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Eduardo M. Peñalver

Cornell Law School, emp3@cornell.edu

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THE ILLUSORY RIGHT TO ABANDON

Eduardo M. Peñalver*

The unilateral and unqualified nature of the right to abandon (at least as it is usually described) appears to make it a robust example of the law's concern to safeguard the individual autonomy interests that many contemporary commentators have identified as lying at the heart of the concept of private ownership. The doctrine supposedly empowers owners of chattels freely and unilaterally to abandon them by manifesting the clear intent to do so, typically by renouncing possession of the object in a way that communicates the intent to forgo any future claim to it. A complication immediately arises, however, due to the common law's traditional prohibition of the abandonment of land. But the problem goes even deeper. Viewed through the lens of land, the (prospective) right to abandon virtually any form of tangible property, even chattels, is an illusion. This is because the legal prohibition of abandoning land dramatically qualifies the unilateral right to abandon chattels to the point of insignificance. The common law's treatment of land is not an anomalous restriction within a legal regime that otherwise empowers owners to freely abandon their property. Instead, the inability to abandon land forms the foundation of a system that, among other things, helps regulate and direct the disposition of unwanted chattels by requiring those seeking to sever their bonds of ownership to do so in cooperation with others. Instead of asking why the common law treats land differently from chattels, the more appropriate question to ask is why the common law exhibits such suspicion of abandonment as a whole. Approaching the discussion of abandonment from this perspective points towards connections between the common law of property and conceptions of ownership that view the latter as a social practice suffused with obligation and duty.

TABLE OF CONTENTS

INTRODUCTION	192
I. THE LAW OF ABANDONMENT	196
A. <i>Abandonment in General</i>	196

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B. <i>Abandonment Distinguished</i>	197
1. <i>Conveyances</i>	198
2. <i>Forfeiture</i>	199
C. <i>Abandonment of Land</i>	199
II. WHY IS LAND DIFFERENT?	202
A. <i>How Different Is Land?</i>	202
B. <i>Regulating Abandonment Through Land</i>	208
C. <i>The Continuing Value of the Common Law's Suspicion of Abandonment</i>	214
CONCLUSION	219

INTRODUCTION

In this Article, I will transform the way you think about abandonment law. This is not just your typical law review introduction bravado. I can make this claim with such confidence because, if you are like most people (even most property scholars), you do not think about abandonment law much at all. That is not your fault. This humble doctrine seems so easy that it merits only the most passing mention in property casebooks and is ignored altogether by many.¹ It has received similar treatment from contemporary property scholars, generating only two articles dedicated to the topic in the past seventy years.² I hope to demonstrate that the doctrine of abandonment is both more complex and significantly more interesting than its relative scholarly neglect suggests.

In a first-year property curriculum that is full of difficult concepts, arcane rules, and seemingly anachronistic distinctions, the law of abandonment stands out for its clarity. Simply put, the law is said to empower owners of chattels to abandon them by unambiguously manifesting the intent to do so (most typically by physically abandoning possession of the object in a way that communicates the intent to forgo any future claim to it).³ At first glance, the unilateral and unqualified nature of the right to abandon appears to make it a robust example of the common law's concern to safeguard the individual autonomy interests that many contemporary commentators have identified as lying at the heart of the concept of private ownership.⁴ For these theorists, private ownership is, at its core, the space of

1. See A. JAMES CASNER ET AL., *CASES AND TEXT ON PROPERTY* 91 (5th ed. 2004); JESSE DUKEMINIER ET AL., *PROPERTY* 106, 793–96 (6th ed. 2006); JOSEPH WILLIAM SINGER, *PROPERTY LAW* 92–97 (4th ed. 2006).

2. See James W. Simonton, *Abandonment of Interests in Land*, 25 ILL. L. REV. 261 (1930); Lior Jacob Strahilevitz, *The Right to Abandon*, 158 U. PA. L. REV. 355 (2010).

3. See *Long v. Dilling Mech. Contractors*, 705 N.E.2d 1022, 1025 (Ind. Ct. App. 1999) (discussed in Strahilevitz, *supra* note 2, at 392–94).

4. Libertarian and “classical liberal” property theorists in particular have frequently argued that the common law robustly protects negative liberty, particularly the right to exclude. See, e.g., RICHARD A. EPSTEIN, *TAKINGS* 57–62, 65 (1985) (“[E]ach person can do with his own land what he pleases so long as he does not physically invade the land of another.”). Epstein refers to himself as a “classical liberal,” as opposed to libertarian, property theorist, because he thinks private property rights can be overcome in order to achieve Pareto superior outcomes, provided that the owner is

negative liberty that remains when others are excluded from an owned object.⁵ Elaborations of these exclusion theories (or “boundary” theories, as Larissa Katz has helpfully dubbed them), tend simultaneously to stake out both normative and descriptive positions with respect to property doctrine, arguing that the exclusion conception of property is normatively superior *and* that the common law of property by and large already incorporates and reflects this understanding of ownership.⁶

Exclusion theories of property lend themselves to the conventional account of abandonment as a robust power enjoyed by owners to unilaterally sever their ties of ownership to things. As James Penner puts it:

It is surely part of a right to determine how a thing is to be used that one may make no use of it at all, for evermore. 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.⁷

And, indeed, at first glance, the common law doctrine of abandonment as it has traditionally been understood appears to provide good support for the exclusion theorists’ descriptive claim that their conception of property is already reflected in the common law.

In this Article, I will characterize the law of abandonment as a counterpoint to the descriptive component of the exclusion theorists’ project. This goal will seem deeply counterintuitive to property scholars accustomed to the traditional description of the right to abandon. But, when we explore abandonment through the lens of possessory interests in land (which everyone agrees cannot legally be abandoned), we begin to recognize the right to abandon as both more qualified and less unilateral than initially appears to be the case. In the end, rather than exemplifying owners’ autonomy, the law of abandonment serves as a useful example of the constant interplay between autonomy and obligation. More broadly, through its operation on

fully compensated for the nonconsensual loss of his property rights. See Richard A. Epstein, *Decentralized Responses to Good Fortune and Bad Luck*, 9 THEORETICAL INQUIRIES L. 309, 316–19 (2008).

5. See Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 277 & nn.6–8 (2008) (describing the “boundary approach” understanding of ownership and collecting sources). Exclusion theories of property can rest on underpinnings that are either conceptual, see, e.g., J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* (1997), or utilitarian, see, e.g., Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 363 (2001); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1719, 1753–90 (2004). Exclusion theories constitute a somewhat broader category than the approaches to property I have grouped under the rubric of “property as exit,” but the two categories share a great deal. See generally Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889 (2005). They also coincide with what Laura Underkuffler has called “property as protection.” LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY* 38 (2003).

6. See, e.g., Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 970–71 (2004) (arguing both that “nuisance law rests on a foundation of exclusionary property rights” and that building nuisance law around such an exclusion logic is efficient because it economizes on information costs); cf. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 740–47 (1998).

7. PENNER, *supra* note 5, at 79.

land, the law of abandonment facilitates a unique role for *landownership* as a mechanism for spreading and enforcing norms of obligation.⁸

In Part I, I describe the broad outlines of the law of abandonment as it has traditionally been understood, focusing on the distinction between chattels, which owners are ostensibly free unilaterally to abandon at will, and land, for which the doctrine of abandonment is more complicated and qualified. In Part II, I revisit this apparently divergent treatment of land and personal property. I argue that, in fact, the two are not treated as differently as the mere statement of the applicable legal rules in Part I suggests. Viewing the law concerning the right to abandon as a unitary legal structure—rather than in piecemeal fashion—reveals that the owner’s right to abandon (even chattels) is largely illusory. This is because the legal prohibition on abandoning land, when coupled with other common-law doctrines, qualifies the right to abandon chattels almost to the point of insignificance.

My description of the law of abandonment flies in the face of the conventional understanding of the doctrine, particularly as it has been set forth in scores of reported cases.⁹ But these cases, which seem at first glance to spell out a simple and robust power of owners to abandon chattels, are not really about the prospective rights of owners at all. Instead, they are invariably concerned with settling (after the fact) disputes about items of property that too many people (including, frequently, the original owners themselves) want to own. In other words, the cases do not actually seek to *empower* owners to abandon their property but rather to protect subsequent possessors of “abandoned” property from prior possessors who want to retain their ownership rights.¹⁰

The (re)interpretation of the law of abandonment that I propose in this essay understands the common law’s treatment of land as the foundation, rather than the exception, to its approach to abandonment in general. As I will argue, the essence of the concept of abandonment—the feature that distinguishes it conceptually from a conveyance (the alternative for owners seeking to rid themselves of property)—is its unilateral nature.¹¹ But if this is the case, then virtually the only property interests that owners can truly

8. See Larissa Katz, *Governing Through Owners* 4–5 (unpublished manuscript, on file with author), available at http://law.anu.edu.au/news/Katz_Abstract.pdf (abstract only).

9. See, e.g., *Trenolone v. Cook Exploration Co.*, 166 S.W.3d 495, 500–01 (Tex. App. 2005) (“[A]bandonment means the relinquishment of the possession of a thing by the owner with the intention of terminating his ownership, but without vesting it in any one else. Abandoned personalty is no man’s property until reduced to possession with intent to acquire title.”) (internal quotation marks and citation omitted) (quoting *Gregg v. Caldwell-Guadalupe Pick-Up Stations*, 286 S.W. 1083, 1084 (Tex. Comm’n App. 1926)); *Terry v. Lock*, 37 S.W.3d 202, 206 (Ark. 2001); *Long v. Dilling Mech. Contractors*, 705 N.E.2d 1022, 1025 (Ind. Ct. App. 1999) (“Abandonment of property divests the owner of his ownership, so as to bar him from further claim to it. Except that he, like anyone else, may appropriate it once it is abandoned if it has not already been appropriated by someone else.”) (quoting *Schuler v. Langdon*, 433 N.E.2d 841, 842 n.1 (Ind. Ct. App. 1982)).

10. Each of the cases cited *supra* note 9 fits this pattern of parties using the law of abandonment to defend their own claim to superior rights of ownership rather than to successfully disclaim property.

11. See Strahilevitz, *supra* note 2, at 360 (discussing the importance of abandonment’s unilateral nature).

abandon are certain incorporeal interests in land.¹² In practice, what typically passes for “abandonment” of other forms of property are actually *bilateral* acts—that is, seamless conveyances of property from one person to another that require the consent of both.

Observing how the rule for land undermines the traditional characterization of the common law right to abandon chattels does not resolve the frequently asked question of why the common law treats the abandonment of land differently from chattels. It merely refines the issue. Instead of asking why the common law treats land differently from chattels, the more appropriate question to ask is why the common law expresses such suspicion of abandonment. A consideration of this reframed question points towards the connections between the common law and a conception of property that views the institution of ownership as a social practice suffused with obligation and duty. This view is at odds with conceptions of ownership that treat it as, at its core, the negative space created by the exclusion of others from owned things, with obligations treated as deviations from that core that stand in need of special justification.

A few caveats. I do not understand or intend this discussion of abandonment to refute exclusion theories. Nor do I mean to imply that rights of exclusion are not a particularly important part of what it means to own private property, especially land. Instead, this Article’s aims are fairly modest. My goal is to identify one of the boundaries of the descriptive fit (or lack of fit) between the common law of property and the conception of property as the negative space resulting from exclusion. Getting this right matters, because the less exclusion theories’ claims are already reflected in existing property doctrine, the heavier the normative burden they must carry. It also matters because of the talismanic role the “common law” of property plays for the subset of exclusion theorists who identify themselves as “libertarians” or “classical liberals.” For these, the “common law” operates as a baseline for determining the proper boundaries of contemporary government regulation of property.¹³ Showing that the common law already imposes affirmative obligations on owners helps to resist their arguments about the narrow scope for permissible government action.

Obviously, this Article focuses its discussion on the law of abandonment. Other corners of the common law of property must await future efforts. But the law of abandonment constitutes an intriguing and potentially important datum in the discussion of the common law’s understanding of ownership, one that has been long overlooked by property theorists. Its treatment of abandonment supports—at least incrementally—the contention that there is significantly more going on within the common law’s (implicit) conception of property ownership than the creation of a negative space free from the interference of others. Viewed from the perspective of abandonment, property relationships are virtually impossible to sever unilaterally

12. See *infra* Section I.B. For one (fairly trivial) exception to this, see *infra* note 53.

13. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 264–66 (2004); EPSTEIN, *supra* note 4, at 35–36; see also *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

and landownership in particular is revealed to be an obligation-laden institution through which the law can both enforce and disseminate norms of ownership.

I. THE LAW OF ABANDONMENT

A. *Abandonment in General*

First, a clarification. It is crucial to keep two issues distinct. On the one hand, we have behavior by owners that we colloquially call abandonment (i.e., leaving property derelict or depositing it in garbage cans or public places). On the other, we have the formal legal judgment that an owner has successfully and *unilaterally* severed ties of ownership that previously bound her to an item of property. My focus will be on the latter.

As for the law of abandonment, the standard hornbook rule is deceptively simple: chattels may be freely abandoned. A chattel will be deemed abandoned when “the owner intentionally and voluntarily relinquishes all right, title, and interest in it.”¹⁴ Important to understanding the legal concept of abandonment, the consequence of the unilateral nature of abandonment is that, with the exception of certain nonpossessory interests in land, abandoned property becomes, in theory, a *res nullius*, a thing owned by no one. In other words, abandoned property returns to the commons. As such, the former owner is no longer responsible for it, and it becomes available for appropriation by its first new possessor.¹⁵

The focus of the standard test is on the subjective intentions of the owner. And, consistent with this focus, the voluntariness of abandonment is crucial. Evidence that an owner was tricked or induced by fraud to abandon an item of property will defeat a claim by a subsequent possessor that it was abandoned.¹⁶

It is obviously difficult to determine with any certainty what is going on inside an owner’s head. As a behavioral matter, however, the intention to abandon is typically accompanied by observable acts that evince that underlying desire to sever a claim of ownership. The most common of these is “relinquishing possession of something.”¹⁷ It should come as no surprise, then, that a number of statements of the legal rule include a requirement that, in order to abandon, an owner must physically separate himself from the abandoned object, usually by discarding it, and that this physical separation must coincide with the requisite intent to sever ties of ownership.¹⁸

14. JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW § 4.03[B][1] (2000).

15. *See, e.g.*, *Haslem v. Lockwood*, 37 Conn. 500 (1871).

16. *See, e.g.*, *Lady v. Realty Assocs.*, 31 A.2d 875 (D.C. 1943). The Uniform Commercial Code provides some protection for downstream, good faith purchasers of property procured through fraud. *See* U.C.C. § 2-403 (2003).

17. PENNER, *supra* note 5, at 79.

18. *E.g.*, 11 THOMPSON ON REAL PROPERTY § 91.07 (David A. Thomas ed., 2d ed. 2002); *see also* *Routh Wrecker Serv. v. Wins*, 847 S.W.2d 707, 709 (Ark. 1993). The intent to abandon must

Rather than understanding this physical separation as an essential component of the legal *concept* of abandonment, however, it would be more accurate to view the intent unilaterally to terminate rights of ownership as definitive of abandonment,¹⁹ with the legal requirement of physical relinquishment of possession serving an evidentiary or solemnizing role, much as it does within the law of gifts.²⁰

The same is true of the claim, sometimes included in treatise or hornbook definitions of legal abandonment, that the act of abandonment must not vest ownership of the abandoned object in any specific person.²¹ The intention required for abandonment is one in which the owner disclaims any further rights over the object, including (crucially, if abandonment is to be distinguished from conveyances) the right to determine the property's subsequent owner. Taking affirmative steps to direct the property towards another individual undercuts the claim that the putative abandoner had the requisite unconditional intention to abandon rather than the more conditional intention to convey the object only to a particular person or class of people.

The law's focus on the abandoner's intentions, however, would seem to mean that abandoning in a context in which the subsequent possessor *can only be* one person (as occurs with the abandonment of the benefit of a servitude) should still conceivably be able to count as abandonment. A person can engage in an act that has multiple foreseeable consequences, only one of which, strictly speaking, he intends to bring about.²² The intent required for abandonment is the intent to sever one's ties of ownership, not an intent to convey the property to a particular person. An abandoner can have that intent even in situations in which abandonment will necessarily result in an identifiable individual acquiring the abandoned property.

B. *Abandonment Distinguished*

Conceptually, it is helpful to keep the doctrine of abandonment separate from other similar, but distinct, legal mechanisms for severing ties of ownership. These fall into the broad categories of conveyances and forfeiture.

coincide with the physical separation, but the two do not need to begin simultaneously. See THOMPSON ON REAL PROPERTY, *supra*.

19. Cf. *Savage Lateral Ditch Water Users Ass'n v. Pulley*, 869 P.2d 554, 567 (Idaho 1993) ("Abandonment of any right is dependent upon a finding of an intent to abandon evidenced by a clear, unequivocal and decisive act of the alleged abandoning party.").

20. See Philip Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 ILL. L. REV. 341, 348-49 (1926). The importance of the abandoner's intent derives from the need to keep abandonment conceptually distinct from other mechanisms of terminating ownership rights, such as forfeiture and conveyances. See *infra* Section II.B.

21. E.g., THOMPSON ON REAL PROPERTY, *supra* note 18.

22. This is the insight behind the famous (or, depending on your point of view, infamous) doctrine of double effect. For a discussion of the doctrine by one of its leading supporters, see, for example, Joseph M. Boyle, Jr., *Toward Understanding the Principle of Double Effect*, 90 ETHICS 527 (1980).

1. Conveyances

Conveyances and abandonment share the requirement that an owner specifically intend to sever the bonds of ownership. But they differ in two ways. First, in a conveyance (e.g., a gift, sale, or devise), the conveyor's intent to give up ownership is conditioned on the ability to direct the property toward a particular person or group of people. The description of the intended recipient need not identify him as an individual. Rather, it can describe the recipient generically (e.g., "my surviving children," or "the highest bidder," or "first come, first served"). Second, in conveyances the consent of the intended recipient is required for the conveyance to be completed and for the bonds of ownership to be severed. What distinguishes abandonment as a legal concept from a conveyance is that it is a purely unilateral act, one that does not depend on the consent of any third party for its completion.²³

Among conveyances, the doctrine whose underlying operation comes closest to abandonment is the law of gifts. In both abandonment and gifts, an owner gives up possession and ownership of the object without any consideration passing in the opposite direction. Traditionally, the law has required three conditions for an owner successfully to convey property to a donee by *inter vivos* gift: (1) the owner must specifically intend immediately to convey ownership to the donee (thereby losing his own claims to the gifted property and giving rise to an ownership right in the donee);²⁴ (2) the owner must deliver the property to the donee²⁵ (a requirement whose nuances are the subject of countless cases and first-year property class hypotheticals); and (3) the donee must accept the gift.²⁶ The first two requirements are unilateral acts that closely resemble the law of abandonment, with "delivery" standing in for the requirement that the abandoner forgo possession. The requirement of acceptance, however, takes the unilateral actions of intent and delivery and subordinates them to the recipient's will. As a result, the legal act of successfully giving a gift is necessarily a cooperative process that is conceptually quite distinct from the unilateral act of abandonment.

23. See Strahilevitz, *supra* note 2, at 360.

24. Gruen v. Gruen, 496 N.E.2d 869, 872-74 (N.Y. 1986); Speelman v. Pascal, 178 N.E.2d 723, 726 (N.Y. 1961).

25. Irons v. Smallpiece, (1819) 106 Eng. Rep. 467, 469 (K.B.).

26. If the item has some value, this is usually not a difficult requirement to satisfy. Indeed, courts often presume it to be satisfied. See Scherer v. Hyland, 380 A.2d 698, 702 (N.J. 1977); Gruen, 496 N.E.2d at 874-75. Donees might conceivably refuse even valuable gifts, however, in order to avoid taxes or frustrate their creditors. SPRANKLING, *supra* note 14, § 5.03[D] n.27. However easily satisfied, the requirement is crucial in distinguishing gifts, which are a conveyance, from abandonment, which is a unilateral act destroying the bonds of ownership.

2. Forfeiture

Forfeiture and abandonment resemble one another in their unilateral operation and in the absence of an intention by the owner to direct the property to a particular person. But in abandonment, unlike in forfeiture, the owner must intend specifically to sever the bonds of ownership. In forfeiture, by contrast, she merely needs to perform some other act, one consequence (and likely an unwelcome one) of which is the loss of ownership rights. Thus, in the forfeiture context, dispossession can take on an involuntary, punitive dimension that is wholly alien to abandonment.

When forfeiture is accomplished by the state, it is usually the result of some wrongdoing by the owner. It can come in either civil or criminal flavors, with differing standards of proof and procedural safeguards applicable to each.²⁷ Forfeiture can also result when an “owner” triggers a limitation inherent in her title. In the context of land, for example, this might occur where the holder of the defeasible possessory interest (say, a fee simple determinable) exceeds the scope of her rights by using the land in a way that is expressly prohibited by the grant according to which she or her predecessors took title. If the original grant conveyed Blackacre to A “so long as used for residential purposes, but if it is ever used for nonresidential purposes, then it will revert back to O,” A’s use of the property for nonresidential purposes would have the effect of depriving A of ownership rights over Blackacre and conveying them to O, or O’s successors in interest.²⁸ But A’s use of the property for non-residential purposes is not, strictly speaking, abandonment. As with forfeiture to the state, the dispossession operates independently of A’s intentions and often occurs against A’s wishes.

Whereas both forfeiture and abandonment result in a unilateral severing of the bond between an owner and her property (in both cases as a result of owner conduct), forfeiture is therefore often something that is resisted (and resented) by potentially dispossessed owners.²⁹ Conceptually, however, abandonment always constitutes a ratification of the owner’s intentions unilaterally to sever ownership ties. In other words, abandonment operates as a legal power enjoyed by owners, whereas forfeitures operate as a limitation on the owner’s authority to use the property as she sees fit.³⁰

C. Abandonment of Land

The seemingly elegant doctrine of abandonment becomes significantly more complicated when interests concerning land are brought into the

27. For a concise overview of the law of civil and criminal forfeiture, see SINGER, *supra* note 1, at 632–35.

28. See RESTATEMENT OF PROPERTY § 56 (1936).

29. See, e.g., *Mahrenholz v. County Bd. of Sch. Trs.*, 417 N.E.2d 138, 140–41 (Ill. App. Ct. 1981).

30. Cf. Larissa Katz, *A Powers-Based Approach to the Protection of Ideas*, 23 CARDOZO ARTS & ENT. L.J. 687, 716–23 (2006) (discussing the concept of “powers” within the intellectual property context).

picture. Most starkly, the common law flatly prohibits the legal abandonment of the fee simple interest in land.³¹ A landowner who wants to sever his ties to the land must find a willing recipient of title, someone to whom he can either sell or give the parcel.³²

Although (like abandonment itself) simple in its statement, the rule prohibiting the abandonment of land is complicated by the sheer number of different property interests that can be carved out of a piece of land. And, unlike the fee simple, many of those interests can be abandoned. The doctrine is typically described as holding that no possessory interest in land may be abandoned.³³ Thus, not only can the fee simple interest not be abandoned,³⁴ neither can a term of years. Traditionally, if a tenant abandoned a term of years, the abandonment was deemed to be an implied offer to surrender the remaining term back to the landlord, who had the option of accepting or refusing the offer.³⁵

On the other hand, most authorities agree that very narrow, nonpossessory interests, such as the benefit of a servitude, can be “abandoned.”³⁶ When such an interest is abandoned, it is normally understood to restore rights to the owner of the burdened possessory estate. The fact that the benefit of this sort of abandonment necessarily accrues to the owner of the servient parcel can make the abandonment of a servitude seem like a borderline case of abandonment.³⁷ The unilateral nature of the rejection of the benefit of a servitude and the possibility that the abandoner does not actually intend to convey the rights to the owner of the servient estate, however, seems to make the abandonment label the appropriate one, at least sometimes.

Although the rule concerning which property interests may be abandoned is traditionally stated in terms of possessory and nonpossessory interests, the interests subject to abandonment also share the feature of being narrow rights to benefit from land possessed by another. In other words, a unilateral right to abandon goes along with property interests that are carefully defined to exclude affirmative obligations. Moreover, it is important to remember that it is only the *benefit* side of a servitude that may be aban-

31. *Cristofani v. Bd. of Educ.*, 632 A.2d 447, 450 (Md. Ct. Spec. App. 1993); *Waldrop v. Whittington*, 57 So.2d 298, 300 (Miss. 1952); 2 AMERICAN LAW OF PROPERTY § 8.98, at 304 (A. James Casner ed., 1952).

32. At least one commentator has argued that the common law does not in fact restrict the abandonment of possessory interests in land. James Kerr's 1895 work, *A Treatise on the Law of Real Property*, asserts that “[i]t is a well-known principle of law that every owner of property, whether personal or real, may abandon it.” 3 JAMES M. KERR, A TREATISE ON THE LAW OF REAL PROPERTY § 2276, at 2303 (1895). There appears to be no basis for Kerr's unorthodox characterization of the law, and the consensus of courts and commentators is directly to the contrary.

33. See *Simonton*, *supra* note 2, at 263.

34. *But see Sharpp v. Stodghill*, 86 S.W.2d 934, 935–36 (Ark. 1935).

35. See SPRANKLING, *supra* note 14, at 286.

36. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.4 (2000).

37. Strahilevitz goes even further and argues that it is not abandonment at all. Strahilevitz, *supra* note 2, at 399 n.186.

doned. (The burden side of an easement is not, properly speaking, even a property interest.) The burden of a servitude can only be terminated with the consent of the benefitted party.³⁸ And the standard remedy for the failure of the burdened property to comply with the terms of a servitude is an injunction.³⁹

Other rights related to land use that can be abandoned, including water rights and mineral rights, follow this pattern of permitting abandonment only where the property right consists narrowly of the right to benefit from another's property. In the western United States, where a number of jurisdictions follow a "prior appropriation" rule for the acquisition of water rights, the right to obtain water is treated as a right that is severable from ownership of riparian land.⁴⁰ This intangible right to divert water from a stream is distinct from both riparian rights, which may not be abandoned,⁴¹ and from ownership of individual particles of water, which ostensibly may be abandoned in the same way that any other item of personal property may be. The law concerning the abandonment of the right to divert water from a watercourse operates more or less in the same way as the right to abandon personal property is normally described. As the California Supreme Court put it:

The right which is acquired to the use of water by appropriation may be lost by abandonment. To abandon such right is to relinquish possession thereof without any present intention to repossess. To constitute such abandonment, there must be a concurrence of act and intent, viz. the act of leaving the premises of property vacant, so that it may be appropriated by the next comer, and the intention of not returning.⁴²

As with water rights, mineral rights frequently represent not a possessory interest in land, but a narrow, intangible right to extract resources from the land of another. And the law typically allows mineral rights to be abandoned in the same way—by giving up use or possession with a simultaneous

38. 2 EMORY WASHBURN, A TREATISE ON THE AMERICAN LAW OF REAL PROPERTY 317 (John Wurts ed., 6th ed. 1902).

39. There is no "efficient breach" in the law of servitudes, and traditionally, doctrines like "changed conditions," which permit courts to modify or terminate some servitudes that outlive their usefulness, have not applied to many types of servitudes, most importantly easements. *E.g.*, AKG Real Estate, L.L.C. v. Kosterman, 717 N.W.2d 835 (Wis. 2006); *see also* Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1364–68 (1982); Stewart E. Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615, 652–54 (1985).

40. DUKEMINIER ET AL., *supra* note 1, at 34–35.

41. 1 SAMUEL C. WIEL, WATER RIGHTS IN THE WESTERN STATES § 861 (3d ed. 1911). The abandonment of water is actually complicated by rules governing the release of surface waters across property lines, rules that vary a great deal from jurisdiction to jurisdiction. *See* SINGER, *supra* note 1, at 128–31 (discussing the doctrines of "natural flow," "common enemy," and "reasonable use").

42. *Utt v. Frey*, 39 P. 807, 809 (Cal. 1895), *quoted in* 2 WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 258 (1974).

intent to forego future claims to them. As with servitudes, these mineral rights revert to the owner of the underlying fee simple estate.⁴³

In short, although the law governing the abandonment of property rights related to land is complex, the general principle underlying this body of rules is less so: narrowly defined rights to extract benefits from someone else's land may be freely abandoned, but otherwise, interests in land may not be. Instead, owners of these land interests must wait for them to expire or find someone willing to take them off their hands in a mutually consensual transaction, such as an *inter vivos* gift or a sale.

II. WHY IS LAND DIFFERENT?

A. *How Different Is Land?*

The apparently divergent treatment of land and personal property within the law of abandonment has, until very recently, received little sustained attention from commentators. Blackstone discusses the abandonment of chattels but passes over the prohibition on abandoning land without comment.⁴⁴ The few discussions of the distinction that do exist have tended to be cursory, and they contradict one another in the explanations they offer. One commentator has simply described the rule prohibiting the abandonment of land as ancient, without attempting to explain it.⁴⁵ A different explanation has described the rule as preventing the confusion and conflict that might result from a scramble to claim abandoned property⁴⁶ without explaining why this would be more of a problem for land than for chattels. A third has discussed the need to avoid gaps in title without discussing what harm would result from such gaps.⁴⁷ Another has condemned the rule as a relic, rooted in outdated concerns with the performance of feudal obligations by tenants.⁴⁸ Finally, in a recent and insightful discussion of the issue, Lior Strahilevitz has argued that the rule keeps owners from doing what they want with their unwanted land without appearing to offer any offsetting (efficiency) benefits and should therefore be discarded, at least as to property that has positive market value.⁴⁹

I am more sympathetic to the rule than is Strahilevitz. But, before going into the reasons why it might make sense to retain it, I want to reframe the question. The conventional modern view is that, under the current regime, the rule prohibiting the abandonment of land deviates from the law's permissive treatment of the abandonment of personal property, and it is this

43. Simonton, *supra* note 2, at 272–75.

44. See 2 WILLIAM BLACKSTONE, COMMENTARIES *9–10.

45. Simonton, *supra* note 2, at 262.

46. AMERICAN LAW OF PROPERTY, *supra* note 31.

47. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.4 cmt. a (2000).

48. James C. Robertson, Recent Development, *Abandonment of Mineral Rights*, 21 STAN. L. REV. 1227, 1228 n.13 (1969), cited in Strahilevitz, *supra* note 2, at 399.

49. Strahilevitz, *supra* note 2, at 412–19.

restrictive treatment of land that needs to be either justified or rejected.⁵⁰ In other words, permissive abandonment is the norm and the rule prohibiting the abandonment of possessory interests in land is the anomaly. This way of stating the question has the situation exactly backwards.

The law actually treats land and personal property far less differently than initially seems to be the case. This is because, considered from the *ex ante* point of view (an owner contemplating the actual mechanics of abandonment), the common law right to abandon chattels is largely an illusion. Thus, it is—where it exists—the *power* to abandon (and not its restriction in the case of land) that is the anomaly requiring explanation. Why this is so requires a bit more discussion.

On the usual statement of the law, as I have already related, successfully abandoning personal property requires an owner to simply forgo possession of an object while, at the same time, intending to renounce all future claims to it. As a practical matter, this means depositing the item of personal property somewhere while possessing the requisite intent. But, because of the rule against abandoning possessory interests in land, all land, at least in the United States, must be at least formally owned by someone, either a private party or the state.⁵¹ The fact that all land is owned means that the owner of an item of personal property who wishes legally to abandon it must intentionally deposit the item on some piece of *owned* land with an intention to renounce future claims to the chattel. This owned land will either be her own, or it will belong to someone else.

If the putative abandoner deposits the item of personal property on her own land, she will still be in possession of it and responsible for it until some third party voluntarily comes and takes it away.⁵² Consequently, until someone else assumes possession of the thing, the original owner cannot satisfy the requirement, imposed by most statements of the law, that the abandoner relinquish possession.⁵³ Consider what happens, for example, with the garbage we generate in our homes or items we leave on our front lawns

50. *E.g.*, THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 521–22 (2007) (characterizing the prohibition of abandonment of land as “a little odd” and assessing various possible justifications for it).

51. It is of course possible that land might be owned by someone who is not aware that he is the owner, perhaps as a consequence of the operation of intestacy statutes. In such cases, the doctrine of adverse possession helps, over time, to bring formal title into line with the actual people on hand to make use of (and care for) the land.

52. This abandonment scenario does not raise the same question addressed under the rubric of “constructive possession” by courts when there is a conflict between the finder of a chattel and the owner of the premises where the chattel is found. *E.g.*, *Parker v. British Airways Bd.*, (1982) 1 Q.B. 1004; *Bridges v. Hawkesworth*, (1851) 21 L.J. Rep. 75 (Q.B.); *South Staffordshire Water Co. v. Sharman*, (1896) 2 Q.B. 44.

53. An exception to this generalization would be wild animals indigenous to the area that the landowner had previously captured. As long as it was not in the habit of voluntarily remaining on (or returning to) the landowner’s land, such an animal would remain the landowner’s property only so long as it was in his possession. If the landowner were to release such a wild animal on his own land, the animal would be free to roam off the landowner’s property and would become unowned property subject to appropriation by another person. *See, e.g.*, *E.A. Stephens & Co. v. Albers*, 256 P. 15 (Colo. 1927). I am grateful to Rachel Moran for bringing this exception to my attention.

free for the taking. In such cases, the termination of our ownership is not complete until some third party willingly takes possession of the item. If no one takes it, the garbage remains our responsibility. The same is true of unwanted items we leave on our front lawn in the hope that some passerby will take them off our hands. Thus, these supposed acts of abandonment are actually bilateral conveyances, like gifts, though gifts where the givers identify the donees only generically (e.g., “first come, first served”). In none of these cases, however, does the unwanted item ever really exist as a *res nullius*. It seamlessly moves from one owner to another, but always at the option of the taker.

If an owner wishes to deposit an unwanted item on land belonging to another, she will for the most part only be able to do so in conformity with the wishes of the land’s owner. Depositing an unwanted item of personal property on someone else’s land without the landowner’s consent is trespassing.⁵⁴ If she wishes, the wronged landowner will be able to obtain injunctive relief forcing the erstwhile abandoner to remove the unwanted property.⁵⁵ Similarly, depositing an unwanted item on public property in a way that is not invited or tolerated by the state is typically prohibited by law as littering or unlawful dumping.

While many jurisdictions have made the pragmatic calculation, at least for small items, that the difficulty of tracking down unauthorized dumpers (i.e., litterers) makes it cost-effective to provide waste disposal services in the form of trash containers on city corners and the like, this is not universally the case. It is not uncommon, for example, for state parks to impose a “carry in/carry out” policy regarding garbage.⁵⁶ Moreover, when confronted with illegal dumping of sufficient magnitude, the state sometimes opts to identify the owner of the property and force her to retake possession of her unwanted chattel. This is what has occurred, for example, in a number of cases involving derelict boats. In Florida, a hot spot for unwanted vessels, the state’s Fish and Wildlife Conservation Commission is empowered to identify the owners of derelict vessels who deposit them on state or private land without authorization and to “notify the owner [that] he must remove the vessel within five days.”⁵⁷ The owner cannot disclaim responsibility by

54. See, e.g., *Breiggar Props., L.C. v. H.E. Davis & Sons, Inc.*, 52 P.3d 1133, 1135–36 (2002).

55. See, e.g., *Eno v. Christ*, 54 N.Y.S. 400, 401 (N.Y. Sup. Ct. 1898).

56. See, e.g., Delaware State Parks Carry In—Carry Out Rules, <http://www.destateparks.com/rules/cico.asp> (last visited May 24, 2010); New Jersey Department of Environmental Protection, <http://www.state.nj.us/dep/parksandforests/parks/index.html> (last visited May 13, 2010); Wisconsin Department of Natural Resources, <http://www.dnr.state.wi.us/org/LAND/parks/picnic/carryout.htm> (last visited May 13, 2010).

57. News Release, Florida Fish and Wildlife Commission, FWC removes junked, abandoned vessels from state’s waters (Apr. 8, 2009), http://myfwc.com/newsroom/09/statewide/News_09_X_Derelict.htm. Owners who fail to remove their vessel can be charged with a criminal violation and required to pay the cost of the vessel’s removal. *Id.*; see also FLA. STAT. § 823.11(4) (2008) (making it illegal to deposit a derelict vessel in state waters without state authorization or on private property without the consent of the private landowner); cf. OR. REV. STAT. § 830.909(1) (2009) (“A person commits the offense of abandoning a boat, floating home or boathouse if the person leaves a

saying she has abandoned the boat and that it is, as a result, no longer her concern.

A landowner who accepts unwanted personal property may agree to do so on a temporary basis pending the property's acquisition by a third party. But, under those circumstances, the personal property continues to belong to its original owner. That owner will have to retrieve it should the landowner change her mind if the property goes unclaimed for too long.

A landowner willing to permanently accept abandoned personal property is likely to fall into one of two categories: someone interested in becoming the owner of the abandoned thing itself or someone in the business of accepting unwanted property for resale or disposal. We can categorize such businesses along a continuum based on how selective they are about the sort of unwanted property they will accept. At the more selective end will be those solely interested in reselling others' unwanted property, such as thrift or second-hand stores. These usually provide donors with extensive guidelines concerning the kinds of chattels they will accept and the condition in which they will accept them. Typical in this regard is the Ann Arbor PTO Thrift. Its donation policy clearly states that donations are to be left during store hours only and that the store reserves the right to refuse any donation that it believes will not be sellable. It asks for items falling within ten product categories and provides an extensive list of the items that it will *not* accept, including, for example, "[a]nything torn, stained or dirty," Christmas items, summer clothing, computers, exercise equipment, box springs, and many more.⁵⁸ At an intermediate level of discrimination will be businesses like junk yards, which both resell unwanted property and agree to store or dispose of property for which there is not likely to be a resale market. Finally, at the extreme in terms of receptiveness to unwanted property will be the dump, which will exercise the least discretion and may be contractually obligated to accept all unwanted property that is not in need of special treatment. Even the dump, however, can set limits on what it will receive and may require dumpers to pay some fee before it will accept their unwanted property.⁵⁹

In all three of the above examples, though, the need to obtain the approval of the receiving landowner substantially qualifies the chattel owner's *ex ante* right (i.e., power) to abandon personal property. The ownership of land puts the landowner in the position of a gatekeeper through which a person wishing legally to abandon personal property must pass. My contention about the restraint on the ability to abandon chattels that flows from the fact

boat, floating home or boathouse on the waters of this state or upon any public or private property except with the permission of the property owner . . .").

58. For the full policy, see Ann Arbor PTO Thrift Shop, <http://a2ptothriftshop.org/donate.php> (last visited May 13, 2010).

59. The solid waste facility serving Tompkins County, New York, for example, will only accept limited quantities of pesticides, and by appointment only. Other items, such as computers, are not permitted to be disposed of with normal household solid waste, but must be recycled. For more information on the intricate nature of the county's permission to dispose of unwanted chattels at its solid waste facility, see Tompkins County Recycling and Solid Waste, <http://www.recycletompkins.org/products/> (last visited May 13, 2010).

that all land is owned does not rely on an absolutist conception of a landowner's right to exclude. The resulting limitation of the power to abandon chattels would exist in any legal regime in which a landowner's prerogatives prevented chattel owners from permanently depositing unwanted chattels on someone else's land, even if landowners operated under substantial constraints limiting their power to exclude *other* activities from their land. The restrictive system of abandonment I am describing is therefore consistent with even highly qualified conceptions of landowners' rights to exclude.⁶⁰

The need to secure the permission of landowners before disposing of unwanted personal property makes most cases commonly classified as abandonment operate in reality as conveyances, either gifts or sales or, in cases where the abandoner must pay the landowner to accept the unwanted property, reverse sales. In other words, because of the prerogatives and obligations of landownership, true abandonment of chattels, i.e., the *unilateral* severance of one's ownership ties with an item of property, is quite exceptional.

Importantly, landowners are not free to do as they please when it comes to accepting unwanted property from others. A landowner who is willing to accept someone else's property will find himself constrained by the common law of nuisance to do so only in certain ways or in certain places. As the Supreme Court aptly put it in *Village of Euclid v. Ambler Realty Co.*, a nuisance is the right thing in the wrong place, "like a pig in the parlor instead of the barnyard."⁶¹ The common law of nuisance, coupled with a neighbor's objection, can have the effect of prohibiting a willing landowner from accepting someone else's unwanted personal property when doing so would harm the landowners' neighbors or the public at large. Even in the days before zoning, someone wishing to operate a junk yard in a quiet residential community, for example, would have found that the law of nuisance likely deprived him of that option.⁶²

The result of this constellation of legal rules is that the common law right of abandonment, even for personal property, is an illusion. At first glance, it is robust—nearly absolute. But upon closer examination, it is highly qualified, almost to the point of irrelevance. Its illusory nature de-

60. In Sweden, for example, landowners' right to exclude is limited by the so-called *allmansrätt*, or "everyman's right" to roam over the countryside in ways that do not damage the land, intrude on privacy, or interfere with the uses to which the owner has chosen to put her land. See Ariane Sains, *Mushroom Mania Tests the Bounds of Allemansrätt*, EUROPE, June 2002, at 44 (discussing how the *allmansrätt* permits people to enter private property for recreational purposes but not to leave behind piles of garbage). This substantial qualification of owners' power to exclude is consistent with exactly the same limitations on the permanent deposit of chattels on land belonging to another necessary to support my claims concerning the limited scope of the power to abandon chattels.

61. 272 U.S. 365 (1926).

62. See, e.g., *Brainard v. Town of W. Hartford*, 103 A.2d 135, 136 (Conn. 1954). Contemporary land-use regulations impose even further restrictions on willing landowners' ability to accept abandoned personal property. These include zoning ordinances, solid waste permit requirements, and countless laws concerning the proper handling and disposal of hazardous waste. These public laws governing landowner conduct further (though indirectly) limit the options available to someone wishing to abandon an item of personal property.

rives from the fact that, because of the prohibition on abandoning land, all land is owned by someone.⁶³ There is, in the United States today, no such thing as *terra nullius* on which unwanted personal property can become *res nullius*.⁶⁴ As a result, there is no *res nullius*.

But, if this is so, how and why is there a rich body of caselaw discussing the abandonment of chattels? The characterization of so-called “abandonment” cases as standing for the prospective power of chattel owners to abandon their property rests on a misunderstanding of the cases’ actual import. For starters, some cases that discuss abandonment actually have nothing to do with ownership as such. This is the situation, for example, with Fourth Amendment cases discussing whether property has been “abandoned.”⁶⁵ But even abandonment cases about ownership are not really about the original owner’s right to abandon. Often, they are conflicts between two strangers to the object’s original title, such as the finder of the abandoned property and some other third party, like the owner of the premises on which the property is found.⁶⁶ In these cases, relativity of title means that the status of the property as abandoned is relevant to the outcome of the case only insofar as it makes some difference for adjudicating the dispute between the two parties. For example, it is commonly said that, as between the finder of property and the owner of the premises in which the property is found, property that was intentionally left by its original owner on the premises with the intent of returning (so-called “mislaid” property) will belong to the owner of the premises, but the property will belong to the finder if it was abandoned (or lost).⁶⁷

63. Again, I am not focusing here on the existence of property that is, de facto, abandoned or derelict. Depositing unwanted personal property on a piece of land whose owner is derelict remains unlawful, though it is unlikely to yield any penalties against the person who engages in it. This is an important phenomenon, and one of which the law of abandonment (or, perhaps, the state’s policies towards abandonment) should take cognizance.

64. This contention does not, of course, apply to chattels deposited or lost at sea. *See, e.g.*, *R.M.S. Titanic v. The Wrecked and Abandoned Vessel*, 435 F.3d 521, 532 (4th Cir. 2006) (discussing the abandonment of personal property lost at sea); *Hener v. United States*, 525 F. Supp. 350 (S.D.N.Y. 1981) (same). But, for most owners, I do not take it to be a significant qualification of my contention that the power to abandon chattels is largely illusory to admit that one has to go offshore in order to exercise it. The difficulty of hauling unwanted property offshore is not a universal deterrent, however. And in fact, in the late 19th century, ocean dumping was a favorite way for New York City to dispose of solid waste. *See* MARTIN V. MELOSI, *GARBAGE IN THE CITIES* 34–35 (rev’d ed. 2005).

65. *See, e.g.*, *California v. Greenwood*, 486 U.S. 35, 49 n.2 (1988) (Brennan, J., dissenting). As in the “ownership” cases discussed below, the Fourth Amendment cases invariably involve situations in which the original owner seeks to *retain* ownership of the chattel. Thus, like those ownership cases, these “privacy” cases do not clearly concern the prospective “power” of owners to abandon unwanted chattels.

66. *See, e.g.*, *Chance v. Certain Artifacts Found and Salvaged from the Nashville*, 606 F. Supp. 801 (S.D. Ga. 1984) (dispute between finder of shipwreck and owner of land in which wreck was embedded); *Terry v. Lock*, 37 S.W.3d 202 (Ark. 2001) (dispute between finder and hotel owner over found stash of money).

67. *See* Comment, *Lost, Mislaid, and Abandoned Property*, 8 *FORDHAM L. REV.* 222, 224–28 (1939).

Even in cases that involve disputes between original owners and finders, cases whose outcomes turn directly on the question whether property was successfully abandoned, the law of abandonment does not actually concern an owner's prospective right (or power) to abandon. In this context, it is helpful to distinguish between the law of abandonment as a *post hoc* means of resolving disputes over ownership and the right to abandon as an affirmative power or privilege that, from an *ex ante* perspective, owners enjoy over their things. Cases decided under the rubric of abandonment where the owner is involved are concerned with the former, not the latter. The doctrine provides a useful mechanism for resolving disputes over ownership after the fact, when there are multiple parties willing and able to assert responsibility for ownership of the item. But the existence of this *post hoc* "settling doctrine" of abandonment in no way lifts the constraints that the common law's treatment of land imposes on owners' actual prospective right to abandon property (even chattels). That is, it does nothing affirmatively to empower owners to unilaterally sever their ties to an item of property in the absence of another party who wishes to accept responsibility for it.

The absence of a general prospective "power" or "right" to abandon even chattels comes through very clearly in the example, discussed above, of Florida's treatment of derelict boats.⁶⁸ The state's first response to the discovery of a derelict boat has been to require the owner to retake possession. In other words, from the state's standpoint, the boat remains the property of the prior owner, notwithstanding his clear expression of an intention to abandon it. Only after efforts to force the owner to retake possession have failed, either because the owner cannot be identified or because the owner lacks the financial means to remove the boat, does the state remove or destroy the boat itself, at which point the owner may be sent the bill or charged with a crime. This last step is not so much a legal recognition of abandonment as a pragmatic response to the refusal of the owner to take responsibility for the derelict property.

To summarize, then, viewed from the *ex ante* standpoint of the right of an owner eager to walk away from his ownership of a thing, the doctrine of abandonment is a sleight of hand. And it is this *ex ante* power of abandonment that matters most to exclusion theorists. The doctrine purports to empower owners with the ability to abandon *unwanted* property, but in fact it does no such thing. Instead, its principal function is to determine after the fact who owns property when the property is *wanted*.

B. *Regulating Abandonment Through Land*

To return to the question with which this Part started, Why might the common law purport to make it easy to abandon personal property while making it impossible for an owner unilaterally to sever his ties with his property in land? The foregoing discussion of the ways in which, in the absence of unowned land, the inability to abandon land constrains the actual

68. See *supra* note 57 and accompanying text.

exercise of the supposed power that owners of chattels enjoy unilaterally to abandon their personal property helps to formulate the beginnings of an answer. The law may well restrict the abandonment of the title to land in order, among other things, to regulate the abandonment of personal property.

This impact on unwanted chattels is far from the only function of the rule prohibiting the abandonment of land. As I discuss at greater length below, we would do better to understand this role of land in regulating the abandonment of chattels as but one example of private landownership operating as a crucial tool for the enforcement and dissemination of property norms. But, although the rule against the abandonment of land has a far broader import than its consequences for the power of owners to abandon chattels, its impact on that power is palpable and is no mere accident.

With no owner to regulate dumping, unowned parcels can become magnets for unwanted personal property, shifting more of the costs of policing such activity onto the community as a whole. Thus, the common law has a powerful, though frequently overlooked, preference that all land has an owner, whether a private party or the state.⁶⁹ The rule against abandoning land is only one manifestation of this preference.

The law governing ownership of land at the unstable interface between the land and the sea reflects a similar anxiety about unowned land. The process of accretion (whereby new material is deposited from the ocean, extending the land farther into the sea) literally creates new land. Although it is at least conceptually possible that the law might have treated accreted land as unowned, the typical rule is that accreted land automatically belongs to the owner of the adjacent uplands.⁷⁰ In offering a justification for this rule, courts sometimes note that “it is in the interest of the community that all

69. Even in civil law countries, where the abandonment of land is said to be freely permitted, abandonment often does not necessarily result in the land being declared *terra nullius*, but rather in the state's ownership of the land. In Québec, the Civil Code makes the state the owner of abandoned land. Civil Code du Québec [C.C.Q.] art. 936 (Can.). The same rule holds in Argentina and Chile. CÓDIGO CIVIL [CÓD. CIV.] art. 2376 (Arg.), *translated in THE ARGENTINE CIVIL CODE* (Frank L. Joannini trans., 1917) (“All lands which, being situated within the territorial limits of the Republic, have no other owner [are the private property of the general State or of the individual States].”); CÓDIGO CIVIL [CÓD. CIV.] art. 590 (“Son bienes del Estado todas las tierras que, estando situadas dentro de los límites territoriales, carecen de otro dueño.”) (Chile), *translated in CIVIL CODE OF CHILE* (Julio Romañach, Jr. trans., 2008) (“Lands located within the territorial limits of the country having no other owner are state assets.”). In German law, although the state does not automatically become the owner of abandoned land, it has the right to step in and take possession before others do so. Bürgerliches Gesetzbuch [BGB] [Civil Code] Aug. 15, 1896, 174 § 928, *translated in THE GERMAN CIVIL CODE* (Simon L. Goren trans., 1994).

70. See generally 1 WATER AND WATER RIGHTS § 6.03(b)(2), at 6-183 to -189 (Robert E. Beck & Amy K. Kelley eds., 3d ed. 2009) (providing background information on the law of accretion); 78 AM. JUR. 2D *Waters* § 315 (2002) (same). The exception is in cases of so-called “avulsion,” where there is a sudden and dramatic shift in the shoreline due to large erosion or accretion events. In those cases, the boundary remains at its prior location and new land created by a large, avulsive accretion event is deemed to be property of the sovereign. 73 AM. JUR. PROOF OF FACTS 3D 167, § 3 (2003); see also 2 WILLIAM BLACKSTONE, COMMENTARIES *261–62. In no cases, however, does the law treat the newly created land as unowned.

land have an owner and, for convenience [in this situation], the riparian is the chosen one.”⁷¹

We can also understand the law of adverse possession as, among other things, reflecting a preference that formal ownership match the actual use of land in order to make it more likely that there will be someone on the scene to take responsibility for the parcel. An owner who cannot be bothered to keep squatters off her land for the adverse possession period is likely to be someone not actively engaged in maintaining or protecting the land in other respects. This interpretation of adverse possession shares a great deal with Carol Rose’s interpretation of adverse possession law as resting on a notion of possession as a form of communication.⁷² Adverse possession, she suggests, “requires [the owner] to make it clear that she, and not the trespasser, is the person to deal with.”⁷³ “Possession as the basis of property ownership, then,” Rose continues, “seems to amount to something like yelling loudly enough to all who may be interested.”⁷⁴ Rose focuses on the way in which clear responsibility for a parcel of land facilitates efficient transactions, but it is equally helpful for encouraging compliance with the obligations of ownership.

Along with its function of aligning actual use with formal ownership, the law of adverse possession serves as an estoppel-like settling mechanism similar to the one I am attributing to the law of abandonment of chattels. But adverse possession accomplishes this in a potentially messier way than abandonment, since it waits for a long period of time (typically seven to ten years) before preventing the original owner from reasserting his interest in the possessed land.⁷⁵ The low likelihood of succeeding in a claim for adverse possession discourages potential possessors from actually taking possession of apparently unwanted land. The intrepid souls who do take possession risk investing substantial resources in the unwanted property only to have the original owner show up at the last moment to reassert ownership.⁷⁶ Although equitable doctrines may step in to prevent the most egregious injustices, the law of adverse possession offers a far less capacious safe harbor than the law of abandonment of chattels even where there is powerful evidence that a landowner intended to wash her hands of her land. It is by failing to protect subsequent possessors of derelict land (not by empowering chattel owners to

71. *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1114 (Fla. 2008); see also FRANK E. MALONEY ET AL., *WATER LAW AND ADMINISTRATION* § 126.1, at 386 (1968).

72. Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985).

73. *Id.* at 79.

74. *Id.* at 81.

75. See Strahilevitz, *supra* note 2, at 415–19 (comparing abandonment with adverse possession to demonstrate why law might prohibit abandonment, but permit transfer via adverse possession).

76. Indeed, as Strahilevitz reports, some confused courts even find evidence of an owner’s intent to abandon his land as blocking the “adversity” (i.e., nonpermissiveness) necessary for the adverse possession clock to even begin ticking. *Id.* at 415 n.232.

unilaterally sever their ties to their property) that the law treats land dramatically differently from chattels.⁷⁷

If the state can protect against unlawful dumping on public lands, however, why would it have any trouble controlling the same behavior on behalf of the public on *terra nullius*? That is, why limit the freedom of private landowners in order to influence (indirectly) behavior that the state could simply regulate itself? The normative thrust behind this question is that, unless it is cheaper to delegate this sort of enforcement to private owners, an interest in regulating abandonment of personal property does not provide adequate justification for the rule prohibiting the abandonment of land. Broadly speaking, the question presupposes that, in the absence of some distinctive gain in efficiency, a restraint on owners' negative liberty is undesirable. This presumption against obligation is characteristic of the sorts of exclusion theories of property I discussed at the outset of this paper. Those approaches make negative liberty the conceptual touchstone of property, a starting point that leads proponents of them to treat constraints on autonomy as exceptional situations in need of special explanation. A similar logic appears to underlie Lior Strahilevitz's reasons for rejecting the rule against abandoning land, at least in some circumstances:

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. 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. 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-time costs 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.⁷⁸

Within the framework of these presumptions, the traditional common law rule against abandoning land is indeed hard to justify. As Strahilevitz suggests, there are clearly some situations in which the ability freely to abandon land would enhance utility. At the same time, eliminating the rule risks a countervailing loss of efficiency. Land that has positive market value in the hands of its owner might become substantially less valuable if it is abandoned and becomes derelict before a willing "taker" realizes that it is

77. This differential treatment may reflect assumptions about the low probability that a landowner will actually intend to permanently walk away from landownership. It may also reflect outdated beliefs about the difficulty of monitoring and defending possession of real property. See EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS 150–51 (2010).

78. Strahilevitz, *supra* note 2, at 412–13.

available.⁷⁹ We can see an analogous process operating in the context of foreclosed homes where responsibility for the property is uncertain due to the fractionation of mortgages through sophisticated mortgage securities.⁸⁰ Without an apparent owner (sometimes the banks themselves seem unsure who is responsible for the property), the foreclosed homes fall into disrepair, and a property that had a positive (though low) market value when in the hands of its former owner-occupant becomes worthless, or possibly even negative in value.⁸¹ Because of efficiency's uncertain valence, a presumption of autonomy unless overridden by efficiency fails to provide much by way of a justification for the traditional common law approach to abandonment.

Efficiency and autonomy are not always so equivocal in the abandonment context. Most obviously, these values seem to line up very strongly in the exceptional area where the common law actually does robustly protect the right to abandon: its permissive attitude towards the abandonment of non-possessory interests in land. Abandonment of encumbrances on possessory interests likely generates significant efficiency and autonomy gains. By facilitating the reunification of the various strands of fee simple ownership, it increases the freedom of owners (both of dominant *and* servient estates) and enhances the alienability of land. And the abandonment of such narrowly drawn beneficial land interests does not seem to generate much by way of harmful consequences for third parties.⁸²

But, looking beyond autonomy and efficiency, the narrow contours of this exception to the common law's overarching suspicion of abandonment is particularly helpful in revealing the logic behind the principal rule. It seems significant that the law freely permits the unencumbered unilateral abandonment of land interests that are gerrymandered to include only narrow rights to benefit from someone else's land. At the same time, however, it expressly prohibits the abandonment of other land interests and requires bilateral consent for the termination of servitude burdens. The narrowness of the servitudes exception suggests that it is the *presence of obligations towards others* that renders the unilateral act of abandonment problematic. Thus, broadening the discussion to include the question of obligations opens up the possibility of a more nuanced defense of the common law's regulation of abandonment.

79. See RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 12.1 cmt. i (1977) ("Abandonment of [real] property is an invitation to vandalism . . ."); cf. Roslyn Corenzwit Lieb et al., Student Project, *Abandonment of Residential Property in an Urban Context*, 23 DEPAUL L. REV. 1186, 1188 (1974) ("Once a building becomes unoccupied, it is often stripped of all but its outer shell, leaving behind the final product of the abandonment cycle—an open, vacant and structurally dangerous building."); *id.* at 1216 (noting that a dwelling whose rehabilitation was economically viable upon abandonment may deteriorate to such an extent over a period of two years that it is no longer cost effective to restore it to habitability).

80. See Susan Saulny, *In Foreclosure Crisis, a Rise in Banks Walking Away*, N.Y. TIMES, Mar. 30, 2009, at A20.

81. See *id.*

82. See generally Carol M. Rose, *Servitudes* (Sept. 2008) (unpublished manuscript, on file with author) (discussing impacts on third parties as a recurring concern within servitudes law).

I have argued elsewhere that an important aim of property law is to promote human flourishing by enforcing and encouraging certain forms of virtue, including obligations to share.⁸³ In a similar vein, Greg Alexander has argued that embedded within the deep structure of American property law are norms of social obligation.⁸⁴ Fundamental to these sorts of obligation-oriented approaches to ownership is the notion that affirmative duties accompanying ownership are both pervasive and intrinsic to the common law of property.⁸⁵ And the sorts of interests that underlie the assessment of a particular duty (or privilege) go beyond individualistic values like autonomy (understood, as it often is, as the absence of coercion) and efficiency (understood, as it often is, through the lens of preference satisfaction).⁸⁶ They include such collective goods as the health and stability of the community in which a particular parcel of property is situated as well as the shared values and commitments on which that health and stability depends.⁸⁷ Such a conception of ownership, with obligation standing alongside autonomy at property's core, fits remarkably well with the contours of the common-law doctrine of abandonment.

Ironically, then, the theory that the rule against abandoning land is an outdated vestige of the feudal origins of Anglo-American land law comes closest to unveiling the reasons for the law's structure. That explanation identifies the rule's inception with the many nested obligations accompanying landownership within a feudal system.⁸⁸ Where the feudal explanation falls short, however, is in its failure to recognize that the modern law of landownership might fruitfully continue to understand landownership as imbued with affirmative duties. When ownership is conceived of as a social practice permeated by obligation, all property labors under a sort of servitude for the benefit of the communities in which the property is situated. On this view, owners' (negative) property liberties and the (affirmative) obligations associated with ownership stand on conceptually equal footings. And, just as the owners of servient estates cannot unilaterally walk away from the obligations imposed by servitudes, the unilateral abandonment of property, especially land, is equally problematic.

83. See Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009).

84. See Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 748 (2009).

85. See Alexander, *supra* note 84; see also Joseph William Singer, *How Property Norms Construct the Externalities of Ownership*, in PROPERTY AND COMMUNITY 57, 59–60 (Gregory S. Alexander & Eduardo M. Peñalver eds., 2010).

86. Cf. Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 152–53 (1977–78) (contrasting “individualist and subjectivist” conceptions of value and freedom that predominate in contemporary economic analysis of law with conceptions—rooted in the Aristotelian tradition—that view both value and freedom as “communal and objective”).

87. See Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES L. 127, 138–45 (2009).

88. See Roberton, *supra* note 48, at 1228.

C. *The Continuing Value of the Common Law's
Suspicion of Abandonment*

Of course, the fact that exclusion approaches to property are a poor fit with the contours of the common law of abandonment does not mean that, normatively speaking, we ought to continue to hew to the common law's suspicion of abandonment. Although the purpose of my Article has been primarily to challenge the fit between exclusion theories of property and this corner of the common law of ownership, the common law's treatment of abandonment has much to be said for it. The notion of ownership reflected in its suspicion of abandonment is admittedly out of phase with popular contemporary norms regarding both ownership in general and the behavior of abandonment in particular. Our modern consumer culture favors disposability and transience in our relationship with property of all sorts, and so a regime that reflects suspicion towards abandonment can seem somewhat alien and perhaps even arbitrarily restrictive. But these consumer norms are of relatively recent vintage; it is an open question whether they can or will endure. Moreover, the values promoted by the common law's restraint of abandonment behavior, on reflection, are familiar. They are the values of frugality and caution most of us recognize in lessons we have heard (sometimes to our irritation) from those whose characters were formed in extreme hardship⁸⁹ or perhaps simply in the days before the rise of plastic salad shooters.⁹⁰

The common law's distrust of abandonment seems less alien and arbitrary if we approach it from the perspective of a community in which things are acquired, not in anticipation of quickly throwing them away, but to be kept and (re)used, or perhaps resold or given away. This was the nature of people's relationship to "stuff" through most of the history of the common law. Historian Susan Strasser discusses the relatively recent nature of our culture of easy acquisition and disposal in *Waste and Want*, her fascinating social history of trash:

Most Americans produced little trash before the twentieth century. Packaged goods were becoming popular as the century began, but merchants continued to sell most food, hardware and cleaning products in bulk. Their customers practiced habits of reuse that had prevailed in agricultural communities here and abroad. Women boiled food scraps into soup or fed them to domestic animals; chickens, especially, would eat almost anything and

89. Those who lived during the Great Depression formed habits of frugality that they retained throughout their lives. See, e.g., Charles D. Schewe et al., *Defining Moments: Segmenting by Cohorts*, 9 MKTG. MGMT. 48, 50–51 (2000). These habits were reflected in the popular culture of that period. Laura Ingalls Wilder's images of frugality and self-sufficiency on the American frontier, which were written at the height of the Great Depression, "reinforced and promoted the consumption patterns that many families [at the time] were compelled to practice." ANN ROMINES, *CONSTRUCTING THE LITTLE HOUSE* 113–14 (1997), quoted in Samantha MacBride, *The Immorality of Waste: Depression-Era Perspectives in the Digital Age*, SUBSTANCE, 2008, at 71, 72–73.

90. To use a favorite example of disposable culture from *The Onion*. See *Chinese Factory Worker Can't Believe the Shit He Makes for Americans*, THE ONION, June 15, 2005, <http://www.theonion.com/content/node/31049>.

return the favor with eggs. Durable items were passed on to people of other classes or generations, or stored in attics or basements for later use. Objects of no use to adults became playthings for children. Broken or worn-out things could be brought back to their makers, fixed by somebody handy, or taken to people who specialized in repairs. And items beyond repair might be dismantled, their parts reused or sold to junk men who sold them to manufacturers. . . . All over the country, even middle-class people traded rags to peddlers in exchange for tea kettles or buttons; in cities, ragmen worked the streets, usually buying bones, paper, old iron, and bottles as well as rags. These small-time entrepreneurs sold the junk to dealers who marketed it in turn to manufacturers. The regional, national, and even international trade in rags was brisk because they were in high demand for papermaking and for “shoddy,” cloth made in part from recycled fibers. Grease and gelatine could be extracted from bones; otherwise, bones were made into knife handles, ground for fertilizer, or burned into charcoal for use in sugar refining. Bottles were generally refilled⁹¹

Today, Strasser notes, “[a]t the turn of the millennium, Americans know only a well-developed consumer culture, based on a continual influx of new products. Many of these are designed to be used briefly and then discarded; many are made of plastics and other materials not easily reused, repaired, or returned to nature. Discarding things is taken to be a kind of freedom”⁹² Strasser observes that “[e]conomic growth during the twentieth century has been fueled by waste” and by the (relatively) new culture of disposability.⁹³

The common law’s closed-cycle conception of ownership may seem outdated or quaint to us, inured as we are to our ephemeral relationships with cheaply built material things. But it reflects values that have prevailed for most of human history and that we might do well to consider carefully before discarding.

This explanation does not, by itself, answer the question why the law should express these values of permanence and responsibility, as well as the underlying conception of ownership as obligation, *indirectly* and through the law of land, rather than through the law of property more universally. That question is answered in part by a repetition of my point about the way in which the law of land qualifies the ease with which personal property can be abandoned. Looking at the operation of the law of abandonment as a whole, rather than piece by piece, it is simply a misunderstanding to see it as permissive with respect to chattels while restraining the abandonment of land. It would be more accurate to say that, through its treatment of land, the common law reflects discomfort with abandonment through and through.

91. SUSAN STRASSER, *WASTE AND WANT: A SOCIAL HISTORY OF TRASH* 12–13 (1999). Strasser’s claim that garbage was not a problem before the twentieth century may be a bit overstated. For a complementary, though less rosy, view of the garbage situation in urban areas prior to the twentieth century, see MELOSI, *supra* note 64, at 17–18; see also Ann E. Carlson, *Recycling Norms*, 89 CAL. L. REV. 1231, 1254–59 (2001).

92. STRASSER, *supra* note 91, at 16.

93. *Id.* at 15.

Nevertheless, there is something special about land that makes it the logical focal point for the law's efforts to regulate owner conduct and to impart norms of obligation. In prior work, I have discussed the features of land that distinguish it from other owned resources as land's "complexity" and "memory."⁹⁴ Both of these characteristics help to explain why the common law might employ rules governing *landownership* to express and inculcate norms of obligation in the domain of abandonment. One feature of land's complexity derives from its status as an essential component in any human activity that requires physical space, giving it a special relationship to human beings and human communities.⁹⁵ In Karl Polanyi's words, land "invests man's life with stability; it is the site of his habitation; it is a condition of his physical safety; it is the landscape and the seasons."⁹⁶ Our actions, including the action of abandoning a chattel, must occur in some place, and so it is hardly surprising that the common law regulates such activity in the first instance by regulating the place.⁹⁷

Perhaps as salient is land's memory, which freights decisions about land with powerful durability. Changes to the land are frequently expensive to undo, at times even prohibitively so. Although, at least conceptually speaking, land cannot be destroyed,⁹⁸ its usefulness to human beings and to ecosystems can be irreparably damaged.⁹⁹ The supply of land is ultimately limited. Land's finitude amplifies the importance of land-use decisions because, all things being equal, more land put to one use leaves less land available for another. This means that, once in place, existing land uses limit the scope of our choices for a long time to come. Consequently, land, more than other resources, remains the site of numerous conflicting demands, both among human beings (including human beings who have yet to be born) and between humans and other species.

When viewed from the standpoint of the affirmative obligations that accompany ownership, these two features of land make it a resource, decisions about which virtually always have implications for the broader community. In the era before the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), permitting a landowner to abandon her

94. See Peñalver, *supra* note 83, at 828–32.

95. See Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1317 (1993) ("Because human beings are fated to live mostly on the surface of the earth, the pattern of entitlements to use land is a central issue in social organization."); see also JOHN R. LOGAN & HARVEY L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* 17 (2007) ("[P]lace is indispensable; all human activity must occur somewhere.").

96. KARL POLANYI, *THE GREAT TRANSFORMATION* 178 (1944).

97. In addition, as Larissa Katz argues, landowners' unique visibility and vulnerability to the state also makes the indirect regulation of behavior on the land through the regulation of landowners an effective strategy. See Katz, *supra* note 8, at 38–44.

98. See Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 360–61 (1954) (illustrating the idea that interests in land do not depend on the physical tangibility and continuation of the property); Lior Jacob Strahilevitz, *The Right To Destroy*, 114 YALE L.J. 781, 795 (2005) ("[L]and is the only inherently perpetual form of property.").

99. See Peñalver, *supra* note 83, at 833.

land could have had the effect of shielding her from liability for conduct that, though not creating harmful consequences for neighbors and therefore not remediable through nuisance, could permanently degrade her own land. An irresponsible owner would be able to pollute her land and simply walk away, leaving the community as a whole worse off by depriving it of the benefits generated by the future productive use of the degraded parcel.

Similarly, in communities that rely heavily on land taxes for revenue to fund local services, a landowner who is permitted to walk away increases incrementally the burden on the remaining taxpayers, who must raise their own contributions in order fully to cover the community's expenditures.¹⁰⁰ And a landowner who abandons a home leaves behind a parcel that, left unattended, can quickly become a blight for his former neighbors. To avoid suffering the consequences, neighbors would be forced to assume the basic maintenance that the landowner would previously have been obligated to perform.¹⁰¹

Private land law is an imperfect means of promoting norms of stewardship and securing the performance of owners' obligations. For example, rather than encouraging owners to dispose of their unwanted chattels in an orderly way, it might instead simply encourage them unilaterally to destroy the unwanted chattel on their own land. The "burn barrel" has long been a common way to dispose of garbage, particularly in rural areas where trash collection service is not always readily available.¹⁰² Nuisance law has traditionally placed some limits on the destruction of unwanted property, especially where it occurs on a large scale.¹⁰³ But, unassisted by modern environmental regulation, the common law leaves significant room for the destruction of property as an alternative to abandonment or conveyance.¹⁰⁴

The owner of unwanted chattels will predictably opt for the path of least resistance among conveying, abandoning, and destroying unwanted property. So a legal rule that makes abandonment more difficult might, under the right circumstances, encourage destruction. But it will not always do so. Destroying property takes effort. Moreover, to the extent that, normatively speaking, the destruction of property is undesirable, the answer is to make destruction harder, not—barring reasons to favor abandonment over conveyances—to make abandonment more convenient. Modern environmental

100. This would not be the case if the property in question consumed more services than it contributed in property taxes. Presumably, however, the temptation to abandon would be strongest when the opposite is true.

101. *E.g.*, Maureen Milford, *Foreclosures become forgotten burdens in neighborhoods*, USA TODAY, June 10, 2008, at 5A, available at http://www.usatoday.com/money/economy/housing/2008-06-09-Foreclosure-upkeep_N.htm?loc=interstitialskip.

102. *See, e.g.*, Michael Hill, *Rural residents oppose burn ban*, ALBANY TIMES UNION, Aug. 12, 2008, at A3, available at <http://www.timesunion.com/AspStories/story.asp?newsdate=11/17/2009&navigation=nextprior&category=STATE&storyID=711074>. In the past, waste disposal facilities have often burned garbage as well. *See, e.g.*, *Kellogg v. Vill. of Viola*, 227 N.W.2d 55 (Wis. 1975).

103. *See, e.g.*, *Kellogg*, 227 N.W.2d 55.

104. *See generally* Strahilevitz, *supra* note 98.

statutes increasingly impose just such restrictions on the right to destroy. New York, for example, recently prohibited the open burning of trash—including in burn barrels—throughout the state.¹⁰⁵

It is true that the doctrine prohibiting the abandonment of land predates zoning codes and solid waste permits. Though these and other modern legal tools for regulating landowner behavior do not completely obviate the value of a rule prohibiting owners from simply walking away from their land, their presence substantially mitigates the consequences of liberalizing the common law's treatment of abandonment. In the modern context, abandonment is already so hemmed in on all sides by public law that the common law rule arguably becomes redundant.

On the other hand, there are reasons to favor retaining the common law rule, the overlapping regulatory alternatives and supplements notwithstanding. For starters, the existence of modern regulatory structures is a double-edged sword. While they reduce the practical need for the common law's suspicion towards abandonment, they also significantly reduce the costs of retaining the rules that follow from that suspicion. At the same time, the gentleness of the common law's restriction of abandonment reaffirms its deep respect for individual autonomy and reduces the cost (in terms of restraints on owner autonomy) of retaining the rule. The rule's force is also tempered by the ease with which it is satisfied under normal circumstances. The owner of a chattel who wants to part with it need only find someone who wants it or, alternatively, a landowner who is, consistent with his own duties of landownership, willing to accept the chattel for disposal. Similarly, although an owner may not simply walk away from the duties he owes the land, he can substitute himself merely by finding someone willing to step into his shoes as the land's owner. Finally, the regulation of abandonment through landowner oversight constitutes a decentralized system for regulating abandonment within the outer limits set by the public and private law. This approach is consonant with a commitment to individual freedom that—while far from its sole preoccupation—is nonetheless characteristic of Anglo-American property law.

Indeed, so mild is the common law rule that its survival has not done much to hamper the rise of the disposable culture that Strasser describes in her history of trash. That culture has been hugely enabled by the state's decision, as the owner of its own land or through its agents in the solid waste industry, to open the doors to cheap and easy disposal of unwanted chattels. In other words, eliminating the common law rule against abandoning land has not been a necessary condition for the rise of our contemporary culture of disposal.

But, as the state's facilitation of easy disposal suggests, retaining the role the common law envisions for landowners in the abandonment process, may (and in some ways, already has begun to) simplify the task of changing course and shifting towards a renewal of the values of recycling and reuse that predominated before the rise of disposability. As Strasser describes, for

105. See N.Y. COMP. CODES R. & REGS. tit. 6, § 215.2 (2007).

example, solid waste companies have been able to leverage their strategic power over trash disposal to facilitate the dissemination of norms favoring recycling, helping to bring these into the mainstream of American consumer culture.¹⁰⁶ If the operator of a local landfill insists on the separation of recyclables, users typically will not have many alternatives to compliance. And the habit of separating recyclables, even when initiated as a result of landfill owner's coercion, might, over time, lead to an internalization of broader environmental norms.¹⁰⁷

CONCLUSION

The interpretation of the law of abandonment that I have proposed in this essay understands its prohibition of the abandonment of land as the foundation, rather than the exception, to the common law's treatment of abandonment as a whole. Far from constituting an anachronistic anomaly, the rule helps to shed light on the common law's conception of ownership more generally, and of landownership in particular. Contemporary accounts frequently treat the duties of ownership as negative in nature. Owners are obligated to avoid taking affirmative actions that harm others but are free to retreat into the cocoon of their property, where they can escape from outside interference. This conception of "property as exit" is normatively unappealing, but, at least in the context of abandonment law, it is also descriptively inaccurate. Within the common law tradition, property ownership is imbued with obligations that bind us to others in the community where the property is situated. The law of abandonment, considered as a unified system for regulating the disposal of property, both reflects and helps to realize this vision of the responsibilities of ownership.

106. See STRASSER, *supra* note 91, at 284–85 (discussing how solid waste companies have been able to disseminate an ethic of recycling).

107. This admittedly speculative suggestion finds some support in Daryl Bem's "self-perception" theory, which posits that people draw conclusions about the nature of their own beliefs and attitudes in part by observing their own behavior, just as we make inferences about others' attitudes by observing their conduct. See Daryl J. Bem, *Self-Perception Theory*, in 6 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 2 (Leonard Berkowitz ed. 1972). The idea is that being convinced to engage in recycling behavior might lead recyclers to come to see themselves as an "environmentalists," at least in some sense or to a greater degree than before having engaged in that behavior. And, having formed this self-perception, the person enters a "virtuous escalator" whereby she becomes more likely to support other environmental initiatives. See John Thøgersen & Tom Crompton, *Simple and Painless? The Limitations of Spillover in Environmental Campaigning*, 32 *J. CONSUM. POL'Y.* 141, 147 (2009) ("[I]f an individual recycles their refuse, this action in itself may lead them to think of themselves as the kind of person 'who cares for the environment.' They may therefore be left more positively predisposed to other pro-environmental behaviors."); see also *All Things Considered: How Consumers Can Affect Climate Change*, (NPR radio broadcast Dec. 8, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=121216180> (transcript) (Professor Michael Vandenbergh stated in the interview, "[T]he little bit of research that's available suggests that people, when they do something good for the environment, don't do less other good things. And, in fact, there are a number of psychological phenomena that suggests that we might actually induce more support for behavior change. When someone becomes committed to a certain behavior, they're more likely to follow through in other areas as well.").

