

A better argument for the common law rule prohibiting abandonment of fee simple interests in land tackles the problem not from the static perspective outlined above but from a dynamic one. Namely, a regime that prevents individuals from abandoning real property might encourage them to use the property in a more sustainable way. We can look to the Brazilian rain forests for an example of how the common law might improve social welfare. It is common for Brazilian ranchers to chop down portions of the Amazon rain forest, use the land quite intensively for cattle ranching, and then, typically within eight years, abandon the land, which will have become worthless scrubland thanks to overgrazing.¹⁸⁸ The rancher then moves on to

¹⁸⁸ See UMA LELE ET AL., WORLD BANK, BRAZIL FORESTS IN THE BALANCE: CHALLENGES OF CONSERVATION WITH DEVELOPMENT 19 (2000) (discussing the “nutrient mining” that has occurred in the Amazon forests as a result of government policies that encourage settlement and economic activity to the detriment of forest preservation); John

greener pastures (or forests) and begins the process anew. Brazil permits the abandonment of real property.¹⁸⁹ Were it to prohibit abandonment, the law might encourage land owners to evaluate their own practices with a longer time horizon in mind, shifting strategies from slash-and-burn to techniques more in line with maximizing the long term value of the property.¹⁹⁰ On this account, the common law rule regarding abandonment might function as a defense against economic conditions that encourage short-sighted uses of land.¹⁹¹

Needless to say, prohibiting the abandonment of real property is hardly the optimal legal intervention for furthering these objectives. Suppose that the legal system sensibly assesses property taxes based on a parcel's peak value rather than its current value as a mechanism to buttress a rule against abandonment. Ranchers might try to circumvent the law by selling a property whose value has been depleted to a judgment-proof buyer for a nominal amount.¹⁹² Direct prohibitions on consumptive uses of land or Pigouvian taxes on such uses are bound to be more effective, assuming they can be enforced to the same degree as a prohibition on abandonment. On this point there is little reason to think that the prohibition on abandonment can be enforced any more efficiently than these alternatives.¹⁹³ For instance, if

Batt & David C. Short, *The Jurisprudence of the 1992 Rio Declaration on Environment and Development: A Law, Science, and Policy Explication of Certain Aspects of the United Nations Conference on Environment and Development*, 8 J. NAT. RESOURCES & ENVTL. L. 229, 282 (1993) (demonstrating how Brazil's original settlement policies have provided the incentive to "slash, burn, graze and move on" with ninety percent of new cattle ranches operating less than eight years before moving on (internal quotation marks omitted)).

¹⁸⁹ See *supra* text accompanying note 164; see also ANGUS WRIGHT & WENDY WOLFORD, *TO INHERIT THE EARTH: THE LANDLESS MOVEMENT AND THE STRUGGLE FOR A NEW BRAZIL* 271 (2003) ("[S]ome individuals have . . . chosen or felt forced to abandon their land and settlement.").

¹⁹⁰ This was the rationale for the regulation of public lands in the American West in the 1890s. See Robert B. Keiter, *Public Lands and Law Reform: Putting Theory, Policy, and Practice in Perspective*, 2005 UTAH L. REV. 1127, 1133.

¹⁹¹ The example suggested in the text is oversimplified. In Brazil, it is evidently the case that some deforestation results from squatters clearing land in order to obtain informal property rights to it. See LELE ET AL., *supra* note 188, at 34; Andrea Cattaneo & Nu Nu San, *The Forest for the Trees: The Effects of Macroeconomic Factors on Deforestation in Brazil and Indonesia*, in *SLASH-AND-BURN AGRICULTURE: THE SEARCH FOR ALTERNATIVES* 170, 183-85, 192 (Cheryl A. Palm et al. eds., 2005).

¹⁹² Cf. Anthony R. Chase & John Mixon, *CERCLA: Convey to a Pauper and Avoid Cost Recovery Under Section 107(a)(1)?*, 33 ENVTL. L. 293, 301-06 (2003) (discussing a series of cases in which the owner of a contaminated site may have tried to avoid liability for remediation and cleanup by conveying the land to a judgment-proof purchaser).

¹⁹³ In Brazil's Amazon region, both land-use regulations and property taxes are widely ignored by property owners and users. See LELE ET AL., *supra* note 188, at 20-24, 30.

the remedy for abandonment is the imposition of continued tax liability on the abandoner, then a Pigouvian tax—which could be imposed on a landowner while she still possesses and has an economic interest in the property—will always be superior to a remedy that tries to extract tax revenue from an owner who has left the property behind.

Note that there may be contexts in which promoting “sustainability” by prohibiting abandonment is questionable or even undesirable. To analogize, consider two hypothetical ivory-tower workplaces. The first faculty is extremely risk averse, finding the prospect of a tenure battle intolerable. As a result, it virtually never hires untenured professors, and those rare souls that do get hired are extremely “safe” scholarly prospects. The second faculty is less risk averse. Although it regards tenure denials as tragic for the scholars involved and very unfortunate for the institution, it is willing to “abandon” a scholar at tenure time if she has not demonstrated excellent scholarship and teaching. If upside reward and downside risk are correlated, we can expect that the second faculty’s hires will have greater potential to become stars than the first faculty’s. In a world where faculties one and two are competing for talent, it is by no means obvious that either strategy will dominate, and a great deal of self-sorting may occur. But flatly prohibiting abandonment in this academic context has costs that are more apparent here than they are in the Amazon.¹⁹⁴ This analogy might help us see a downside to overly restrictive abandonment rules in real and chattel property contexts. Suppose there is a large number of distressed homes in a community, or polluted parcels that may have substantial mineral wealth underneath. A rule prohibiting abandonment in these contexts might ensure that these resources go underutilized because of the risks associated with trying to repair and exploit the resources in question. Seen in this light, a rule permitting abandonment functions as a kind of insurance policy for investors in high-risk, high-reward property.

D. *Licensing*

A licensing regime is one in which governmental consent is required in order for an individual or entity to abandon property. A railway seeking to abandon an unprofitable or otherwise undesired

¹⁹⁴ For a similar argument in a very different employment setting, see Julie C. Suk, *Discrimination at Will: Job Security Protections and Equal Employment Opportunity in Conflict*, 60 STAN. L. REV. 73 (2007) (examining the ways that job-security protections can exacerbate racial inequalities in employment).

line has needed the permission of the federal government to do so since 1920.¹⁹⁵ The right to block railway abandonments was initially vested in the Interstate Commerce Commission, and it has been exercised by the Surface Transportation Board (STB) since the Commission's demise.¹⁹⁶ The petition for a declaration of abandonment can be brought by the railway-line owner.¹⁹⁷ In deciding whether to approve an application for abandonment, the STB is to weigh "the interests of those now served by the present line on the one hand, and the interests of the carrier and the transportation system on the other."¹⁹⁸

The licensing regime for railroad rights of way is rather unusual, but it is best explained by the heavily regulated nature of the railroad industry. Railway carriers, like telephone and cable providers, may be required to serve some unprofitable customers in exchange for limited monopoly protection in servicing profitable ones. In deciding whether to permit the abandonment of a rail line, the STB is really deciding whether to permit the abandonment of a railway's promise to provide service to a particular community. The law thus accounts for the externalities associated with property abandonment and refuses to permit abandonment where those negative externalities would be too great. In that sense, the licensing regime resembles the prohibition regime, which attempts to limit abandonment where abandonment entails significant negative externalities. The law similarly would frown upon a landowner who agreed to purchase for a nominal amount two connected parcels of land, one of which had high value and the other of which had negative value because of contamination, and then tried to abandon the contaminated parcel without remediating the pollution. A licensing regime may well be superior to the common law prohibition on the abandonment of land because it contains an escape hatch that is responsive to changed circumstances. On the other hand, because decisionmaking is delegated to an administrative agency, there is a risk of interest-group capture. If such capture occurs, then railway abandonment may begin to resemble a permissive regime.

¹⁹⁵ See *RLTD Ry. Corp. v. Surface Transp. Bd.*, 166 F.3d 808, 810 (6th Cir. 1999).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Chi. & Nw. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 321 (1981) (internal quotation marks omitted) (quoting *Purcell v. United States*, 315 U.S. 381, 384 (1942)).

E. *Promoting Abandonment?*

We have established that the state might flatly permit or prohibit abandonment, exercise discretion about when abandonment can occur, or take possession of abandoned property itself. In theory, there is also the possibility that the law will actually encourage abandonment—privileging it over gifts, sales, and destruction. In practice, it is hard to imagine why a jurisdiction would want to do this—the benefits of abandonment are real, but they flow mostly to the abandoning owner, not to society writ large. That said, we can find something that looks a bit like an abandonment promotion regime in one jurisdiction's treatment of animals.

Under Mississippi law, if the owner of an animal abandons it, the remedy is seizure by the state.¹⁹⁹ The statute provides a series of procedural protections for the owners of such animals to reclaim them if they can show that they would care for them adequately in the future.²⁰⁰ Upon their failure to do so, the law provides for transfer of title to an animal-control agency for the purposes of providing euthanasia where appropriate. Alternatively, the animals may be auctioned off, with the proceeds used to repay the state for boarding costs and any remainder *returned to the abandoning owner*.²⁰¹ No other American jurisdiction has the same statutory language on the books, and while animal abandonment is a crime in most other jurisdictions,²⁰² it does not appear to be one in Mississippi. The regime in Mississippi is thus a strange hybrid of systems for regulating abandonment. It has aspects of an escheat regime, in that the state plays a large role in disposing of the property. But in its operation, it most closely resembles a permissive regime taken to the extreme. If an animal owner abandons the animal, the state must go through the trouble of selling off or destroying it, and in the case of sale—which seems most likely in the case of livestock—the state will forward any profits to the owner.²⁰³

¹⁹⁹ MISS. CODE ANN. § 97-41-2 (West 1999).

²⁰⁰ *Id.* § 97-41-2(2).

²⁰¹ *Id.* § 97-41-2(5).

²⁰² See *supra* note 183 and accompanying text.

²⁰³ It is more common for the law to provide that the state *may* claim abandoned property and compensate its owner at fair market value. Such uses of eminent domain to condemn blighted property are relatively uncontroversial under the Fifth Amendment. Similarly, the Italian Civil Code provides a clear statutory authorization for the use of eminent domain:

[W]hen the owner abandons the maintenance, cultivation or use of property that affects national production . . . expropriation of the property by the administrative authorities can take place, subject to the payment of a just in-

In effect, the law is encouraging animal owners to abandon them at any time and in any place. In light of the costs that abandonment imposes on animal welfare, as compared with abandonment's alternatives, the case for an abandonment-promoting regime is particularly weak in this setting.

It is hard to come up with any rational explanation for why Mississippi would embrace this regime—it most likely reflects poor drafting of a legal framework that was designed to minimize an abusive or neglectful owner's resistance to state intervention. Extending that regime to cover animal abandonment may have been an instance of cognitive dissonance by legislators. In any event, the unusual law as written appears to have generated little controversy and has gone unnoticed in the legal scholarship.²⁰⁴

III. A PROPOSAL FOR RATIONALIZING THE LAW OF ABANDONMENT

Having reviewed the motivations for abandonment, the different types of property that might be abandoned, and the existing legal regimes governing abandonment in the United States, it is appropriate to ask how, if at all, the law might be improved. In light of the social benefits associated with abandonment and its utility to property owners, the law should strive to permit abandonment while mitigating the associated negative externalities. Namely, the law should attempt to mitigate confusion costs, deterioration costs, and error costs, while reducing disposal costs in the case of negative-value property and lawless-race costs in the case of positive-value property.

A. *Negative-Market-Value Property*

Let us begin by recalling the different types of abandoned property and the bright-line rules that the law has created to govern their abandonment. The abandonment of positive-subjective-value, negative-market-value goods is plainly undesirable, though it almost never occurs. When such resources are abandoned, we can expect that no one

dennity. The same provision applies if the deterioration of the property has the effect of seriously prejudicing the appearance of cities or considerations of art, history, or public health.

CODICE CIVILE [C.C.] art. 838 (Italy), *translated in* THE ITALIAN CIVIL CODE AND COMPLEMENTARY LEGISLATION, *supra* note 162.

²⁰⁴ Westlaw's citing references to the statute include several sources mentioning it in a string citation of state animal-cruelty laws, but there is no mention of its evidently unique animal-abandonment provision.

will claim the abandoned property, which may cause it to be reclaimed by the owner if its subjective value has not deteriorated too much in the interim. The decision to abandon this type of property is a mistake, one that arises because of the unilateral nature of abandonment. If an owner were to propose a sale of such a resource, there would be no meeting of the minds as to a price. If the owner were to offer the resource to someone as a gift, the intended recipient could refuse to accept it. Abandoning such property may deprive the owner of the opportunity to get feedback from the market about the resource's valuation, and it is that lack of information that causes the owner to make a transfer that leaves everyone worse off.

With respect to positive-subjective-value, negative-market-value resources, then, there are two plausible legal approaches. First, the law might prohibit abandonment altogether. This is a sensible paternalistic rule if it can be enforced at a low cost and if law enforcers can readily determine which properties have positive subjective value but are negative-market-value resources. Second, the law might require a means of abandonment that will expose the owner to information about market valuations. The best way to do this in the case of chattels is to insist that the abandoning owner leave the chattel property at issue on a portion of her own real property adjoining a public way.²⁰⁵ If an owner sees that no one is taking the object in question, then she eventually will conclude that the market does not value the item as highly as she does, and she will reclaim it if it has not deteriorated.²⁰⁶ Keeping the item on her own real property also prevents third parties from having to shoulder unwanted disposal costs, and it subjects the abandoning owner to any reputational sanctions if the item in question is regarded as an eyesore. Ordinarily, when abandonment is proscribed or restricted, one should worry that individuals will destroy that which cannot be abandoned. But it is difficult to imagine circumstances in which an owner would be motivated to destroy positive-subjective-value, negative-market-value property.²⁰⁷

What of negative-subjective-value, negative-market-value resources? This category presents the strongest case for total prohibition. By ab-

²⁰⁵ Of course this approach only works well for owners of single-family homes—for condominium and apartment owners, not so much.

²⁰⁶ See *supra* text accompanying note 80.

²⁰⁷ Pets may again present an exceptional case. There are cases in which an individual contemplating imminent death seeks to destroy her animals because of a concern that they will not be taken care of adequately after her passing. See, e.g., *Capers Estate*, 34 Pa. D. & C.2d 121, 126 (Orphans' Ct. 1964); *In re Wishart*, [1992] 129 N.B.R.2d 397, 404 (Can.).

andoning this type of property, the resource's owner imposes a negative externality on society. Assuming the property in question will not biodegrade quickly or will be an eyesore after abandonment, the law ought to compel the prior owner to bear the disposal costs. In addition to forcing an owner to internalize disposal externalities, a prohibition rule may promote the use of assets in sustainable ways, discourage aesthetic blight while an owner waits to see if anyone will claim the property, and encourage the development of a market for waste disposal firms that will benefit from specialization and economies of scale. Setting aside contexts where society wants to encourage individuals to explore taking ownership of risky resources that might have negative value, the best argument against a prohibitory rule will stem from enforcement costs. Abandoning negative-subjective-value, negative-market-value resources will always be tempting for the owner, and a local government may find it more cost effective to create a de facto escheat rule than to monitor and punish surreptitious dumping on public property. A prohibition rule, then, forces the owner to choose between two options: (1) unlawful self help, or (2) a market transaction where the owner will pay for disposal.

Surveying the two categories of negative-market-value properties, then, we arrive at the conclusion that a prohibition regime works best for negative-subjective-value properties. For positive-subjective-value properties, prohibition and a safe-harbor rule permitting abandonment on one's own property appear to be the sensible alternatives. In theory, one might try to adopt a fine-grained legal rule whose dictates differ based on the subjective value of the property. In practice, however, a more complex doctrinal framework is unattractive because the act of abandonment suggests that property probably lacks subjective value to its owner, and subjective valuations of abandoned property will comprise private information that the state has a great deal of difficulty discovering. Assuming such a rule can be enforced with reasonable effectiveness, the law should prohibit the abandonment of negative-market-value resources. A rule of escheat, where the state takes possession of negative-market-value resources at taxpayer expense, would be justified only where baseline levels of law-abiding behavior are quite low or illegal dumping is particularly difficult to detect.

B. *Positive-Market-Value Property*

Positive-market-value properties present the most compelling case for a permissive rule regarding abandonment. The thorny question is whether the law should restrict abandonment so as to privilege other

forms of property transfer, such as sales or gifts. As the analysis in Section II.C demonstrated, in order for policymakers to make an optimal decision about whether and when to permit the abandonment of a piece of positive-market-value property, they would need to know, at the very least, (1) the propensity of race participants to resort to illegal acts in order to capture that abandoned property, (2) the effects that the marginally increased prevalence of abandoned property would have on the propensity for finders to help reunify lost and mislaid property with its owners, (3) the likely time lag before someone will claim abandoned property, (4) the decay rate of the property in question, and (5) the magnitude of the transaction costs, decision costs, entertainment value, and warm glow associated with hypothetical bilateral transfers of the same property. To describe these as difficult empirical questions would be a vast understatement. They can be answered only through educated guesses. And whereas the property owner's revealed preferences may expose some otherwise private information concerning factors (4) and (5), factors (1), (2), and (3) represent externalities that will have no bearing on the abandoning owner's decisionmaking. What is a common law court or an administrative agency in a licensing regime to do?

The sensible legal response is one that seeks to control most of the negative externalities associated with the abandonment of positive-market-value property by supplementing the information that is available to members of the public. This can be done by encouraging an abandoning owner to (1) physically mark abandoned property as "abandoned" and (2) advertise the availability of property on one of the many free Internet forums that have sprung up to alert consumers to the availability of "free stuff." These measures will reduce, but not eliminate, confusion and lag-time costs.²⁰⁸ Such behavior could be incentivized through tax policy, giving abandoned property of this sort some of the same tax advantages that property donated to charity presently receives. Alternatively, the law might regard property abandonment that does not comport with steps one and two as a misdemeanor, akin to littering, or it might enforce laws prohibiting the destruction of property in those cases. Owners wishing to rid them-

²⁰⁸ When a British price-comparison website hired representatives to stand on a street corner wearing signs saying, "If you ask me for a £5 note you can have one," only twenty-eight out of 1800 passersby took them up on the offer. Posting of Stephen J. Dubner to N.Y. Times Freakonomics Blog, *There's No Free Lunch, or Money*, <http://freakonomics.blogs.nytimes.com/2008/07/29/theres-no-free-lunch-or-money> (July 29, 2008) (internal quotation marks omitted). This failure to claim the money is probably explained by skepticism that the offer was bona fide.

selves of property would still find that abandonment represents the lowest-transaction-cost option for doing so, especially if destruction is taken off the table.

Permitting abandonment, provided that adequate publicity is given to the abandoned property, will mitigate all the negative externalities associated with abandonment save one: lawless-race costs. If there is reason to believe that lawless races are likely and will engender large social costs when they do occur, requiring that abandonment be publicized will entail more races, with more participants, resulting in more lawlessness. So what is the evidence on that score? No one keeps accurate statistics on the question of lawless races, so one needs to turn to data on behavior that may function as a proxy for propensity to engage in lawless races. Here, the data suggest that compared to the rest of the world, the United States has relatively high rates of property crimes,²⁰⁹ though a slightly lower rate than, say, Canada.²¹⁰ Of course, scholars working on serious studies of cross-national crime statistics warn against relying on crime-report data, because the methodologies for reporting and collecting such data vary so much across nations.²¹¹ In short, Americans *might* have a relatively high propensity to engage in lawless races, but it is unlikely that the social costs from marginally more races would trump the reduction in lag time, decay costs, confusion costs, and the greater warm glow associated with higher rates of utilization of abandoned property.

What can be done about lawless races? Even if lawless races would be frequent and costly in a legal regime that publicized abandonment, those costs could be mitigated through legal doctrine. Perhaps that sentiment forms the basis for a sensible defense of escheat regimes in abandonment law. By permitting abandonment but criminalizing claims to abandoned property, the state mitigates the incentive to race, at least in theory. Once we account for the agency problems inherent in government management of common resources and the temptation for private actors to abscond with abandoned property before the state discovers its entitlement, however, the violent-race-reducing benefits of escheat likely dissipate.

²⁰⁹ See Jan van Dijk & Kristiina Kangaspunta, *Piecing Together the Cross-National Crime Puzzle*, NAT'L INST. JUST. J., Jan. 2000, at 35, 39.

²¹⁰ See Maire Gannon, *Crime Comparisons Between Canada and the United States*, JURIS-TAT, Dec. 18, 2001, at 1, 6-7, available at <http://www.statcan.gc.ca/pub/85-002-x/85-002-x2001011-eng.pdf>.

²¹¹ See Richard R. Bennett & P. Peter Basiotis, *Structural Correlates of Juvenile Property Crime: A Cross-National, Time-Series Analysis*, 28 J. RES. CRIME & DELINQ. 262, 284 n.16 (1991).

Property law offers a better avenue for curtailing lawless races. The law might both require publicity via Craigslist, or one of the other information clearinghouses that have emerged, and provide that the first person who puts in an online claim receive a time-limited window during which only she could lawfully take possession of the abandoned asset. Put another way, after I announced that I was abandoning a dining room set, the first person to note in a linked follow-up posting on Craigslist that she was putting in a claim would get an exclusive two-hour window to take possession. If she failed to take possession within that time frame, the dining room set would be up for grabs once again.²¹² It is easy to imagine such a legal rule working in concert with social norms whereby people claim “dibs” on up-for-grabs resources. Where substantive law tracks internalized norms, widespread compliance will occur, even if the state devotes few resources to enforcing the law.²¹³ In settings where the use of Craigslist is impractical, with the *Popov v. Hayashi* home run ball dispute being the paradigmatic case, such a rule would give the first chance to catch the ball without interference to the fan in the best position to catch it.

²¹² A colleague who has used Craigslist to transfer property at no cost points out that no-show claimants impose a substantial cost on the would-be donor, who often must wait around for the claimant who has promised to pick up the item. Ideally, the property owner would require the claimant to post a small bond to protect the owner against the costs of a no-show. An advantage of pure abandonment over quasi-abandonment is that the abandoning owner can avoid these no-show costs. An associated disadvantage is that true abandonment may discourage an item’s highest value user from trying to claim a valuable abandoned resource based on a fear that another claimant will take possession first. This analysis suggests that in quasi-abandonment situations, where a would-be claimant detrimentally relies on an owner’s promise to hold an item until the would-be claimant arrives, and the owner instead gives it to another claimant, liability for detrimental reliance under an estoppel theory would be appropriate. See *supra* note 94 and accompanying text.

This anecdote also suggests an important dimension of the right to abandon that gets only a little attention here. The choice among sales, gifts, and abandonment will engender a selection effect. The sort of people who are likely to take possession of a surrendered resource may depend on the mechanism the prior owner chooses for relinquishment. In some settings, claimants of abandoned property may possess undesirable attributes—perhaps they take less care of real property and are worse neighbors than purchasers. But from other perspectives, abandonment’s selection effects may be welfare maximizing. For example, claimants of abandoned property usually will be poorer than purchasers, and might be even less well off than recipients (to the extent that socially well-connected needy recipients are more likely to benefit from charity). Abandonment therefore may function as a progressive mechanism for voluntary wealth redistribution, given the decreasing marginal utility of wealth. See *supra* note 89 and accompanying text.

²¹³ See generally Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 962-72 (1995) (providing examples of interventions that prompted changes in social norms).

That would have been Alex Popov on the facts of the case.²¹⁴ This proposed rule echoes the “reasonable prospect . . . of taking” the fox rule articulated by Judge Livingston in the canonical case of *Pierson v. Post*.²¹⁵ Although a regime privileging the first would-be claimants online or offline would slightly increase lag-time costs, it would substantially curtail lawless races, so such a doctrinal tweak would make sense in high-violence environments.

Alternatively, criminal law or tort law could help deter owners from abandoning property in ways that spark lawless races. Criminal liability for disturbance of the peace is one mechanism that law enforcement might use in cases where lawless races occur.²¹⁶ An alternative approach would make abandoning owners liable if their act of abandonment sparked a foreseeable lawless race that resulted in injuries or littering qua looting.²¹⁷ Such a strategy represents a partial embrace of abandonment, permitting the practice but requiring a lingering legal relationship between the abandoner and the abandoned resource. Any of these remedies, alone or in combination, ought to reduce the lawless-race costs associated with the abandonment of high-value property.

In underscoring the attractiveness of an abandonment doctrine that hinges on the market value of the property rather than its character as real property or chattel, a final consideration emerges: problems of proof. What if courts and other government bodies charged with enforcing the law are particularly bad at differentiating between positive- and negative-value property? In that case, it might make sense to prohibit abandonment generally, reasoning that positive-market-value properties are likely to be transferable via gift or sale and negative-market-value properties are not. At the end of the day, we will want to know how great these problems of proof are likely to be. They do not seem to be particularly severe. In the case of real property, data on comparable sales is readily obtainable, as is data on liens encumbering the property. Where complexity arises, it will largely be because of the presence of easements on the property that diminish

²¹⁴ Popov v. Hayashi, No. 400545, 2002 WL 31833731, at *1 (Cal. Super. Ct. Dec. 18, 2002). Popov’s attempt to claim the abandoned property would then give him title to the ball once either (a) he took certain control of it, or (b) a third party’s unlawful act impeded his ability to do so.

²¹⁵ 3 Cai. 175, 182 (N.Y. Sup. Ct. 1805) (Livingston, J., dissenting).

²¹⁶ See Allen, *supra* note 42, at C1 (reporting that police were called to break up a melee following an incident where a basketball spectator threw dollar bills in the air).

²¹⁷ See Platoni, *supra* note 74.

its value in ways that may be difficult to monetize. In the chattel property context, we ordinarily need not worry about easements and other servitudes.²¹⁸ Unless chattel property is unique, calculating its market value—let alone determining whether that value is positive—should be a simple matter. In short, absent significant skepticism about the cognitive capacities of courts and other judicial decision-makers, there is little reason to think that the inefficiencies associated with a prohibition on all abandonment are justified.

C. *Is Land Different?*

Recall the common law's treatment of abandonment. The abandonment of chattel property is generally permitted,²¹⁹ but the abandonment of corporeal interests in real property is flatly prohibited.²²⁰ The doctrine looks to the nature of the property rather than to its value. It is worth asking whether there is anything about land that justifies its disparate treatment.

Land differs from chattel property in three relevant respects: (a) it is immobile, (b) it cannot be destroyed, and (c) a sophisticated recording system is already in place for land throughout the United States.²²¹ Real property's immobility eliminates the possibility that such property will be lost or mislaid, a consequence that reduces the significance of confusion costs in the policymaking calculus. Real property's indestructibility mitigates the damages associated with resource decay.²²² The presence of a recording system means that there already exists, and long has existed, a low-tech version of Craigslist, which might function as an effective clearinghouse for information about abandoned real property, thereby reducing confusion and lag-

²¹⁸ See Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885, 907-10 (2008) (describing the hostility of common law courts to the enforceability of personal property servitudes).

²¹⁹ See *supra* text accompanying notes 145-50.

²²⁰ See *supra* text accompanying note 184.

²²¹ See Douglas Baird & Thomas Jackson, *Information, Uncertainty, and the Transfer of Property*, 13 J. LEGAL STUD. 299, 308-10 (1984) (noting the first and third of these attributes). Baird and Jackson point out that some chattels, such as airplanes and automobiles, do have serial numbers that lend themselves to the creation of recording systems. *Id.* at 309-10.

²²² Note that this is true for land but not for buildings or other improvements. Note further that because chattel property is destructible, the law conceivably could favor abandonment of chattels over abandonment of real property based on a fear that, in the absence of an abandonment option, owners of positive-value chattels will destroy the resource in question. I thank Jeremy Meisel for the latter observation.

time costs. Recall that German law permits land to be abandoned, provided that the abandoning owner records a notice of relinquishment at the local land registry.²²³ In short, the unique attributes of land suggest that the problems created by abandonment are *more significant* in the context of chattels than they are in the context of real property. On this reasoning, the rule regarding the abandonment of real property should be at least as permissive as the rule regarding chattel property.

Alas, there are three complicating factors. First, if abandoned real property has a higher propensity than abandoned chattel property to have negative value, then the prohibitory common law rule might make more sense. Such negative-value real property is unlikely to be claimed by well-informed third parties if abandoned, so permitting abandonment will not diminish the harms associated with lag time. Unfortunately, reliable data about the proportions of abandoned real and chattel property that have negative value is in short supply. One study suggests that ninety-eight percent of all properties that were *foreclosed on* by New York City had negative value at the time of foreclosure, but this does not tell us whether the same is true of abandoned properties at the time of abandonment.²²⁴ If the ninety-eight percent figure holds for abandoned real property and the figure is much lower for abandoned chattels, then a plausible argument for the common law rule exists.

Second, Eduardo Peñalver has ingeniously suggested that the law might prohibit the abandonment of real property as a means of curtailing the abandonment of chattels.²²⁵ The intuition behind Peñalver's descriptive argument is appealing: we have all come across vacant lots that are strewn with trash. But Peñalver fails to address the fact that none of this land is abandoned, as abandonment of land is barred in this country. Were the abandonment of positive-value real estate permitted, and were abandoning owners required to alert the public to the land's availability, then we would be surprised to see it go unclaimed for long. But as soon as it is claimed, we have an owner who will be incentivized to keep it free of abandoned eyesores. After all, a potential claimant of the land is typically going to have much more at stake than someone who merely wants to abandon trash on

²²³ See *supra* text accompanying note 156.

²²⁴ Scafidi et al., *supra* note 7, at 293, 297.

²²⁵ Peñalver, *supra* note 10, at 22-28.

the parcel. In a race between a potential claimant and a litterer, one should bet on the potential claimant every time.

As a normative matter, it is unclear why the law should take the position advocated by Peñalver with respect to positive-value chattel property. As this Article suggests, abandonment of such resources often facilitates their reuse or recycling by a high-value user.²²⁶ In many instances, permitting the abandonment of positive-value resources is welfare enhancing and freedom promoting. Since Peñalver has argued forcefully that property is laden with social obligations that should define property rights,²²⁷ if he cannot refute the argument that the abandonment of positive-value resources makes society better off, he ought to be arguing for the imposition of a duty on land owners to let third parties abandon positive-value resources on their land.

Peñalver goes further, suggesting that the right to abandon chattel property is “illusory.”²²⁸ Although I think this hypothesis has some merit as a formal matter, I do not agree with Peñalver that it advances our analysis. Peñalver argues that the abandonment of chattel property is much harder than the common law suggests and that abandoning chattels on someone else’s property without their consent is unlawful.²²⁹ My response to Peñalver’s formal argument is something along the lines of the answer given by the preacher when a skeptical congregant asks whether she believes in baptism: “Believe in it? Hell, I’ve seen it done!” While some successful abandonment takes advantage of the state’s inability to monitor all its public spaces effectively, so much of the abandonment we observe in the real world *is legal*. Someone abandons furniture on her front lawn adjoining a sidewalk, and a passerby temporarily enters her land to claim it. People leave appliances in an alleyway or on a sidewalk owned by a municipality or common-interest community, and a claimant grabs it before anyone else does. Someone abandons books in a student lounge, leaves a geocache in a state park, etc. The point is that in all of these contexts, the landowner in question, be it a private party or a state actor, permits the abandonment of positive-value chattel property *because* the

²²⁶ See *supra* notes 89, 129, and accompanying text.

²²⁷ See Eduardo Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 860-84 (2009) (arguing that property laws should incentivize owners to act virtuously rather than selfishly).

²²⁸ See Peñalver, *supra* note 10, at 4 (“[T]he law concerning the right to abandon . . . reveals that the owner’s right to abandon is largely illusory.”).

²²⁹ See *id.* at 16-17, 32 n.79 (arguing that abandonment of chattels can only be accomplished by leaving them on one’s own land, which is more like an “open-ended gift” than abandonment).

landowner believes that such abandonment is valuable to both the prior owner and the subsequent claimant. In the case of a common-interest community, letting people abandon property in the alleyway might prevent an owner from putting an item in the dumpster, thereby lowering a condominium association's waste-hauling fees. The Army Corps of Engineers and USDA Forest Service actually encourage geocaching because it is a popular form of recreation that promotes the public's use of federal lands.²³⁰ In short, most landowners implicitly consent to the use of their land to facilitate abandonment, which reduces the significance of Peñalver's trespass concerns. To the extent that the formalistic concerns still resonate, we might regard the tolerance of chattel abandonment despite the presence of a contrary legal rule as an instance of an efficient norm displacing an inefficient legal rule.²³¹

Third, we must consider the relationship between adverse possession law and the law of abandonment. Like foreclosure, adverse possession may function as a substitute for abandonment, though it is an awkward one. The primary conceptual difference between abandonment and adverse possession stems from adverse possession's requirement of nonpermissiveness. If the owner has intentionally relinquished title, then the trespasser's presence on the land becomes permissive, precluding the possibility of adverse possession.²³² What

²³⁰ See Memorandum from Michael B. White, Chief of Operations, Directorate of Civil Works, U.S. Army Corps of Eng'rs to U.S. Army Corps of Eng'rs District Commanders (June 10, 2005), available at <http://corpslakes.usace.army.mil/employees/cecwon/pdfs/05jun16-geocache.pdf> ("Geocaching may be allowed on public lands managed by the U.S. Army Corps of Engineers in accordance with the Code of Federal Regulations Title 36"); Georgia Geocachers Association, GA Cache Guidelines and Requirements, <http://www.ggaonline.org/gadodont.html> (last visited Nov. 15, 2009) ("The US Army Corps of Engineers . . . has determined that geocaching is an appropriate and compatible [sic] recreational use of Corps of Engineers regulated property.").

²³¹ See generally ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 141 (1991) ("Substantive norms often supplant substantive laws." (italics omitted)).

²³² See *St. Louis Union Trust Co. v. Smith*, 182 S.W.2d 945, 946-47 (Ark. 1944) (holding that an abandoned parcel of land cannot be adversely possessed). The occasional sloppily reasoned case holds that the same facts constitute both abandonment and adverse possession. See, e.g., *Sackett v. O'Brien*, 251 N.Y.S.2d 863, 868 (Sup. Ct. 1964) (holding that an abandoned parcel of land was adversely possessed), *abrogated by Sackett v. O'Brien*, 278 N.Y.S.2d 788, 790 (App. Div. 1967) (finding that the adversely possessed parcel of land was not abandoned). The lower court holding was incoherent because abandonment transfers title to the first claimant immediately. On the facts of *Sackett*, it would have been coherent for a court to hold that title had been lost either by abandonment or, alternatively, adverse possession.

the thwarted abandoner therefore must do is either incur the transaction and decision costs associated with a sale or gift to a willing recipient, or engage in an elaborate kabuki performance with a faux adverse possessor, whereby the abandoner pretends that she objects to the “trespasser’s” entry. Such scenarios are not merely hypothetical; they are reflected in the case law.²³³ This latter approach will not be attractive to a real property owner, precisely because under adverse possession law it takes so long—typically six to ten years—for title to transfer.²³⁴ This lag creates a great deal of uncertainty for the would-be-transferor, who may see a trespasser work the land for five years, only to move elsewhere, likely requiring the would-be-transferor to start from scratch.

Given that abandonment would be far more attractive than adverse possession to a land owner who wishes to lose her interest in land, what could possibly explain why the law might prohibit the abandonment of land but permit its transfer via adverse possession? To put the point even more provocatively, we might ask why the law would favor consensual transfers of land masquerading as nonconsensual transfers over genuinely consensual transfers of land. There is no satisfying answer to this question. The conventional response would be that adverse possession ensures that someone who values the property is using it at all times. But this response is deprived of its force once we recognize that (1) a rational trespasser will hesitate to improve the land any more than the law of adverse possession requires before title transfers at the end of the statute of limitations period, whereas a party that claims abandoned property will not hesitate to put property to its highest-value use immediately; and (2) property doctrine can reduce the consequences of lag time by requiring that the owner advertise her act of abandonment. Indeed, the comparison between the very sensible law of chattel property—which makes transfer via adverse possession rather difficult²³⁵ and transfer via abandonment easy—and

²³³ Something similar happened in *Yourik v. Mallonee*, 921 A.2d 869, 871-72 (Md. Ct. Spec. App. 2007), where a divorcing couple abandoned real property, and the parents of the husband took possession of the property and began making tax and mortgage payments on it. The prodigal son sued to quiet title decades later, asserting that he owned a fee simple in the property, the mortgage of which had been paid off by the parents. The court held that the parents were the owners of the land, not by virtue of abandonment, but rather through adverse possession. *Id.* at 880 & n.6. See also *Anson v. Tietze*, 190 S.W.2d 193, 197 (Mo. 1945) (recognizing the prior owner’s abandonment but noting that title transferred by adverse possession).

²³⁴ See *DUKEMINIER ET AL.*, *supra* note 9, at 115.

²³⁵ See *O’Keeffe v. Snyder*, 416 A.2d 862, 870 (N.J. 1980) (holding that adverse possession of chattels should be subject to the discovery rule, which dictates that the

the law of real property—where the reverse is true—is puzzling.²³⁶ Path dependence, not economic logic, explains the doctrine.²³⁷

The first of these two points has significant doctrinal implications worth emphasizing here. A bad-faith adverse possessor who enters another's property knowing that it belongs to someone else or indifferent as to the state of title will not have an incentive to put the property in her possession to its highest-value use until the statute of limitations expires. The law does not require that the land be put to its highest-value use but only that it be used in conformity with ordinary uses for that neighborhood.²³⁸ There often will be substantial distance between those two standards, and the rational, knowing adverse possessor will not improve the land any more than necessary to satisfy the "actual use" element. A good-faith adverse possessor, by contrast, will not hesitate to put the land to its highest-value use, however, because she believes the property in question to be hers. The longer a jurisdiction's statute-of-limitations period for ejectment actions, the more severe this problem with bad-faith adverse possession becomes.²³⁹ Good-faith adverse possession fares best from this perspective because there is neither a lag in ownership nor a diminished incentive to put the property to its highest-value use. Abandonment, however, may be superior to bad-faith adverse possession on this score. And if we think that the sort of person who claims abandoned property is more likely to be a savvy, efficient user of land than a good-faith adverse possessor,

statute of limitations starts running only when the true owner reasonably knows or should know the whereabouts of the property and the identity of its possessor); *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 429 (N.Y. 1991) (holding that the statute of limitations does not run until the true owner demands return of the chattel property and a good faith purchaser refuses to hand it over).

²³⁶ Note further the contrast to the law governing government-owned lands. Here, too, abandonment is typically permitted and adverse possession is largely prohibited. *See, e.g., McCauley v. Thompson-Nistler*, 10 P.3d 794, 800-01 (Mont. 2000) (stating that a public road cannot be adversely possessed but can be abandoned by a showing of clear intent).

²³⁷ *See supra* text accompanying note 187 (suggesting that the rule against abandonment is a remnant of the past that no longer serves a logical purpose).

²³⁸ *See, e.g., Trask v. Nozisko*, 134 P.3d 544, 549 (Colo. Ct. App. 2006) (holding that an adverse possessor occupies the land when she makes ordinary use of the land); *Moore v. Musa*, 198 So. 2d 843, 848 (Fla. Dist. Ct. App. 1967) (same); *Burkhardt v. Smith*, 115 N.W.2d 540, 543-44 (Wis. 1962) (same).

²³⁹ This efficiency argument for good-faith adverse possessors could weaken the case that Lee Anne Fennell has made on behalf of bad-faith adverse possessors in her recent work, though the selection-effect factors that she points to in her work do cut the other way. It is hard to know how the empirical issues wash out. *See generally* Lee Anne Fennell, *Efficient Trespass: The Case for "Bad Faith" Adverse Possession*, 100 NW. U. L. REV. 1037 (2006).

then it is arguable that abandonment is actually superior to both forms of adverse possession from an efficiency perspective. In short, there may be good reasons to continue permitting the bad-faith adverse possession of real property, but it is nearly impossible to construct a set of premises under which bad-faith adverse possession of land should be permitted while the abandonment of positive-value real estate is prohibited. Yet that is the situation in which American law finds itself.

Assuming that abandoned real property is not overwhelmingly characterized by negative value and that courts have the institutional capacity to sort between valuable and valueless property, *Pocono Springs* and numerous similar common law cases prohibiting the abandonment of real property should be overruled.²⁴⁰ With respect to positive-market-value property, the law should create a safe harbor permitting the abandonment of corporeal interests, requiring only that the owner record a notice of abandonment, so that all parties interested in the land will learn of its availability. The successful claimant will then record his interest in the land, informing third parties and government taxing authorities of the title transfer. The burden of demonstrating that property has positive market value should fall on the ab-

²⁴⁰ Perhaps, as Eduardo Peñalver has suggested to me, *Pocono Springs* could be defended on much narrower grounds than those embraced by the court. Namely, whatever the rule ought to be regarding the abandonment of land, the law should restrict landowners' ability to abandon obligations to pay homeowners' association dues required under the covenants, conditions, and restrictions of a common-interest community. Even this narrower and more sensible approach might be inapt in a case like *Pocono Springs*, where the litigants and many other similarly situated landowners purchased their holdings under the mistaken impression that the land could be developed. See E-mail from Sandra M. Lloyd to author (May 10, 2009) (on file with author); E-mail from Sandra M. Lloyd to author (Apr. 28, 2009) (on file with author). According to Ms. Lloyd, her parents, Joseph and Doris MacKenzie, purchased the land at issue in *Pocono Springs* using the proceeds of a gift from Ms. Lloyd's grandmother. After discovering that they could not build on the land, the MacKenzies tried in vain to convince the Homeowners' Association to take possession of it, but the Association, which Lloyd describes as a "syndicate of non-resident owners/speculators," refused. See E-mail from Sandra M. Lloyd to author (May 10, 2009) (on file with author). The MacKenzies felt compelled to litigate the case because of a concern that the property would "become the ultimate family white elephant." *Id.*

Scenarios like the one in *Pocono Springs*, where real estate becomes an inescapable money pit, explain the common law courts' historic refusal to let affirmative covenants bind successors in interest. See, e.g., *Miller v. Clary*, 103 N.E. 1114, 1117 (N.Y. 1913) ("[T]he rule that affirmative covenants accompanying conveyances of land are not enforceable against subsequent owners is a wise one."). This common law rule was rejected in the landmark case of *Neposit Property Owners' Ass'n v. Emigrant Industrial Savings Bank*, 15 N.E.2d 793 (N.Y. 1938), which held that an affirmative covenant to pay assessments may run with the land and be enforceable against subsequent owners.

andoning owner in the case of any controversy, since that person can most easily get it appraised.²⁴¹ With respect to negative-market-value property, the same considerations relevant in the chattel context have enough force to warrant similar treatment for real and chattel property. An owner seeking to abandon land should be able to do so upon cleaning up or improving the property sufficiently to give it positive market value.²⁴² An owner should not be forced to find a seller to take the property off her hands in order to be rid of it in light of the substantial transaction costs associated with land sales.

CONCLUSION

There has not been much sustained attention given to the issue of property abandonment. This lack of attention may explain the generally lackluster content of abandonment law. Though most abandoned property probably has negative value, the abandonment of positive-value chattel and real property appears to be rather common. In such instances, abandonment may be an attractive means of relinquishing property that minimizes an owner's transaction and decision costs. Abandonment may also serve other social objectives, such as facilitating generalized altruism, promoting desirable risk taking, enabling profit maximization via the sale of ancillary products, furthering individual autonomy, and encouraging the transfer of resources to higher-value users. Prohibition rules, which assume that abandonment inevitably creates negative externalities, therefore usually miss the mark. More misguided still are laws that take as a given the social costs that the abandonment of positive-value assets may engender—the waste and decay of unowned resources, confusion among third parties as to the state of title, and lawless races. These assumptions may have held true in a pre-Internet era, but they no longer make sense in a world where Craigslist and Freecycle are facilitating thousands of successful quasi-abandonment transactions every day. Where abandoned positive-market-value property can be identified clearly

²⁴¹ The imposition of such a burden on the would-be abandoner is necessary to counter the unappetizing prospect raised by Bob Ellickson that the homeowners' association at a place like Pocono Springs would have great difficulty determining the identity of the person responsible for paying the assessments on its various parcels.

²⁴² If the landowner in question is the party that polluted it, abandoning the property would not relieve the polluter of the legal liabilities resulting from that pollution. See Baird, *supra* note 14, at 187 (stating that abandonment of property has no effect "on obligations that have arisen as a result of *past* ownership of the property").

and potential claimants can be easily notified of its status, there is little reason to prohibit this ancient means of transferring title.