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# More Is Not Always Better Than Less: An Exploration in Property Law

Daphna Lewinsohn-Zamir

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## Article

# More Is Not Always Better than Less: An Exploration in Property Law

Daphna Lewinsohn-Zamir<sup>†</sup>

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The cities and towns of France were swept last year by waves of strikes and demonstrations.<sup>1</sup> Each wave of nationwide protest typically brought more than one million people into the streets.<sup>2</sup> Demonstrations at times turned violent, with marchers throwing bottles, stones, and other objects at the police, who in turn responded with tear gas and arrests.<sup>3</sup> People were injured; property was destroyed.<sup>4</sup> Strikes that accompanied the protests disrupted French daily life: flights were cancelled, ground transportation services operated haphazardly, and universities, schools, offices, and shops closed their doors. Even one of France's most famous symbols, the Eiffel Tower, shut down during the demonstrations.<sup>5</sup> The trigger that provoked this rage and set off the social unrest was a seemingly modest legislative initiative: a new labor law that changed the status of workers under the age of twenty-six by permitting employers to fire them without cause during their first two years of employ-

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1. See, e.g., Editorial, *Everybody Loses*, N.Y. TIMES, Apr. 11, 2006, <http://www.nytimes.com/2006/04/11/opinion/11tue4.html> (last visited Dec. 1, 2007); Elaine Sciolino, *Chirac Will Rescind Labor Law That Caused Wide French Riots*, N.Y. TIMES, Apr. 11, 2006, at A1; Elaine Sciolino & Craig S. Smith, *French Premier Refuses to Bow to Protests by Angry Youths*, N.Y. TIMES, Apr. 5, 2006, at A8; Craig S. Smith, *French Unrest Reflects Old Faith in Quasi-Socialist Ideals*, N.Y. TIMES, Apr. 9, 2006, at 10.

2. Sciolino & Smith, *supra* note 1.

3. *Id.*

4. *Id.*

5. *Id.*

ment.<sup>6</sup> Both the unions and the majority of the French population supported the wide civil protest, which resulted in the summary repeal of the law.<sup>7</sup>

At first glance, the severity and magnitude of the reaction to the legislation seems puzzling. The government declared that the law's aim was to combat unemployment and encourage the hiring of young people.<sup>8</sup> Arguably, employers would be less hesitant to hire young, inexperienced workers if they were assured the flexibility of being able to discharge them with ease. Consequently, more young people would be given the chance to prove their abilities.<sup>9</sup> Repealing the labor law and requiring just cause for dismissal, so the argument goes, would result in fewer jobs for the young.<sup>10</sup> Since more employment is better than less, the demonstrators' victory was illusory and the condition of young workers as a group actually *worsened*. How could the protestors not see this?

I submit that the demonstrators were not fools or populists—rather, they understood the tradeoffs their struggle involved. Indeed, the connection between easy firing and increased employment was not kept secret, but pervaded the public discussion.<sup>11</sup> What the outraged protestors rejected, I believe, was the notion that “more” employment is necessarily better than “less.” In essence, their behavior conveyed the following message: it is better not to be hired at all than to be hired and then discarded on a whim, without being deemed worthy of a reasonable explanation.<sup>12</sup>

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6. French law, in contrast to American labor law, does not adopt an employment at-will regime and generally protects employees against unjust termination of their contract. Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 510 (1976). For a discussion of the two employment regimes, see *infra* notes 305–15 and accompanying text. The new French legislation constituted a move to an at-will scheme for the first two years of a young person's employment.

7. Editorial, *supra* note 1; Sciolino, *supra* note 1.

8. Smith, *supra* note 1.

9. *Id.*

10. Editorial, *supra* note 1.

11. *Id.*; Sciolino, *supra* note 1.

12. I do not argue that restrictions on unjust dismissal would necessarily reduce employment rates, nor that one always faces a stark choice between inferior hiring terms and fewer employment opportunities. Actual outcomes in the labor market are determined by many variables, and policymakers may take measures to increase the employability of workers or employment rates. See *infra* note 315 (discussing possible effects of minimal labor contract terms). I do claim that even if just-cause clauses would result in less employment of young workers, this outcome may be regarded as superior to working

This Article expands on the counterintuitive idea that “more is not always better than less.” The conventional view that “more is better than less” (MBL) often underlies our arguments and assumptions regarding legal rules. It supports the belief that the ability to carry out an extreme measure with respect to property includes the power to take a more moderate measure.<sup>13</sup> For example, scholars have claimed that since owners are free not to transfer their assets to descendants—but rather destroy or sell them before death—then they should be able to bequeath their assets subject to conditions.<sup>14</sup> As it is implicitly assumed that more property is better than less, it is better to inherit property that comes subject to restrictions than not to inherit at all. Therefore, so the argument goes, the law should not interfere with testamentary freedom, because such intervention would give donors an incentive to destroy, deplete, or sell resources during their lifetime to the detriment of their potential beneficiaries.<sup>15</sup>

The MBL rationale is implicit in other property law contexts as well. For instance, scholars usually assume that the right to use one’s property implies the freedom *not* to use it.<sup>16</sup> When a property owner exercises her right, she burdens the persons who must respect her right and suffer the consequences of its use.<sup>17</sup> Nonuse, therefore, means *more* freedom to others. Since more freedom is better than less, the greater entitlement to exercise a property right intensively should fold within it the lesser entitlement not to exercise it.<sup>18</sup>

This Article has two major goals. The first is to demonstrate that in fact numerous rules in a variety of legal contexts reject the MBL argument.<sup>19</sup> Moderate measures are often *less tolerated* than extreme ones. Thus, for example, intensive exercise of a right may be permitted, whereas nonuse results in its

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under humiliating or degrading conditions. For further elaboration, see *infra* notes 310–15 and accompanying text.

13. Richard A. Epstein, *Rights and “Rights Talk,”* 105 HARV. L. REV. 1106, 1109 (1992) (book review).

14. *E.g.*, Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667, 705 (1986).

15. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 548–49 (7th ed. 2007).

16. Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1130 (1985).

17. *See infra* notes 32–34 and accompanying text.

18. *See infra* notes 33–35 and accompanying text.

19. *See infra* Part I.B.

loss;<sup>20</sup> destruction of property may be allowed, even when its modification is forbidden;<sup>21</sup> total inalienability may be respected, yet restrictions on alienability struck down.<sup>22</sup>

The second goal of the Article is to demonstrate that this seemingly puzzling state of affairs has sound justifications. These justifications rest on both normative analysis and insights from behavioral studies. In particular, I argue that moderate measures may generate more harm to other people's welfare than extreme ones, that moderate measures are more likely to induce mistakes and misconceptions in others, and that the very use of moderate measures may be a good proxy for strategic behavior or low valuation. I contend that extreme measures are less subject to inefficiencies and more likely to be a product of careful thought, and that moderate measures can be indicative of distributive errors that require correction. By granting greater deference to extreme measures, legal rules enhance welfare, reduce mistakes and cognitive biases, and facilitate the transfer of assets to those who value or need them more.

The suggested reasons for rejecting the MBL argument can serve as a yardstick for supporting or critiquing existing rules. Thus the Article justifies property law rules that terminate unused trademarks but not unused copyrights and patents, and that rein in speculation in domain names but not in land. At the same time, this Article criticizes the prevailing rule that does not regard lengthy nonuse as sufficient in itself to extinguish servitudes. Finally, the Article illustrates how the analysis presented here is equally valid in other legal fields, such as labor law, zoning law, and contract law.

Part I of the Article introduces the conundrum that the Article addresses. Part I.A explains the MBL argument and its intuitive appeal. Part I.B demonstrates the refutation of this argument in diverse rules of property law. These illustrations span the whole gamut of property law: "regular" and intellectual property; real and personal property; tangible and intangible property. This Part presents rules conflicting with the MBL rationale, and rejects the conventional rationalizations that the

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20. As is the case with trademarks, rent-controlled housing, and water rights. See *infra* notes 65–100 and accompanying text.

21. As demonstrated by the legal protection of authors' moral rights. See *infra* notes 133–41 and accompanying text.

22. As is the case with restrictions on alienation by tenants. See *infra* notes 55–63 and accompanying text.

literature provides for them. Part II offers justifications for the idea that more may not be better than less. Specifically, three arguments are advanced in support of greater scrutiny and intervention in the case of moderate, rather than extreme, measures with respect to property rights: protecting potential property transferees; reducing the incidence of low-valuing owners; and correcting distributive errors. Part II.D then articulates the conclusions and policy implications of the discussion. Part III demonstrates how the justifications underpinning statutory or judicial restriction of more moderate measures are applicable beyond the realm of property law.

## I. THE ARGUMENT FOR WIDE OWNERSHIP DISCRETION AND ITS PUZZLING REFUTATIONS

Arguments based on the view that “more is better than less” are prevalent in property law. Nonetheless, many well-established property rules do not follow the MBL rationale. The conventional explanations for these rules are not persuasive.

### A. THE BASIC ARGUMENT, ITS APPEAL, AND ITS UNDERLYING PREMISE

A familiar argument with respect to property is that the right to carry out an extreme measure encompasses also the power to take a more moderate one. If an owner may freely destroy, consume, or sell an asset before her death,<sup>23</sup> thereby completely denying it to her descendents, then she can surely bequeath the asset subject to restrictions. Richard Epstein put it clearly: “If I needn’t convey at all, than [sic] I can convey subject to whatever restrictions I choose.”<sup>24</sup> Similarly, since an

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23. Generally speaking, the right of ownership includes the liberty to consume or destroy the thing owned as well as the right to alienate it both in life and upon death. A.M. Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107, 118 (A.G. Guest ed., 1961).

24. Epstein, *supra* note 14, at 705; see also STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 68–69 (2004) (equating a living owner’s consumption decisions regarding her property with her decisions to control the property after death, and explaining how the costs associated with both decisions are internalized in each, resulting in efficient outcomes); Jeffrey E. Stake, *Darwin, Donations, and the Illusion of Dead Hand Control*, 64 TUL. L. REV. 705, 754 (1990) (noting that a person is free to destroy his Rolls Royce car despite the loss his descendants will consequently suffer); Symposium, *Time, Property Rights, and the Common Law: Round Table Discussion*, 64 WASH. U. L.Q. 793, 843 (1986) [hereinafter *Round Table Discussion*] (remarks of Jack Carr) (“If I can destroy [assets such as my house or car], then why can’t I tie [them] up in the future?”).

owner is entitled to entirely exclude others from entering her land, she may also allow only partial or conditional entrance or simply regulate the property's disposition and use.<sup>25</sup> The same argument potentially applies to any type and means of property transfer: whether inter vivos or mortis causa; contractual or testamentary; by way of a trust or through the creation of an easement. In all these cases it can equally be claimed, that the right *not* to transfer includes the right to transfer subject to restrictions.

The force of this argument rests on the effects of extreme and moderate measures on others. The underlying assumption is that employing the greater power would be *worse* for the affected individuals than exercising the lesser power (and that the latter does not inflict external harms on others).<sup>26</sup> In the context of bequests, for instance, it is implicitly assumed that it is better to inherit property subject to conditions than not to inherit at all.<sup>27</sup> More property is better than less; some property better than none.

For this very reason, scholars often warn against legal interference with testamentary freedom. Attempts to curtail dead-hand control, so the argument goes, would create incentives to destroy, deplete, or sell resources during the testator's lifetime.<sup>28</sup> Consequently, *less* wealth will be left upon death, to the detriment of prospective beneficiaries.<sup>29</sup> The case for

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25. Epstein, *supra* note 13, at 1109 ("The greater power to exclude includes the lesser power to admit on conditions, [and an owner's ability to set her price and refuse to sell for a lower one] carries over to other terms as well, including terms regulating financing and use.")

26. Epstein, *supra* note 14, at 705. If the "moderate" measure involves uninternalized negative externalities then it may be, in fact, the less moderate of the two, or even inefficient in itself.

27. POSNER, *supra* note 15, at 548-49.

28. *Id.* at 549.

29. ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 158 (4th ed. 2004); Richard A. Epstein, *Justice Across the Generations*, 67 *TEX. L. REV.* 1465, 1474 (1989); Stake, *supra* note 24, at 749-50. Annuities exacerbate this problem, because they enable owners to consume or disperse their assets while alive and, at the same time, secure their own economic comfort until death. See SHAVELL, *supra* note 24, at 61-62 (explaining how annuities can guarantee people sufficient funds during their life while enabling them to refrain from leaving a significant estate upon death); Stake, *supra* note 24, at 750 (same); see also Carol M. Rose, *Servitudes, Security, and Assent: Some Comments on Professors French and Reichman*, 55 *S. CAL. L. REV.* 1403, 1413 (1982) (noting, in the context of servitudes, that striking down covenants restricting alteration or demolition of buildings using the changed conditions doctrine may deter developers from building in the first place). Indeed, land is a spatial asset that cannot be utterly destroyed, and thus must pass to *some-*



upholding restrictions on property is further strengthened by the fact that the recipients may always reject the conditioned bequest and acquire unrestricted property on their own, if they happen to prefer the latter option.<sup>30</sup>

The MBL notion is not limited to the context of conditioned or partial transfers. It is implicit in other areas of property law as well. One of the most important rights in a property owner's bundle is the right to *use* the asset.<sup>31</sup> The very idea of a right or liberty—as opposed to a *duty*—to use implies that the owner is free *not to use* her property.<sup>32</sup> The MBL argument easily provides an explanation: when a property owner exercises her right to use her property, she unavoidably burdens other people—those who must respect her right and suffer the consequences of its use.<sup>33</sup> For example, in the case of a right of way, the more the easement owner exercises her right, the greater the burden imposed on the servient landowner. Nonintensive use or nonuse by the easement holder means more freedom to the landowner to enjoy her property as she pleases. It is therefore unsurprising that scholarly writing focuses on the more burdensome right to *use* property, which generates the problem of harmful uses.<sup>34</sup>

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*one* on its owner's death. Consequently, curtailment of testamentary freedom should not reduce the total amount of available land. It is still true, however, that striking down testators' conditions may lead owners to transfer the land during their lifetime, thereby denying it to their descendants. Descendants might have received *more* property were the conditions upheld.

30. Epstein, *supra* note 14, at 704–05.

31. Honoré, *supra* note 23, at 116 (“[The] right (liberty) to use at one’s discretion has rightly been recognized as a cardinal feature of ownership.”).

32. Lee Anne Fennell, *Efficient Trespass: The Case for “Bad Faith” Adverse Possession*, 100 NW. U. L. REV. 1037, 1064 (2006) (“[O]wnership importantly encompasses the prerogative to use or not use the land as one pleases.”); Merrill, *supra* note 16, at 1130 (claiming that an owner’s right to use his property as he wishes so long as he does not injure others should also include the right to “ignore the property, if by ignoring it he does not injure others”). As Wesley Hohfeld famously claimed, a “duty” is the jural opposite of a privilege or liberty. Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30, 32, 36, 41 (1913); see also Madeline Morris, *The Structure of Entitlements*, 78 CORNELL L. REV. 822, 828 (1993) (“To have a privilege means that one is at liberty to do the act in question.”).

33. Hohfeld, *supra* note 32, at 36–37.

34. For example, Honoré’s well known essay on ownership discusses an owner’s right or liberty to use the property at her discretion. Honoré, *supra* note 23, at 113, 116. The only qualification Honoré mentions is the prohibition on harmful uses. *Id.* at 123; see also JOSEPH W. SINGER, INTRODUCTION TO PROPERTY 7 (2d ed. 2005) (“[O]wners are generally free to use their property as they wish, but they are not free to harm their neighbors’ property substan-

The argument that the power of owners to carry out extreme measures with respect to their property includes the power to engage in more moderate actions accords with common sense, and seems persuasive. Moderate measures result in more property or more freedom to others, who are consequently better off than they would be if extreme measures were taken. At the same time, allowing property owners wide discretion to opt for moderate measures also enhances their autonomy and freedom. Put differently, the argument's attractiveness stems from what appears to be a Pareto improvement: no one is made worse off by a shift from an extreme to a moderate measure with respect to property, and at least some people (if not all those affected) are made better off.<sup>35</sup>

The MBL argument has clear policy implications for the regulation of private property. Generally speaking, owners should be allowed greater liberty to pursue moderate measures with respect to their property. Nonuse and conditioned transfer of property rights should be less interfered with by the law than extreme measures such as destruction and total inalienability. At the very least, similar rules should apply to extreme and moderate measures, granting equal discretionary powers to property owners with respect to both of them.

Surprisingly, property law does not always follow these principles. Moderate measures are often *less* tolerated than extreme ones. Such rules seem to apply an *opposite* policy, namely, that owners should have more freedom to use property than not to use it; more power to destroy property than to modify or neglect it; greater liberty to not transfer property than to transfer it conditionally, and so on.

This Article argues that this phenomenon, which seems puzzling, is in fact sound legal policy. The next Part lays down the basis for the discussion, by demonstrating the ways in which the MBL argument is implicitly rejected in a variety of contexts in property law, and exposing the shortcomings of conventional explanations for these rules. Only on that basis will

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tially and unreasonably."); JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 27 (1988) (stating that a property owner has "a legal liberty to use it in certain ways"). Thus, the liberty *not to use* property is taken for granted as naturally included in the greater—and more burdensome to others—liberty to use property as one wishes.

35. A change is Pareto-efficient (or a Pareto improvement) if it makes at least one person better off and no person worse off. ALLAN FELDMAN, *WELFARE ECONOMICS AND SOCIAL CHOICE THEORY* 140–42 (1980).

we be able to offer alternative justifications for this phenomenon.

## B. REJECTIONS OF THE "MORE IS BETTER THAN LESS" ARGUMENT

Notwithstanding the natural, intuitive appeal of the MBL argument, it is often rejected in specific legal rules. The following illustrations were selected with an eye to variety. They span the whole gamut of property law: "regular" and intellectual property; real and personal property; tangible and intangible property.<sup>36</sup>

### 1. Nontransfer Versus Conditioned Transfer

Rules preferring nontransfer over conditioned transfer contradict the MBL rationale. Examples of such rules can be found

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36. An explanation of why I will not discuss the unconstitutional conditions doctrine may be in order. In a nutshell, this doctrine holds that "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989). Accordingly, the government's greater power to deny a certain benefit does not include the lesser power to impose any condition on its receipt, if such conditioning attempts to achieve indirectly what the government may not do directly. Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 7-8 (1988); see also Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 485-504 (1991) (critically examining prevailing theoretical explanations for the unconstitutional conditions doctrine). I will not discuss the unconstitutional conditions doctrine for various reasons. First, this doctrine focuses on the legitimate powers of the grantor-state and on the state's attempt to curtail or burden such constitutional rights as substantive due process, freedom of speech, or freedom of religion. Sullivan, *supra*, at 1415-16. In contrast, I concentrate on relationships between individuals with respect to private property which usually do not threaten constitutional rights or impose significant negative externalities. Second, my focus is on the grantees of certain benefits, in order to explain why receiving less property may be better than receiving more. Although unconstitutional conditions are sometimes identified and invalidated also in specific, narrow private settings, such as with respect to racially restrictive covenants, the main relevance of the doctrine is in the public realm. See *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948); RESTATEMENT (THIRD) OF PROP.: SERVIDUES § 3.1 cmt. d (2000) ("[T]here are few cases holding that enforcement of particular servitudes, other than racial covenants, is prohibited by the Fourteenth Amendment . . ."). Third, the unconstitutional conditions doctrine, as its name clearly indicates, deals only with certain problematic conditions. This Article, in contrast, exposes and rejects MBL arguments in additional and wider contexts that include, for instance, nonuse of property and destruction or modification of property.

in the laws governing donative transfers and alienation by tenants.

*a. Donative Transfers*

The law of donative transfers is a particularly appropriate field to examine the MBL argument. Indeed, the argument seems at its strongest when applied to gratuitous giving, either by the living or after death. In general, an owner is under no obligation to bestow her property as a gift in her lifetime, or to bequeath it to a particular person upon death.<sup>37</sup> Any property the owner decides to transfer, albeit with restrictions, can be viewed as a windfall to the beneficiary, to be assessed from a "zero-property" baseline. The intended recipient is not parting with anything in return for the conditional gift or bequest, so no fairness or "consumerist" concern for lack of equivalence in the parties' respective considerations arises. At the same time, the beneficiary need not accept the property.<sup>38</sup>

One would therefore expect the law not to interfere with conditioned donative transfers, as long as no illegalities or significant harmful externalities are involved. This is not, however, the case. Though the owner could legally have chosen not to donate the property at all—but rather to destroy, sell, or otherwise dispose of it—her freedom to transfer it subject to restrictions is highly curtailed.

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37. This is especially true with respect to American law, which grants testators considerable freedom to disinherit their close relatives (with the partial exception of the spouse). See John H. Langbein & Lawrence W. Waggoner, *Re-designing the Spouse's Forced Share*, 22 REAL PROP. PROB. & TR. J. 303, 304–05 (1987) ("America is uniquely the land of testamentary freedom. In none other of the world's great legal systems would you be so free to choose whom you want to receive your property when you die."); Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. ILL. L. REV. 1273, 1277 ("One may disinherit family members for any reason at all, however arbitrary or even hateful the reason may be; unconditional testamentary dispositions are not subjected to any 'reasonableness' standard."). Continental law, in contrast, affords substantial protection to testators' children and other blood relatives by entitling them to a reserved portion of the estate. 11 AUBRY & RAU, DROIT CIVIL FRANÇAIS §§ 679–81 (Paul Esmein ed., 6th ed. 1956), in 3 CIVIL LAW TRANSLATIONS (Carlos E. Lazarus trans., 1969); MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 240–50 (1989); 10 THOMPSON ON REAL PROPERTY § 88.12(c)(1) (David A. Thomas ed., 2d Thomas ed. 1998).

38. See, e.g., Epstein, *supra* note 14, at 705 ("If the grantee does not like the restrictions, there is an easy out: he can reject the gift and acquire his own property by purchase and thus obtain absolute control over it.").

For example, conditions pertaining to the recipient's personal conduct<sup>39</sup> have sometimes been held invalid as being against public policy.<sup>40</sup> Thus, a court struck down a restraint in a will that conditioned a cash bequest to four of six siblings, on their having no communication with the other two.<sup>41</sup> Similarly, a condition may be invalidated if it aims at preventing the beneficiary from ever marrying,<sup>42</sup> inducing divorce or separation from a spouse,<sup>43</sup> or otherwise unreasonably limiting the choice of spouse.<sup>44</sup> Courts have also struck down conditions that required the adoption or abandonment of a particular religious faith,<sup>45</sup> or excessively interfered in, or limited, career choices.<sup>46</sup>

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39. Conditions regarding beneficiaries' personal conduct are an appropriate test case for the MBL argument, because they involve neither illegality nor negative externalities, in contrast to racial restrictions with respect to the disposition or use of property. See SHAVELL, *supra* note 24, at 71 (stating that a racial restriction on the use of property causes harmful external effects by increasing feelings of separateness in the population and causing social friction); Stewart E. Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615, 620-21 (1985) (explaining that servitudes prohibiting the sale or lease of land to racial minorities affect persons not party to the contract, and by restricting the choices available to minority buyers and renters such servitudes may increase their housing costs). Personal conduct conditions are thus a "clean" example of restrictions on property that directly affect mainly the parties to the transaction.

40. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 5.1 (1983); see also RESTATEMENT (THIRD) OF TRUSTS § 29(c) (2003) (stating that a trust provision is invalid if "it is contrary to public policy").

41. *Girard Trust Co. v. Schmitz*, 20 A.2d 21, 37 (N.J. Ch. 1941); see also *Estate of Romero v. Nott*, 847 P.2d 319, 321-23 (N.M. Ct. App. 1993) (voiding a condition that discouraged children from living with their mother, the testator's former wife).

42. *Knost v. Knost*, 129 S.W. 665, 665 (Mo. 1910); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.1 (1983); 2 THOMPSON ON REAL PROPERTY, *supra* note 37, § 20.13.

43. *In re Estate of Gerbing*, 337 N.E.2d 29, 35 (Ill. 1975); *In re Estate of Agnew*, 174 N.Y.S.2d 1008, 1012 (Sur. Ct. 1957); RESTATEMENT (THIRD) OF TRUSTS § 29(c) cmt. j (2003); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS §§ 7.1-7.2 (1983); 2 THOMPSON ON REAL PROPERTY, *supra* note 37, § 20.13, at 917; Sherman, *supra* note 37, at 1308.

44. The condition is deemed unreasonable if a marriage permissible under it is not likely to occur. For example, a condition requiring that the beneficiary marry a certain person or that a religious recipient marry someone outside her faith would be unreasonable. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.2 & cmts. b-c (1983). Unproblematic conditions include, for example, those inducing the support and care for particular persons, or the acquisition of a certain level of education. *Id.* §§ 5.1 cmt. b, 8.3 illus. 2.

45. RESTATEMENT (THIRD) OF TRUSTS § 29(c) cmt. k (2003).

46. *Id.* § 29(c) cmt. l (conditioning a bequest on the adoption or abandonment of a particular profession (such as being a surgeon) may be deemed invalid); cf. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 8.3

Scholarly attempts to rationalize intervention with conditioned transfers have focused on the issue of dead-hand control. The main justification advanced in the literature is the high transaction costs involved in enforcing testators' conditions.<sup>47</sup> In particular, as time goes by and as heirs-owners multiply, it may be extremely difficult to implement or modify outdated restrictions.<sup>48</sup>

The transaction costs rationale does not satisfactorily explain the curtailment of conditioned transfers. First, there are various legal mechanisms that enable the adjustment of restrictions to changed circumstances. These are commonly provided for in advance by the donors themselves (for example, by inclusion of appropriate provisions in the will or trust documents),<sup>49</sup> or, in their absence, supplied externally by the law.<sup>50</sup> From a transaction costs perspective, it seems preferable to use such nuanced mechanisms if and when needed, rather than to invalidate categories of restrictions wholesale.

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(1983) (upholding education and occupation restrictions). It should be noted, however, that the cases discussed in the reporter's notes did not involve significant limitations on the professional possibilities open to beneficiaries.

47. See, e.g., SHAVELL, *supra* note 24, at 70 (discussing "the cost and impracticality" of arranging dead-hand control of property as a "valid argument" against it); Robert C. Ellickson, *Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights*, 64 WASH. U. L.Q. 723, 736 (1986) (noting that the transaction costs of dead-hand control rise over time and serve as a justification for phasing out dead-hand control).

48. POSNER, *supra* note 15, at 544-46; SHAVELL *supra* note 24, at 70-71; Ellickson, *supra* note 47, at 736-37.

49. See Epstein, *supra* note 14, at 714-21 (discussing change mechanisms in trusts, condominiums, cooperatives, and corporations); Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1365-66 (1982) (arguing, in the context of servitudes, that the original parties' ability to include change mechanisms, if they so desire, when the servitude is created, renders the changed conditions doctrine redundant); Ronald C. Link, *The Rule Against Perpetuities in North Carolina*, 57 N.C. L. REV. 727, 820-26 (1979) (advocating abolition of the rule against perpetuities and explaining other ways to limit dead-hand control); Jonathan R. Macey, *Private Trusts for the Provision of Private Goods*, 37 EMORY L.J. 295, 307-09 (1988) (criticizing the rule against perpetuities, and claiming that people creating trusts are rational and thus will take the possibility of unforeseen contingencies into account); *Round Table Discussion*, *supra* note 24, at 849-51 (remarks of Richard Epstein) (addressing various ways to deal with changed circumstances, such as creation of a charitable foundation).

50. A prime example is the *cy pres* doctrine, which enables courts to modify provisions in wills and trusts that have become impossible or impracticable to execute, so as to carry out the transferor's charitable intent as closely as possible. RESTATEMENT (THIRD) OF TRUSTS § 67 (2003); RONALD CHESTER ET AL., *THE LAW OF TRUSTS AND TRUSTEES* §§ 431, 433, 438-439 (3d ed. 2005).

Second, and more importantly, the problem of transaction costs is relevant mainly to *long-term* restrictions. When a condition must be met in the near future, there is little fear that circumstances will change so much by that time as to require its modification. Yet the rules discussed above apply equally to long-term and short-term restrictions, and are not contingent on any proof that circumstances have changed. Thus, for instance, a condition that the beneficiary must marry a specific person within three years in order to enjoy the property is deemed invalid from the outset.<sup>51</sup> Moreover, even if one believes that unforeseen circumstances are a significant risk in the case of short-term testamentary restrictions, this concern is inapplicable to inter vivos transfers.<sup>52</sup> Since the donor is still alive when the time for complying with the restriction approaches, she can decide whether there is reason to modify or waive the restrictions. Indeed, the literature justifying curtailment of dead-hand control often relies on the fact that the original owner cannot be consulted with respect to the changed circumstances, whereas a living donor can be approached and convinced to change her mind.<sup>53</sup> To conclude, transaction costs cannot explain the legal aversion to certain conditions in gratuitous transfers, which apply equally to inter vivos and posthumous transfers. At most, "transaction costs" justify interventionist legal rules that target distant-future restrictions exclusively, such as the rule against perpetuities.<sup>54</sup>

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51. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.2 (1983).

52. Cf. POSNER, *supra* note 15, at 546 (noting that there is a stronger case for intervention in wills than in contracts, because "[c]ontracts can be modified, but a person cannot modify the terms of his will after he's dead").

53. *Id.* at 548 (stating, with respect to a trust conditioned on a son's marrying a Jewish woman by the age of twenty-five, that "[a]s the deadline approached, the son might come to his father and persuade him that a diligent search had revealed no marriageable Jewish girl that would accept him. The father might be persuaded to grant an extension or otherwise relax the condition"); SHAVELL, *supra* note 24, at 71 ("[T]he dead cannot be told of difficulties that arise and cannot give permission to alter the terms of their arrangements. . . . [I]f a person now alive is using land as a memorial to his dead cat and the land becomes very valuable, he can be asked and perhaps convinced to sell it."); *Round Table Discussion*, *supra* note 24, at 844–45 (remarks of Thomas Merrill) (contrasting inter vivos and posthumous restrictions in terms of the possibility for renegotiation).

54. In general, the rule against perpetuities invalidates future interests that will vest or terminate at too remote a time by limiting the creation of an interest chain to a maximum of two generations. See generally Jesse Dukeminier, *A Modern Guide to Perpetuities*, 74 CAL. L. REV. 1867 (1986); Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 50 (1992); Stake, *supra* note 24.

b. *Restraints on Alienation by Tenant*

An important issue in landlord-tenant relations is the ability of tenants to transfer their leases. Leaseholds are property rights, and as such are ordinarily transferable.<sup>55</sup> Landlords, however, have property rights too, and a legitimate interest in determining the identity of their tenants. The landlord, for instance, may wish to ensure that the apartment will be kept in good condition or that the tenant is financially sound and will pay the rent on time.<sup>56</sup> Consequently, lease agreements often contain clauses restricting the tenant's right to assign the lease or sublet the apartment.<sup>57</sup>

Examination of landlord-tenant rules on this issue reveals that, curiously, the harshest and most one-sided restrictions on alienation are upheld, while more lenient restrictions are subject to closer scrutiny and greater intervention. The most extreme restrictions absolutely prohibit any alienation by tenants. Such restrictions are generally enforceable.<sup>58</sup> Accordingly, the landlord enjoys complete discretion, and her reasons for prohibiting alienation are not examined. If the contract, however, is more considerate of the tenant's interests and permits alienation provided certain conditions are met, the landlord's subsequent refusal may be examined and overruled. Take, for example, a clause permitting alienation provided the landlord grants consent. Courts often interpret such clauses as implying a requirement of reasonableness.<sup>59</sup> The landlord must

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55. RESTATEMENT (SECOND) OF PROP.: LANDLORD AND TENANT § 15.1 (1977); 1 MILTON R. FRIEDMAN, *FRIEDMAN ON LEASES* 290 (4th ed. 1997); ROBERT S. SCHOSHINSKI, *AMERICAN LAW OF LANDLORD AND TENANT* § 8:10, at 552, § 8:15, at 578 (1980 & Cum. Supp. 2007); Alex M. Johnson, Jr., *Correctly Interpreting Long-Term Leases Pursuant to Modern Contract Law: Toward a Theory of Relational Leases*, 74 VA. L. REV. 751, 756 (1988).

56. 1 FRIEDMAN, *supra* note 55, at 284; SCHOSHINSKI, *supra* note 55, § 8:15, at 578-79; SINGER, *supra* note 34, at 497.

57. In the following discussion, I use the terms "transfer" and "alienation" to include both assignment of the lease and subletting.

58. 1 FRIEDMAN, *supra* note 55, at 321; Johnson, *supra* note 55, at 756-57; Martha Wach, Note, *Withholding Consent to Alienate: If Your Landlord Is in a Bad Mood, Can He Prevent You from Alienating Your Lease?*, 43 DUKE L.J. 671, 672 (1993); see also CAL. CIV. CODE § 1995.230 (West 1985 & Supp. 2007) ("A restriction on transfer of a tenant's interest in a lease may absolutely prohibit transfer."); SCHOSHINSKI, *supra* note 55, § 8:10, at 552 ("[I]t is not considered against public policy for the parties to a lease to restrict or prohibit the alienability of the tenant's interest either absolutely or without consent of the lessor.").

59. *Kendall v. Ernest Pestana, Inc.*, 709 P.2d 837, 849 (Cal. 1985) (holding that when a commercial lease conditions assignment on the prior consent of



consent to the proposed new tenant unless she has a reasonable basis for refusal.<sup>60</sup> Reasonable objections typically relate to objective factors, such as the financial responsibility of the proposed tenant, the legality of the intended use of the property, or the extent of alterations needed by the new tenant.<sup>61</sup> In contrast, “subjective” reasons—such as those pertaining to race, religion, ideology, tastes and beliefs—are usually deemed unacceptable.<sup>62</sup> Thus, when the lease agreement places moderate—rather than extreme—restrictions on assignment by the tenant, there is a greater chance that the landlord will be required to defend her decision and ultimately forced to accept a tenant she opposes.

The disparate treatment of prohibitions and conditional alienations is puzzling. A tenant may wish to assign her leasehold when she no longer needs the premises or is no longer able to use them, or when a third party values them more highly. If one believes that a reasonableness requirement is justified because it removes excessive obstacles to efficient transfers, then a similar requirement should apply to leases prohibiting assignment altogether. Alternatively, if one holds that the reasonableness requirement is redundant because the principle of mitigation of damages gives landlords ample incentive to find an efficient replacement for the original tenant,<sup>63</sup> then the re-

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the lessor, “such consent may be withheld only where the lessor has a commercially reasonable objection to the assignee or the proposed use”); *Cafeteria Operators L.P. v. AMCAP/Denver Ltd. P’ship*, 972 P.2d 276, 278–79 (Colo. Ct. App. 1998) (“[W]ithout a freely negotiated provision in the lease giving the landlord an absolute right to withhold consent, a landlord’s decision to withhold consent must be reasonable.”); 1 FRIEDMAN, *supra* note 55, at 325.

60. 1 FRIEDMAN, *supra* note 55, at 325.

61. RESTATEMENT (SECOND) OF PROP.: LANDLORD AND TENANT § 15.2 cmt. g (1977); 1 FRIEDMAN, *supra* note 55, at 340–43; SCHOSHINSKI, *supra* note 55, § 8:15, at 581–82; 5 THOMPSON ON REAL PROPERTY, *supra* note 37, § 42.04(b)(3)(iii); Johnson, *supra* note 55, at 760; Wach, *supra* note 58, at 691–94.

62. *Am. Book Co. v. Yeshiva Univ. Dev. Found., Inc.*, 297 N.Y.S.2d 156, 160–61 (Sup. Ct. 1969); RESTATEMENT (SECOND) OF PROP.: LANDLORD AND TENANT § 15.2 cmt. g (1977); 1 FRIEDMAN, *supra* note 55, at 344.

63. Although the original tenant may vacate the apartment in response to the landlord’s refusal to grant consent, the mitigation of damages principle would deny the landlord rent for the period exceeding the reasonable time for finding a new tenant. 2 FRIEDMAN, *supra* note 55, at 1084–87, 1090; *see also* SCHOSHINSKI, *supra* note 55, § 10:12, at 677–79, 728–31 (stating that the modern approach is to impose on landlords a duty to mitigate their damages from their tenant’s abandonment, and thereby promote the beneficial use of the premises); SINGER, *supra* note 34, at 470–71 (noting that the modern rule requires “reasonable” efforts to mitigate damages). The Uniform Residential

quirement is also superfluous in the case of conditional transfer clauses. Either way, efficiency considerations do not justify the different treatment. Moreover, the stricter legal treatment of the more moderate form of control—conditional alienation—may motivate landlords to adopt the more extreme measure at the outset, which would result in reduced property rights for tenants.

## 2. Use Versus Nonuse

Although the right *not* to use one's property is assumed to be a natural corollary of the more burdensome right to *use* property,<sup>64</sup> the law abounds with instances recognizing only the latter. In these situations, owners cannot choose the more moderate measure with respect to their property, but must exercise the more extreme one which results in less freedom to others. Nonuse of the property right may lead to its loss. Sometimes, mere nonuse is sufficient to cause the loss of the right, while in other cases an additional factor is necessary to effectuate this result. I label the first type of cases "naked nonuse" and the second "nonuse plus." The two categories are examined below in the contexts of trademarks, rent-controlled housing, water rights, servitudes, and ownership in land.

### a. Trademarks

A trademark is a word, phrase, device or symbol that identifies the source of goods and services, and conveys information about their attributes and qualities.<sup>65</sup> The existence of such information and the possibility of associating a particular trademark with a particular producer or seller reduce consumers' search costs.<sup>66</sup> A trademark grants a property right that prohibits others from using it without the owner's permission. Consequently, the owner of a mark has an incentive to improve the

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Landlord and Tenant Act states that if the landlord does not make reasonable efforts to mitigate the damages caused by the tenant's abandonment (by attempting to rent the apartment at a fair rental price), the lease is terminated "as of the date the landlord has notice of abandonment." UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.203(c) (amended 1974), 7B U.L.A. 400-01 (2006); see also Johnson, *supra* note 55, at 780-88 (explaining the efficiency of a clause that completely prohibits the alienability of the lease).

64. See *supra* notes 31-34 and accompanying text.

65. 15 U.S.C.A § 1127 (West Supp. 2007); SIEGRUN D. KANE, TRADEMARK LAW: A PRACTITIONER'S GUIDE § 1:1.1 (4th ed. 2006).

66. SHAVELL, *supra* note 24, at 169; Nicholas Economides, *Trademarks*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 601, 602-03 (Peter Newman ed., 1998) [hereinafter NEW PALGRAVE DICTIONARY].

product's quality and the reputation of its brand name, without fearing that competitors will free-ride on her efforts or mislead consumers.<sup>67</sup>

In contrast to both copyrights and patents, trademarks have no fixed expiration date.<sup>68</sup> A trademark, however, must be used in order to be retained.<sup>69</sup> The Lanham Act requires that an owner prove use of the trademark during the sixth year after registration and when applying for renewal every ten years, by filing an affidavit to this effect. Failure to comply with this requirement results in loss of the trademark.<sup>70</sup> The Act further states that a trademark is deemed to be abandoned "[w]hen its use has been discontinued with intent not to resume such use."<sup>71</sup> Such intent may be inferred from the circumstances; nonuse of a trademark for three consecutive years is *prima facie* evidence of abandonment.<sup>72</sup> An owner can rebut the inference of abandonment only by showing an actual intent to resume use within a reasonable period of time.<sup>73</sup> "Use" in this context requires meaningful use of the mark in the ordinary course of trade, and not use that is made "merely to reserve a right in a mark."<sup>74</sup>

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67. 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§ 2:3–2:4 (4th ed. 2007); SHAVELL, *supra* note 24, at 169–70; William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 268–70 (1987).

68. The duration of copyrights and patents is limited. The former lasts for the life of the author plus seventy years. 17 U.S.C. § 302(a) (2000). The latter expires twenty years from the date of filing the patent application. 35 U.S.C. § 154(a)(2) (2000).

69. See, e.g., KANE, *supra* note 65, § 1:1.5[E] ("Use it or lose it' should be a guiding principle for trademark owners."); 2 MCCARTHY, *supra* note 67, § 16:9 (stating that ownership of a trademark requires continuous use). By contrast, there is no general rule requiring the use of a copyrighted work or a patented invention and nonuse does not extinguish the property right. SINGER, *supra* note 34, at 818.

70. 15 U.S.C. § 1058(a) (2000). The affidavit must contain both a statement of use in commerce and specimens evidencing such use. *Id.* § 1058(b); KANE, *supra* note 65, §§ 7:1–7:2. Use requirements are common in other countries as well. Richard J. Taylor, *Loss of Trademark Rights Through Nonuse: A Comparative Worldwide Analysis*, 80 TRADEMARK REP. 197, 203–05 (1990).

71. 15 U.S.C.A. § 1127(1) (West Supp. 2007).

72. *Id.*

73. *Exxon Corp. v. Humble Exploration Co.*, 695 F.2d 96, 100–01 (5th Cir. 1983); *Sodima v. Int'l Yogurt Co.*, 662 F. Supp. 839, 851 (D. Or. 1987).

74. 15 U.S.C.A. § 1127(1). The "intent not to resume use" test for abandonment and the requirement of meaningful use in the ordinary course of business apply not only to federally registered trademarks but to common law marks as well. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 30(2)(a) & cmt. b (1995); 2 MCCARTHY, *supra* note 67, § 17:11. Real commercial (rather

The words “abandonment” and “intent” are somewhat misleading in this context. Ordinarily, these words denote a subjective and complete waiver of an entitlement by its owner. For example, when we say that an owner “abandoned” her book, we usually mean that she relinquished her possession of the book with the subjective intention of forgoing her right of ownership.<sup>75</sup> Consequently, the book becomes an ownerless object.<sup>76</sup> In contrast, the Lanham Act inquires whether there is an intent to resume use of the trademark, rather than an intent to relinquish ownership.<sup>77</sup> Moreover, the loss of the mark is not conditioned upon an intention never to use it again. It suffices that the owner cannot show an intention to resume use in the foreseeable future.<sup>78</sup> In other words, although the owner may subjectively wish to *retain* the right in the mark and not abandon it—perhaps for the purpose of a future sale or for the eventuality that she might want to reuse it at a later date—she cannot reserve the mark without at the same time using it.<sup>79</sup> Nonuse is *objectively* viewed by the law as abandonment. The trademark reverts to the public domain where it can be appropriated by others.<sup>80</sup>

This state of affairs is at odds with the notion that more is better than less. From the point of view of those burdened by the existence of the trademark, nonuse by the owner is better than use. Nonuse benefits competitors in the market for similar goods and services. The less the trademark is used, the greater their freedom and the higher their chances of thriving and profiting. Furthermore, *nonuse* of a trademark does not confuse or

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than token) use of a trademark is required in other countries also. Taylor, *supra* note 70, at 224–28.

75. See A. JAMES CASNER ET AL., *CASES AND TEXT ON PROPERTY* 73 (4th ed. 2000).

76. *Id.*

77. *Roulo v. Russ Berrie & Co.*, 886 F.2d 931, 938 (7th Cir. 1989); *Exxon*, 695 F.2d at 102.

78. *Silverman v. CBS Inc.*, 870 F.2d 40, 46–47 (2d Cir. 1989); PAUL GOLDSTEIN, *COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES* 238–39 (5th ed. 2004).

79. 2 MCCARTHY, *supra* note 67, § 17:5 (noting that trademark law applies the term “abandonment” also to cases where the owner unintentionally loses the mark); see also KANE, *supra* note 65, §§ 5:1.4, 12:2.3[B] (stating that abandonment cannot be avoided by token use or by “warehousing” a trademark).

80. *Gen. Cigar Co. v. G.D.M. Inc.*, 988 F. Supp. 647, 658 (S.D.N.Y. 1997); 2 MCCARTHY, *supra* note 67, §§ 17:1–17:2.

mislead consumers with respect to attributes or qualities of goods and services.<sup>81</sup>

*b. Rent-Controlled Housing*

Leaseholds grant tenants the right to occupy and use the premises for the duration of the lease.<sup>82</sup> The right to use the leased apartment ordinarily includes the right *not* to use it. Use or occupation is permissible, not required.<sup>83</sup> This state of affairs follows naturally from the MBL argument. Continuous, intensive use of the apartment unavoidably causes wear and tear. The less the tenant uses the premises, the smaller this adverse effect. Assuming the tenant pays the rent, the landlord will usually not be harmed by nonexercise of the right, but will rather benefit from it.<sup>84</sup>

The rule allowing nonuse by tenants does not apply, however, to rent-controlled housing. Rent-control legislation aims to protect low-income tenants against displacement by regulat-

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81. In fact, scholars have argued that the abandonment doctrine may harm consumers. This is because loss of the trademark enables others to use it. If consumers still associate the trademark with the qualities of its former owner's product, they may mistakenly believe that these qualities exist in the competitor's product. Michael S. Denniston, *Residual Good Will in Unused Marks—The Case Against Abandonment*, 90 TRADEMARK REP. 615, 646–49 (2000); Johanna F. Sistek, *Goodwill Hunting: The Role of Residual Goodwill in the Analysis of Trademark Abandonment*, 22 ENT. & SPORTS L. 8, 9, 11 (2004). This problem diminishes with the length of nonuse. If a long time has passed, the public will no longer associate the mark with the product of its former owner. GOLDSTEIN, *supra* note 78, at 240.

82. WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* §§ 6.11, 6.22 (3d ed. 2000).

83. 3 FRIEDMAN, *supra* note 55, at 1518; SCHOSHINSKI, *supra* note 55, § 5:1, at 227; SINGER, *supra* note 34, at 460.

84. Even the exceptions to the above rule accord with the MBL argument, as the exceptions recognize a duty to use the premises only when the landlord is *clearly harmed* by nonuse. Such is the case, for instance, if the rent is based on a percentage of the tenant's profits from using the premises for a certain business. Courts have sometimes interpreted the contract to include an implied covenant to use the premises in good faith for the relevant trade. Usually, a duty will be imposed only if the contract does not contain a base rent, or if the fixed minimum rent is inadequate. SCHOSHINSKI, *supra* note 55, § 5:3, at 230–33; SINGER, *supra* note 34, at 461–62. Likewise, if the premises are part of a shopping center, the very fact of inactivity may have a detrimental effect on the rest of the property, and so a covenant to operate commercially may be implied. 3 FRIEDMAN, *supra* note 55, at 1519. These exceptions are irrelevant to residential leases. Since, from the landlord's point of view, nonuse in these exceptional circumstances is actually worse than use, it is not surprising that the tenant is not free to opt for nonuse.

ing rent levels and restraining landlords' powers of eviction.<sup>85</sup> Accordingly, after the expiration of the lease the tenant has a right to remain in the apartment as a statutory tenant, and has to pay only a prescribed, regulated rent.<sup>86</sup> The landlord can terminate the tenancy solely on specific grounds laid down in the law.<sup>87</sup> The tenant, however, must reside in the apartment, or else forfeit her right.<sup>88</sup> Primary residence elsewhere constitutes grounds for eviction.<sup>89</sup> This occupation requirement cannot be bypassed by subletting the whole of the premises.<sup>90</sup> Although family members of the tenant may have succession rights to the apartment if the original tenant dies or vacates the apartment, these too depend on the fulfillment of certain occupancy requirements.<sup>91</sup> Thus, a rent-controlled tenant can-

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85. For general discussion of the evolution of rent control in the United States, see JOEL F. BRENNER & HERBERT M. FRANKLIN, *RENT CONTROL IN NORTH AMERICA AND FOUR EUROPEAN COUNTRIES* 46-54, 56-60 (1977).

86. T. M. ALDRIDGE, *RENT CONTROL AND LEASEHOLD ENFRANCHISEMENT* 34 (6th ed. 1975); 1 ROBERT F. DOLAN, *RASCH'S LANDLORD AND TENANT* § 2:39, at 144-45 (4th ed. 1998); SCHOSHINSKI, *supra* note 55, §§ 7:1, 7:8; STOEBUCK & WHITMAN, *supra* note 82, § 6.55; Kenneth K. Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade*, 35 RUTGERS L. REV. 723, 725-29, 732-37, 745-49, 765-76 (1982); Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741, 742-45 (1988); Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 554-55 (1984).

87. SCHOSHINSKI, *supra* note 55, § 7:10; Baar, *supra* note 86, at 833-35; Susan E. Kaiser et al., *Recent Developments in Urban Redevelopment*, 21 URB. L. ANN. 317, 347-48 (1981). See generally W. DENNIS KEATING ET AL., *RENT CONTROL: REGULATION AND THE RENTAL HOUSING MARKET* (1998) (analyzing different aspects of rent control, including its history, economics and politics, as well as empirical studies of rent control in various cities).

88. DOLAN, *supra* note 86, § 2:39, at 145, § 8:13, at 333; P. F. SMITH, *EVANS & SMITH: THE LAW OF LANDLORD AND TENANT* 271, 275 (4th ed. 1993).

89. ALDRIDGE, *supra* note 86, at 35; ANDREW SCHERER, *RESIDENTIAL LANDLORD-TENANT LAW IN NEW YORK* §§ 4:28, 4:45, 8:203, 8:207 (2005).

90. *Conti v. Citrin*, 505 N.Y.S.2d 481, 485-88 (Sup. Ct. 1985) (holding that an "illusory tenant," i.e., a lessee who does not occupy the premises as his primary residence but subleases it for a profit, cannot enjoy the protection of rent control law); *Skinner v. Geary*, [1931] 2 K.B. 546, 559 (holding that the purpose of the rent restriction law is "to protect a resident in a dwelling-house, not to protect a person who is not a resident in a dwelling-house, but is making money by sub-letting it"); SMITH, *supra* note 88, at 271, 275 (stating that such subletting causes the loss of the right, since the tenant cannot comply with the residency requirement).

91. DOLAN, *supra* note 86, § 2:39, at 145-46; SMITH, *supra* note 88, at 272-73. Thus, for instance, a family member seeking to succeed the original tenant may have to prove that she used the apartment as her primary residence for a minimum period of two years prior to the original tenant's death. DOLAN, *supra* note 86, § 10:13, at 459-60; SCHERER, *supra* note 89, §§ 4:203, 4:215-4:216.

not refrain from using the premises while retaining the right to resume occupation at will at some point in the future.<sup>92</sup>

c. *Water Rights*

Like the laws of trademarks and rent control, the rules governing water rights often apply the “use it or lose it” principle. Most relevant for our inquiry are the western states, which have adopted a “prior appropriation” system with respect to water.<sup>93</sup> According to this system, the first person to use the water beneficially (who need not necessarily be a riparian landowner), acquires a property right in the water.<sup>94</sup> This translates into a right to divert a specified quantity of the flow of the water source, in priority to others.<sup>95</sup>

A property right received through prior appropriation may be lost, however, if not used.<sup>96</sup> The law in Kansas, for example, provides that nonuse of the right without due and sufficient cause results in its forfeiture.<sup>97</sup> There is no requirement that

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92. See Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 958–59 (1985) (discussing use requirements in subsidized housing programs).

93. A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 1:1 (1988 & Supp. 2007). The alternative legal system adopted in the eastern states, often called “riparian rights,” allows landowners whose property is on the banks of flowing waters only “reasonable use” of the water in common with others, and does not permit them to reduce the water to individual ownership. Each landowner’s use must not unreasonably interfere with the other riparian owners’ opportunity for reasonable use. STOEBUCK & WHITMAN, *supra* note 82, § 7.4, at 421–23; 6 THOMPSON ON REAL PROPERTY, *supra* note 37, § 50.08(k); Carol M. Rose, *Riparian Rights*, in NEW PALGRAVE DICTIONARY, *supra* note 66, at 344–45. Since the riparian rights system does not grant exclusive property rights in water, one cannot examine how nonuse would affect such rights.

94. TARLOCK, *supra* note 93, §§ 5:24–5:26; John C. Peck, *Loss of Kansas Water Rights for Non-Use*, 43 U. KAN. L. REV. 801, 805 (1995); Rose, *supra* note 93, at 345; V. Lane Jacobson, Note, *Snake River Basin Adjudication Issue 10: Partial Forfeiture for Non-Use of a Water Right in Idaho*, 35 IDAHO L. REV. 179, 182–83 (1998).

95. TARLOCK, *supra* note 93, §§ 5:3–5:4, 5:14–5:15, 5:30; George A. Gould, *Water Rights Transfers and Third-Party Effects*, 23 LAND & WATER L. REV. 1, 5, 8–11 (1988). Appropriation systems are controlled by state agencies which issue water permits and certificates of rights, adjudicate disputes, and enforce the rules. STOEBUCK & WHITMAN, *supra* note 82, § 7.4, at 425; TARLOCK, *supra* note 93, §§ 5:32, 5:44, 5:47; Peck, *supra* note 94, at 806–07.

96. TARLOCK, *supra* note 93, § 5:86; 6 THOMPSON ON REAL PROPERTY, *supra* note 37, § 50.09(gg).

97. KAN. STAT. ANN. § 42-308 (2006); Peck, *supra* note 94, at 802. For instance, the existence of adequate natural precipitation in certain years for crops that usually require irrigation because of their location can constitute due and sufficient cause for nonuse. *Id.* at 808–09; see also TARLOCK, *supra*

the property owner intended to relinquish her right; it suffices that she failed to exercise it.<sup>98</sup> Likewise, under Idaho law a water right not used for a period of five years is forfeited, regardless of the owner's intent. The right reverts to the state and may be again subject to appropriation.<sup>99</sup> Furthermore, prior appropriation states also recognize a rule of partial forfeiture. Under this principle, if an owner uses only a portion of her appropriated water right, she may lose her right to the unused portion.<sup>100</sup>

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note 93, § 5:89 (discussing various defenses to forfeiture and abandonment claims).

98. Peck, *supra* note 94, at 823–25.

99. IDAHO CODE ANN. § 42-222(2) (2006); Jacobson, *supra* note 94, at 185. For discussion of similar forfeiture rules in other states, see TARLOCK, *supra* note 93, § 5:88; 6 THOMPSON ON REAL PROPERTY, *supra* note 37, § 50.09(gg); and R. Lambeth Townsend, *Cancellation of Water Rights in Texas: Use It or Lose It*, 17 ST. MARY'S L. J. 1217 (1986).

100. Peck, *supra* note 94, at 831–32; Townsend, *supra* note 99, at 1232–34; Jacobson, *supra* note 94, at 187–92, 203–04. Note that some Western states have recognized rights in instream flows, which entitle their holders to refrain from diversion and consumption of water, in order to protect endangered fish, wildlife and habitats, or for recreational purposes. Instream rights thus allow nonuse of water to achieve certain goals. Mary Ann King, *Getting Our Feet Wet: An Introduction to Water Trusts*, 28 HARV. ENVTL. L. REV. 495, 503–06 (2004); Barton H. Thompson Jr., *Markets for Nature*, 25 WM. & MARY ENVTL. L. & POLY REV. 261, 270–72 (2000). Typically, however, instream rights are held by a state agency and not by individuals or private entities. Thus, even when the initial acquisition of instream rights by the latter is permitted, they are usually not allowed to hold on to the rights (for fear of future speculation), but must transfer them to the state. See, e.g., OR. REV. STAT. ANN. § 537.332 (West 2003) (defining “In-stream water right” as requiring that the right be held in trust by the Water Resources Department of Oregon); see also King, *supra*, at 505–06; Thompson, *supra*, at 287, 289; Sarah B. Van de Wetering & Robert W. Adler, *New Directions in Western Water Law: Conflict or Collaboration?*, 20 J. LAND RESOURCES & ENVTL. L. 15, 31 (2000). Furthermore, in order to acquire an instream right at the outset, one must specifically apply for it and prove that an environmental concern exists (for instance, by submitting relevant scientific data). See, e.g., Application Form of the Alaska Department of Natural Resources, <http://www.dnr.state.ak.us/mlw/water/instream> (last visited Dec. 1, 2007); see also Jack Sterne, *Instream Rights and Invisible Hands: Prospects for Private Instream Water Rights in the Northwest*, 27 ENVTL. L. 203, 227–30 (1997) (discussing the rigorous testing and measurement requirements for demonstrating a need for water reservation in Arizona and Alaska). Thus, mere nonuse of water cannot establish an instream right or constitute a defense against a use-it-or-lose-it rule. For further discussion of instream rights, see *infra* note 231.



*d. Servitudes*

Servitudes are nonpossessory property rights in land,<sup>101</sup> providing their holders with a variety of possible enjoyments, such as a right of way through another person's land,<sup>102</sup> a right to sever and remove minerals,<sup>103</sup> a right to prevent construction that would block a pleasing view,<sup>104</sup> or a right to restrict business competition on a specified parcel.<sup>105</sup> As property rights, servitudes bind not only the original servient landowners, but their successors in title as well.<sup>106</sup> Servitudes may be of unlimited duration.<sup>107</sup>

In contrast to trademarks, rent-controlled housing, and water rights, naked nonuse does not ordinarily terminate servitudes.<sup>108</sup> Servitudes usually belong to the category which I have labeled "nonuse plus," whose extinction requires some additional factor besides nonexercise of the right. Thus, termination may occur if nonuse is accompanied by some affirmative behavior that expresses the servitude owner's intent to abandon her right.<sup>109</sup> Many states, however, recognize an exception to the

101. JON W. BRUCE & JAMES W. ELY, *THE LAW OF EASEMENTS AND LICENSES IN LAND* § 1:1 (2001 & Supp. 2007); 4 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* § 34.01[1] (Michael A. Wolf ed., 2000).

102. *Hyland v. Fonda*, 129 A.2d 899, 900–01 (N.J. Super. Ct. App. Div. 1957).

103. *STOEBUCK & WHITMAN*, *supra* note 82, § 8.1.

104. *Id.* (describing negative easements of "light, air, and view").

105. *Whitinsville Plaza, Inc. v. Kotseas*, 390 N.E.2d 243, 248–50 (Mass. 1979); *Davidson Bros. v. D. Katz & Sons*, 579 A.2d 288, 295 (N.J. 1990).

106. *RESTATEMENT (THIRD) OF PROP.: SERVITUDES* § 1.1(1) (2000).

107. *BRUCE & ELY*, *supra* note 101, § 10:1; *POWELL*, *supra* note 101, § 34.19.

108. *BRUCE & ELY*, *supra* note 101, §§ 10:18–10:19; Jennifer L. Romeo, Annotation, *Loss of Private Easement by Nonuse*, 62 A.L.R. 5TH 219, § 3, at 266–68 (1998).

109. *Tract Dev. Servs., Inc. v. Kepler*, 246 Cal. Rptr. 469, 476 (Ct. App. 1988); *BRUCE & ELY*, *supra* note 101, §§ 10:18, 10:20; 7 *THOMPSON ON REAL PROPERTY*, *supra* note 37, § 60.08(b)(3)(i)–(iii). Such is the case, for instance, if the servitude holder not only ceased to use her right of way, but also blocked the sole access route permitting exercise of the servitude by nailing a board across garage doors and allowing a tree to grow near it. *Hatcher v. Chesner*, 221 A.2d 305, 307–08 (Pa. 1966). By contrast, nonexercise of the servitude coupled with use of some alternative does not lead to termination. For example, some courts have held that nonuse of a right of way while using an alternative route does not justify termination of the servitude. *See, e.g.*, *Jackvony v. Poncelet*, 584 A.2d 1112, 1117 (R.I. 1991); *Filby v. Brooks*, 481 N.Y.S.2d 865, 868 (App. Div. 1984). In addition, it has been held that termination may occur if nonuse is accompanied by physical obstruction by the servient landowner for the period required by the statute of limitations. *RESTATEMENT (THIRD) OF PROP.: SERVITUDES* § 7.7 & illus. 1 (2000) (involving the construction of a fence

nonuse plus rule in the case of easements created by prescription,<sup>110</sup> holding that this type of servitude can be terminated by nonuse that lasts for the period of prescription.<sup>111</sup> Furthermore, some states infer a rebuttable presumption of intent to abandon a servitude in case of lengthy nonuse by the owner.<sup>112</sup>

The *Restatement (Third) of Property* supports the general nonuse plus rule that “[s]ome additional action on the part of the beneficiary inconsistent with continued existence of the servitude is normally required.”<sup>113</sup> However, it also states that the amount of additional evidence required diminishes as the period of nonuse grows longer, to the point where a very long period of nonuse may suffice in itself to bring about the loss of the right.<sup>114</sup> Naked nonuse is recognized as grounds for terminating servitudes in Louisiana,<sup>115</sup> as well as in other legal systems.<sup>116</sup>

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by the servient landowner that completely blocked the entrance to an easement of passage, and that stood for the duration of the prescriptive period); POWELL, *supra* note 101, § 34.21[1]; STOEBUCK & WHITMAN, *supra* note 82, § 8.12, at 468–69.

110. For general discussion of the requirements for creating prescriptive servitudes, see RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 2.16–2.17 (2000); STOEBUCK & WHITMAN, *supra* note 82, § 8.7; and Will Saxe, *When “Comprehensive” Prescriptive Easements Overlap Adverse Possession: Shifting Theories of “Use” and “Possession,”* 33 B.C. ENVTL. AFF. L. REV. 175, 185–92 (2006).

111. BRUCE & ELY, *supra* note 101, § 10:19; Romeo, *supra* note 108, at 270–71; see, e.g., CAL. CIV. CODE § 811(3)–(4) (West 2007); N.D. CENT. CODE, § 47-05-12(4) (2006).

112. BRUCE & ELY, *supra* note 101, § 10:19; see, e.g., GA. CODE ANN. § 44-9-6 (2006).

113. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.4 cmt. c (2000). Note that the doctrine of “changed conditions” is applied when, as a result of some change in the servient land or the surrounding area, it is impossible to use the servitude or to accomplish its intended purpose. *Id.* § 7.10. A good example is a servitude restricting the use of lots in a subdivision to residential purposes only, after many adjoining parcels have been commercially developed and have changed the character of the neighborhood. See *Owens v. Camfield*, 614 S.W.2d 698, 700 (Ark. Ct. App. 1981); *Uvanni v. CMB Builders, Inc.*, 343 N.Y.S.2d 954, 955–56 (App. Div. 1973). Thus, under this doctrine, nonuse alone by the servitude owner will not be considered a “change” that justifies the termination of the servitude. See *Scott v. Long Valley Farm Ky., Inc.*, 804 S.W.2d 15, 16 (Ky. Ct. App. 1991) (holding that nonuse of a water supply easement and the existence of alternative means of attaining water do not justify termination).

114. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.4 cmt. c (2000).

115. LA. CIV. CODE ANN. art. 753 (2006) (“[A] predial servitude is extinguished by nonuse for ten years.”). Extinguishment by nonuse “applies to all conventional servitudes, apparent or nonapparent, affirmative or negative.” A.N. Yiannopoulos, *Extinction of Predial Servitudes*, 56 TUL. L. REV. 1285,

To sum up, the rules of servitude termination conflict, to some extent, with the notion that more is better than less. Servitude holders are not totally at liberty to refrain from exercising their property right, even though nonuse is clearly less burdensome to the servient landowner than use.

*e. Ownership in Land*

Unlike the previous examples, ownership of land is generally not forfeited by mere nonuse or by the affirmative behavior of the property owner alone.<sup>117</sup> The main doctrine pursuant to which ownership of land may be lost is adverse possession. As indicated by its name, it requires wrongful occupation by another person; nonuse by the landowner does not suffice. The trespasser gains title to the land if her possession is adverse to the owner's interests,<sup>118</sup> actual, open and notorious, exclusive, and continuous for the statutory period of limitation.<sup>119</sup>

The justification for the nonuse plus rule with respect to land ownership will be discussed below.<sup>120</sup> At this point, let it suffice to note that even in this context, the freedom not to use is somewhat curtailed. Although failure to occupy and use land does not in itself result in forfeiture of ownership,<sup>121</sup> neglect

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1291 (1982). The running of the ten-year prescription period commences for affirmative servitudes from the date of their last use. LA. CIV. CODE ANN. art. 754 (2006). If the servitude has never been used, the relevant starting time is the date the servitude was established and its exercise became possible. Yiannopoulos, *supra*, at 1293.

116. For example, servitudes are terminated in France after thirty years of nonuse, and in Greece after twenty years. Yiannopoulos, *supra* note 115, at 1291. Under Israeli law, courts have general discretion to terminate a servitude on grounds of nonuse alone, without laying down any fixed minimal period of nonuse. See § 96 of the Land Law, 5729-1969, 23 LSI 283, 299-300 (1966-69) (Isr.).

117. Furthermore, and in contrast to other kinds of property, land cannot be "abandoned" by its owner and thereby rendered ownerless. STOEBUCK & WHITMAN, *supra* note 82, at 468.

118. That is to say, her possession does not stem from the owner's right and is without the owner's permission. *Id.* at 856.

119. For general discussion of the various requirements of adverse possession, see 16 POWELL, *supra* note 101, §§ 91.03-91.08, and Jeffrey E. Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2423-32 (2001). The statutory period of limitation varies from state to state and ranges from five to forty years. POWELL, *supra*, § 91.10[1]; 10 THOMPSON ON REAL PROPERTY, *supra* note 37, § 87.01, at 77-86.

120. See *infra* notes 232-35, 252-53 and accompanying text.

121. Interestingly, this was not always the case. In the colonial era, land use statutes often required owners to continuously use and develop their land. Failure to comply with these requirements resulted in forfeiture of title to the

and nonuse create the risk that a trespasser will take possession and eventually gain title. This (relative) lack of freedom not to use land becomes apparent once we compare the American system to legal systems that do not recognize adverse possession claims in land.<sup>122</sup> In the latter, a trespasser cannot gain title or immunity from an ejection suit, regardless of the length of time she wrongfully possesses the land. Clearly, there is greater freedom not to use land under such a system.

Arguably, the existence of an adverse possession doctrine does not force owners to *use* their land. As long as they check the land once in a while for the presence of trespassers, and file suits within the limitation period, they may both retain title and not use their property.<sup>123</sup> In practice, however, nonusing owners are often absent or far from their property. It may therefore be quite costly to monitor the land and periodically sue wrongdoers. As a result, an adverse possession doctrine can be seen as a limitation on the freedom not to use one's land.<sup>124</sup>

In conclusion, although land ownership is governed by a nonuse plus regime, rather than by a naked nonuse regime, the MBL argument does not apply even here without reserve. Although other people would (ordinarily) be less adversely affected by nonuse of land than by its use,<sup>125</sup> the former liberty is somewhat curtailed.

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land, even if no one else gained possession of it. The state could then give the land to others. John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1259–63 (1996).

122. Israeli Law, for instance, does not recognize adverse possession claims with respect to "settled" lands. See § 159(b) of the Land Law, 5729–1969, 23 LSI 283, 311 (1966–69) (Isr.). Ninety-six percent of the lands in Israel have undergone a settlement of title procedure, according to the Land (Settlement of Title) Ordinance (New Version), 5729–1969, 2 LSI 41 (1972) (Isr.), and are thus considered "settled" land.

123. Merrill, *supra* note 16, at 1130.

124. Although statutes of limitations apply, in principle, to all assets, the above argument is particularly relevant to land. When a person gains wrongful possession of personal property—for example, by theft of a valuable painting—it is artificial to speak of the owner's choice between use and nonuse of her property. If the asset in question is an intangible right, such as a copyright, one cannot speak of possession at all. The period of limitation will run against a copyright owner that does not enforce her right against copying by others, even if she continuously uses the copyright herself.

125. The law of nuisance, for instance, will not protect the neighbors of a landowner from all harms resulting from the use of her land. There is a threshold of damage that individuals must bear, and the neighbors will have to prove that the harmful activity constitutes a substantial and unreasonable interference with the use and enjoyment of their land. W. PAGE KEETON ET AL.,

### 3. Destruction Versus Modification, Alienation, or Neglect

Arguably, the most extreme measure that an owner can take with respect to her property is to destroy it. The bundle of rights constituting ownership of an asset includes the right of destruction.<sup>126</sup> True, as is the case with other rights, the right to destroy is not absolute. Various laws prohibit the destruction of specific assets, such as buildings designated for conservation,<sup>127</sup> certain types of currency,<sup>128</sup> or trees protected under a preservation order.<sup>129</sup> Nevertheless, the law does not as a rule prevent owners from destroying their property, and there is no general prohibition on destroying valuable assets.<sup>130</sup>

In the present context, we are interested in cases in which total destruction is allowed, while more moderate measures such as modification or alienation are less tolerated. Once again, this phenomenon conflicts with the MBL argument. Destruction can be viewed as the most extreme form of use of an asset by its owner.<sup>131</sup> If the owner can use up the property *completely*, then, according to this argument, she should also be able to affect it less drastically, in a manner that leaves *some* of the property intact. Moreover, scholars have argued that the right to destroy—as an extreme form of waste—should be *more* restricted than other rights in the property owner's bundle.<sup>132</sup>

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PROSSER AND KEETON ON THE LAW OF TORTS § 88, at 626, 629 (W. Page Keeton ed., 5th ed. 1984).

126. The right to destroy (*ius abutendi*) is commonly listed among the rights of ownership. Roscoe Pound, *The Law of Property and Recent Juristic Thought*, 25 A.B.A. J. 993, 997 (1939).

127. F.H. LAWSON & BERNARD RUDDEN, *THE LAW OF PROPERTY* 116 (2d ed. 1982); Daphna Lewinsohn-Zamir, *The "Conservation Game": The Possibility of Voluntary Cooperation in Preserving Buildings of Cultural Importance*, 20 HARV. J.L. & PUB. POL'Y 733, 738–39 (1997).

128. Lior J. Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 843 (2005).

129. LAWSON & RUDDEN, *supra* note 127, at 116.

130. *Id.* (noting that the owner of a Vermeer painting can destroy it); Honoré, *supra* note 23, at 118 (stating that a general requirement not to destroy would be "inconsistent with the liberal idea of ownership").

131. Strahilevitz, *supra* note 128, at 794 (asserting that the right to destroy is an extreme exercise of an owner's rights to use the property, to exclude others from using it, and to control its subsequent alienation).

132. See, e.g., Edward J. McCaffery, *Must We Have the Right to Waste?*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 76, 77, 81, 91–96 (Stephen R. Munzer ed., 2001) (arguing against the right to destroy); see also JOSEPH L. SAX, *PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES* 42, 200–01 (1999) (asserting that owners should not have the right to destroy cultural property—such as works of art and literary works—unless they are their creators).

a. *Moral Rights*

The rules relating to authors' moral rights provide one illustration of the rejection of the MBL reasoning. Generally speaking, authors are entitled to have their work attributed to them, and they have the right to prevent modifications of the work that are prejudicial to their honor or reputation.<sup>133</sup> For example, the owner of a painting or a sculpture cannot alter it in a way that is detrimental to the artist's honor or reputation. Moral rights are given to authors regardless of whether they have the copyright in their work.<sup>134</sup> It is also immaterial whether they are the owners of the tangible object in which their creation is embodied.<sup>135</sup>

While all legal systems that recognize moral rights protect against injurious *changes* in the narrow sense—those that do not eliminate the embodiment of the work completely—there is no unanimity as to whether the right to prevent modifications extends to total destruction.<sup>136</sup> International and most national

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133. The primary international source of moral rights is Article 6<sup>bis</sup> of the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention). Berne Convention for the Protection of Literary and Artistic Works art. 6<sup>bis</sup>, July 24, 1971, 1161 U.N.T.S. 36. Moral rights are widely recognized in continental Europe and apply in principle to all types of copyrightable works. See Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 359–61 (2006) (noting that moral rights in France, Germany, and Italy generally protect authors of copyrightable works, and are thus integrated into the copyright statutes). United States legislation has adopted a narrower framework of moral rights that protects only works of visual art. See 17 U.S.C. § 106A (2000); see also 17 U.S.C.A. § 101 (West 2005) (defining “work of visual art”); Robert J. Sherman, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 CARDOZO L. REV. 373, 409–10 (1995). This narrow definition excludes, for instance, literary and architectural works.

134. 17 U.S.C. § 106A(b); 1 SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND* 599 (2d ed. 2006).

135. The duration of moral rights varies from country to country. In England and Germany, for example, the time limit of moral rights is identical to that of the economic copyright: both expire seventy years after the death of the author. See Copyright, Designs and Patents Act, 1988, c. 48, §§ 12(2), 86(1) (Eng.), reprinted in 11 HALSBURY'S STATUTES OF ENGLAND AND WALES, 956, 1051 (4th ed. 2006 reissue); Adolf Deitz, *Germany*, in 2 INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 7[3] (Paul E. Geller ed., 2006). Moral rights in the United States are limited to the life of the author and hence expire before the copyright. See 17 U.S.C. § 106A(d). In contrast, France and Italy recognize perpetual moral rights that extend beyond the life of the copyright. John H. Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1041–42 (1976); Rigamonti, *supra* note 133, at 361 n.51.

136. WILLIAM CORNISH & DAVID LLEWELYN, *INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS* 461–62 (5th ed.

legislation (with the notable exception of the United States)<sup>137</sup> does not refer specifically to the case of destruction,<sup>138</sup> and courts and commentators are reluctant to extend moral rights to encompass a right not to have one's work destroyed.<sup>139</sup> Moreover, even the American exception does not equate destruction with alteration: whereas the statute protects every work (within the statute's definition of "visual art") from detrimental modification, it only protects works of "recognized stature" from destruction.<sup>140</sup> The need to prove established quality and importance reduces the practical significance of this legislative expansion.<sup>141</sup> We may thus conclude that moral rights allow

2003); 1 RICKETSON & GINSBURG, *supra* note 134, at 605.

137. 17 U.S.C. § 106A(a)(3)(B).

138. 1 RICKETSON & GINSBURG, *supra* note 134, at 605 (asserting that it is clear that destruction remained outside the scope of Article 6<sup>bis</sup> of the Berne Convention); Christopher J. Robinson, *The "Recognized Stature" Standard in the Visual Artists Rights Act*, 68 *FORDHAM L. REV.* 1935, 1940 (2000) ("[T]here is no express provision in the Berne Convention against the complete destruction of a work of art.").

139. JEREMY PHILLIPS & ALISON FIRTH, *INTRODUCTION TO INTELLECTUAL PROPERTY LAW* 266 (4th ed. 2001) (asserting that moral rights in England do not protect from total destruction); DAVID VAVER, *INTELLECTUAL PROPERTY LAW: COPYRIGHT, PATENTS, TRADE-MARKS* 90–91 (1997) (citing Canadian cases that held that total destruction does not violate moral rights); Adolf Dietz, *The Artist's Right of Integrity Under Copyright Law—A Comparative Approach*, 25 *INT'L REV. INDUS. PROP. & COPYRIGHT L.* 177, 190–91 (1994) (explaining that German law does not extend the right to prevent detrimental modifications to complete destruction of works); Judica Krikke, *Copyright: No Moral Rights Protection Against Destruction*, 26 *EUR. INTELL. PROP. REV.* N-155, N-155 to -56 (2004) (reporting on a Supreme Court of the Netherlands decision that held that the Berne Convention was not meant to include the destruction of works, and that total destruction cannot be considered to be "mutilation" under the Dutch Copyright Act); Rigamonti, *supra* note 133, at 371 (stating that the right to prevent destruction is "usually not protected in Continental Europe"); Robinson, *supra* note 138, at 1937 (noting that the American provision regarding destruction grants a moral right beyond that commonly accepted in Europe).

140. See 17 U.S.C. § 106A(a)(3)(A)–(B); Sherman, *supra* note 133, at 411.

141. See, e.g., *Pollara v. Seymour*, 206 F. Supp. 2d 333, 336–37 (N.D.N.Y. 2002) (dismissing a claim by an artist under 17 U.S.C. § 106A(a)(3)(B) for failure to prove that a mural intended for display at a one-time event qualified as a work of "recognized stature"). To meet the "recognized stature" threshold, it must be proven that the work in question is both meritorious and recognized as such by experts (such as other artists, art dealers, or museum curators). Francesca Garson, *Before That Artist Came Along, It Was Just a Bridge: The Visual Artists Rights Act and the Removal of Site-Specific Artwork*, 11 *CORNELL J.L. & PUB. POLY* 203, 227–28 (2001); Robinson, *supra* note 138, at 1945, 1950–51. Furthermore, it has been argued that the "recognized stature" limitation renders the right against destruction empty, since the owner of such works would rarely have an incentive to destroy them. Henry Hansmann &

property owners *more* freedom to *totally destroy* their assets—in which authors' works are embodied—than to modify their property.

*b. Cultural Property*

Outside the sphere of moral rights, the laws protecting cultural property provide another demonstration of the greater intervention with relatively moderate measures. Generally speaking, the law does not prevent *private* owners of cultural property from destroying it;<sup>142</sup> “you can throw darts at your Rembrandt.”<sup>143</sup> In contrast, more moderate decisions do not receive similar respect. For example, laws often curtail the owner's rights of alienation and use by heavily restricting the export of cultural property or by granting the right of first refusal to domestic purchasers.<sup>144</sup>

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Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 111 (1997). Thus, there may be little practical difference between the American rule and the civil-law rule, which “provides no protection at all against complete destruction of a work of art.” *Id.* Notably, the right against destruction is further qualified in § 113(d) of the American Copyright Act, which deals with works of art installed or incorporated into buildings. 17 U.S.C. § 113(d) (2000). Accordingly, property owners have considerable freedom to destroy a work of art (such as a mural) that cannot be otherwise removed from the premises. See 17 U.S.C. §§ 106A(a)(3), 113(d)(1); 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.06[C][3] (2007); Sherman, *supra* note 133, at 418–22.

142. I refer here to cultural property that is not subject to the moral rights discussed above (for example, a painting by an artist whose moral rights have expired), and is not owned by the state. The law may provide that certain categories of cultural property, such as archaeological objects unearthed by private individuals, are property of the state. See JOHN H. MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS AND THE VISUAL ARTS 89, 95–96 (4th ed. 2002); LYNDEL V. PROTT & P. J. O'KEEFE, 1 LAW AND THE CULTURAL HERITAGE: DISCOVERY AND EXCAVATION 188–91 (1984); SAX, *supra* note 132, at 184–85; Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 391–92 (1995). Since private ownership is excluded in these cases, one cannot compare the legal treatment of extreme and moderate measures by private owners with respect to their property.

143. SAX, *supra* note 132, at 4; see also Nicole B. Wilkes, *Public Responsibilities of Private Owners of Cultural Property: Toward a National Art Preservation Statute*, 24 COLUM. J.L. & ARTS 177, 187–88 (2001) (stating that moral rights in the United States expire upon the death of the artist and that therefore “art can be lawfully destroyed . . . after an artist's death”).

144. KIFLE JOTE, INTERNATIONAL LEGAL PROTECTION OF CULTURAL HERITAGE 158–61, 165 (1994) (discussing export restrictions and preemption rights for domestic buyers in Canada, and concluding that most national cultural property laws address illicit traffic and export); MERRYMAN & ELSEN, *supra* note 142, at 89, 96–102 (listing various limitations on the sale of cultur-



c. *Animals*

Animal protection laws provide yet another example of the lesser extent of intervention by the state in the face of more extreme measures. Most states consider animals to be the property of their owners, who are generally free to “destroy” them as long as the animal is put down in a way that does not inflict pain.<sup>145</sup> In contrast, an owner is not allowed to neglect or mistreat her animal, for instance by starving or torturing it.<sup>146</sup>

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al property and focusing on export restrictions and preemptive rights under Italian law); PROTT & O’KEEFE, *supra* note 142, at 197 (listing countries that impose a right of preemption on sales); Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 313–17 (1982) (stating that almost all countries regulate the export of cultural property; describing restrictions such as total embargo, screening through licensing and permit systems, and the state’s preemptive right to purchase cultural property for itself or on behalf of national museums); Borodkin, *supra* note 142, at 391–92 (noting that most countries restrict export of antiquities through various prohibitions and licensing requirements).

145. GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 24, 44, 128–29, 133 (1995) (asserting that animals are regarded as property and hence may be killed by their owners, and that protective legislation has never been interpreted to interfere with unnecessary killing by owners if done in a humane fashion). The Federal Animal Welfare Act of 1966, Pub. L. No. 89-544, 80 Stat. 350 (codified as amended at 7 U.S.C.A. §§ 2131–2159 (West 2007)), does not expressly prohibit the extermination of animals, but rather bans certain forms of abuse and neglect. Although state legislation sometimes adds “killing” to the prohibition on torture and mistreatment, it also typically carves out broad exceptions for the killing of animals by their owners. See M. Varn Chandola, *Dissecting American Animal Protection Law: Healing the Wounds with Animal Rights and Eastern Enlightenment*, 8 WIS. ENVTL. L.J. 3, 9–10 (2002) (citing state legislation that creates exceptions for the killing of an animal by its owner, without requiring justification).

146. FRANCIONE, *supra* note 145, at 121 (stating that anticruelty statutes focus on humane treatment of animals by prohibiting, for instance, deprivation of necessary food, water, or sanitary living conditions); Darian M. Ibrahim, *The Anticruelty Statute: A Study in Animal Welfare*, 1 J. ANIMAL L. & ETHICS 175, 179–80 (2006) (asserting that protective legislation prohibits only the infliction of unjustified pain and suffering); see, e.g., *State v. Hill*, 996 S.W.2d 544, 547 (Mo. Ct. App. 1999) (holding that while Missouri law does not preclude owners from intentionally killing their animals in a humane way, it prohibits them from intentionally and purposely causing them injury or suffering). Admittedly, mistreatment may cause an animal severe pain, whereas its killing may be relatively painless. In such cases, shouldn’t we regard killing as the more moderate measure? Notwithstanding the fact that mistreatment may inflict more pain, I believe that annihilation is still the more extreme measure.

## II. MORE IS NOT ALWAYS BETTER THAN LESS— NORMATIVE JUSTIFICATIONS

Part I of this Article demonstrated that despite its strong intuitive appeal, the “more is better than less” argument is rejected by numerous legal rules and doctrines in a wide variety of contexts. Property owners have more freedom to refrain from, or to prohibit the transfer of their property than to transfer it conditionally; more liberty to use property than not to use it; more power to destroy property than to modify, alienate or neglect it. Thus, we have observed cases where total inalienability is respected, whereas restrictions on alienability are struck down; intensive use is permitted, but nonuse extinguishes the right; destruction allowed, yet modification forbidden.

This Part of the Article moves from doctrine to theory, and offers normative justifications for tolerating extreme measures to a greater extent than moderate ones. Three types of justifications are offered for greater scrutiny and intervention in the case of moderate—rather than extreme—measures with respect to property rights: protecting property transferees; reducing the incidence of low-valuing owners; and correcting distributive errors. These explanations are supported by both normative analysis and lessons from behavioral studies.<sup>147</sup>

### A. PROTECTING POTENTIAL PROPERTY TRANSFEREES

A major reason for intervening where property owners take moderate measures is the protection of property transferees. This justification for legal interference falls into two categories: preventing significant harm to welfare, and avoiding confusion and mistakes.

#### 1. Preventing Severe Harm to Welfare

More property is not better than less when, contrary to what one might initially expect, the outcome that apparently produces “more property” for the transferees, in fact adversely affects their long-term welfare. It may very well be the case that a moderate measure (which grants more property to recipients), generates more harm than an extreme measure (which

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147. The justifications discussed below do not exhaust the reasons for rejecting the MBL argument. For an additional type of justification focusing on minimum standard requirements for economic and social relationships, see *infra* notes 180 & 311.

results in their receiving less property). There are various reasons for this seemingly paradoxical outcome.

Compare a conditional transfer of property with no transfer at all. Conditions attached to the transfer of property might insult or humiliate the transferee, thereby harming her dignity and self-respect.<sup>148</sup> Moreover, an attempt by the transferee to meet the stipulated conditions, even if successful, may gravely injure her autonomy and her opportunity for self-development and self-realization.<sup>149</sup> By contrast, when property is not transferred at all, these injuries will not occur: no insulting message is conveyed along with the property, and the harmful consequences from satisfying the offensive conditions do not transpire. In this sense, more property can sometimes be regarded as worse than less or even none.

Take, for instance, a will conditioning a bequest of property on the beneficiary's termination of relations with her sibling, choosing an opposite-sex spouse in conflict with her sexual identity, adoption of a particular religious faith, or relinquishment of her favored profession (deemed by the testator as unsuitable for a woman).<sup>150</sup> Such conditions attempt to exert power and control over a person's most significant and intimate life choices—the very decisions that every individual should make for herself.<sup>151</sup> They express, *by their very existence*, disrespect for the transferee as an autonomous individual. Fulfillment of such conditions by recipients who were tempted by the prospect of owning the property exacerbates the adverse effects on their welfare. Current law seems to follow this reasoning. It strikes down conditions similar to the ones mentioned above as violating public policy<sup>152</sup> while at the same time recognizing the right

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148. See *infra* notes 154–64 and accompanying text.

149. See Sherman, *supra* note 37, at 1300 (stating that respect for individual autonomy should preclude the enforcement of certain testamentary conditions).

150. Thus, for example, in the case of *Girard Trust Co. v. Schmitz*, a donor conditioned a cash bequest to four of six siblings on their having no communication with the other two. 20 A.2d 21, 24–25 (N.J. Ch. 1941). In *Drace v. Klinedinst*, a donor conditioned a bequest of land on the descendants' continued adherence to a particular religious faith. 118 A. 907, 908 (Pa. 1922).

151. See MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 291–303 (1983) (arguing that ownership of property and the economic power it wields in the market should not carry over to dominion and control over people in the political sphere).

152. See *supra* notes 39–46 and accompanying text.

of potential donors to refrain from transferring property at all.<sup>153</sup>

To better understand the impact of these rules, it is worth examining two variables. One is the subjective perception of the potential transferee as to whether receiving the property subject to conditions is worse than not receiving it at all. The other is the potential donor's reaction to the law's invalidation of certain conditions. A donor may either forgo control and transfer the property without conditions,<sup>154</sup> or refrain from bestowing the property.

If the intended transferee would have been insulted by the condition and viewed compliance with it as worse than not obtaining the property, then a legal rule that reflects this position does not adversely affect either party. The donor would not in any case have been able to achieve her first choice, which was to transfer the property subject to the condition. If she decides, as her second best choice and in response to the legal rule, not to transfer the property at all, then this outcome is equivalent to that of an attempted conditioned transfer in a world without the legal rule, since the potential transferee will reject the transfer. In contrast, if, given the rule, the donor prefers an unconditional transfer to nontransfer, then the transferee is better off, whereas the donor is neither positively nor negatively affected by the rule.<sup>155</sup> In both cases, the legal rule reduces transaction costs by signaling that attempts to prescribe certain types of conditions are likely to be futile.

Scenarios in which transferees prefer to receive no property rather than some property are perfectly realistic; researchers have extensively tested and documented them in the behavioral literature. One example is the experiment known as the Ultimatum Game.<sup>156</sup> In the basic form of this game, one person (the

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153. See *supra* notes 37–39 and accompanying text.

154. I refer here to objectionable conditions of the type discussed above because, obviously, the donor is free to include conditions that are not similarly harmful.

155. It is reasonable to assume that although the beneficiary prefers no transfer to conditioned transfer of the property, she also prefers unconditioned transfer to no transfer at all.

156. For studies of the Ultimatum Game, see Werner Güth et al., *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEHAV. & ORG. 367 (1982); Alvin E. Roth et al., *Bargaining and Market Behavior in Jerusalem, Ljubljana, Pittsburgh, and Tokyo: An Experimental Study*, 81 AM. ECON. REV. 1068 (1991); and Richard H. Thaler, *Anomalies: The Ultimatum Game*, 2 J. ECON. PERSP. 195 (1988). For a general survey of Ultimatum Game experiments, see Alvin E. Roth, *Bargaining Experiments*, in THE HANDBOOK OF

proposer) is asked to divide a sum of money between herself and another person (the responder). The responder is then free to choose either to accept or to reject the amount offered. If she accepts, then the sum is divided between the two parties as agreed. If she declines, neither player receives anything. The standard economic prediction is that responders would accept *any* positive share of the pie, since any amount is preferable to none. Knowing this, proposers will offer the smallest possible denomination of currency (which responders will then accept), thus retaining for themselves almost all of the original sum of money.<sup>157</sup>

Experimental results, however, have dramatically deviated from this prediction. Most proposers offered substantial amounts of money, which often reached an equal split of the profits, and such offers were indeed accepted by responders.<sup>158</sup> Offers that deviated substantially from fifty percent—such as less than twenty percent—were usually rejected.<sup>159</sup> Researchers reached similar results in variants on the basic game when relatively large sums of money were involved,<sup>160</sup> or when numerous rounds were played (instead of one-shot games).<sup>161</sup> One dominant motivation demonstrated by the Ultimatum Game is that people wish to be treated fairly and will thus reject unfair or insulting offers even if economically advantageous.<sup>162</sup> This

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EXPERIMENTAL ECONOMICS 253, 258–92 (John H. Kagel & Alvin E. Roth eds., 1995) [hereinafter Roth, *Bargaining Experiments*].

157. See Gary E. Bolton, *A Comparative Model of Bargaining: Theory and Evidence*, 81 AM. ECON. REV. 1096, 1097 (1991); Roth, *Bargaining Experiments*, *supra* note 156, at 257–58.

158. Colin F. Camerer, *Progress in Behavioral Game Theory*, 11 J. ECON. PERSP. 167, 169 (1997).

159. *Id.*; see Güth et al., *supra* note 156, at 374–76; Ramzi Suleiman, *Expectations and Fairness in a Modified Ultimatum Game*, 17 J. ECON. PSYCHOL. 531, 532–33, 547 (1996).

160. In one variant, the sum to be divided was \$100 (instead of the more typical \$10 pie). Elizabeth Hoffman et al., *On Expectations and the Monetary Stakes in Ultimatum Games*, 25 INT'L J. GAME THEORY 289, 295–96, 299 (1996). In another experiment played in Indonesia, researchers recorded similar results when the amount to be shared was the equivalent of three months' income. Lisa A. Cameron, *Raising the Stakes in the Ultimatum Game: Experimental Evidence from Indonesia*, 37 ECON. INQUIRY 47, 47, 58 (1999).

161. See RICHARD H. THALER, *THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE* 28–31 (1992); Roth, *Bargaining Experiments*, *supra* note 156, at 259–67.

162. Daphna Lewinsohn-Zamir, *The Choice Between Property Rules and Liability Rules Revisited: Critical Observations from Behavioral Studies*, 80 TEX. L. REV. 219, 230 (2001); Roth, *Bargaining Experiments*, *supra* note 156, at 264–65, 267. Another important motivation reflected in ultimatum bargain-

preference for nothing over something has been found to exist even in a variant of the game where the responder could decline *only her own payoff*, knowing that her refusal will not affect the proposer's share!<sup>163</sup>

Returning to the donor-transferee context, it is reasonable to assume a direct correlation between the magnitude of the insult to the intended transferee and the value of the property consequently rejected. The greater the harm perceived by the recipient, the more property she will be willing to turn down. And lest we suppose that voluntary relinquishment of goods is limited to trifles, recall the English king who rejected a crown conditioned on not marrying the woman he loved, saying, "I have found it impossible to carry the heavy burden of responsibility and to discharge my duties as King, as I wish to do, without the help and support of the woman I love."<sup>164</sup>

Alternatively, one should consider the possibility that, absent the legal rule, the transferee would *not* have rejected the conditioned property. In this scenario, the legal rule blocks a transfer that would otherwise occur. This intervention can be justified on the basis of an objective theory of welfare. An objective theory rejects the idea that people's well-being is solely determined by the extent to which their subjective, actual preferences are fulfilled.<sup>165</sup> As actual preferences might be based on mistake, prejudice, whims, or lack of self-respect, their satisfaction might reduce, rather than enhance, welfare.<sup>166</sup> The objec-

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ing is that people are willing to sacrifice some of their material well-being in order to punish people who act unfairly. Güth et al., *supra* note 156, at 384; Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1493-95 (1998). Experimental studies have shown that both motivations determine people's behavior. Lewinsohn-Zamir, *supra*, at 231.

163. Werner Güth & Steffen Huck, *From Ultimatum Bargaining to Dictatorship—An Experimental Study of Four Games Varying in Veto Power*, 48 METROECONOMICA 262, 272 (1997). This experiment demonstrates the existence of a fairness per se motivation.

164. EDWARD WINDSOR, *A KING'S STORY: THE MEMOIRS OF THE DUKE OF WINDSOR* 355, 411 (1951).

165. Daphna Lewinsohn-Zamir, *The Objectivity of Well-Being and the Objectives of Property Law*, 78 N.Y.U. L. REV. 1669, 1701 (2003). Actual preferences are those where which a person has in fact, whatever their content. JAMES GRIFFIN, *WELL-BEING: ITS MEANING, MEASUREMENT AND MORAL IMPORTANCE* 10 (1986); John C. Harsanyi, *Morality and the Theory of Rational Behaviour*, in *UTILITARIANISM AND BEYOND* 39, 55 (Amartya Sen & Bernard Williams eds., 1982).

166. ROBERT MERRIHEW ADAMS, *FINITE AND INFINITE GOODS: A FRAMEWORK FOR ETHICS* 84-85, 89-91 (1999); SHELLY KAGAN, *NORMATIVE ETHICS* 38 (1998); Richard J. Arneson, *Human Flourishing Versus Desire Satisfaction*, 16 SOC. PHIL. & POL'Y 113, 124 (1999).

tive theory holds that certain things—such as autonomy, knowledge, successful achievement of worthwhile goals, realization of one's potential, deep and meaningful social relationships and enjoyment—are good for people and promote their welfare.<sup>167</sup> These things have intrinsic value that is independent of preferences or tastes.<sup>168</sup> By the same token, some things detrimentally affect people's welfare, even if the individuals concerned do not realize it.<sup>169</sup> An objective criterion judges individuals' well-being by the extent to which they attain the goods worth having in their lives and avoid the intrinsically bad.<sup>170</sup>

Under an objective theory of welfare, if as a result of the legal rule the donor decides to transfer the property unconditionally, then the transferee is better off, whereas the donor's autonomy is injured, since she cannot realize her highest-ranking preference, but only her second-best one. It stands to reason, however, that the magnitude of the benefits to the recipient of unrestricted property outweighs the loss to the donor. One must remember that the legal rule does not intervene with all—or even most—conditions, but only with those pertaining to the most significant or intimate life choices of individuals.<sup>171</sup> From an objective welfare perspective, a donor's interference in these choices is particularly harmful to the long-term well-being of the transferee. The donor's loss in terms of her auton-

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167. GRIFFIN, *supra* note 165, at 67–68; KAGAN, *supra* note 166, at 39; DEREK PARFIT, REASONS AND PERSONS 499 (1984); Lewinsohn-Zamir, *supra* note 165, at 1701–05.

168. STEPHEN DARWALL, WELFARE AND RATIONAL CARE 1, 3, 103 (2002); *see also* T.M. SCANLON, WHAT WE OWE TO EACH OTHER 112–13 (1998).

169. KAGAN, *supra* note 166, at 39; PARFIT, *supra* note 167, at 499.

170. An objective theory of well-being need not entail unwarranted interference with people's desires or liberty. One safeguard, for instance, is already built into the objective theory itself. According to the theory, "autonomy" and "enjoyment" are also objective goods. Because these goods are not the only ones on the list, they consequently do not receive the same supremacy that they would have had in an actual preferences theory of welfare. To illustrate, sufficient increases in other goods—such as accomplishment or deep relationships—may outweigh losses in autonomy. Nevertheless, autonomy and pleasure can and should be given substantial weight. GRIFFIN, *supra* note 165, at 71; Thomas Scanlon, *Value, Desire and Quality of Life*, in *THE QUALITY OF LIFE* 185, 192 (Martha C. Nussbaum & Amartya Sen eds., 1993). Thus, for instance, the value of autonomy may prevent us from compelling people to adopt a single best activity, but it would not preclude us from the much milder interference of forbidding a certain worst activity or preventing a result that would greatly reduce well-being, while leaving numerous other options available for free choice. THOMAS HURKA, PERFECTIONISM 149, 152, 156 (1993); Lewinsohn-Zamir, *supra* note 165, at 1706–07, 1710–13, 1718–19.

171. *See supra* notes 39–46, 150–53 and accompanying text.

omy is substantially smaller for two reasons. First, a preference to excessively exert control over another person's life conflicts with other objective goods, such as attaining appropriate relationships of mutual respect. Second, were the goals underlying the conditions extremely important to the donor, she would have responded by not transferring the property at all. The fact that she opted to make an unrestricted giving demonstrates that this was not the case. We should not permit conditioned transfers that severely injure the beneficiary's welfare while only slightly enhancing the donor's well-being.

Finally, even if a subset of potential donors would prefer absolute nontransfer to unconditioned transfer, the rule invalidating certain restrictions may still be justified. First, we should judge any rule by its overall outcomes, taking into account all possible scenarios, rather than judging one case in isolation. Second, since preferences are largely endogenous and legal rules often have educational effects,<sup>172</sup> the very existence of the rules may gradually decrease the number of donors favoring nontransfer over unconditioned transfer.<sup>173</sup> Third, the subjective loss to the donor from not being able to transfer property subject to restrictions is mitigated by the fact that the law does not coerce an unconditioned transfer. The legal rule blocks only one of the property owner's options—a certain type of restricted transfer—leaving many paths open for autonomous choice. The law honors the donor's wish to withhold property from a person that does not submit to her control. Fourth, the injury to the potential transferee from not receiving the property at all should be offset against the grave objective harms that would have ensued (in the absence of the legal rule) had she received the conditioned property.<sup>174</sup>

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172. Cass R. Sunstein, *Endogenous Preferences*, *Environmental Law*, 22 J. LEGAL STUD. 217, 221–42 (1993) (discussing the endogeneity of preferences and its normative implications); Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106, 111, 118, 128–29, 132–33 (2002) (advocating the use of default rules to shape people's preferences and "push" their subjective valuations in a welfare-enhancing direction).

173. The fact that wills, trusts, and gifts of significant value are ordinarily executed with the assistance of lawyers ensures that the legal rule would be widely known and communicated to the donors.

174. The former injury is further mitigated by the fact that the property was never given—even conditionally—to its potential recipient. The latter may even be unaware of the fact that, were it not for the legal rule, the donor would have given her property subject to conditions. As behavioral studies clearly demonstrate, a forgone gain "hurts" much less than a loss of a thing one already possesses. See *infra* notes 195–98 and accompanying text.



The same conclusions may hold even if one adopts an ideal preferences theory of welfare rather than an objective theory. According to an ideal preferences theory, a person's well-being is judged not by the preferences she *actually* has, but rather according to the preferences she *would have* if she thoroughly, clearly and calmly deliberated all possible alternatives and their consequences on the basis of full information and without any errors of reasoning.<sup>175</sup> In the present context, ideal preferences support the nullification of certain injurious conditions. It can be claimed that preferences formed under ideal conditions would lead a person to reject the conditioned property. Furthermore, even if one adheres to strictly subjective criteria of well-being—fulfillment of actual preferences or attainment of pleasure and avoidance of pain<sup>176</sup>—an individual's well-being is measured not according to her preferences or mental states at a particular point in time, but rather by the degree to which her preferences are satisfied, or her happiness is enhanced, over the course of her life.<sup>177</sup> If we can foresee with high probability that a person who is willing to accept a conditioned entitlement will eventually regret her decision, or that it will cause her more sorrow than happiness overall, then even these subjective theories justify the invalidation of harmful conditions. At times, the existence of second-order preferences (preferences people have with regard to their own, first-order preferences)<sup>178</sup> can also substantiate such invalidation. Individuals may succumb to the temptation of accepting restricted property, yet at the

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175. See GRIFFIN, *supra* note 165, at 11–13; KAGAN, *supra* note 166, at 38; HENRY SIDGWICK, *THE METHODS OF ETHICS* 110–12 (7th ed. 1981). Elsewhere I have argued that any plausible theory of well-being, including a preferences-satisfaction theory, contains strong objective components that bring it very close to an objective theory of welfare. Lewinsohn-Zamir, *supra* note 165, at 1690–1700.

176. Jeremy Bentham's utilitarian conception of welfare equates well-being with happiness, defined as the presence of pleasure and absence of pain. Welfare is calculated by subtracting the total quantity of pain from the total quantity of pleasure. JEREMY BENTHAM, *UTILITARIANS: AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 407, 412 (Dolphin Books 1961) (1823); see also JEREMY BENTHAM: *THE COLLECTED WORKS OF JEREMY BENTHAM* 11–12 (J.H. Burns & H.L.A. Hart eds., The Athlone Press 1970) (1789).

177. Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 246 n.49 (1998).

178. See Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. PHIL. 5 (1971) (formulating the distinction between first- and second-order preferences).

same time wish they had resisted it.<sup>179</sup> Legal intervention with conditioned transfers may thus satisfy people's second-order preferences, which are as real as their first-order ones.

In summary, a conditioned transfer of property might significantly harm the transferee's long-term well-being in a way that nontransfer of property cannot. This injury may lead the intended transferee herself to reject the property altogether. When this is not the case, various theories of welfare support a rule that strikes down objectionable conditions, even if the transferees would have chosen to accept the property and comply with the conditions attached to it.<sup>180</sup>

Similar reasoning can explain why the extant rules governing moral rights allow property owners more freedom to destroy works created by artists than to modify them.<sup>181</sup> Although destruction is a more extreme measure than modification, the latter is often the more injurious to the welfare of the creator.<sup>182</sup> An altered work may constitute a continuous eyesore—one that misrepresents the author and portrays her art pejoratively to the public. Modification may hurt not only the author's honor and reputation,<sup>183</sup> but also hinder the attainment of important goods, such as self-respect, self-fulfillment, and accomplishment.<sup>184</sup> In contrast, a destroyed work ceases to exist and so

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179. Zamir, *supra* note 177, at 242 (“[A] person may regularly eat junk food or read pulp fiction and at the same time be unhappy with these choices, wishing his eating and reading preferences were different.”). The existence of first- and second-order preferences is famously illustrated by the story of Ulysses and the sirens. JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 36–111 (rev. ed. 1984).

180. A different explanation for such intervention can rest on the idea that a free and democratic society requires minimum standards of decency and fairness, that treat every person with equal concern and respect. This framework of minimal standards defines the contours of social life and structures contractual and social relationships. Accordingly, certain conditions, terms or clauses may be deemed unacceptable. For elaboration of this argument, see generally Joseph William Singer, *Things That We Would Like to Take for Granted: Minimum Standards for the Legal Framework of a Free and Democratic Society* (Harvard Pub. Law, Working Paper No. 136, 2006), available at <http://ssrn.com/abstract=946108>.

181. See *supra* notes 133–41 and accompanying text.

182. See Merryman, *supra* note 135, at 1035 (conceding that damage to a work of art may sometimes be worse than destruction of the work).

183. “Honor” and “reputation” are the phrases used in moral rights legislation. See *supra* note 133 and accompanying text. Indeed, courts have relied on these terms to deny the extension of moral rights to the case of destruction. Garson, *supra* note 141, at 218.

184. See *supra* notes 166–69 and accompanying text. The claim that moral rights aim at enhancing an objective conception of welfare is strengthened by

cannot inflict these damages, or at least not to the same extent.<sup>185</sup>

## 2. Preventing Mistakes and Misconceptions

The discussion in the previous Section assumed that the property transferees are clearly able to satisfy the conditions. It therefore focused on the effect that such compliance will have on their welfare. This assumption does not always hold. When conditions are not easily met, there are additional reasons for preferring extreme measures to moderate ones.

Recall the issue of restriction on alienation by tenants. We observed that the law is more tolerant of extreme, absolute prohibitions on transferring the lease than it is of moderate, conditioned transfers. The former type of restriction is generally enforceable, even if the landlord's refusal to accept a prospective new tenant is arbitrary or capricious.<sup>186</sup> If, however, the lease allows for alienation provided the tenant receives the landlord's consent, such consent must be granted unless there is an *objectively* reasonable ground for refusal.<sup>187</sup>

This peculiar, unequal legal treatment can be justified. Imagine an opposite legal rule, one that permits landlords to withhold their consent under a conditioned-transfer clause for any reason, or even for no reason at all. Such complete discretionary freedom is tantamount to an outright prohibition on alienation by tenants. This is because even if a lease explicitly forbids any transfer, the tenant may still try to convince the landlord to accept a replacement when the issue arises in prac-

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the fact that these rights are nontransferable. 17 U.S.C. § 106A(b), (e) (2000). In addition, the law severely restricts the waiver of moral rights. In the United States, such waiver must be stated explicitly and contained in a written, sufficiently detailed, and signed document. 17 U.S.C. § 106A(e); 3 NIMMER & NIMMER, *supra* note 141, § 8D.06[D]; David Nimmer & Eric J. Schwartz, *United States*, in 2 INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 7[4], at USA-117 (Paul Edward Geller ed., 1994). Some countries, such as France, do not allow waiver of moral rights at all. Pascal Kamina & Andre Lucas, *France*, in 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, *supra*, § 7[4], at FR-109..

185. In a somewhat similar vein, the torturing of an animal can be viewed as worse than the extreme act of killing it (if the latter act is done without inflicting pain). Arguably, mistreatment and abuse are particularly odious not only for their effect on the animal's welfare, but also for their long-term effect on the torturer's well-being. This may explain why animal protection laws either do not refer to killing at all, or create a carve-out for the killing of animals by their owners. See *supra* notes 144-46 and accompanying text.

186. See *supra* notes 57-58 and accompanying text.

187. See *supra* notes 58-62 and accompanying text.

tice.<sup>188</sup> The landlord is free to agree or refuse, in the same way as under our hypothetical complete-discretion conditioned-transfer rule. The two rules are thus equivalent in terms of the landlord's interests; but not so from the tenants' point of view. Whereas the absolute prohibition clause is clear and unequivocal, the conditioned-transfer clause is more ambiguous and open to misunderstanding. When the lease indicates that alienation is a viable option, tenants may mistakenly believe that they are entitled to transfer their right (as long as they find an objectively suitable candidate), and that landlords would not unreasonably withhold their consent. Therefore, a rule subjecting a conditioned-transfer clause to a reasonableness test protects tenants from confusion, by giving landlords an incentive to state in unequivocal terms their preference for total control over the choice of prospective tenants.

Behavioral studies confirm the likelihood of such mistakes on the part of tenants. First, there is a well-documented, prevailing cognitive bias toward overoptimism.<sup>189</sup> Even people who are factually informed about particular risks often underestimate the likelihood that such risks will materialize in their case.<sup>190</sup> Thus, for instance, notwithstanding correct information about the chances of being involved in an automobile accident, suffering a heart attack or divorcing from one's spouse, most individuals overconfidently believe that they are much less likely than the average person to experience these events.<sup>191</sup>

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188. See 1 FRIEDMAN, *supra* note 55, at 356 ("A landlord may waive a restriction against assignment or subletting."); SMITH, *supra* note 88, at 97 (explaining that even under an absolute prohibition covenant, a landlord may give the tenant a license to carry out a particular transaction).

189. See Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653, 1659-61 (1998) (describing the overoptimism phenomenon).

190. Cass R. Sunstein, *Introduction to BEHAVIORAL LAW AND ECONOMICS* 1, 4 (Cass R. Sunstein ed., 2000).

191. Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 443-47 (1993) (finding that, notwithstanding accurate knowledge about the rate of divorce, individuals about to be married were confident that it would not happen to them. Such unrealistic optimism was also demonstrated by law students participating in a course on family law); David M. DeJoy, *The Optimism Bias and Traffic Accident Risk Perception*, 21 ACCIDENT ANALYSIS & PREVENTION 333, 336-37 (1989) (observing excessive optimism with regard to driving competency and the risk of causing auto accidents); Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806, 809-12 (1980) [hereinafter Weinstein, *Future Life Events*] (analyzing overoptimism with respect to personal and professional prospects); Neil D. Weinstein, *Unrealistic Optimism About Suscepti-*

Overoptimism is especially prevalent with respect to occurrences perceived by people as (at least somewhat) under their control.<sup>192</sup> Second, people tend to think that others will treat them fairly and decently.<sup>193</sup> Thus, for example, although respondents in an experiment on perceptions of divorce estimated that only forty percent of spouses who have been awarded alimony or child support actually receive these payments, they confidently predicted that their own spouse would fully comply with the court's decision.<sup>194</sup> It is therefore highly likely that a tenant signing a conditioned-transfer lease would believe she stood a very good chance of persuading the landlord to grant permission, and would discount the possibility that the latter would arbitrarily withhold consent.<sup>195</sup>

Overconfidence in this regard may be reinforced by another well-known behavioral phenomenon. Cognitive studies have observed that people's evaluation of a situation depends on the way in which the relevant data has been presented to them.<sup>196</sup> In particular, an individual's evaluation is made in relation to a certain reference point or status quo, which, in turn, determines whether a scenario is framed as one that involves gain or loss.<sup>197</sup> As Amos Tversky & Daniel Kahneman's prospect theory

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*bility to Health Problems: Conclusions from a Community-Wide Sample*, 10 J. BEHAV. MED. 481, 487-89 (1987) (finding unrealistic optimism with regard to health hazards).

192. SHELLEY E. TAYLOR, POSITIVE ILLUSIONS: CREATIVE SELF-DECEPTION AND THE HEALTHY MIND 36-39 (1989); DeJoy, *supra* note 191, at 336, 338; Jeffrey Rachlinski, *The "New" Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739, 747 (2000); Weinstein, *Future Life Events*, *supra* note 191, at 814, 819.

193. Baker & Emery, *supra* note 191, at 443 (observing such beliefs with respect to receiving alimony and child support payments).

194. *Id.*

195. The opposite behavioral phenomenon of overpessimism, or overestimation of risks, is expected to occur when a negative event that one cannot control (or affect) becomes highly salient or threatening, such as after wide media coverage of a nuclear power plant accident or a natural disaster. W. KIP VISCUSI, FATAL TRADEOFFS: PUBLIC AND PRIVATE RESPONSIBILITIES FOR RISK 150 (1992) (stating that people overestimate the likelihood of events such as death by tornado, but underestimate risks such as heart disease or stroke); Colin F. Camerer & Howard Kunreuther, *Decision Processes for Low Probability Events: Policy Implications*, 8 J. POLY ANALYSIS & MGMT. 565, 569-70 (1989); Jolls, *supra* note 189, at 1662-63. Overpessimism is less likely to characterize ordinary contractual relationships, such as landlord and tenant, where both parties exercise at least some degree of control over the ensuing outcomes, and the relevant contingencies are unlikely to be very salient.

196. Sunstein, *supra* note 190, at 6.

197. Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 274 (1979); Amos Tversky & Da-

famously demonstrated, an inflicted loss "hurts" much more than an un-obtained gain of the same magnitude.<sup>198</sup>

Compare, once again, a total prohibition clause with a complete discretion, conditioned-transfer clause. As explained above, both rules enable (or are designed to enable) landlords to refuse consent for any reason at all. Tenants, however, are likely to perceive the two rules very differently. A clause unequivocally prohibiting alienation conveys the message that no right of transfer exists. Although a tenant may try at some point in the future to convince the landlord to allow a transfer, her reference point, or the status quo, is that she is not entitled to transfer her lease. Renegotiation of this issue would therefore be viewed by the tenant as involving the possibility of obtaining a gain. Consequently, failure on her part would be more readily accepted, and its adverse impact on her mitigated. By contrast, a conditioned-transfer clause might reasonably be regarded by the tenant as creating a right to alienate, albeit a qualified one. The Landlord's subsequent refusal would thus be viewed as inflicting a loss which, in turn, would increase the negative impact on the tenant and her frustration from not being able to exercise what she perceived as her right.<sup>199</sup>

For these reasons, we should not regret that imposing a reasonableness requirement on the landlord's exercise of her contractual discretion to withhold consent, may prompt some landlords to put in the lease agreement an outright prohibition on any transfer by the tenant. On the contrary, unequal legal treatment of prohibition and conditioned-transfer clauses can prevent tenants' mistakes, and reduce their potential, subsequent losses by dividing landlords at the outset into two groups: those willing to submit to a reasonableness standard and those insisting on complete control. The former will continue to use conditioned-transfer clauses, which will henceforth correspond to the understanding by *both* parties that consent

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niel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. S251, S257-62 (1986) (discussing the effect of framing on the evaluation of outcomes and showing, among other things, how people's preferences change when a frame is shifted from one involving the number of lives saved to one involving the number of lives lost).

198. Kahneman & Tversky, *supra* note 197, at 265-69; Daniel Kahneman et al., *The Endowment Effect, Loss Aversion, and the Status Quo Bias*, 5 J. ECON. PERSP. 193, 199-201 (1991).

199. For these reasons, even if a tenant is overoptimistic regarding her chances of persuading the landlord to waive a complete prohibition clause, her failure to do so will be less harmful to her welfare than in the case of a conditioned-transfer clause.

cannot be unreasonably withheld. The latter will make use of prohibition clauses, which clearly reflect the true state of affairs with respect to the possibility of alienation. The law thus assists in creating two unambiguous, distinct paths for landlord-tenant relationships.

A caveat is in order. For the purposes of this Article, I need not take a stand on whether total deference to alienation-prohibition clauses is justified. One may argue, for instance, that freedom of contract should be limited in both cases, i.e., that both prohibition and conditioned-transfer clauses should be subject to a reasonableness test.<sup>200</sup> I do submit, however, that if we believe landlords should have the power to veto alienation by tenants completely, there is good reason to require that such contractual terms be phrased in an extreme and unambiguous fashion.

The foregoing analysis is not limited to alienation control clauses in lease agreements. It is generally applicable to conditions attached to rights that are not easily fulfilled but might mistakenly appear to be so. Another example of this kind is a bequest conditioned on the donee marrying within a short period of time a person who meets certain restrictive criteria.<sup>201</sup> The potential recipient of the gift may overconfidently believe that she will easily satisfy the condition, and so rely to her detriment on the expectation of enjoying the bequest. In this type of case, the practical difference between having no right from the outset and having a conditioned right that is difficult to meet is relatively small.<sup>202</sup>

Viewed from this perspective, legal rules that interfere more with moderate-phrased measures than with extreme-phrased ones, can be understood as debiasing devices. By encouraging the party granting a right to frame it in unconditioned and unambiguous terms, rather than in a moderate, conditioned manner which might be misleading, these rules reduce cognitive biases, such as the overoptimism bias.<sup>203</sup>

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200. Such is the case in Israeli Law. Hire and Loan Law, 5731-1971, 25 LSI 152, § 22 (1972) (Isr.).

201. See RESTATEMENT (SECOND) OF PROP: DONATIVE TRANSFERS § 6.2 & cmts. b-c (1983) (stating that a condition that unreasonably limits the donee's opportunity to marry is invalid); see also *supra* note 44.

202. For examples outside of property law, see *infra* notes 326-41 and accompanying text.

203. This debiasing method is different from the methods discussed by Jolls and Sunstein, who recommend using the availability and framing biases to correct consumer overoptimism. Christine Jolls & Cass R. Sunstein, *Debias-*

## B. REDUCING THE INCIDENCE OF LOW-VALUING OWNERS

The preceding justifications for greater intervention with moderate measures relating to property focused on the protection of prospective transferees. This Section offers a totally different reason for rejecting the MBL argument. At times, the very employment of a moderate measure is a good proxy for low-valuing owners. The same is not generally true of the exercise of extreme measures.

Recall the issue of use versus nonuse of property. As explained above, the notion that “more is better than less” implies that the liberty to extensively use one’s property should include the freedom to not use it.<sup>204</sup> The more intensively a property right is exercised, the greater the burden inflicted on those who must respect the right and suffer the consequences of its use.<sup>205</sup> It therefore seems that allowing nonuse of property grants more freedom to such people and at the same time respects owners’ choices regarding their property.<sup>206</sup> This depiction of a win-win situation, however, conceals the “darker” side of non-use of property rights.

The value of property may be intimately connected with, and dependent on, its actual use. This is particularly true of property rights created for a specific, narrow purpose that cannot be unilaterally altered or expanded. Take, for instance, a right of way through another person’s land. The servitude’s sole goal is to enable passage. If the owner neither uses the servitude for a lengthy period nor attempts to transfer it or negotiate a change in its scope, one can reasonably infer that the servitude has little (or no) value to her. There may be no fur-

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*ing Through Law*, 35 J. LEGAL STUD. 199, 209–11 (2006). The first technique employs “horror stories” that make the risk more immediate or salient in people’s minds, and thus increases their assessment of the likelihood of its occurrence. *Id.* at 209–10. The second method frames the situation as one that involves losses rather than gains, the idea being that individuals will make a greater effort to avoid harm than they will to acquire a comparable benefit. *Id.* at 210–11. In contrast, I argue that debiasing can also be achieved by encouraging the framing of a situation as one that is *unconditioned* or certain. If a given scenario is framed as involving little uncertainty—or none at all—then overoptimism would be reduced or not arise at all.

204. See *supra* note 32 and accompanying text.

205. Recall the example of an easement holder’s frequent use as a burden on the servient estate owner. See *supra* notes 32–34 and accompanying text.

206. See *supra* notes 34–35 and accompanying text.



ther need for a right of way at all,<sup>207</sup> or the servitude holder may have long ago switched to another, more convenient means of access. Why then does she not expressly relinquish the right? This question may be answered through the examination of two plausible scenarios: nonstrategic nonuse and strategic nonuse.

### 1. Nonstrategic Nonuse

One possible explanation for not actively relinquishing an unused and unneeded servitude is that its owner simply has not bothered to do so. The acquisition of the right<sup>208</sup> is typically a sunken cost. Affirmatively relinquishing a right and the communication of this fact to the relevant parties entail new costs in terms of thought, time, and money.<sup>209</sup> The marginal costs of contemplating the alternative courses of action with respect to one particular item of property that one owns might outweigh the benefits. It may therefore be cheaper or easier to do nothing at all, and leave the status of the title undisturbed.

Neglecting to search for other, more efficient users may sometimes be due to the fact that the owner never paid the property's full market value. She may have paid nothing at all (as in the case of rights acquired by prescription), or only a reduced price (as in the case of rent-controlled housing). In both instances, the fact that not all the costs of owning the property have been internalized can lead owners to hold on to low-valued rights and discount the possibility of relinquishing or transferring them to higher-valuing users.<sup>210</sup>

Furthermore, psychological studies have demonstrated that people seek to avoid regret,<sup>211</sup> and that regret looms larger

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207. For example, a right of way for a restaurant's customers will no longer be needed when the business on the dominant estate was replaced by a residence.

208. Such as the actual price paid (if the servitude was bought in a voluntary sale), or the years of active adverse use (if the servitude was acquired by prescription).

209. Usually, in addition to the servient landowner, the land registry would also have to be informed of the need to erase the servitude from the registry. See, e.g., 76 C.J.S. *Registration of Land Titles* §§ 54–55 (1994) (noting the requirement to register a servitude and the further requirement of a proceeding in some jurisdictions to cancel a memorial of an easement).

210. See Epstein, *supra* note 86, at 762–63 (explaining how regulated rent can distort housing allocation).

211. William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 38 (1988) (using "regret avoidance" to explain people's bias in favor of the status quo).

for commissions than for omissions.<sup>212</sup> An economic loss from an action generates stronger feelings of regret than a loss of similar magnitude resulting from inaction.<sup>213</sup> Thus, for example, one study has shown that monetary loss from a decision to move stock from one investment to another is perceived as causing more regret than an equivalent loss from failing to switch one's stocks to an alternative investment.<sup>214</sup> In a similar vein, another study has demonstrated that people are reluctant to exchange the lottery ticket in their hand for another one, even when they are offered a financial incentive for making the exchange and even when they do not believe their original ticket has a higher probability of winning.<sup>215</sup> The researchers found that the anticipation of ex post regret from exchanging a ticket and losing is greater than the regret from losing after refusing to trade.<sup>216</sup>

These phenomena support the contention that people may be overly reluctant to part with low-valued property rights. Such parting requires a commission, which is particularly prone to the regret avoidance bias.<sup>217</sup> In contrast, holding on to the property right involves an omission, which engenders lower regret costs. Consequently, in order to minimize future regret, individuals will unnecessarily hold on to unused property.

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212. *Id.*

213. Jonathan Baron & Ilana Ritov, *Reference Points and Omission Bias*, 59 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 475, 476–77, 495–96 (1994); Ilana Ritov & Jonathan Baron, *Status-Quo and Omission Biases*, 5 J. RISK & UNCERTAINTY 49, 50, 59–60 (1992) [hereinafter Ritov & Baron, *Omission Biases*]; Mark Spranca et al., *Omission and Commission in Judgment and Choice*, 27 J. EXPERIMENTAL SOC. PSYCHOL. 76, 78–79, 101–03 (1991); see also THALER, *supra* note 161, at 73 (explaining this asymmetry by the fact that people feel more blame and responsibility when voluntarily assuming a risk than when failing to reduce a risk); Lee Anne Fennell, *Death, Taxes, and Cognition*, 81 N.C. L. REV. 567, 588–90 (2003) (using the regret avoidance and omission/commission biases to explain the low rate of inter vivos giving).

214. Daniel Kahneman & Amos Tversky, *The Psychology of Preferences*, 246 SCI. AM. 160, 173 (1982).

215. Maya Bar-Hillel & Efrat Neter, *Why Are People Reluctant to Exchange Lottery Tickets?*, 70 J. PERSONALITY & SOC. PSYCHOL. 1, 18, 24–25 (1996). Such reluctance was not manifested in an equivalent experiment that involved the trading of pens. *Id.* at 23–24.

216. *Id.* at 25–26; see also Ilana Ritov & Jonathan Baron, *Reluctance to Vaccinate: Commission Bias and Ambiguity*, in BEHAVIORAL LAW AND ECONOMICS, *supra* note 190, at 168, 184 (finding that people are reluctant to vaccinate a child even when the risk of death from disease is significantly higher than death from vaccinating against it).

217. Samuelson & Zeckhauser, *supra* note 211, at 38.

In this context, the comparison between nonuse and destruction of property is illuminating. Destruction is not susceptible to the above problems, which may lead to inefficient choices regarding property. A decision to destroy cannot be the product of neglect, inertia or lack of thought. Destruction, by its very nature, is much more likely to result from thoughtful evaluation of alternative options. One main reason is that there is no way back from it. A decision to destroy, once carried out, is irreversible. It cannot be employed as a kind of default, to be changed, perhaps, at some time in the future. The finality of the act naturally draws the owner's attention to other possible courses of action, and compels her to examine them carefully. Specifically, when an owner chooses destruction, she will usually be aware of the fact that she is permanently forgoing all other options, including sale, lease, gift, and abandonment of the property. Leaving aside such relatively rare cases as owner insanity and accidental destruction, if an owner prefers destruction even over abandonment of her property,<sup>218</sup> then this indicates the former action's high value for her. The fact that, in practice, owners usually do not destroy valuable assets<sup>219</sup> strengthens—rather than weakens—this argument. In those special cases where owners intentionally opt for the destruction of their property notwithstanding its market value, there is a strong *prima facie* case that this extreme measure was taken for good reason and that it is the efficient course of action.<sup>220</sup>

Moreover, the cognitive biases described above strengthen the argument regarding the differences between nonuse and destruction. The choice to hold on to unused property (which may be due to neglect, lack of knowledge and thought, or transaction costs) is further bolstered by aversion to regret. This aversion, in turn, is *reinforced* by the omission/commission bias, since holding on to property constitutes inaction, which engenders lower costs of regret.<sup>221</sup> In contrast, a decision to de-

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218. Abandonment renders an asset ownerless and enables another person to take possession and become its new owner. Abandonment ordinarily requires less effort on behalf of the original owner than destruction.

219. Honoré, *supra* note 23, at 118 ("Most people do not wilfully destroy permanent assets . . ."); McCaffery, *supra* note 132, at 86 ("[D]issipatory waste is not common in our culture.").

220. Strahilevitz convincingly argues that destructive acts often promote expressive values and that such acts should receive greater deference than currently afforded under law. Strahilevitz, *supra* note 128, at 821–22, 824–26. Examples of expressive destruction include burning a flag or a draft card. *See id.*

221. *See supra* notes 211–16 and accompanying text.

stroy an asset represents not merely a commission, but an reversible one at that. As a result, it is subject to the highest potential costs of regret.<sup>222</sup> Acts of destruction must *overcome* the bias against regret-producing commissions in order to occur at all. Consequently, higher nonexistence value and stronger reasons than otherwise are needed to enable owners to prevail over their cognitive bias. Since the omission/commission bias operates against—rather than in favor of—destroying property, it adds assurance that destruction is the consequence of rational thought.

Before proceeding, an important caveat is in order. Of course it is not the case that decisions to destroy can never be mistaken. Owners may sometimes be unaware of the existence of an individual whose valuation of the property surpasses their own destruction value.<sup>223</sup> Similarly, noninternalization of positive externalities might cause owners to demolish a building of architectural importance.<sup>224</sup> I do argue, however, that there are important differences between nonuse and a decision to destroy property, and that as a rule we have greater confidence—albeit not absolute certainty—in the efficiency of the latter.

Once the differences between nonuse and decisions to destroy are revealed, their different legal treatment is easily explained. In this context too, intervention in the case of the more

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222. Compare, for instance, an act of destruction with an act of alienation (such as a sale). Although in both cases the owner parts with her asset, in the latter case there remains a chance of repurchasing the asset in the future.

223. Strahilevitz recommends solving this problem, with respect to destructive instructions contained in wills, by requiring owners, while they are still alive, to market the future interest in the property (that is, the ownership of the property after their death). Strahilevitz, *supra* note 128, at 850. If the owner's minimum asking price exceeds the highest bid in an auction of the future interest, then she demonstrably values the property's destruction more than anyone else values its preservation, and consequently the instruction in her will to destroy the property should be honored. *Id.* at 850–51. Note that Strahilevitz does not suggest a similar mechanism as a condition for permitting owners to destroy property during their lifetime. *Cf. id.* at 851 (discussing the posthumous restriction without application to *inter vivos* destruction). Thus, he assumes that the risk of inefficient *ante mortem* destruction is too small to warrant legal intervention. *See also id.* at 821–22 (generally arguing in favor of a right to destroy).

224. On the public goods aspects of building preservation, see Lewinsohn-Zamir, *supra* note 127, at 746–48. If we define the relevant property as “land in its entirety,” rather than “the structure erected on it,” then the decision to demolish may be viewed not as a case of property destruction, but as an instance of changes in the utilization of the property (since demolition will usually be followed by new development of the land).

moderate measure of nonuse is more justifiable than regulation of the extreme measure of destruction.

Since nonuse of property is less likely to be grounded in sound reasons and more prone to cognitive biases, the law aims to counteract these problems by stating that unused rights may be lost.<sup>225</sup> At the same time, to minimize the risk of mistakes, use-it-or-lose-it rules are not applied across the board to all property rights, but are limited to cases where a significant period of nonuse is a strong indicator of low-valuing owners.<sup>226</sup> For this reason, such rules typically target rights that were created at the outset for a specific, narrow purpose that cannot be unilaterally altered by the right holders. In these cases we can rest assured that nonuse is not motivated by owners' waiting until the time when their property is ripe for a better use.

This cautiousness explains why use-it-or-lose-it rules are found with respect to trademarks, rent-controlled housing, water rights, and to some extent servitudes as well.<sup>227</sup> The whole point of a trademark is its actual business-related use to enable the identification of the source of goods and services.<sup>228</sup> Furthermore, a trademark cannot be secured until the mark is used in commerce.<sup>229</sup> Likewise, the sole purpose of rent control is to supply affordable housing to those who would otherwise lack it.<sup>230</sup> Water rights and rights of way are similarly linked to particular, limited kinds of enjoyment. By extinguishing unused rights of these types the law reduces instances of low valuation by right holders while saving on the transaction costs

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225. See *supra* Part I.B.2.

226. For example, use-it-or-lose-it rules are applied to trademarks, rent-controlled housing, water rights, and certain types of servitudes. See BRUCE & ELY, *supra* note 101, § 10:19, at 10-39 to -40; DOLAN, *supra* note 86, § 2:39, at 144-45; KANE, *supra* note 65, § 1:1.1; 6 THOMPSON ON REAL PROPERTY, *supra* note 37, § 50.09(gg), at 751.

227. For criticism of the majority rule, which does not suffice with naked nonuse for terminating servitudes, see *infra* notes 301-02 and accompanying text.

228. 15 U.S.C.A § 1127 (West Supp. 2007) (“[T]he intent of this chapter is to regulate commerce.”); KANE, *supra* note 65, § 1:1.1 (noting that the critical element of trademarks is to “identify and distinguish one company’s products from another’s”).

229. GOLDSTEIN, *supra* note 78, at 223-24; KANE, *supra* note 65, §§ 1:1.5[E], 1:3, 5:1.1, 5:1.10; 2 MCCARTHY, *supra* note 67, §§ 16:1-16:2.

230. See, e.g., KEATING ET AL., *supra* note 87, at 3 (“[R]ent controls typically have been imposed . . . when rents increased beyond the ability of many tenants to pay without hardship.”).

associated with freeing scarce resources<sup>231</sup> for more efficient uses.<sup>232</sup>

According to this rationale, it is not surprising that nonuse does not in and of itself extinguish ownership of land, and that a nonuse plus regime applies instead.<sup>233</sup> Contrary to the above examples, ownership of land enables many potential and diverse enjoyments, some of which may be realized only in the future. It may very well be the case that land is presently unutilized because it is not yet ripe for development or because the owner is waiting for the time when a better use can be made.<sup>234</sup> Thus, a use-it-or-lose-it rule might create inefficient incentives for premature development.<sup>235</sup> Consequently, nonuse of land by

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231. Peck, *supra* note 94, at 801–02 (describing the scarcity of water rights in Kansas); Jacobson, *supra* note 94, at 182 (stating that water in the western states “is scarce and demand is consequently very high”). The limited recognition of instream flow rights held by individuals is compatible with the above argument. *See supra* note 100. First, the need for water preservation must be positively demonstrated and cannot be deduced from mere nonuse. *See, e.g.,* Sterne, *supra* note 100, at 227–29 (noting the positive need requirements for Arizona and Alaska, as well as Alaska’s further requirement that the reservation be in the public interest). When such proof is presented by the right holder, the issue of inefficient nonuse will not arise. Second, my explanation for the use-it-or-lose-it rule applies to the value of a *consumptive use* right (for example, a right to divert a certain quantity of the water source) to its *nonusing* owner. Once this low valued right is extinguished, the identity of the efficient alternative can be debated. Efficiency considerations may favor either a new consumptive user or that the consumptive right be converted into an instream-preservation right.

232. Abolition of unused rights saves, for instance, on the costs of negotiating their transfer from the original owner to new users, or of their voluntary relinquishment by the former.

233. For example, rights in land may be lost via adverse possession. *See* STOEBUCK & WHITMAN, *supra* note 82, at 853; *see also supra* notes 117–19 and accompanying text.

234. SHAVELL, *supra* note 24, at 73 (stating that idle land sometimes serves a high-value purpose, for instance, a developer may wish to leave his land untouched because he is planning to build on it in the future, and an environmentalist owner may desire to maintain land in its pristine condition for the benefit of wildlife); Fennell, *supra* note 32, at 1064 (arguing that a passive use of land may actually increase overall societal value); Jeff M. Netter et al., *An Economic Analysis of Adverse Possession Statutes*, 6 INT’L REV. L. & ECON. 217, 219 (1986) (“[O]ptimizing behavior does not require that land be continuously in service. For example, a tract of land’s most valuable use might be in the future and it does not pay the owner to employ it in any other manner until then.”); *see also* John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 857–62 (1994) (asserting that preservation of wild lands in their natural condition may be socially preferable to economic development by adverse possessors).

235. In a related context, it was claimed that homesteading acts which condition the grant of land on residency and improvement by settlers are inef-

owners is not a sufficiently persuasive indication of the owners' low valuation of their property.

Once again, the case of destruction differs from that of nonuse. Since an owner's decision to destroy her property is more likely to be justified and less susceptible to cognitive biases,<sup>236</sup> there is no need for a general law prohibiting the destruction of property. Indeed, no such law exists.<sup>237</sup> The differences between destruction and moderate measures relating to property can also explain why cultural property legislation is limited to regulation of issues such as export restrictions and rights of preemption.<sup>238</sup> There is greater risk of mistake in export decisions—which are reversible and so do not necessarily draw attention to the costs inflicted on third parties (the general public of the country of origin)—than in destruction choices.

In summary, although destruction is the most extreme measure an owner can take with regard to her property—the one that entails the most significant and irreversible consequences—there is less need for state regulation of this act and a stronger case for governmental deference to the owner's wishes.

## 2. Strategic Nonuse

Neglect, inertia, and lack of thought or information are not the only reasons for holding on to unused property. A different reason for not relinquishing unused rights is their "blackmail" value. For example, even if a right of way has no value to the holder who does not intend ever to use it in the future, its very existence can be utilized to extract gain from the servient landowner. Although property rights as rights *in rem* generally bind the whole world,<sup>239</sup> they often affect certain people much more than others. While it is true that everyone must respect the servitude holder's right,<sup>240</sup> it is equally clear that the servient landowner is especially burdened by the servitude, and to a much greater extent than third parties in general. Even though the right of way is not used at all, its very existence

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ficient, because they encourage premature development of land. Terry L. Anderson & Peter J. Hill, *The Race for Property Rights*, 33 J.L. & ECON. 177, 178, 181–82, 189–91 (1990).

236. See *supra* notes 211–22 and accompanying text.

237. See *supra* notes 129–30 and accompanying text.

238. See JOTE, *supra* note 144, at 158–61.

239. LAWSON & RUDDEN, *supra* note 127, at 2–3.

240. *Id.* at 127–28.

may preclude the most efficient use of the servient estate. The right of way's location, for instance, may prevent the replacement of a small villa on the servient land with a high rise condominium permitted under a new zoning ordinance. By refusing to relinquish the unused right of way which is otherwise of no value to her, the servitude owner exploits her monopoly position to transfer wealth from the servient landowner to herself. In a similar vein, a tenant's right to enjoy the rent-controlled apartment burdens the landlord more heavily than all others. Even if the apartment remains vacant, the right of tenancy prevents the landlord from putting it to any other use and realizing its full market value. Consequently, the tenant can use her property right to extract a profit from the landlord.

Such pure transfers of wealth are unjustifiable. From an efficiency point of view, they constitute a needless waste of resources. Furthermore, the wealth transfer cannot be supported by distributive considerations. There is no reason to believe that property owners who hold out are, as a group, significantly less well-off than the people from whom they attempt to extract gain.<sup>241</sup>

One may object that even assuming unused or obsolete rights should be terminated, this fact alone does not support their coerced (rather than voluntary) abolition. Carol Rose, for instance, argues that "[t]he right to 'hold out,' for whatever idiotic reasons, is an aspect of the right to hold property."<sup>242</sup> Richard Epstein similarly states that "[t]o say that ordinary ownership presents a holdout problem is not to identify a defect in the system; it is to identify one of its essential strengths."<sup>243</sup> A main justification for insisting on voluntary termination is our fear of institutional mistakes. As outsiders, we may genuinely believe that a certain right is no longer valuable to its holder, or that an alternative use of a resource is superior, but our beliefs may be erroneous.<sup>244</sup> What appears to us as a market fail-

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241. Tenants as a group are usually considered to be less wealthy than landlords, who have at least one other apartment for their own residence. However, a tenant who does not exercise her right to reside on the premises also has another place to live in. For elaboration of this point, see *infra* Part II.C.

242. Rose, *supra* note 29, at 1412.

243. Epstein, *supra* note 49, at 1367. Epstein applies this general argument to the servitude context as well: "The power of the original party to hold out, to maintain his servitude against his neighbor, marks the vitality of nascent ownership." *Id.*

244. Rose, *supra* note 29, at 1412 ("Sometimes the purported holdout has a



ure may actually be the continuation of an efficient status quo. Moreover, even if we correctly identify a potential for an efficient change, we might still err in our objective estimation of the magnitude of the right holder's loss.<sup>245</sup> Undercompensation can undermine people's incentives to invest in, and develop, their assets.<sup>246</sup> For these reasons we ordinarily do not regard external evaluations as sufficient, and we require the owners' consent to the transfer or termination of their property rights.

Note that the above justification for obtaining consent is instrumental.<sup>247</sup> It is based on the assumption that the danger of market failure is considerably smaller than the risk of inefficient coercion. I agree that when transaction costs are reasonably low, it is generally wise to protect entitlements with property rules.<sup>248</sup> Consensual transactions increase the utility to both parties by allowing them to trade their allotted shares for oth-

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genuine interest in his property right, however irrationally inflated that interest may seem to the world at large.").

245. Richard A. Epstein, *Holdouts, Externalities, and the Single Owner: One More Salute to Ronald Coase*, 36 J.L. & ECON. 553, 570-71 (1993).

246. Daphna Lewinsohn-Zamir, *Compensation for Injuries to Land Caused by Planning Authorities: Towards a Comprehensive Theory*, 46 U. TORONTO L.J. 47, 61-62, 65-66 (1996).

247. Carol Rose, for instance, acknowledges the legitimacy of preventing opportunistic holdouts if we can adequately distinguish between the former cases and those where owners have a genuine, subjectively high evaluation of their property. Rose, *supra* note 29, at 1412. My argument is directed toward such a nonlibertarian, utilitarian approach, whose objection to nonconsensual termination is mainly instrumental.

248. An entitlement is protected by a "property rule" if no one can appropriate the entitlement without securing its owner's consent. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092, 1105-07 (1972). The entitlement must be transferred through a voluntary transaction, and its price agreed to by the owner-seller. *Id.* "Liability rule" protection, in contrast, enables a forced transfer of the entitlement. *Id.* The coercing party need not seek the owner's permission, but only pay her the objectively determined value of the entitlement. *Id.* Calabresi and Melamed argued that property rules should be used when transaction costs are low and the parties can bargain with one another to achieve desirable outcomes. *Id.* at 1106-07, 1118-19. Liability rules, in contrast, are best applied when transaction costs are high and bargaining is impossible or difficult. *Id.* at 1106-10, 1118-19. The criterion of transaction costs, with its attendant recommendations regarding the choice and content of legal rules, was adopted in subsequent scholarly writing. *See, e.g.*, James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440, 450-51 (1995); Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341, 367-70 (1984); *see also* Lewinsohn-Zamir, *supra* note 162 (applying behavioral studies to vindicate the use of property rules when transaction costs are low).

ers that they prefer, and thus reallocate goods to those who value them most.<sup>249</sup> Nevertheless, in circumstances where the risks involved in objective evaluations are substantially diminished, involuntary termination may emerge as a superior option. I claim that this is the case with respect to unused property rights, provided certain conditions are met. The right must not have been used for a significant period of time. Nonintensive but continuous use is not a reliable indicator of low valuation by the property owner.<sup>250</sup> In addition, the property right must be of the kind that entitles its holder only to a specific enjoyment, which is either unattained at all (by the owner herself or by a third party of her choice) or else is realized by other means.

When these conditions are fulfilled, nonuse can be a good proxy for low valuation. If a right created for a particular purpose is left unused for a lengthy period without its holder attempting either to dispose of it or to negotiate a change in its scope, then we may reasonably conclude that the value of the right is in its blackmail potential. This conclusion can be supported by evidence that the purpose which the right was intended to serve is achieved by other means. An example is a servitude owner who for a period of many years does not use the right of way to which she is entitled, but rather uses an alternative route.<sup>251</sup>

Once the risk of erroneous termination of rights is sufficiently reduced, we should not bear the costs of bargaining for pure transfers of wealth to transferees who cannot be regarded as appropriate targets for redistribution. Involuntary abolition avoids dissipation of value through unnecessary negotiations and avoids the risk that such negotiations will fail.<sup>252</sup> In con-

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249. SHAVELL, *supra* note 24, at 18.

250. *Id.* at 73.

251. As explained above, the American doctrine of servitude abandonment usually requires more than naked nonuse, *see supra* notes 108–09 and accompanying text, and the doctrine of changed conditions requires the impossibility of either use or realization of purpose, *see supra* note 113. Hence, nonuse of the servitude coupled with use of an alternative ordinarily does not lead to its termination.

252. Bilateral monopoly may hinder efficient transactions. When there is only one seller and one buyer for a particular entitlement (as is the case when negotiating a release from an easement or a rent-controlled tenancy) and the parties have imperfect information about the other's true valuation, mutual attempts to capture the potential gains from the trade may result in bargaining failure. SHAVELL, *supra* note 24, at 89–91; Thomas W. Merrill, *Trespass and Nuisance*, in NEW PALGRAVE DICTIONARY, *supra* note 66, at 617, 619;

trast, when the danger of mistaken intervention is substantial, use-it-or-lose-it rules should not be—and in fact are not—created. As explained above, one such example is ownership of land, which allows for numerous and diverse enjoyments, some of which will be attainable only in the future. Hence, we cannot deduce low valuation from present nonuse alone.<sup>253</sup>

The same reasoning can account for the differing legal treatment of trademarks and copyrights in this context. Whereas trademarks can be lost if not used, copyrighted works do not lose their protection if similarly unutilized.<sup>254</sup> The value of a trademark is intimately connected to its actual use in commerce, and its purpose is to identify the source of particular goods and services (as a signifier of their attributes, quality, prestige, etc).<sup>255</sup> The trademark's value is wholly instrumental, not intrinsic. Since continuous nonuse can adequately signify low valuation by the trademark owner, a use-it-or-lose-it rule is justified. A copyright—in contrast to trademarks and like ownership of land—allows for diverse exclusive uses, such as the right to copy, distribute, and display the protected work, and to

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Stewart E. Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55, 71–73 (1987).

253. See *supra* notes 233–35 and accompanying text. Another difference between land ownership and rights in land that fall short of full ownership pertains to the magnitude of the burden inflicted on others. See, e.g., BRUCE & ELY, *supra* note 101, § 1.1. As explained above, a right that is less than ownership inflicts a direct and special burden on the owner of the land, even if it is not exercised. See *supra* notes 239–41 and accompanying text. This burden is much heavier than the general burden of respect and non-interference that property rights impose on third parties. Hence, there is both the potential and the incentive to employ the unexercised lesser right to extract gains from the landowner. In contrast, an owner not using her land burdens third parties equally and to a much lesser extent. Typically, she does not enjoy a monopoly position, and third parties would be able to acquire desired rights in other lands. Thus, nonuse cannot be employed by the owner as a form of blackmail. This difference strengthens the case for distinguishing between landowners and other right holders in land who do not use their rights. Cf. Laura S. Underkuffler-Freund, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1038 (1996). Professor Underkuffler generally argues, without distinguishing between different kinds of property rights, that property rights differ from other constitutional rights (such as freedom of speech or due process of law) in that by granting them we necessarily deny or take the same resources from others. *Id.* at 1038–39, 1042. I agree that in a world of scarce resources, allocation of certain property to someone comes at the expense of allocating it to others. Nonetheless, I submit that property rights differ in the extent to which they burden others, and that this difference may be relevant in formulating legal rules.

254. See *supra* notes 67–72 and accompanying text.

255. See *supra* notes 65–67 and accompanying text.

prepare derivative works.<sup>256</sup> As a result, there may be various good reasons for nonuse of the copyrighted work. A copyright owner may, for instance, prefer nonuse because the best use of her work—adapting her book for a television series—will be feasible only in the future. She may therefore refrain from other uses until the use she prefers can be realized, in order to ensure the public's interest in the adaptation. Furthermore, a copyrighted work often has intrinsic—in addition to instrumental—value. Thus, an artist may attribute high value to the very existence of her sculpture, which is a manifestation of her talent, creativity and achievement, even if she does not intend to put it to any practical use. Nonuse, therefore, is a poor proxy for low valuation.<sup>257</sup> Alternatively, even if an artist decides not to authorize any use of her early work because she believes it is not up to standard and its dissemination would hurt her reputation, her refusal to “use” the work by herself or to authorize its use by third parties is genuine—aimed at preventing harm to herself—and not strategic.<sup>258</sup>

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256. MERRYMAN & ELSEEN, *supra* note 142, at 382.

257. One may argue that this conclusion gradually changes as more and more years pass from the initial creation of the copyrighted work. A copyright lasts for a long period of time—the life of the author plus seventy years. See *supra* note 68. It may therefore be the case that after many years have gone by (yet well before the statutory expiration date), all the potential uses of the work have been exhausted. When such a point has been reached, wouldn't lengthy nonuse become a good proxy for low valuation and a use-it-or-lose-it rule thus justified? I believe not. Even if all the uses and adaptations of a copyrighted work have been realized, it may still have high intrinsic value for its owner (as explained in the text). Although this may not be true for each and every work, the existence and pervasiveness of this phenomenon precludes the adoption of an across-the-board use-it-or-lose-it rule.

258. Patent nonuse—like copyright nonuse—is not a reliable indicator of low value to its owner. One possible reason for noncommercialization of a patent is that the resulting product would compete with another product that the owner has developed and commercialized. 3 PHILIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* § 708b–d (2005); Kurt M. Saunders, *Patent Nonuse and the Role of Public Interest as a Deterrent to Technology Suppression*, 15 HARV. J.L. & TECH. 389, 392–94 (2002); Julie S. Turner, *The Nonmanufacturing Patent Owner: Toward a Theory of Efficient Infringement*, 86 CAL. L. REV. 179, 183–84 (1998). The new technology is nevertheless registered as a patent in order to block the patent owner's competitors from registering a similar patent. Strahilevitz, *supra* note 128, at 809–11; Turner, *supra*, at 184–85. The question whether patent suppression is a legitimate activity is beyond the scope of this Article. For present purposes, it suffices to note that nonuse of patents may be due to various reasons. Although nonuse in the above example is strategic, it is not due to the patent holder's low valuation of her patent. Quite the contrary—the patent remains unused precisely because *it is valua-*

Similar analysis can account for the unsympathetic legal treatment of cybersquatting compared to the relative toleration of land speculation. At first glance, the two activities have much in common. A cybersquatter strategically registers a domain name that consists of a name of a well-known trademark or individual, in order to profit from selling the domain name (usually to the latter) for a considerable price.<sup>259</sup> A land speculator strategically buys and assembles parcels of land she does not intend to occupy or utilize herself, and keeps them from the market until she can maximize profits by selling them to developers.<sup>260</sup> Typically, in both cases the property is unused from the outset by the original owner, who doesn't value it in and of itself. Rather, it is the expectation of extracting profits from high-valuing future owners that motivates the initial acquisition of the property.<sup>261</sup> Yet, while cybersquatting gives rise to civil liability,<sup>262</sup> land-speculation does not.<sup>263</sup> Moreover, the remedies against cybersquatters include forfeiture or cancellation

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*ble.* Therefore, it is unsurprising that patent law does not extinguish unused patents. See Turner, *supra*, at 202–04. The suggested remedies for illegitimate patent suppression are protecting an infringed unused patent only with liability rules, or compulsory licensing of the patent to others. See Saunders, *supra*, at 434–39.

259. See Anticybersquatting Consumer Protection Act, 15 U.S.C.A. §§ 1125(d)(1)(A), 1129(1)(A) (West Supp. 2007). The former section deals with cyberpiracy of trademarks and the latter addresses cyberpiracy of individuals' names. For descriptions of cybersquatting activities, see S. REP. NO. 106-140, at 5 (1999); Adam Silberlight, *Domain Name Disputes Under the ACPA in the New Millennium: When Is Bad Faith Intent to Profit Really Bad Faith and Has Anything Changed with the ACPA's Inception?*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 269, 270–71 (2002); and John D. Mercer, Note, *Cybersquatting: Blackmail on the Information Superhighway*, 6 B.U. J. SCI. & TECH. L. 290, 293, 308–09 (2000).

260. C.E. Elias, Jr. & James Gillies, *Some Observations on the Role of Speculators and Speculation in Land Development*, 12 UCLA L. REV. 789, 792 (1965).

261. *Id.* at 790 (stating that a speculator “buys the commodity because of his expectation of profits; he does not buy for use”); Jian Xiao, *The First Wave of Cases Under the ACPA*, 17 BERKELEY TECH. L.J. 159, 161 (2002) (noting that most cybersquatters merely register domain names and never use them as actual website addresses).

262. 15 U.S.C.A. §§ 1125(d)(1)(A), 1129(1)(A).

263. See WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* 266 (1985) (stating that few jurisdictions have adopted the antispeculation policy of taxing speculative gains). Fischer criticizes such policy for penalizing people who sold their land at the right time and rewarding—by lower taxation—those who sold too quickly or waited too long. *Id.* at 267.

of the domain name and transfer of the domain name to the plaintiff.<sup>264</sup>

Further thought, however, reveals important differences between the two activities. Land speculation can serve useful purposes. Professional land speculators can promote orderly city growth and prevent premature development and urban sprawl, by delaying development until the time is ripe, and selling the land for its most valuable use.<sup>265</sup> Indeed, some scholars have argued that rules of first possession, preemption rights for squatters and homesteading acts encourage inefficient competition between individuals to take possession or develop land prematurely.<sup>266</sup> In contrast to land speculation, cybersquatting has no advantages, and is a socially wasteful activity.<sup>267</sup> It merely transfers income from the person or trademark owner that truly values the domain name, since it is their own name or is associated with their product, to the squatter (who does not value the right apart from its blackmail potential). The search and early registration by squatters of such domain names have no social value, since they "create" a resource that either would have been created anyway (by the obvious trademark owner targeted for extortion), or need not be created at all (since the individual whose name is identical to the domain name places a high value on her privacy).<sup>268</sup>

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264. 15 U.S.C.A. §§ 1125(d)(1)(C), 1129(2).

265. FISCHER, *supra* note 263, at 265–66; J. Anthony Coughlan, *Land Value Taxation and Constitutional Uniformity*, 7 GEO. MASON. L. REV. 261, 261 n.3 (1999); Elias & Gillies, *supra* note 260, at 791–93, 797; Merrill, *supra* note 16, at 1130.

266. Anderson & Hill, *supra* note 235, at 179–82, 189–91 (explaining why land speculation is less problematic than preemption for squatters and homesteading requirements); David D. Haddock, *First Possession Versus Optimal Timing: Limiting the Dissipation of Economic Value*, 64 WASH. U. L.Q. 775, 776–78, 791–92 (1986) (discussing the inefficiencies of first possession rules).

267. See Roger D. Blair & Thomas F. Cotter, *An Economic Analysis of Seller and User Liability in Intellectual Property Law*, 68 U. CIN. L. REV. 1, 43 (1999) (stating that cybersquatting is not socially productive).

268. Arguably, another reason to differentiate between land speculation and cybersquatting is that the latter may also harm third parties, by confusing or defrauding consumers. Indeed, this problem was expressly acknowledged by the legislature. See S. REP. NO. 106-140, at 5–6 (1999). Note, however, that the consumer protection motivation is only applicable to cybersquatting with respect to trademarks, and not to cybersquatting relating to names of individuals. In the latter case, the sole goal of the legislation is to prevent the extraction of money from a person. Such a case was successfully litigated in *Schmidheiny v. Weber*, wherein the defendants offered to sell the domain name "schmidheiny.com" to the plaintiff for \$1.1 million. 285 F. Supp. 2d 613, 618 (2003). The court enjoined the defendants from registering a do-

Once again, it is instructive to compare the case of nonuse with that of destruction of property. A decision not to use ordinarily does not harm the asset, and can be reversed. Therefore, nonuse can serve strategic purposes and facilitate the extraction of profits. In contrast, since there is no way back from destroying an asset, destruction is usually an inadequate way for potential blackmailers to hold out for gain. Consequently, destruction is typically motivated by sincere reasons, and is not strategic. For this reason as well, there is less need for state intervention with owners' decisions to destroy their property. Of course it is not true that owners never hold on to unused land or a copyright due to inertia or for strategic purposes. As a general rule, though, nonuse of these assets is not a sufficiently reliable proxy for low valuation. Therefore, the costs of a use-it-or-lose-it rule would outweigh its potential benefits.

### C. CORRECTING DISTRIBUTIVE ERRORS

This Section completes the normative argument by highlighting an additional advantage of greater intervention with respect to decisions by owners not to use their property: it enables the correction of distributive errors, thus improving the functioning of redistributive mechanisms.

Most people would agree that the state should enhance the well-being of those who are worse off, and reduce inequality among members of society. An ongoing debate, however, centers on the appropriate means to achieve this goal. Specifically, scholars are divided on whether redistribution should be accomplished solely through taxes and transfer payments, or also via legal rules, and in particular through the private law.<sup>269</sup> The former refers to methods such as progressive taxation, cash assistance to needy families, social security and disability bene-

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main name similar to the name of the plaintiff, one of the world's wealthiest individuals, and ordered them to transfer the existing domain name to the plaintiff. *Id.* at 614, 628. We may thus conclude that low valuation by right holders is the main ground for intervention with cyberpiracy in names of individuals, and is one of the two major rationales for combating cyberpiracy in trademarks.

269. A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 147–56 (3d ed. 2003); Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093, 1093–1102 (1971); Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667–68 (1994); Chris William Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. LEGAL STUD. 797, 797–98 (2000).

fits. The latter refers to legal rules that do not form part of the tax-and-transfer system, such as rules of property and contract law.

A powerful argument against redistribution through private law is grounded in economic considerations. It has been claimed that legal rules are more costly and less effective at accomplishing welfare redistribution than tax-and-transfer schemes, and that therefore distributive concerns should be dealt with solely through taxes and transfer payments.<sup>270</sup> For the purposes of this Article, the various economic arguments and their critical counterarguments need not be analyzed.<sup>271</sup> One particular claim, though, is relevant for this discussion—that of haphazard application.

Some writers argue that legal rules cannot be tailored as carefully as taxes and transfer payments, and so they are frequently under- or overinclusive.<sup>272</sup> A prime target of this charge is landlord-tenant law, since the rules in this field are heavily dominated by distributive concerns. Such rules, so the argument goes, will apply not only to wealthy landlords and poor tenants, but also to landlords who are not affluent and tenants who are well-off. Obviously, it is unreasonable to redistribute in favor of those who are better off.<sup>273</sup> A conventional response to the haphazardness claim is that a similar problem hampers successful redistribution through taxes and transfer payments.<sup>274</sup>

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270. COOTER & ULEN, *supra* note 29, at 8–10, 111–13; POLINSKY, *supra* note 269, at 147–56; POSNER, *supra* note 15, at 505–07; Kaplow & Shavell, *supra* note 269, at 505–07; Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821, 822–25 (2000); David A. Weisbach, *Should Legal Rules Be Used to Redistribute Income?*, 70 U. CHI. L. REV. 439, 446–53 (2003).

271. I have explored this issue in depth elsewhere. Daphna Lewinsohn-Zamir, *In Defense of Redistribution Through Private Law*, 91 MINN. L. REV. 326 (2006).

272. POLINSKY, *supra* note 269, at 154–55; Kaplow & Shavell, *supra* note 269, at 674–75; Weisbach, *supra* note 270, at 449.

273. POSNER, *supra* note 15, at 506 n.3; Rabin, *supra* note 86, at 560–62; Daniel P. Schwallie, *The Implied Warranty of Habitability as a Mechanism for Redistributing Income: Good Goal, Bad Policy*, 40 CASE W. RES. L. REV. 525, 531–32 (1990).

274. Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 502–03 (1980) (claiming that taxes may be as underinclusive as redistributive contract rules); Chris W. Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003, 1051–56 (2001) (arguing that the haphazardness of redistributive legal rules has been exaggerated, whereas the



The problem of haphazard application should not lead to the abandonment of redistribution through legal rules. What it does require, however, is that we carefully choose those rules that can adequately serve distributive goals.<sup>275</sup> More importantly, we can craft redistributive legal rules in a way that weeds out undeserving recipients. A good example is occupancy requirements for rent-controlled housing.

As explained above, a tenant of a rent-controlled apartment must reside in it, or else forfeit her right.<sup>276</sup> Thus, actual use is required from the rent-control tenant even though non-use, in itself, does not harm the landlord and ensures less wear and tear on the apartment.<sup>277</sup> Why, then, does the extreme right to intensively use the apartment not include in it the more moderate right to *not* use it?

A use requirement in this situation operates as a correcting device. Rent-control legislation aims to protect low-income tenants against displacement and homelessness by regulating rent levels at below market levels and by restraining landlords' powers of eviction.<sup>278</sup> Ordinarily, tenants are an appropriate target-group for redistribution. Unlike landlords, who have at least one (and possibly more than one) additional apartment at their disposal, tenants typically do not own another apartment and do not rent more than one. Thus, *ex ante*, tenants seem to be appropriate recipients of redistribution, which justifies the creation of the legal rule in favor of their group. This generalization, however, may prove to be wrong *ex post*, with respect to specific tenants. Nonuse of a rent-controlled apartment is a good proxy for mistaken redistribution. A nonoccupying tenant has residence elsewhere, and so does not need the assistance of rent-control laws to secure affordable housing. Furthermore, since such a tenant has an additional home, we can no longer

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haphazardness of taxes has been downplayed). Moreover, it has been found that state and local taxes are often *regressive* (rather than progressive). MICHAEL P. EITLINGER ET AL., WHO PAYS? A DISTRIBUTIONAL ANALYSIS OF THE TAX SYSTEMS IN ALL 50 STATES (1996); David Brunori, *The Limits of Justice: The Struggle for Tax Justice in the States*, in TAX JUSTICE 193 (Joseph J. Thorndike & Dennis J. Ventry eds., 2002); Andrew Reschovsky, *The Progressivity of State Tax Systems*, in THE FUTURE OF STATE TAXATION 161 (David Brunori ed., 1998).

275. Compensation rules for regulatory takings of land are a good example of rules that are unsuitable as a vehicle for redistribution. Lewinsohn-Zamir, *supra* note 271, at 390–93.

276. See *supra* notes 85–89 and accompanying text.

277. See *supra* notes 83–84 and accompanying text.

278. See *supra* notes 84–85 and accompanying text.

assume that the landlord is better off than she is, and that the landlord is an appropriate transferor of the redistribution process.<sup>279</sup> A use-it-or-lose-it rule in this context enables the correction of clear distributive errors and mitigates the problem of haphazard application.<sup>280</sup>

Similar reasoning applies to in-kind provision of social welfare rights. Thus, for instance, disabled veterans are entitled to services and assistance that will enable them to achieve maximum independence and obtain suitable employment.<sup>281</sup> To this end, veterans may participate in a rehabilitation program (ordinarily, for a period of up to forty-eight months),<sup>282</sup> that includes educational and psychological counseling, placement services, vocational training and materials, and so forth.<sup>283</sup> This entitlement, however, is subject to a time limitation. It may not be afforded if twelve years have passed from the date of the veteran's discharge.<sup>284</sup> In other words, nonuse of the welfare right results in its loss, although nonuse, in itself, does not harm the providing authorities. Why, then, not let the veteran decide on the timing of the use? A plausible rationale for this rule is the correction of distributive errors. Disabled veterans, as a group, are an appropriate target group for redistribution. This assumption, however, may prove to be wrong with respect to specific individuals. A disabled veteran who has not applied for rehabilitation assistance over the course of twelve years has demonstrated by her behavior that she does not need the special redistributive assistance.<sup>285</sup>

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279. The case of tenants of non-rent-controlled apartments is different. If the apartment is not subject to rent control, then the tenant pays the market rent. Wealth—in the form of regulated rent—is not transferred from the landlord to the tenant, and hence there is no need for a retroactive correction of a redistributive error (for an explanation of the reason why, with respect to regular leases, there is less of a fear that tenants would hold on to unvalued rights, see *supra* notes 208–10 and accompanying text).

280. The restrictions on subletting a rent-controlled apartment are further intended to ensure that only individuals who do not have an alternative place of residence will enjoy the distributive benefit. See *supra* note 90 and accompanying text. Our analysis of residency requirements in rent-controlled housing applies to occupancy requirements in subsidized housing programs as well. Generally, such programs condition the provision of governmental subsidies on nonvacancy of the units and their occupancy by low-income tenants. 42 U.S.C. § 1437f(o)(9), (o)(13)(J) (2000); Rose-Ackerman, *supra* note 92, at 958.

281. 38 U.S.C. §§ 3100, 3102 (2000).

282. 38 U.S.C. § 3105(b) (2000 & Supp. III 2005).

283. 38 U.S.C. § 3104 (2000).

284. 38 U.S.C. § 3103(a) (2000 & Supp. III 2005).

285. This argument is supported by the exceptions to the twelve-year rule.

Another example of a social welfare benefit that expires with nonuse is the right to family leave under the Family and Medical Leave Act.<sup>286</sup> Under this law, certain employees are entitled to a total of twelve weeks of leave during any twelve-month period following the occurrence of certain events, such as the birth of a child.<sup>287</sup> This right expires “at the end of the 12-month period beginning on the date of such birth,”<sup>288</sup> although the employer is not hurt by the fact that a mother does not use her entitlement during the child’s first year, but wishes to exercise it when the child is two years old. Once again, this use-it-or-lose-it rule can be seen as a correcting device. The law assumes that the first months following a child’s birth are particularly demanding on parents, who therefore need special consideration and assistance from their workplace. Parents who do not take family leave during the entire year following the birth of their child may reasonably be regarded as not needing this benefit.

#### D. SUMMARY AND POLICY IMPLICATIONS

Part II offered three reasons for rejecting the common wisdom that more is better than less and, consequently, for intervening to a greater extent in the case of moderate—as opposed to extreme—measures relating to property. The three reasons are: protecting property transferees; reducing the incidence of low-valuing owners; and correcting distributive errors. This analysis leads to interesting conclusions and policy implications.

##### 1. Conditioned Transfers

One general conclusion is that owners should be granted more freedom to refrain from conveying a right than to transfer it subject to restrictions. The analysis illustrated this claim in two fields: donative transfers and landlord-tenant relations.<sup>289</sup>

While current law grants potential donors considerable freedom not to bestow their property at all, their freedom to

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The time limitation does not apply, for instance, to veterans whose medical condition prevented them from participating in a rehabilitation program. 38 U.S.C. § 3103(b)(1). By recognizing this (and other) exceptions, the law aims to ensure that only veterans whose nonuse is a good proxy for not needing the redistributive benefit are excluded from its coverage.

286. 29 U.S.C. § 2612 (2000).

287. *Id.* § 2612(a)(1)(A).

288. *Id.* § 2612(a)(2).

289. *See supra* Parts I.B.1 & II.A.

transfer it subject to conditions is restricted.<sup>290</sup> The literature has either condemned such rules altogether as conflicting with the MBL rationale, or has relied on transaction costs to justify intervention in the limited sphere of dead-hand control.<sup>291</sup> This Article, in contrast, suggests that the rules are not only justifiable but should equally apply to posthumous and inter vivos controls. More property that is subject to restrictions may be more detrimental to the transferees' long-term well-being than less, unencumbered property, or even none.<sup>292</sup> From this welfare perspective, there is no material difference between posthumous and inter vivos controls. Harmful conditions in both types of transfers should be struck down.

Conditioned rights can be problematic for additional reasons, as demonstrated by the example of restraints on alienation by tenants. Absolute prohibitions on assignment by tenants are enforceable even if arbitrary or capricious, whereas moderate, conditional restrictions are subject to an objective reasonableness requirement.<sup>293</sup> The justification for this unequal treatment is that absolute clauses are clear and unequivocal, whereas conditioned clauses are subject to uncertainty and open to misunderstanding. A rule holding conditioned clauses to stricter standards protects its intended addressees from confusion and reduces cognitive biases by giving an incentive to draft clauses in unambiguous terms.<sup>294</sup>

## 2. Naked Nonuse and Nonuse Plus

The analysis also establishes that, although nonuse of a property right is ordinarily less burdensome to others than intensive use of the right, nonuse should sometimes lead to the loss of the property right. Use-it-or-lose-it rules are both efficient and fair in circumstances where a significant period of nonuse is a reliable indicator either of the low value owners place on their property,<sup>295</sup> or of a distributive error that requires correction.<sup>296</sup> In particular, nonuse is a good proxy for low value with respect to rights created for a specific, narrow purpose that cannot be unilaterally altered by their holders,

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290. See *supra* notes 37–46 and accompanying text.

291. See *supra* notes 46–48 and accompanying text.

292. See *supra* Part II.A.1.

293. See *supra* notes 58–62 and accompanying text.

294. See *supra* Part II.A.2.

295. See *supra* notes 224–32, 249–52 and accompanying text.

296. See *supra* notes 278–88 and accompanying text.

and when holders have not paid the property's full market value.<sup>297</sup>

The suggested rationale for not tolerating nonuse accounts for the unequal treatment of different property rights. Whereas some property rights are lost through naked nonuse, others are subject to a nonuse plus regime, which requires additional elements besides nonutilization. The rationale explains why use-it-or-lose-it rules are found in the context of trademarks but not with respect to copyrights and patents;<sup>298</sup> in the context of ownership of internet sites but not ownership of land;<sup>299</sup> in domain names speculation but not in land speculation;<sup>300</sup> in connection with rent-controlled apartments but not in connection with non-rent-controlled apartments.<sup>301</sup> At the same time, the discussion exposes the shortcomings of current servitudes law, which mostly applies a nonuse plus rule.<sup>302</sup> According to this Article's argument, naked nonuse is the preferable rule since servitudes permit only a specific, narrow enjoyment of property that cannot be unilaterally changed.

### 3. Destruction of Property

An additional conclusion is that the epitome of an extreme measure with regard to one's property—its destruction—is generally less problematic than more moderate measures such as nonuse, modification and alienation. A decision to destroy property is less subject to inefficiencies than a resolution to leave property unused. In contrast to nonuse, destruction cannot be the product of neglect or lack of thought, and is an ineffective blackmailing device.<sup>303</sup> Furthermore, destruction decisions are much less prone to cognitive biases than nonuse choices.<sup>304</sup> Therefore, the hostility of courts and scholars to the right to destroy one's property is unwarranted, and the fact

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297. See *supra* notes 226–27, 249–51 and accompanying text. Evidence for the low value placed on such rights may be found when the purpose that the right was intended to serve is achieved by other means, or when the right holder does not attempt to either assign the right or negotiate a change in its scope.

298. See *supra* notes 253–58 and accompanying text.

299. See *supra* notes 252–53 and accompanying text.

300. See *supra* notes 259–68 and accompanying text.

301. See *supra* notes 229–31 and accompanying text.

302. See *supra* notes 109–12 and accompanying text.

303. See *supra* notes 217–20, 268 and accompanying text.

304. See *supra* notes 220–22 and accompanying text.

that no general law prohibits the destruction of property is perfectly reasonable.

### III. BEYOND PROPERTY LAW

This Article focuses on refutations of the “more is better than less” argument in the law relating to private property, particularly with respect to the relations between individuals and their property rights. It has provided various justifications for greater intervention in the case of moderate measures than in the case of extreme ones. These justifications may be equally applicable in other legal fields. Relevant examples may be found in labor law, zoning law and contract law.

#### A. PREVENTING SEVERE HARM

Labor law abounds with MBL rationalizations, some of which relate to the at-will employment regime. Employment at-will permits an employer to terminate the contract with an employee without cause,<sup>305</sup> and is the generally accepted default rule in the United States.<sup>306</sup> It is argued, for instance, that if employers were able to dismiss workers only for just cause, then some potential workers (such as the young or the inexperienced) would not be hired at all.<sup>307</sup> Stated differently, more

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305. Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405 (1967); Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 680 (1994); Cass R. Sunstein, *Rights, Minimal Terms, and Solidarity: A Comment*, 51 U. CHI. L. REV. 1041, 1051 (1984); see also Clyde W. Summers, *Individualism, Collectivism and Autonomy in American Labor Law*, 5 EMP. RTS. & EMP. POL'Y J. 453, 457-60 (2001) (describing cases upholding unjust discharges of workers, including discharges for reporting on improper behavior by directors, refusing to wear antiunion buttons or cut their hair, and expressing views in favor of African-Americans' rights).

306. Blades, *supra* note 305, at 1416; Morriss, *supra* note 305, at 688-89, 699-700. True, almost all unionized employees are covered by collective agreements that include protection against unjustified dismissal, but unionized employees are but a small minority of United States workers. PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 50, 72-73, 94, 105-06 (1990). Other countries, in contrast, grant much wider protection against unjust discharge. Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 68 (1988) (stating that sixty countries around the world protect workers from unfair discharge); Summers, *supra* note 6, at 508-20 (discussing restrictions on dismissal without cause in France, Germany, Sweden, and England).

307. John P. Frantz, *Market Ordering Versus Statutory Control of Termination Decisions: A Case for the Inefficiency of Just Cause Dismissal Require-*

employment is better than less; the prospect of continuous employment is better than no employment. The natural conclusion is that the law should not intervene in employment-at-will arrangements.<sup>308</sup>

Once we accept this rationale for an at-will regime, additional conclusions seem to follow. If an employer is entitled to exercise the extreme measure of firing without a cause, does this not also subsume a right to exercise the more moderate measure of employing workers under any conditions, including, for instance, payment of below-minimum wages?<sup>309</sup> Is not employment—albeit under inferior conditions—still preferable to no employment at all? Moreover, should not such an employer have the power to unilaterally change the contractual terms? Since the employer can fire for any reason (or for no reason), she could do so and condition reemployment on the signing of a new contract which contains less favorable terms. In which case, why not skip altogether the additional transaction costs involved in firing and rehiring and recognize the legitimacy of unilateral modification?<sup>310</sup>

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ments, 20 HARV. J. L. & PUB. POL'Y 555, 573–74 (1997); Jeffrey L. Harrison, *The "New" Terminable-at-Will Employment Contract: An Interest and Cost-Incidence Analysis*, 69 IOWA L. REV. 327, 336–37, 340–42, 345, 359 (1984); Sunstein, *supra* note 305, at 1053, 1054 n.47 (noting that a "for cause" provision may harm newly hired employees and result in layoffs).

308. A similar argument is raised by Professor M. J. Trebilcock in his discussion of court intervention in the content of a standard form contract between a publishing company and a then-unknown composer. M. J. Trebilcock, *The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords*, 26 U. TORONTO L.J. 359 (1976). The court did not enforce terms it held to be unfair and result from unequal bargaining power. *Id.* at 361. The contract transferred all present and future rights in the composer's work to the company, did not require it to publish any of his works, and denied him the right to terminate the contract. *Id.* at 361–64, 377, 379. Trebilcock criticizes this intervention in contractual freedom, reasoning that as a result companies will sign on much fewer young, unknown, and therefore economically risky, composers. *Id.* at 382–83. Thus, Trebilcock also assumes that "more" is better than "less" and that any contract (whose formation was not infected with mistake, misrepresentation, duress, undue influence, and the like) is better than none.

309. See Keith N. Hylton, *A Theory of Minimum Contract Terms, with Implications for Labor Law*, 74 TEX. L. REV. 1741, 1749–50 (1996) (stating the argument that minimum terms in labor contracts are inconsistent with the doctrine of employment at-will). Hylton rejects the argument for different reasons than the ones advanced in this Article. *Id.* at 1750–51, 1782. See also Sunstein, *supra* note 305, at 1046 (stating that minimum wages might eliminate jobs for the poorest workers).

310. See Katherine M. Apps, *Good Faith Performance in Employment Contracts: A "Comparative Conversation" Between the U.S. and England*, 8 U. PA.

This Article's answer to these arguments is that the MBL rationale underlying them is inadequate. Thus, for instance, the experience of being fired on a whim, without being deemed worthy of any explanation, can be more injurious to workers' long-term well-being than not being hired in the first place. The dignity and self-respect of individuals, their ability to act autonomously, as well as their reputation and esteem of their peers, may suffer more through such summary termination of relations than if they had not been given the job.<sup>311</sup> This state of affairs was acknowledged by the demonstrators who flooded the streets of France,<sup>312</sup> and may also be explained by the well-known behavioral phenomenon that losses "hurt" more than un-obtained gains of similar magnitude.<sup>313</sup> People may perceive not being hired as an unrealized gain, but view being discharged without cause as a loss.<sup>314</sup> Similar observations can be made regarding the comparison of employment at-will with employment under any conditions or unilateral modification of contractual terms. Working under humiliating and degrading work conditions—either from the outset of the contractual relationship or following unilateral changes to the existing contract—can be worse in terms of personal welfare than not working in such an environment at all.<sup>315</sup>

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J. LAB. & EMP. L. 883, 930 (2006) (questioning whether regulation of contract modification becomes "practically meaningless" since "an employer is free to terminate an employment relationship without notice and then offer reemployment on different terms" and further noting that "an employer is also free to threaten an employee with total termination without reengagement if the new terms are not agreed to").

311. For a discussion of the effect of extreme and moderate measures on well-being, see *supra* notes 147–79 and accompanying text. See also Jedediah S. Purdy, *People as Resources: Recruitment and Reciprocity in the Freedom-Promoting Approach to Property*, 56 DUKE L.J. 1047, 1110–16 (2007) (arguing that the goals of relative equality in interdependence and human flourishing should structure the allowable terms of recruitment in labor relationships); Singer, *supra* note 180, at 5–7 (justifying the regulation of minimal standards in contracts by the idea of a free and democratic society).

312. See Sciolino & Smith, *supra* note 1; Smith, *supra* note 1; see also *supra* notes 1–6 and accompanying text.

313. See *supra* notes 197–98 and accompanying text.

314. See *supra* notes 195–97 and accompanying text.

315. Note that employers would not necessarily react to minimal contract terms (such as minimum wages or prohibition on unilateral modification of the contract) by reducing employment. See, e.g., David Card, *Do Minimum Wages Reduce Employment? A Case Study of California, 1987–89*, 46 INDUS. & LAB. REL. REV. 38, 43–46, 52–53 (1992) (relying on empirical data to prove that an increase in California's minimum wage did not cause a decline in the employment of young and less-skilled workers); Harrison, *supra* note 307, at 332–36,



Similar reasoning is relevant to some suggested solutions to the problem of exclusionary zoning. Public land-use controls can serve as an exclusionary device, for instance, by requiring minimum lot sizes and types of residential structures that only wealthy people can afford.<sup>316</sup> Excluding low-income families from living in certain neighborhoods, with the resultant concentration of poverty in other neighborhoods, have negative social effects.<sup>317</sup> One novel solution, adopted by the New Jersey legislature, was to require each municipality in the state to provide a “fair share” of low-income housing,<sup>318</sup> but then to permit municipalities to trade up to fifty percent of this “fair share” obligation by paying another municipality to accept additional low-income housing units for a negotiated price.<sup>319</sup> This

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359 (arguing that requiring a cause for discharging employees may result in a reduction in wages); Sunstein, *supra* note 305, at 1046–47, 1052–53 (explaining that minimal terms may result in lower salaries). An employer may prefer, for example, to forgo the possibility of unilateral modification rather than to bear the costs of firing and rehiring under new terms. In other words, the prohibition on unilateral alteration may ensure introduction only of new terms that are extremely important to the employer, in particular, terms whose value justifies firing and rehiring. For an elaboration of this argument in the context of conditioned transfers, see *supra* notes 170–74 and accompanying text. In addition, even if employers respond to minimal contract terms by reducing salaries of workers earning above-minimum wages, it may still be the case that overall welfare is enhanced. The welfare increase from eliminating particularly harmful working conditions may surpass the welfare decrease from lowering wages. Interestingly, an empirical study has found that employees generally (albeit erroneously) believe that they can be fired only for just cause. Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 110–11, 131–40 (1997). Accordingly, one cannot state with confidence that the great incidence of at-will contracts is due to the fact that workers prefer this regime to a for-cause regime with lower wages.

316. For instance, a zoning ordinance that bans multifamily dwellings and permits only construction of single-family units on large lots. Patrick Field et al., *Trading the Poor: Intermunicipal Housing Negotiation in New Jersey*, 2 HARV. NEGOT. L. REV. 1, 6 (1997).

317. See Lee Anne Fennell, *Properties of Concentration*, 73 U. CHI. L. REV. 1227, 1227–28 & nn.1–2 (2006) (explaining the detrimental effects of concentrated poverty on education, safety, and overall life chances of children).

318. See Mark A. Hughes & Therese J. McGuire, *A Market for Exclusion: Trading Low-Income Housing Obligations Under Mount Laurel III*, 29 J. URB. ECON. 207, 208–10 (1991) (explaining how each municipality’s “fair share” is calculated).

319. Field et al., *supra* note 316, at 1–2, 9–12 (describing the new legislation and actual agreements struck between municipalities under it); Harold A. McDougall, *Regional Contribution Agreements: Compensation for Exclusionary Zoning*, 60 TEMP. L.Q. 665, 679–82 (1987) (explaining the New Jersey legislation). Studies have found, for instance, that “wealthier, predominantly white communities pay poorer, more densely populated and more racially diverse

creative housing scheme was criticized on various grounds, including leaving the concerned low-income households out of the negotiations.<sup>320</sup> By not involving them in the process, so the argument went, the municipalities were treating these people as unwanted objects to be traded away, instead of as autonomous individuals.<sup>321</sup> In addition, agreements that are struck between the municipalities alone might harm the poor.<sup>322</sup> If low-income households are made party to the negotiations, their preferences will be heard and taken into consideration, and they could share in the compensation paid in exchange for relocating low-income housing.

According to this Article's thesis, greater involvement of the poor in the negotiations might not improve matters, but rather might make them worse. True, at first glance, participation in the decision-making process and compensation for exclusion seem to be in the interests of the poor. A complete prohibition on exclusion is hard to enforce, whereas voluntary agreements to exclude for a price might be workable. Put differently, compensated exclusion is better than uncompensated exclusion—more is better than less. This conclusion, however, is unwarranted. Negotiated compensation (both to the excluded households and to the receiving communities) stigmatizes the individuals concerned and legitimizes (and possibly perpetuates) an undesirable phenomenon. Specifically, compensation formally labels low-income households as a burden to others. True, even implicit, uncompensated exclusion can convey the message that “you are not wanted here.” Nevertheless, compensation conveys a still more hurtful message, namely, “we don't want you *so much* that we are even willing to *pay you* to

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communities to assume the wealthy communities' affordable housing obligations.” Field et al., *supra* note 316, at 11. Similar data was observed in another empirical study of this novel market. Hughes & McGuire, *supra* note 318, at 211–15. Hughes and McGuire state that “[t]he conventional point of view is that lower-income housing units are being traded. Our view is that it is the right to exclude lower-income households that is being traded.” *Id.* at 216. The negotiated price for the right to exclude will range between the transferring municipality's maximum willingness to pay to exclude and the receiving municipality's minimum cost of housing construction. *Id.* at 211.

320. Fennell, *supra* note 317, at 1269 & n.140.

321. *Id.* at 1274.

322. McDougall, *supra* note 319, at 683–84 (explaining that the interests of the poor will not receive sufficient weight in agreements to which they are not privy).

go away.”<sup>323</sup> Thus, compensation in this context may have a particularly harmful effect on the welfare of the poor.<sup>324</sup> Furthermore, granting compensation may transform the act of exclusion from a shameful activity to a socially acceptable practice.<sup>325</sup> In conclusion, welfare may be further promoted if we eliminate the trading mechanism and better enforce the municipalities’ “fair share” obligations.

## B. PREVENTING MISTAKES AND MISCONCEPTIONS

Yet another refutation of the MBL argument is found with respect to consumer product warranties. The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act<sup>326</sup> requires suppliers of consumer products<sup>327</sup> who provide a written warranty, to expressly indicate whether it is “full” or “limited.”<sup>328</sup> Only a full warranty must meet the federal minimum standards for warranties,<sup>329</sup> which entitle the consumer to remedy a defective product without charge by repair, replace-

323. Hughes and McGuire have found that prices ranged between \$20,000 to \$27,500 per unit of low-income housing. Hughes & McGuire, *supra* note 318, at 213. Furthermore, they report on a case where taxpayers of one municipality agreed to pay an additional \$800 per year for six years to help finance the transfer of forty-five housing units to another municipality. *Id.*

324. This is true even if the affected individuals do not oppose the trade in the right to exclude them. For detailed explanation, see *supra* notes 164–79 and accompanying text.

325. Morris Cohen offers similar reasons for noncompensation of slave owners after slavery was abolished. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927), *reprinted in* LAW AND THE SOCIAL ORDER 61–62 (1933). In this respect, trade in the right to exclude, is very different from trade in emission permits between air polluters. Although the latter offers firms a choice between complying with air quality standards and purchasing a pollution permit from other firms, it does not cause stigmatization or perpetuation of condemnable social practices. For discussion of tradable pollution permits see, for example, James E. Krier, *Marketable Pollution Allowances*, 25 U. TOL. L. REV. 449, 452–54 (1994), and Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 163–66 (1998). In contrast, Fennell notes that norms against exclusion may produce a “shaming control,” which would limit municipalities’ willingness to offer high prices for the right to exclude. Fennell, *supra* note 317, at 1274–75. At the same time, she acknowledges that compensation by excluders might be viewed as acceptably complying with the antiexclusion norm. *Id.*

326. The Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301–2312 (2000).

327. The Magnuson-Moss Warranty Act defines a consumer product as “any tangible personal property which is distributed in commerce and which is normally used for personal, family or household purposes.” *Id.* § 2301(1).

328. *Id.* § 2303(a).

329. *Id.* §§ 2303(a)(1)–(2), 2304.

ment, or refund.<sup>330</sup> In addition, a full warranty cannot condition these remedies on the fulfillment by consumers of any duty other than notification, unless the supplier proves that such a duty is *reasonable*.<sup>331</sup> One example of an unreasonable duty is requiring the consumer to return a registration card as a condition for securing warranty performance.<sup>332</sup>

These rules conflict with the MBL rationale, since extreme disclaimers of warranties are permissible, whereas more moderate conditioning of warranty remedies are not. A supplier need not provide a written warranty at all, and in this case the Magnuson-Moss Act does not restrict her power to disclaim any warranties.<sup>333</sup> Furthermore, even if a supplier decides to give a written warranty, it may easily evade the federal minimum standards by designating it as a limited warranty.<sup>334</sup> In both cases, the supplier need not prove that the restrictions or disclaimers on warranty remedies are reasonable.<sup>335</sup> By contrast, if the supplier demonstrates more consideration for the consumers' interests and provides a broader warranty, it will be

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330. *Id.* § 2304(a), (d), (e); see also Jonathan A. Eddy, *Effects of the Magnuson-Moss Act Upon Consumer Product Warranties*, 55 N.C. L. REV. 835, 863-65 (1977).

331. 15 U.S.C. § 2304(b)(1).

332. 16 C.F.R. § 700.7 (2007) (interpreting the Magnuson-Moss Warranty Act). Another example of an unreasonable obligation is conditioning the repair of a defective boat on returning it to a factory on the opposite coast. Eddy, *supra* note 330, at 865.

333. *Ducharme v. A&S RV Center, Inc.*, 321 F. Supp. 2d 843, 854 (E.D. Mich. 2004) (holding that the Magnuson-Moss Act did not apply when the seller of a motor home did not offer an express warranty and disclaimed all implied warranties); *Mitsch v. Gen. Motors Corp.*, 833 N.E.2d 936, 939-40 (Ill. App. Ct. 2005) (stating that a buyer of a used vehicle could not recover from the dealer under the Magnuson-Moss Act when a disclaimer contained in the purchase agreement stated that the vehicle was sold "as is," without any warranty, either express or implied); 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.29, at 613 (3d ed. 2004); Annotation, *Consumer Product Warranty Suits in Federal Court Under Magnuson-Moss Warranty—Federal Trade Commission Improvement Act*, 59 A.L.R. FED. 461, 464-65 (1982) ("Under the Act, no seller is forced to give an express written warranty, but if one is offered, it must comply with the standards set forth in the law.").

334. 15 U.S.C. § 2303(a)(2); *Gilbert v. Monaco Coach Corp.* 352 F. Supp. 2d 1323, 1330 (N.D. Ga. 2004) (holding that warranties specifically designated as "limited" are not required to meet minimum standards set forth in the Magnuson-Moss Act); 1 FARNSWORTH, *supra* note 333, § 4.29, at 612-13; Eddy, *supra* note 330, at 862.

335. See Richard H. Matthews, *A Guide to Federal Warranty Legislation—The Magnuson-Moss Act*, 11 U. RICH. L. REV. 163, 171 (1976) (describing the reasonableness requirement and stating that a warranty not complying with it can still be valid if designated as a limited warranty).

subject to greater scrutiny and intervention. A reasonableness standard will apply, and with it the risk that conditions and restrictions will be invalidated.<sup>336</sup> The harsher legal treatment of full warranties may motivate suppliers either to offer a limited warranty or not to provide a written warranty at all. Both reactions result in a lesser contractual right for consumers.

Nevertheless, this rejection of the MBL rationale is perfectly justifiable. As with the example of restrictions on alienation by tenants discussed above,<sup>337</sup> stricter standards for full warranties are designed to prevent consumer confusion and mistakes. A contract that does not provide a warranty or that conspicuously provides only a limited warranty, is much clearer than a contract that supposedly grants a full warranty but then subjects it to unreasonable conditions. With respect to the latter, consumers may mistakenly believe that they would be able to enjoy the warranty and fulfill its conditions, whereas in fact there is little practical difference between having no right from the outset and having an unreasonably conditioned right that is difficult to meet.<sup>338</sup> The cognitive bias of overoptimism confirms the likelihood of such mistakes.<sup>339</sup> In addition, absence of a warranty will be perceived by consumers as an unobtained gain, whereas nonenjoyment of a conditioned warranty will be viewed as a loss. As inflicted losses "hurt" more than unobtained gains of similar magnitude, upholding unreasonable conditions would exacerbate the injury to consumers who cannot enjoy a certain warranty.<sup>340</sup> Imposing a reasonableness standard on conditioned full warranties serves as a debiasing device in favor of consumers, by encouraging suppliers to clear-

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336. 15 U.S.C. § 2304(b)(1).

337. See *supra* Part II.A.2.

338. See *supra* notes 187–89 and accompanying text.

339. For detailed explanation, see *supra* notes 189–93 and accompanying text. I believe that this reasoning also explains section 2-316(1) of the Uniform Commercial Code (UCC), which holds that negation or limitation of an express warranty is inoperative to the extent that it cannot be reasonably read as consistent with the warranty. U.C.C. § 2-316(1) (2007). Accordingly, courts routinely invalidate disclaimers that negate express warranties. See Debra L. Goetz et al., *Special Project: Article Two Warranties in Commercial Transactions: An Update*, 72 CORNELL L. REV. 1159, 1259 (1987). Thus, "[a] drafter who makes an undertaking in one breath and seeks to retract it in the next breath has usually wasted breath the second time." 1 FARNSWORTH, *supra* note 333, § 4.29a, at 615. If a seller wishes to exclude warranties, she should not appear to provide them in the first place, as to do so would confuse buyers.

340. See *supra* notes 196–99 and accompanying text.

ly choose between two options: restricted (or no) warranties and broad warranties.<sup>341</sup>

### C. REDUCING THE INCIDENCE OF LOW-VALUING RIGHT HOLDERS

The contract law doctrine of “course of performance,” according to which the conduct of the parties in the course of performing their contract bears on its interpretation, provides an example of this final reason for rejecting the MBL rationale. The Uniform Commercial Code (UCC) states that if a sales contract involves repeated occasions for performance, and one party knowingly, and despite opportunity for objection, accepts or acquiesces in a course of performance deviating from the contractual terms, then such course of performance may be regarded as waiver or modification of any contractual term inconsistent with it.<sup>342</sup> More than one occasion of nonobjection is required before inferring a waiver or alteration of the contract’s provisions.<sup>343</sup> Scholars agree that according to this rule a course of performance can vary even express terms,<sup>344</sup> and that the UCC does not condition the rule on the ambiguity of the contractual language.<sup>345</sup> Thus, for example, if a buyer is entitled to receive seven shipments of goods on certain dates or at a specific location, but has accepted three times, and without objection, late delivery or delivery at a different location, then

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341. For further explanation, see *supra* notes 199–203 and accompanying text. A caveat is in order. I do not take a stand on whether consumer protection legislation should take the form of disclosure requirements or directly control the contractual terms themselves. American legislatures have usually favored the former type of regulation. See 1 FARNSWORTH, *supra* note 333, § 4.29, at 611. For the purposes of my thesis, it suffices to argue that if we opt for disclosure, then we should also insist that contractual terms be clear and not confusing. The reasonableness requirement in the Magnuson-Moss Act achieves this purpose, as explained above.

342. U.C.C. § 1-303(a), (d), (f) (incorporating the doctrine formerly found in U.C.C. § 2-208(1), (3)).

343. The UCC requires “a sequence of conduct” between the parties and an agreement involving “repeated occasions for performance.” U.C.C. § 1-303(a). Courts have held that two acts may constitute a course of performance. *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772, 794 (9th Cir. 1981).

344. 2 FARNSWORTH, *supra* note 333, § 7.13, at 330; JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1-6, at 60 (5th ed. 2000); Lisa Bernstein, *Merchant Law in Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1782–84 (1996).

345. 2 FARNSWORTH, *supra* note 333, § 7.13, at 330.

course of performance may alter the contract.<sup>346</sup> Consequently, the buyer will not be able to insist that the delivery of the remaining four shipments adhere to the original terms. The common explanation for the doctrine is that the parties' conduct during performance is the best indicator of their actual intentions and of the modifications they have agreed to.<sup>347</sup> By adopting this doctrine, the UCC facilitates flexible and informal adjustments of contractual obligations.

This Article offers a different explanation for the doctrine, one which lends it additional support. Course of performance is a use-it-or-lose-it rule: contractual rights that are not exercised during the contract's performance should be lost, because non-use in these circumstances is a good proxy for low valuation of the right by its holder.<sup>348</sup> When a party repeatedly fails to "use" a right that grants it a specific, narrow entitlement (such as delivery on a certain date or at a specific location), the party signals that it values such right to a lesser extent than the other party values its modification (for example, the new date or location for delivery as evidenced by the course of performance). This conclusion is supported by the fact that the cost of avoiding this legal outcome is extremely low:<sup>349</sup> the right holder need only verbally communicate her objection to the course of performance.<sup>350</sup> Thus, the UCC rule reduces the incidence of low-valuing right owners, while at the same time saving on the transaction costs to the parties of negotiating contract modifications. This justification for the course of performance doctrine is pertinent even when the traditional explanation—that

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346. See Omri Ben-Shahar, *The Tentative Case Against Flexibility in Commercial Law*, 66 U. CHI. L. REV. 781, 790–91 (1999) (discussing such examples as late payments and late delivery dates).

347. 2 FARNSWORTH, *supra* note 333, § 7.13, at 329–32; Omri Ben-Shahar, *The Erosion of Rights by Past Breach*, 1 AM. L. & ECON. REV. 190, 197–98 (1999) (stating the traditional rationalization); David V. Snyder, *Language and Formalities in Commercial Contracts: A Defense of Custom and Conduct*, 54 SMU L. REV. 617, 643 (2001) (supporting the conventional view).

348. See *supra* notes 224–32, 249–51 and accompanying text.

349. Cf. Ben-Shahar, *supra* note 347, at 192–94, 216–17, 223–27, 234 (arguing, generally, that people will react to doctrines that erode their rights as a result of past breach by taking measures to enforce their rights, unless the cost of such enforcement outweighs the value of the rights).

350. U.C.C. § 1-303(a)(2) (2007) (stating that courts will infer course of performance only if the other party "accepts the performance or acquiesces in it without objection"); Ian Ayres, *Eroding Entitlements as Litigation Commitment*, 66 U. CHI. L. REV. 836, 838–39 (1999).

course of performance is the best indication of the parties' intentions—does not apply.<sup>351</sup>

### CONCLUSION

Oliver Twist, one of Dickens's memorable characters, was an orphan raised in the infamous workhouses of nineteenth century England.<sup>352</sup> Oliver's childhood was pure misery, as he was starved, beaten, and unloved. Although meek and mild by nature and by circumstance, Oliver summoned up the courage to ask for an additional helping of gruel. "He rose from the table; and advancing to the master, basin and spoon in hand, said: somewhat alarmed at his own temerity: 'Please, sir, I want some more.'"<sup>353</sup> Following this outrageous request, Oliver was turned out of the workhouse and forced to learn to survive in a brutal world.

Would it not have been *better* if Oliver had been given *more* food? Of course; no one can deny it. I do not claim that "less" is always or usually better than "more." Indeed, having more of something is ordinarily better than having less of it, and a certain minimum amount of property is necessary for people to be able to fare even modestly well. Property in excess of this minimum can raise individuals' level of well-being by affording them greater freedom from others, more opportunities for acquiring knowledge, additional means for pursuing long-term

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351. Moreover, the alternative justification is further supported by an influential criticism of the course of performance doctrine. Professor Lisa Bernstein has argued that course of performance reflects the "relationship-preserving" norms that govern an ongoing relationship of contractual parties, whereas the written contract expresses their intended "end-game" norms, applicable when the relationship deteriorates into litigation. Bernstein, *supra* note 344, at 1796–98. If, so the argument goes, courts used course of performance to alter express terms, then parties would be reluctant to accommodate one another even when their relationship is still good. They would fear that concessions on their part would be later construed as modifying the explicit terms. Consequently, the parties will insist on rigid compliance with formal contractual provisions. *Id.* at 1808–11. For the purposes of this Article, I need not take a stand on whether the course of performance doctrine would on the whole advance or impede the goal of flexible adjustment of contracts. Regardless of whether the doctrine will eventually apply to many or few cases, in those instances where a party *does not* object to a different course of performance, despite being familiar with the doctrine and despite the availability of easy means to avoid its application, the reasonable conclusion is that the right has low value for her.

352. CHARLES DICKENS, OLIVER TWIST 1 (Broadview Encore Editions, 2005) (1846).

353. *Id.* at 9.



goals and more possibilities for enjoyment. Although it may be argued that beyond a certain amount of property welfare ceases to increase (or increases only marginally),<sup>354</sup> it may still be true that welfare does not *decrease* from acquiring the additional property.

If MBL arguments were clearly and generally false, there would be no need to discuss them. Rather, since they may be correct, it is doubly important to guard against their allure. This Article claimed that in several different legal contexts more is *not* better than less, and that therefore moderate measures should be *less* tolerated and *more* restricted than extreme ones. It analyzed the normative justifications for this counterintuitive idea, and provided guidelines for identifying mistaken applications of the MBL argument. The fruitfulness of the suggested justifications was demonstrated in property law and in other legal fields, concluding that “more is better than less” rationales should be treated with suspicion. They should be scrutinized carefully rather than uncritically embraced.

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354. HURKA, *supra* note 170, at 171–75.