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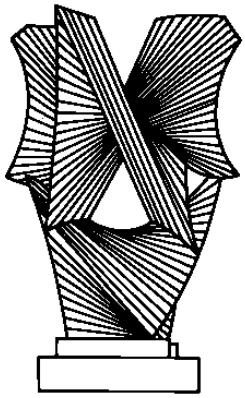

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Abstract

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

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

On an ordinary Wednesday in August of 2008, there were 77 separate listings in the "Free Stuff" section of Chicago's Craigslist directory.[1] The belongings made freely available ranged from items highly desirable (an entertainment center in great condition, a working Gilbranson organ, televisions and microwave ovens) to those that might be useful to a niche population (a Hewlett Packard inkjet cartridge, VHS tapes of the motion pictures Free Willy *and* Free Willy 2, wooden doors from a colonial house built in 1938) to the nearly worthless (a broken refrigerator, one cubic yard of dirt from a landscaping project, "tons of river rocks"). All were offered by their owners on a first come, first served basis. In most cases, the items were kept inside the owner's home, and a claimant would need to make arrangements with the owner to haul off the property. But the owners would not be picky—the first claimant with the ability to do so would be taking the advertised property home. In a few cases, such as the broken refrigerator, the item had been left by the owner in an alley or another easily accessible place, and the Craigslist advertisement described its location.[2] Craigslist is not alone in matching up would-be abandoners with potential claimants—another national organizational called freecycle.org offers a similar service, with high levels of participation, and bookcrossing.com is a global service that facilitates the abandonment and finding of books. In recent years, communities of "freegans" have sprouted up in urban areas around the world, eating, cleaning, and furnishing their homes exclusively with resources that other people have discarded. As a testament to the prevalence of abandonment, it appears that some of these freegans are able to live essentially pleasant, middle-class lives.[3] What's more, it is not only personal property that is widely abandoned. In rural, depopulated areas of Kansas, Nebraska, and North Dakota, local governments have made free land available to anyone who is willing to build a house on it and move in.[4] And in urban centers, the problem of abandoned dwellings is significant, accounting for 23,000 dwelling units in New York City in 1996, and fully 1.3% of all urban residential housing units in the Northeastern United States two decades earlier.[5]

Given the ubiquity of abandoned property and its presumptive economic importance, one would expect there to be a large legal literature exploring the contours of abandonment law. Such a supposition is reasonable, though it turns out to be unduly optimistic. There is very little legal writing on the abandonment of property. When legal scholars tackle the issue, they tend to focus on specific issues, like abandoned shipwreck cases, abandoned oil and gas interests, or abandoned rail lines.[6] The leading Property casebooks either ignore abandonment entirely or

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[1] *See* <http://Chicago.craigslist.org/zip/> (visited Aug. 14, 2008).
[2] *See* <http://Chicago.craigslist.org/chc/zip/795812089.html> (visited Aug. 14, 2008).
[3] Steven Kurutz, *Not Buying It*, N.Y. Times, June 21, 2007, at F1.
[4] *See, e.g.*, Laura Bauer, *Property Giveaway, Trying to Halt the Population Slide: Towns Tout Free Land to Lure New Residents*, Kansas City Star, Jan. 29, 2007, at A1; <http://www.kansasfreeland.com/> (visited Aug. 15, 2008).
[5] Benjamin P. Scafidi et al., *An Economic Analysis of Housing Abandonment*, 7 J. Housing Econ. 287, 288 (1998).
[6] *See e.g.* David J. Bederman & Brian D. Spielman, *Refusing Salvage*, 6 Loy. Mar. L.J. 31(2008) ; Ronald W. Polston, *Mineral ownership theory: Doctrine in Disarray*, 70 N.D. L. Rev. 541(1994) ; Michael L. Stokes, *Adverse Abandonment: Toward Allowing the States to Condemn or Dispose of Unneeded Railway Land*, 31 Transp L.J. 69 (2003).

give it brief attention.[7] For whatever reason, legal scholars have nearly abandoned the topic and remained oblivious to its charms. This paper fills that gap in the property literature by examining the law of abandonment in a comprehensive way. Perhaps not surprisingly in light of the dearth of attention that abandonment law has received, this paper finds the law of abandonment wanting, and suggests doctrinal improvements.

Part I examines the motivations behind decisions to abandon real and personal property, developing a taxonomy of abandonment along the way, and demonstrating through the use of examples that positive market value property is abandoned with some frequency. Part I also highlights some of the social costs of abandonment, which will form a predicate for laws that restrict the practice. The Part concludes by comparing abandonment to the primary competing methods of ridding one's self of property—sales, gifts, and destruction. Part II describes and analyzes the law of abandoned property, identifying five basic approaches that courts and legislatures have taken and assessing the rationales and merits of these approaches. Part III proposes a framework for rationalizing the law of abandonment. In the place of a common law regime that prohibits the abandonment of real property and regulates abandonment in the context of chattels, the paper suggests a unified regime that is pegged to the underlying market value of the resource and the social costs of abandonment. More precisely, the law likely ought to permit the abandonment of positive market value resources if owners take steps to advertise the availability of such property. Such advertisement will minimize most of the social costs associated with abandonment. In the context of negative market-value resources, a prohibition on abandonment usually makes sense in both the real property and chattel property contexts, at least in nations where the baseline level of law abiding behavior is high. In short, this Paper presents a qualified defense of the right to abandon property.

I. Understanding Abandonment

It will be helpful to begin with a definition. In the case of abandonment, a simple and elegant definition is readily available. Abandonment means *any unilateral transfer of ownership*. The word "unilateral" is doing much of the heavy lifting here.[8] Other means of transferring

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[7] *See, e.g.*, BARLOW BURKE ET AL., FUNDAMENTALS OF PROPERTY LAW 18-24 (2d Ed. 2004) (including *Eads v. Brazelton*, a case involving an abandoned shipwreck and *Haslem v. Lockwood*, involving abandoned manure); JOHN E. CRIBBET ET AL., PROPERTY: CASES AND MATERIALS 109-113 (9th ed. 2008) (providing, in 4 pages, the most detailed treatment of the subject among leading casebooks, focusing mostly on the abandonment of chattels and including *Eads*); JESSE DUKEMINIER ET AL., PROPERTY 793-96 (6th ed. 2006) (including the *Pocono Springs* case concerning the abandonment of land and focusing on affirmative covenants' relationship to the abandonment of real property); JOHN P. DWYER & PETER S. MENELL, PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE (1998) (ignoring the abandonment of real property outside of the landlord-tenant context); PAUL GOLDSTEIN & BARTON H. THOMPSON, JR., PROPERTY LAW: OWNERSHIP, USE, AND CONSERVATION (2006) (ignoring the issue of abandonment); THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 518-523 (2007) (focusing on the abandonment of real property, and including the *Pocono Springs* case); JOSEPH SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 92-96 (2006) (including *Charrier v. Bell*, a case involving the legal treatment of buried Native American artifacts).

[8] The clearest articulation of this point in the case law is found in Bright v. Gineste, 284 P.2d 839, 842 (Cal. App. 1955) ("[T]o constitute an abandonment in the strict legal sense there must be a parting with title that is unilateral, the owner must leave the property free to the acquisition of whoever wishes to claim it, and indifferent as to what

property—sales, gifts, bequests, releases, forfeitures, foreclosures, and adverse possession—require that a third party assume ownership of the property or agree to do so. An owner who wishes to dispose of property unilaterally has just two options: abandonment and destruction.[9] Logically, then, abandonment can be defined with reference to what it is not: It is a unilateral, non-destructive means of ridding one's self of ownership. The destruction of a resource is not a transfer, because there is no transferee.

Why would someone abandon property? This question lies at the core of any serious inquiry into this body of law. As discussed below, there may be a number of reasons why an owner might regard abandonment as an attractive strategy for transferring property. The most significant advantages of abandonment are that it allows an owner to avoid the transaction costs associated with a consensual transfer and the decision costs associated with determining the identity of the most appropriate transferee. Other reasons why abandonment might prove attractive include altruistic or reciprocal motivations, a desire to sell ancillary goods, and efforts to enhance one's reputation or derive entertainment value.[10] The paragraphs that follow describe some of the more common forms of property abandonment.

A. Taxonomy of Abandoned Properties

It is widely assumed that property is only abandoned when it becomes worthless or when the transaction costs of transferring the property exceed its market value. For example, Tom Merrill and Henry Smith identify the core condition that leads to abandonment as an asset possessing negative value.[11] They then ask whether there would ever be a context in which owners abandon property that does not have negative value. Although they do not respond to this question, it has an affirmative answer. The case law reflects numerous instances in which property with positive market value is abandoned, and contemporary experience, summarized below, suggests that this behavior remains common. By exploring the different types of non-negative value properties that are nevertheless abandoned, we will make headway toward determining precisely what the law of abandonment ought to say.

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may become of it. A transfer of property from one person to another cannot be effected by abandonment, and abandonment cannot be made to a particular individual.").

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

[10] These are the private benefits of abandonment, and such private benefits will enhance social welfare. In isolated cases, there may be disconnected social benefits from abandonment. For example, abandonment might signal a shift in underlying property values that helps transition land to its most appropriate use, which in some cases may be a commons. *See* Saul Levmore, *Two Stories About the Evolution of Property Rights*, 31 J. Legal Stud. 421, 425 (2002).

[11] MERRILL & SMITH, *supra* note 7, at 522; *cf.* Douglas G. Baird, *A World Without Bankruptcy*, 50 Law & Contemp. Probs. 173, 190 (1987) (noting that a trustee's "abandonment power exists because some kinds of property are not worth keeping").

We can describe property, be it real, chattel, or intellectual, using a four box matrix. The two relevant variables are value to the existing owner (subjective value) and market value.[12]

Positive Subjective Value, Positive Market Value **Medium-low abandonment frequency** (Examples: geocaching, major league baseballs, Making it Rain)	*Positive Subjective Value, Negative Market Value* **Very low abandonment frequency** (Examples: Tyrannical Heirlooms)
Negative Subjective Value, Positive Market Value **Medium-high Abandonment Frequency** (Examples: Property associated with ex-lovers, cultural objects predating owners' taste changes, some pets)	*Negative Subjective Value, Negative Market Value* **Very High Abandonment Frequency** (Examples: Refuse, contaminated land, badly damaged chattels)

Property that is devoid of both subjective value and market value is likely to be abandoned unless the law forbids it. In the overwhelming majority of forfeiture cases involving New York City real estate, the property in question had liens that exceeded the market value of the underlying property at the time of its seizure by the government to pay off tax liens, and it seems plausible that most abandoned real estate has this characteristic as well.[13] Nobody wants this property in its present form, and the cost of paying off tax liens exceeds the market value that it would have if repaired or brought free and clear. In some contexts, such as the environmental contamination setting, the law must impose the clean-up costs on someone—either the owner of the negative value asset, the polluter, the neighbors who are suffering from the pollution, or the taxpayers.[14] Speaking more generally, an asset that has no economic value to anyone should be repaired, recycled, unbundled, or destroyed.[15]

Repairing, recycling, unbundling, and destruction are of course not costless. Hence the law will limit an individual owner's ability to impose such costs on the public at large. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[16] provides a statutory framework for imposing environmental remediation costs on the owners of

[12] The divergence between subjective value and market value is a well-established trope in the academic literature on the law of takings and the question of just compensation. *See, e.g.*, Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 Nw U. L. Rev. 677 (2005); Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 Mich. St. L. Rev. 957, 962-65 (2004).

[13] Scafidi et al., *supra* note 5, at 293, 297. Although they refer to these units as "abandoned" property, most of the units described in their paper are more accurately characterized for our purposes as foreclosed. *Id*. At no point is the real property placed up for grabs to a finder, as is the case with legally abandoned property. *See supra* note 8.

[14] The law typically imposes these costs on the polluter if it can collect from him. *See* Baird, *supra* note 11, at 187-91.

[15] *See infra* section I.C.

[16] 42 U.S.C. § 9601 et seq.

negative value property. Various laws at the state and local level prohibit the non-consensual dumping of waste on public and private property.[17] Municipalities may provide public trashcans in parks or on city streets, and people wishing to rid themselves of negative value assets will try to abandon them there, but it is not irrational for the government to take on the costs of destruction or recycling in this case. The city might rationally conclude that in the absence of these trash receptacles, people will abandon their property in the parks or streets themselves, creating unsightly litter and public health hazards. Note, however, that cities cap the costs associated with the intake of abandoned property by prohibiting the dumping of household waste in public trash cans[18] and limiting their size. It is quite rare to find public dumpsters in urban parks or near sidewalks, in part because their presence will invite individuals to dispose of large negative value assets therein. As a general matter, individuals and firms have to arrange with private entities or public sanitation departments to lose possession of negative market value property. Once such a contract is entered into or tax revenue is dedicated to this purpose, it is no longer appropriate to describe the waste in question as having been abandoned. Rather, it is consensually transferred by one party to another for the purposes of disposal.

A second category of property that is regularly abandoned has negative subjective value and positive market value. Property that is associated with an ex-lover is often abandoned by an owner despite its positive market value. A popular press how-to book that instructs readers on making money by purchasing abandoned properties suggests that divorce frequently causes both former spouses to abandon the family home, and that people who inherit properties where a loved one died sometimes abandon the land so as to avoid dealing with painful memories.[19] More trivially, an adult may decide that the objects associated with her youth do not belong in her residence any longer, but would surely make some child happy, so she may leave them in a publicly accessible place for the first interested passer by.

A third category of property, entailing positive subjective value and low market value, is extremely unlikely to be abandoned. In these cases a transfer of the resource in question makes society worse off. Indeed, in these cases abandonment will almost invariably result from imperfect information. Either the owner underestimates her own attachment to the property or the owner overestimates its market value and mistakenly believes herself to be abandoning a

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[17] *See, e.g.*, Alaska Stat. Ann. § 46.06.080 (fines maximized at $1000); Cal. Penal Code § 374.3 (West 2008) (separates personal dumping from commercial dumping, fines up to $6000 for commercial dumping); Tex. Health & Safety § 365.012 (creates a carefully graded punishment regime dependent on the amount of waste dumped).

[18] Several years ago a Washington, D.C. lawyer threw away a FedEx mailing slip providing his residential address in a public trashcan and was fined $35 for violating the District's prohibition. Marc Fischer, *When It Comes to Waste, D.C. Is Priceless*, Wash. Post., May 24, 2004, at B1.

[19] CHANTAL HOWELL CAREY & BILL CAREY, MAKE MONEY IN ABANDONED PROPERTIES: HOW TO IDENTIFY AND BUY VACANT PROPERTIES AND MAKE A HUGE PROFIT 15 (2006). Much of the Careys' advice seems as dubious as the title of their book. They state that they have purchased multiple high value properties that were in the process of being abandoned by their owners, but provide no documentation. *See id*. at 7-15. Their account should be taken with a fistful of salt. Having said that, scenarios like the ones described by the Careys are reflected in the case law. *See, e.g.*, Yourik v. Mallonee, 921 A.2d 869, 871-72 & n. 1 (Md. App. 2007); Mickens v. Mickens, 385 P.2d 14, 16 (Wash. 1963).

positive subject value, positive market value resource. Examples of this category are somewhat difficult to imagine, but perhaps they might include "tyrannical heirlooms." Quintessential tyrannical heirlooms are property that an individual received from a relative that were valued by the donor but detested by the recipient. Nevertheless, the recipients felt duty bound to keep and maintain the heirloom in question, out of affection for the donor.[20] The presence of such a relationship makes it far more likely that we will see this sort of transfer in the testamentary context than anywhere else, because the recipient has no opportunity to express dissatisfaction with the bequest to the decedent. Such transfers will not occur via sales because no one will step forward to purchase the items. They will occur via inter vivos gifts only occasionally. The law of gifts requires acceptance as an element, but the recipient may accept an item she does not truly want out of a desire to avoid hurting the donor's feelings.[21] It is hard to imagine abandonment as a domain for such transfers because (1) people will be reluctant to abandon property they value to total strangers; (2) total strangers who do not want such property will be reluctant to take possession of it; and (3) there is little reason to think that the finder of such undesirable property will feel any sense of kinship with the abandoner, such that he would willingly take possession. On reflection, then, if they occur at all these sorts of transfers are surely quite rare.

As a perusal of Craigslist will attest, positive market value assets are abandoned with some regularity. These are the most interesting abandonment cases, and they will get the fullest treatment here. For starters, take baseballs hit into the stands at major league ballgames. Thanks to *Popov v. Hayashi*, the Barry Bonds home run ball controversy, we now have clear case law holding that a baseball is the property of major league baseball at the time the pitcher throws it, but that it becomes abandoned property the moment it flies off a hitter's bat and out of play.[22] Some of these baseballs have significant monetary value. For example, Mark McGwire's 70th home run ball sold for $3 million, the ball at issue in *Popov* sold for $450,000, and the foul baseball that Cubs fan Steve Bartman deflected into the stands in the 2003 National League Championship series fetched more than $113,000 at auction. We might therefore wonder why Major League Baseball does not retain title to balls hit into the stands, as the National Basketball Association and National Football League evidently do. The answer is straightforward—the league seems to have concluded that the opportunity to capture abandoned baseball at ballparks induces fans to attend games. Thus, by abandoning valuable property, but limiting the potential claimants of that property almost entirely to paying fans,[23] major league baseball plausibly maximizes its own profits. Major league baseball is not the only entity to recognize that abandonment might lend itself to profit-maximization by opening up ancillary revenue streams.

[20] Joyce Wadler, *The Tyranny of the Heirloom*, N.Y. Times, June 26, 2008.

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

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

[23] The modifier is included because at some ballparks, such as Chicago's Wrigley Field or San Francisco's AT & T Park, home run balls are hit out of the stadium with some regularity, landing on public streets outside Wrigley or public waterways outside AT & T Park.

One clever Craigslist poster offered a free HDTV that was in need of expensive repairs, and noted, "As an added bonus, you can buy the [TV] stand for 50 bucks!"[24]

Now for some less straightforward cases. Devon, England, has been celebrating the Hot Pennies Ceremony for more than 750 years. During the ceremony, town residents in the buildings throw buckets of coins into the streets, where they are scooped up by the crowds below.[25] Although the ceremony has now become a successful tourist attraction—consistent with the major league baseball explanation of abandoned baseballs—its origins were rather different. By town lore, the items tossed into the streets were initially coins that had been heated to high temperatures "so that rich people could amuse themselves by witnessing poor people burning themselves."[26] In an updated echo of this ancient ceremony, athletes, musicians, models, and other public figures have gained notoriety by tossing large denomination bills into the air in public places. In hip-hop culture the practice has been referred to as "making it rain," and media accounts have popped up around the globe describing the practice, with one sports columnist referring to it as a "tradition" among athletes.[27] Boxing champion Floyd Mayweather, Jr. has become famous for the practice of tossing stacks containing $10,000 in hundred dollar bills into their air so that he can watch fans scramble for them.[28] So too football player Pacman Jones, who was arrested after allegedly sending tens of thousands of dollars airborne at a Las Vegas strip club, sparking a violent melee.[29] In homage to Jones, Comedian George Lopez tosses $1000 in $20 dollar bills into the crowd at a golf tournament each year.[30] Even purportedly cash-strapped collegiate athletes have gotten into the act, triggering brawls at nightclubs.[31] Making it rain has even worked down-market, with models from the clothing line Shmack getting press coverage for tossing 400 one dollar bills into a crowd after a fashion show,[32] around the same time that an unidentified Albany basketball fan threw 50 one dollar bills into the crowd at a high school basketball game, causing a disturbance that forced the game's cancellation.[33] The practice of

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[24] *See* <http://Chicago.craigslist.org/nwc/zip/795820052.html> (visited Aug. 14, 2008).

[25] Bradley Gerrard, *Town Cashes in as Hot Pennies Rain Down on a Money-Mad Crowd*, EE, July 23, 2008, at 3, available in 2008 WL 13754625.

[26] *Id*. In America in the 1960s, something similar happened to the father of vice presidential nominee Joe Biden, causing him to quit a job. *See* David Brooks, *Hoping Its Biden*, N.Y. Times, Aug. 22, 2008, at A21. ("Once, when Joe Sr. was working for a car dealership, the owner threw a Christmas party for the staff. Just as dancing was to being, the owner scattered silver dollars on the floor and watched from above as the mechanics and salesmen scrambled about for them. Joe Sr. quit that job on the spot.").

[27] Tom Knott, *Blath Following Pro Athlete Tradition*, Wash. Times, June 6, 2008, at C1.

[28] Norm Clark, *Waxworks Visitors Casts Vote Early*, Las Vegas Rev. J., Nov. 12, 2006, at 4A, available in 2006 WL 19743500; Paul Hayward, *A Fight for Survival?*, Daily Mail, June 23, 2007, at 115, available in 2007 WLNR 11869796.

[29] Greg Moore, *The Mash-Up: Live in a Fantasy This Week in Video Games, This Week in Sports, Pop Culture Mash-ups*, K.C. Star, Feb. 25, 2007, at C15. There is some dispute as to whether Jones was throwing the money at exotic dancers, abandoning it generally, or just tossing it in the air with the hopes of reclaiming it. He was arrested after allegedly striking a dancer who was grabbing some of the bills.

[30] Scott Ostler, *Lopez Says No Feud with Murray – Seriously*, S.F. Chron., Feb. 6, 2008, at D1.

[31] Dick Weiss, *2 Tales Make for Great Final Four*, N.Y. Daily News, April 6, 2008, at 47.

[32] Malcolm Venable, *The Beautiful People Overheard*, Virginian Pilot & Ledger-Star, Dec. 2, 2007, at 12, available in 2007 WLNR 23785053.

[33] James Allen, *Thrown Bills Lead to Ruckus at Game*, Albany Times Union, Dec. 8, 2007, at C1.

abandoning specie is, in short, a strategy for accomplishing any number of rational objectives: garnering attention, signaling wealth, or being entertained (for people with perverse entertainment preferences).

In the last few years, however, the abandonment of positive-value property has become mainstream and organized by a group far removed from the hip-hop set, thanks to an emerging outdoor activity called geocaching. Geocaching was invented by David Ulmer in 2000. Shortly after highly precise GPS receivers were first made available to ordinary consumers, Ulmer "hid a treasure near his home, posted the coordinates on the web, and challenged people to find it."[34] Other owners of GPS receivers soon followed suit, hiding their own treasures in waterproof containers, and posting their coordinates on www.geocaching.com, a web site that contained 625,132 active caches as of August 1, 2008. There are active geocaches in more than 100 countries and on every continent.[35] Caches typically include inexpensive items, like coins, carnival prizes, Match Box cars, or rubber erasers, and the expectation is that each geocacher who finds the cache will take the contents and leave another cache in the same place for the next geocacher to find.[36] Individuals setting up geocaches sometimes spend substantially more on the contents of a cache, however. Music CDs, concert and sporting event tickets, books, and costume jewelry are commonly left in caches.[37] Some geocachers leave a webcam at the specified location, permitting the person who finds it to pose for a picture that can then be sent to the person who hid the webcam.[38] Experienced geocachers will often carry a few luxury items with them, so that they can leave an equal or higher value item for the next geocacher if they do discover a high-value cache.[39] Whenever a high value item is left in the cache, whether it is something like a web cam that is not meant to be taken away, or a cache that is intended to be carried off by a finder, the creator of the cache runs a real risk that the property will be taken by someone who leaves nothing behind—or plundered, to use the term that geocachers prefer. When this happens, a disappointed geocacher typically notes on a geocaching web site that the cache needs maintenance, and the person who established it typically will restock it.[40]

Despite the common adherence to the norm dictating that someone who finds a geocache should leave a trinket of equal or greater value behind for the next geocacher, there is evidently no legal requirement that this be done. As a formal matter, a geocache left on public land is abandoned property, and the first person who finds it is entitled to take the entirety of the cache. This raises the question of why geocaching has thrived, and why individuals spend time and money establishing caches to begin with. In a survey of geocaching participants, Chavez,

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[34] Barbara Elwood Schlatter & Amy R. Hurd, *Geocaching: 21st-Century Hide-and-Seek*, 76 J. Phys. Ed., Recreation & Dance 28 (2005).
[35] Deborah J. Chavez, Ingrid Schneider & Todd Powell, *The Social Psychology of a Technology-Driven Outdoor Trend: Geocaching in the USA* 1 (unpublished manuscript on file with author).
[36] Schlatter & Hurd, *supra* note 34, at 29.
[37] Chavez et al., *supra* note 35, at 3.
[38] *Id*. at 30.
[39] *See* < http://cacheopedia.com/wiki/Trade_items> (visited Aug. 1, 2008).
[40] *Id*.

Schneider and Powell found that a narrow majority of geocachers had never set up a geocache of their own. More than a third had created one to five geocaches, and a little more than five percent had set up more than ten geocaches.[41] It appears that a desire to gain reputational benefits drives relatively little of the geocaching behavior. When the researchers asked geocachers about the benefits of the activity, the desire to meet others was identified as the least important motivation for their participation.[42] Geocachers do go on treasure hunts with family and friends, frequently, however, which suggests that that there is a social dimension to looking for treasure,[43] but the reasons why individuals leave caches evidently have more to do with general altruism and a sense of ethical reciprocity than a desire to enhance one's reputation among strangers.[44]

Surveying the identified categories of abandoned property that has positive perceived value to the abandoner, we can identify three distinct types of motivations for abandonment. First, the owner may abandon property for profit-maximizing purposes, seeking to acquire revenue streams for services that those seeking to claim the abandoned property will need to purchase. It is conceivable that a GPS-manufacturer like Garmin could pursue a similar strategy with respect to geocaching by seeding geocaches all over the country as an inducement to purchase their products. To my disappointment, I have been unable to turn up any evidence that Garmin has pursued this strategy.[45] Second, the owner may abandon property for reputation-enhancing purposes. Third, the owner may abandon property for more altruistic reasons, which may have some connection to entertainment value (as in "making it rain") or norms of reciprocity (as in geocaching).

More broadly, abandonment may provide an attractive alternative to other means of ridding one's self of positive-value property. Abandonment is advantageous because it enables an owner to rid herself of property while incurring neither the transaction costs of a bilateral transfer nor the decision costs associated with a gift.[46] In that sense, abandonment represents another property right designed to expand the owner's freedom of action. This brings to mind

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[41] Chavez et al., *supra* note 35, at 7 tbl. 3,
[42] *Id*. at 10.
[43] *Id*. at 8-10.
[44] There are some parallels between geocaching and dedications of valuable copyrighted works to the public domain. On the latter, see, e.g., Severine Dussolier, *The Master's Tools v. The Master's House: Creative Commons v. Copyright*, 29 Colum. J. L. & Arts. 271, 274 & n.9 (2006), and sources cited *infra* note 125. In both cases the valuable resources is being left up for public use, but in the former case the prior owner's expectation is that the resource will become another's private property, whereas in the latter case no individual will be entitled to establish private property rights in the work. In recent years organizations like Creative Commons have arisen to facilitate the dedication of copyrighted works to the public domain. *See, e.g.* http://creativecommons.org/licenses/publicdomain/ (visited Jan. 27, 2009) (providing language for a public domain license). The model licenses even Creative Commons features most prominently on its web sites, however, fall short of a public domain dedication, and provide for restrictions requiring users to provide attribution to the creator, limiting commercial use of the work, or limiting the right to create derivative works. *See* <http://creativecommons.org/about/licenses/> (visited Jan. 27, 2009). Many authors dedicating work to the public domain understandably would bristle at the idea that another person might take credit for creating the work in question or profit by distributing the dedicated work or derivate works.
[45] Perhaps deep-pocketed Garmin is concerned that seeding a number of caches might expose the company to liability if geocachers are injured or trespass while searching for the treasure.
[46] *See infra* text accompanying notes 64-110.

J.E. Penner's justification for abandonment, which is rooted in an individual autonomy interest: "One ought not to be saddled with a relationship to a thing that one does not want, and an unbreakable relation to a thing would condemn the owner to having to deal with it. It would indeed be a funny turn of events if . . . property in essence gave the things a person owned a power over him."[47] On Penner's account, there is a symmetry between a system of laws that gives an individual the freedom to choose whether and when to acquire, and whether and when to be rid of, property.[48]

Penner's discussion of the relationship between abandonment and autonomy is insightful but he pulls one important punch. It is precisely the unilateral nature of abandonment that makes it and the right to destroy the most powerful manifestations of an individual's autonomy interest in the bundle of property rights.[49] By letting an individual abandon property, the state is saying to the owner, essentially, "we will allow you to rid yourself of a resource regardless of what anyone else has to say about the matter." As with its cousin, the right to destroy, this unilateral empowerment of the abandoning owner raises the prospect of disempowerment of everybody else. Penner sensibly recognizes that there are autonomy interests on both sides of the abandonment calculus:

> While the interest underpinning property incorporates the interest in getting rid of things one no longer wants, people also have an interest in not being harmed by the way people deal with their things. This is both an interest that all individuals have, and a social interest, in that the maintenance of the environment is a collective good. The rules of title, specifically the rule that one's title is not extinguished unless another takes possession and acquires his own title, either gratuitously or for a fee, provide a means of ascribing responsibility to a person for the harms which his property may cause, even though he might wish to sever his relation to it. . . . [B]y relinquishing possession, he may not avoid responsibility for the effects of his ownership, say the creation of hazardous industrial wastes.[50]

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

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[47] J.E. PENNER, THE IDEA OF PROPERTY IN LAW 79 (1997).

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

[49] *See* Lior Jacob Strahilevitz, *The Right to Destroy*, 114 Yale L.J. 781, 794-95 (2005) (discussing the right to destroy's importance as the most extreme right in the property bundle).

[50] *Id*. at 79-80.

B. Costs of Abandonment

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

Let us consider the confusion problem first. The legal treatment of abandoned property differs from lost or mislaid property. Abandoned property belongs to the first person to find it and take possession.[51] The finder of lost property typically prevails over anyone other than the true owner or a prior possessor.[52] Finally, mislaid property typically goes to the landowner on whose property the item in question was found for safekeeping.[53] When an individual stumbles upon chattel property, it can be difficult to discern whether it is abandoned, lost, or mislaid, and thus difficult for the finder to determine his rights and responsibilities.

Similarly, there are a number of noteworthy property cases in which courts had to confront substantial ambiguity over whether a resource owner abandoned personal property or incorporeal interests in real property. In *Eads v. Brazelton*,[54] the court struggled with the question of whether title to a shipwreck on the Mississippi River had been abandoned or retained by its owner. In *Haslem v. Lockwood*,[55] the court flailed in its discussion of whether piles of manure left overnight had been abandoned. In the macabre case of *Hays v. Montague*,[56] the court had to decide whether the rifle that James Earl Ray left at the crime scene after murdering Martin Luther King had been abandoned. In *Hawkins v. Mahoney*,[57] the majority and dissent sharply disagreed over whether personal property left in a jail cell by an escaped inmate had been abandoned. And in *Strong v. Detroit & Mackinac Railway Company*,[58] the court held that a railway's explicit reference to its own "abandoned" railway line in a public document did not amount to abandonment of its incorporeal interest in the property. The lesson here is that abandonment causes confusion, and confusion engenders social costs—it may spark controversy, moral qualms, and unnecessary investments in determining the status of property. Ex ante, confusion may deter finders from claiming valuable property that they discover, resulting in

[51] *Popov*, 2002 WL 31833731, at *3.
[52] *See, e.g.*, Armory v. Delamirie, 93 Eng. Rep. 664 (K.B.1722); Ganter v. Kapiloff, 69 Md.App. 97, 103 (1986).
[53] McAvoy v. Medina, 11 Allen 548, 549 (Mass. 1866).
[54] 22 Ark. 499 (1861).
[55] 37 Conn. 500 (1871).
[56] 860 S.W.2d 403 (Tenn. Ct. App. 1993)
[57] 990 P.2d 776 (Mont. 1999).
[58] 423 N.W.2d 266, 269 (Mich. App. 1988).

welfare losses. As this analysis indicates, one goal of abandonment law should be to reduce the associated confusion costs. We will take up this issue in Part III.

The deterioration problem is also nearly universal in cases of abandonment. To the extent that property forms a portion of a jurisdiction's tax base, abandonment may result in an ownership lag whereas gifts, sales, and bequests do not. The lag also means that a productive societal asset generates no value for a period of time. This lag is particularly troublesome in the case of an asset whose quality or value will decline the longer it remains unpossessed by an owner. The classic example would be abandoned homes, which may experience burst pipes, vandalism, vermin infestations, fixture stripping by scavengers, icy sidewalks, or become dens of criminality if they remain unoccupied for a significant period of time.[59] Once again, with most abandoned assets, the goal of law should be to reduce the time during which property remains up for grabs. We shall consider this interest in Part III as well.

Two mutually exclusive costs of abandonment are disposal costs (in the case of negative market value property) and lawless race costs (in the case of positive market value property). The former are best exemplified in the context of environmentally contaminated real property, where CERCLA tries to impose cleanup costs on owners who try to abandon their land. Examples of the latter include the *Popov v. Hayashi* and Pacman Jones disputes referenced earlier. If particularly valuable property is to be abandoned, one can expect that many claimants will invest in capturing it, and those who seek to do so may try to obtain some advantage over their competitors by engaging in violent or other unlawful acts.[60] That said, lawless races may engender harms even if there is no outbreak of violence. Many communities throughout California had to cancel "bulky trash day," when homeowners were permitted to abandon large items at curbside because scavengers inevitably rummaged through abandoned property before government and non-profit-affiliated salvagers arrived, made off with the valuable items, and increased the costs of sorting through and collecting what remained.[61] Finally, as discussed

[59] *See* Briglia v. Modrian Mortgage Co., 698 A.2d 28, 30-31 (N.J. Super. 1997); Scafidi et al., *supra* note 5, at 288; Note, *A Nuisance Law Approach to the Problem of Housing Abandonment*, 85 Yale L.J. 1130, 1132-33 (1967). Note, however, that all of those problems have been documented in the foreclosure context, where a home is not abandoned, but is in the process of being transferred by a mortgagor to a mortgagee. Even if a homeowner undergoing foreclosure is occupying the premises, his incentive to maintain them appropriately will be substantially diminished because of the risk that the benefits of that maintenance will be captured by the bank.

[60] *See Popov*, 2002 WL 31833731, at *6; *infra* text accompanying note 29. In the *Popov* case, where the baseball in question was valuable enough to be claimed by someone in short order, and it was likely going to be found in a located in a finite space, there was no need to have 20,000 fans in position to track down the ball. This may infer inefficiently high levels of entry into the race. A few dozen spectators could have covered the outfield bleachers and McCovey Cove adequately while still ensuring that the ball in question would be located. (This sets aside the considerable entertainment value associated with having a chance to take possession of the ball.) In the case of other valuable abandoned property whose location is harder to pinpoint, such as most ancient shipwrecks, we can be less certain about the optimal number of finders.

[61] Kara Platoni, *What's Killing Bulky Trash Day? The Popular Neighborhood Event – Lifeblood of Nonprofits, Artists, and Scavengers Is on Its Way to the Rubbish Heap*, East Bay Express, June 30, 2004. Platoni describes these lawless race costs in detail:

elsewhere in this paper, permitting abandonment may encourage non-sustainable uses of a resource,[62] and may prompt welfare losses if an owner erroneously overestimates demand for property he is considering abandoning.[63]

C. Abandonment's Comparative Appeal

Although "unilateral transfer of property" provides a straightforward conceptual description of abandonment, such a definition provides little help to a court that must determine whether a particular set of actions and circumstances amount to a transfer. The common law requires that the party seeking to demonstrate abandonment of property establish two elements. First, the owner must have intended to relinquish all interests in the property, with no intention that it be acquired by any particular person. Second, there must be a voluntary act by the owner effectuating that intent.[64] If property is abandoned, then it belongs to the first person who subsequently takes control over it.[65] Although it need not be part of the definition, the use of a public or communal space to effectuate a transfer is often a hallmark of abandonment.[66] Notably, the abandoner can reclaim possession of the abandoned property if he does so before any other person appropriates it.[67]

Although it is the second element that often looms large in abandonment litigation, the first is worth emphasizing for analytical purposes. True abandonment entails an individual relinquishing property to *no one in particular*.[68] Abandonment thus provides a property owner

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> When residents leave out donations in opaque garbage bags, the scavengers will rip them open to see what's inside and toss the contents everywhere. And Ryan gets stuck with the cleanup. The scavengers, he says, "take most of the good stuff and leave a big old mess."
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> This, it turns out, is the main reason local governments no longer love bulky trash day, and why so many have decided to get rid of it. In past years, most cities in Alameda County cities hosted these neighborhood spring cleanings, and several had programs like Ryan's that gave the nonprofits first dibs. Now Ryan's Contra Costa reuse program is the last of its kind in the East Bay, and Orinda is one of just a handful of local cities that still does neighborhood-wide pickups. The pro scavengers simply got so good at the game that they would routinely beat the nonprofits to the punch. Sanitation workers, meanwhile, were tired of dealing with the mess, and homeowners were getting creeped out by the strangers sifting through their belongings.
>
> So this spring, Berkeley, Oakland, El Cerrito, and Livermore all quietly nixed their bulky trash days in favor of appointment-only systems in which residents must call the city for a pickup. Alameda, Hayward, San Leandro, and Richmond already made this switch in recent years. The cities hope that the scavengers, no longer knowing when and where lucrative piles will appear, will simply give up.

Id.

[62] *See infra* text accompanying notes 137-140.

[63] *See supra* text accompanying note 20.

[64] *See, e.g.*, Campbell v. Cochran, 416 A.2d 211, 221 (Del. Sup. Ct. 1980); Griffis v. Davidson County Metro. Govt., 164 S.W.3d 267 (Tenn. 2005).

[65] Haslem v. Lockwood, 37 Conn. 500 (1871).

[66] At least one court has imposed a public place test as part of its definition of property abandonment for the purposes of the Fourth Amendment. *See* State v. Reed, 641 S.E.2d 320, 323 (N.C. App. 2007).

[67] Hawkins v. Mahoney, 990 P.2d 776, 779 (Mont. 1999) (quoting 1 C.J.S. *Abandonment* § 12 (1985)).

[68] *See, e.g.*, Martin v. Cassidy, 307 P.2d 981, 984 (Cal. App. 1957) (holding that the abandoning owner must be "entirely indifferent as to what may become of [the property] or as to who may thereafter possess it"); Miller v. Dallas County, 158 S.W.2d 828, 837 (Tex. Civ. App. 1941) (Bond, C.J., dissenting) ("Abandonment, accordingly, is

with a low-cost way to "roll the dice" as to the identity of the subsequent owner, and in this way it differs from virtually all other forms of uncompensated relinquishment, where the subsequent taker or class of takers will be identified with particularity.[69] This "roll of the dice" element is important, because it means that a great deal of what is commonly called "abandonment" in the law actually is better deemed forfeiture.[70] For example, when the record owner of a property with tax liens that exceed its market value "abandons" the property, he is not placing the resource up for grabs.[71] Rather, he is enabling another party that already holds an interest in the property to take possession of it. The forfeiting owner's fractional ownership interest has seen its value lowered to zero, but the resource as a whole likely retains positive value. The transfer is not unilateral, but rather a voluntary transfer from one record owner to another specifically contemplated at the time the relevant property interests were created.[72] Similarly, when the beneficiary of an easement releases it, this is not abandonment because the transfer necessarily benefits the owner of the servient tenement. "Abandonment" as used in the Bankruptcy Code likewise does not count as abandonment for our purposes because the trustee necessarily abandons property "to the debtor" or another party with an interest in the property.[73]

Insofar as it necessarily entails a roll of the dice, abandonment has something in common with most sales. A generally underappreciated attribute of an auction or other sale is that the seller typically rolls the dice as to the identity of the subsequent owner. Sellers are usually indifferent to the identities of subsequent owners because that indifference is likely to maximize the sale price.[74] With abandonment, randomization must serve some different purpose. At first glance, the randomization that abandonment entails seems to undermine distributive justice. But

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the relinquishment of a right, a total desertion, the giving up to no one in particular of something to which one is entitled."), *majority op. rev'd by* 166 S.W.2d 922 (1942); *see also* Cutone v. Cutone, 285 S.E.2d 905 (W.V. 1982) (holding that a widow does not abandon her right to quarantine – the right to occupy the family residence during the period between a husband's death and the assignment of dower – unless she "has demonstrated an apparent indifference to what would become of the property").

[69] It is possible to design a future interest in property in such a way as to approximate abandonment. For example, "I leave my Rolex watch to the first person who stumbles upon it after it is deposited by my executor in a hidden location in Central Park in January of 2009."

[70] *See* Bright v. Gineste, 284 P.2d 839, 842-43 (Cal. App. 1955).

[71] *See supra* text accompanying note 13 and accompanying text.

[72] The same analysis applies to widely publicized recent cases of "jingle mail," where a homeowner with a property whose value is exceeded by the outstanding balance of a mortgage mails the keys to the mortgage lender and voluntarily moves out. *See* Vikas Bajaj, *Mortgage Holders Find It Hard to Walk Away from Their Homes*, N.Y. Times, May 10, 2008, at C1. Colloquially, the homeowner's actions amount to abandonment. Legally, they are forfeiture. For further discussion, see *infra* text accompanying notes 112-113.

[73] 11 U.S.C. § 554(c); Jack F. Williams, *The Tax Consequences of Abandonment Under the Bankruptcy Code*, 67 Temp. L. Rev. 13, 28-29 (1994).

[74] There are important exceptions, where a seller cares a great deal about the identity of a subsequent purchaser. *See, e.g.*, Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 Mich. L. Rev. 1835, 1851-59, 1894-97 (2006) (examining situations in which a profit-maximizing real estate developer might try to exclude particular homeowners despite their willingness to pay the market price for units in the development); Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 Va. L. Rev. 437, 444-452(2006) (analyzing exclusivity premiums in racially homogenous neighborhoods and Manhattan cooperative apartments). Franchise sales would be another classic case where one would not expect to see indifference by a seller, given the substantial network effects and reputational spillovers.

compared with the viable alternatives, abandonment holds up reasonably well. Some charities, like OxFam, say, may specialize in trying to get resources to the places where they will do the most good, but bilateral market transactions will rarely achieve this end because ability to pay constrains willingness to pay. Other charities, like elite law schools or well-endowed symphonies, make no pretense of being the most deserving recipient of donor largess, but rather tap into notions of reciprocity or offer signaling benefits so as to attract donors. Inter vivos gifts probably fare worse still on distributive grounds because social networks tend to be heavily stratified by socio-economic class. Thus rich people may have few interactions with the poor people who would be the most deserving recipients of their charity.[75] Abandonment of chattel property, but contrast, might fare reasonably well from a distributive justice perspective, especially if poorer people are more likely to be traveling through public spaces where property is abandoned and richer people, freegans notwithstanding, are less likely to be inclined to claim abandoned property in public spaces.[76] Of course, the location of the abandonment will have distributive justice implications—abandoning an item inside a gated community necessarily limits the universe of possible claimants.

Upon close reflection, then, there appear to be several degrees of dice rolling, and a spectrum of randomization emerges in the various sorts of abandonment that we observe. At one pole would be pure randomization. If an individual dropped a $100 bill in a randomly selected spot on the globe, that act would constitute pure randomization. As best I can tell, this never happens. Much more common is nearly-pure randomization. The property owner leaves property in a particular spot, to be claimed by the first person who finds and wants it. Obviously, if the property is abandoned in San Francisco, right outside the abandoner's home, then a San Francisco resident has a much better chance of claiming the property than someone from Little Rock. Geocaching, discussed earlier, is less random still. Someone who leaves behind a cache almost certainly has a fellow geocacher in mind as the subsequent owner, though the geocacher does incur the risk that a passerby may claim the property instead.[77] Similarly, the sort of abandonment that most typically shows up in Craigslist advertisements reflects impure randomization. The owner will give the property to the first person who shows up at his home or workplace requesting it. In these cases, the abandoner has no particular recipient in mind, but he there may be warm-glow associated with the physical handover of the property to a particular

[75] *Cf.* Arthur C. Brooks, *Does Social Capital Make You Generous?*, 86 Soc. Sci. Q. 1, 2-4, 9-12 (2005) (discussing the association between social capital and charitable giving); Bruce Rankin, *How Low Income Women Find Jobs and Its Effects on Earnings*, 30 Work & Occupations 281, 285 (2003) (discussing the stratification of social networks of low-income workers, and how their lack of network ties to high-income workers constrains their employment prospects).

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

[77] *See supra* text accompanying notes 39-40. In this sense, geocaching resembles a reciprocal charitable enterprise like a blood bank. Here it is abandonment's unilateral transfer element, rather than its randomization attribute, that distinguishes the cases.

person who self selects.[78] In such instances, the transfer is something of a hybrid between abandonment and a gift.[79] Low randomization transactions occasionally appear in the free stuff section of Craigslist. For example, one owner of a working piano offered it for free to a needy church that wanted it.[80] By specifying a needy church as the recipient, the owner substantially limited the extent to which subsequent distribution was randomized. When a transaction has such a limited degree of randomization, it is inappropriate to characterize the transfer as abandonment. Rather, it more closely resembles a class gift of the sort commonly seen in trusts and estates law.

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

The Bible contains perhaps the best known instance of child abandonment, when Jochebed placed the infant Moses in a basket on the Nile in the hopes that he would be spared an edict putting all Jewish male newborns to death.[81] Acts like Jochebed's are not the mere stuff of legend, however. Indeed, hers would have been a tale to which many of the Bible's earlier audiences could relate. Not long ago in Western Civilization the relinquishment of newborns by their birth parents was startlingly commonplace. John Boswell's definitive study of child abandonment presents some stark statistics:

> In the late eighteenth century in Toulouse, one child in every four was *known* to be abandoned. In poor quarters the rate reached 39.9 percent; even in rich parishes the rate was generally around 15 percent. In Lyons between 1750 and 1789 the number of children abandoned was approximately one-third the number of births. During the same period in Paris children *known* to have been abandoned account for between 20 and 30 percent of the registered births. . . . In Florence it ranged from a low of 14 percent of all baptized babies at the opening of the eighteenth century to a high of 43 percent early in the nineteenth. In Milan the opening of the

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[78] On warm glow, see James Andreoni, *Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving*, 100 Econ. J. 464 (1990).

[79] The law probably would characterize such a transaction as a gift, not abandonment. If someone steals the property from the owner's home after an ad has been posted on Craigslist but before anyone has shown up to claim it, the homeowner might have a cause of action for conversion. *See infra* text accompanying notes 127-131. That is not true for property left in the alleyway. *See* Schmidt v. Stearman, 253 S.W.3d 35, 42 (Ark. App. 2007). On the other hand, if a claimant showed up to claim the property abandoned on Craigslist and the owner who posted the advertisement refused to surrender it, the would-be claimant might pursue a legal claim under an abandonment theory or equitable estoppel. *Cf.* Helms v. Vaughan, 467 S.W.2d 399, 401 (Ark. 1971) (noting that in the real property context, estoppel may legitimate abandonment); Fencl v. City of Harpers Ferry, 620 N.W.2d 808, 817 (Iowa 2000) (same).

[80] *See* < http://chicago.craigslist.org/sox/zip/795845097.html> (visited Aug. 15, 2008).

[81] Jochebed "took for him a box of papyrus, and daubed it with slime and with pitch, and put the child in it; and she laid it in the rushes by the River's brink." EXODUS 2:3-2:4.

> eighteenth century witnessed a rate of 16 percent; by its closing it was 25. . . . Comparable figures are not available for other nations, although fragmentary evidence suggests very similar urban abandonment rates ranging from 15 to 30 percent of registered births.[82]

These disturbing statistics overstate the prevalence of abandonment as the term is used in this paper. They include both literal abandonment—where babies and children were left up for grabs in public places—and instances in which babies were sold or left with people or institutions that were to take care of them.[83] It appears that until the late Middle Ages, the abandonment of babies in public places was quite common, with the public setting being viewed as the locale most likely to cause the newborn to be noticed and taken in by a stranger—hopefully to be adopted, perhaps to be enslaved.[84]

Over time, and apparently beginning in the late fourteenth century in Rome, foundling homes emerged to take in the large number of unwanted children, and they were often built with "a revolving door in a niche in the wall which allowed a parent or servant to deposit the child safely without being observed."[85] They remained an important part of European life for the next several centuries. Rousseau deposited *five* of his children in a foundling hospital in the mid-eighteenth century.[86] His subsequent explanation, written in code, contained a myriad of rationales for his cold-hearted conduct.[87] Fascinatingly, he began by differentiating his own conduct from true abandonment: "He claimed that since the children had been formally deposited, they were not really abandoned (*deposes*, not *trouves*)."[88] His distinction was quite right as a matter of property law, though perhaps less persuasive during an era when 70 percent of the infants deposited at French foundlings died within the first year of their lives.[89] Rousseau's second excuse echoed Penner's autonomy-based defense of abandonment while missing entirely Penner's recognition that abandonment can impose costs on third parties[90]: Rousseau's "hopes of doing important work would have been ruined by the need to provide for a family."[91] Finally, Rousseau's ultimate effort to excuse his unfathomable actions reveal some attraction to the idea of dice rolling when it came to the placement of children in families: "Clearly the foundling hospital was the best choice: it would raise the children to be sturdily self-sufficient, 'not gentlemen but peasants or workers' . . . Didn't Plato argue that children should be brought up by

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[82] JOHN BOSWELL, THE KINDNESS OF STRANGERS: THE ABANDONMENT OF CHILDREN IN WESTERN EUROPE FROM LATE ANTIQUITY TO THE RENAISSANCE 15-16 (U. Chicago Press 1988).
[83] *Id*. at 24-25.
[84] *Id*. at 429-33. Because of the stigma associated with infertility, couples often were reluctant to advertise their willingness to adopt unwanted infants. Upon finding an abandoned child or being brought one discreetly, the childless couple often pretended the infant was their own offspring. Abandonment in a public place was in some cases a rational strategy for poor parents hoping to improve the lot of their offspring in the Middle Ages.
[85] *Id*. at 433.
[86] LEO DAMROSCH, JEAN-JACQUES ROUSSEAU: RESTLESS GENIUS 191-95 (2005).
[87] *Id.* at 193 ("In a letter to Mme De Francueil he gave not just one explanation but several . . . in what a psychoanalyst would call a case of overdetermination.").
[88] *Id.*
[89] *Id*.
[90] *See supra* text accompanying notes 49-50.
[91] DAMROSCH, *supra* note 86, at 193.

the state with no knowledge of their parents?"[92] In short, for much of European history, the impulse to abandon infants was powerful, social and religious norms largely tolerated the practice—or, in the case of illegitimate offspring, even encouraged it[93]—and abandonment was sometimes the primary alternative to infanticide or baby selling.

The revolving doors of early foundling houses have contemporary echoes in modern Europe and America.[94] During the gilded age, Americans celebrated what one might call reverse Rousseauian dice-rolling: stories of abandoned babies being adopted by wealthy elites.[95] In contemporary America, only about 1.5 percent of newborns are placed up for adoption,[96] but the impulse to roll the dice with respect to placement of a child has not dissipated fully. Closed adoptions, where the birth parents had no say in the placement of their offspring and remained anonymous, were long the norm in the United States, though that is quickly changing.[97] The shifting practices may result from the desire of most birth parents to exercise greater control over the identities of their children's adoptive parents. Many birth parents, interviewed after the fact, "expressed incredulity that they entrusted their child to strangers," and nearly half of the birth parents described the decision to give their children up for adoption as a mistake they wished they could undo.[98] Yet rolling the dice remains attractive to a minority of birth parents. This is particularly true for parents wishing to avoid the complexity of relationships with a child they have relinquished and a new set of parents who have displaced them.[99] Not surprisingly, few

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

[93] *Id*. at 192.

[94] *See* JULIE MILLER, ABANDONED: FOUNDLINGS IN NINETEENTH-CENTURY NEW YORK CITY 226-27 (2008) (noting that during the early 1880s, an average of 2,041 infants per year were left at one of four foundling hospitals in New York City) ; Elisabetta Povoledo, *Updating an Old Way to Leave a Baby on the Doorstep*, N.Y. Times, Feb. 28, 2007, at A4 (discussing the introduction of high-tech foundling wheels in Europe). Consider also American laws that provide parents with the opportunity to abandon babies at fire stations and other designated places without fear of criminal liability. *See* Cynthia Dailard, *The Drive to Enact 'Infant Abandonment' Laws – A Rush to Judgment?*, Guttmacher Report on Pub. Pol'y, Aug. 2000, at 1-2; Lee Anne Fennell, *Anxiety and Alienability* 41 & n. 189, 122 Harv. L. Rev. ___ (forthcoming 2009) (Aug. 11, 2008 draft) (on file with author); Eric Eckholm, *Law's Effect: An Iowa Girl Is Abandoned in Nebraska*, N.Y. Times, Oct. 9, 2008, at A15. These laws for the most part have not been terribly efficacious. *See* Dailard, *supra* , at 2 ("In the case of public abandonment, the women are often not mature enough to thoughtfully weigh their options or the consequences of their actions. . . . [S]ince the Texas law took effect, 12 infants have been illegally abandoned – and not one was turned in under the terms of the law."). An exception was Nebraska's short-lived abandonment statute, which, due to poor drafting, permitted parents to abandon any child under 18 at hospitals with impunity. Three dozen children, including many teenagers from out of state, were abandoned in Nebraska before the legislature modified the law to apply only to infants. *See* Nicholas Riccardi, *State Revamps Haven Law*, L.A. Times, Nov. 22, 2008, at 10; *California Teen Is Last to Be Abandoned Under Law*, L.A. Times, Nov. 23, 2008, at 28.

[95] MILLER, *supra* note 94, at 237-38.

[96] BOSWELL, *supra* note 82, at 16.

[97] Marianne Berry et al., *The Role of Open Adoption in the Adjustment of Adopted Children and Their Families*, 20 Children & Youth Serv. Rev. 151, 152-54 (1998).

[98] Phyllis R. Silverman, *Reunions Between Adoptees and Birth Parents: The Birth Parents' Experience*, Social Work, Nov.-Dec. 1988, at 523, 523, 527. So too with Rousseau, who tried unsuccessfully to discover the whereabouts of his first abandoned child ten years after the fact. *See* DAMROSCH, *supra* note 86, at 191-92.

[99] Adrienne D. Kraft et al., *Some Theoretical Considerations on Confidential Adoptions, Part I: The Birth Mother*, 2 Child & Adolescent Soc. Work. 13, 18 (1985).

parents opt for anything approximating pure randomization here—individuals choosing closed adoptions typically hand over their newborns to adoption agencies or local authorities for placement with adoptive parents.[100] The parent who gives up a child for adoption to an agency is opting out of the wrenching decisions as to which adoptive parent(s) are most deserving or can provide the best home. In such cases, it seems that avoiding these decision costs is a way for the biological parents to reduce their psychological bond with their offspring and perhaps help protect their anonymity.[101] Rolling the dice makes it easier for the biological parents to move on.

In the organ donation context, pure randomization similarly does not exist. The universe of potential recipients is limited to people in need of a transplant. But this wrinkle is not unlike abandonment of other forms of property—like geocaching—where the claimant of positive market value property will surely be someone who wants it and expends some effort to take possession. Live kidney donations to relatives and acquaintances are far more common than live donations to strangers.[102] Indeed, many transplant centers refuse to accept kidney donations in the absence of a genetic or social relationship between the donor and donee.[103] The few transplant centers that permit individuals to donate a kidney anonymously to the top person on the kidney waiting list have performed a little over a hundred such transplants in the United States.[104] In the context of bone marrow donation, where the costs of being a donor are lower

[100] There will occasionally be horrific contemporary circumstances in which a newborn is abandoned in a dumpster or public restroom – this occurs approximately 100 times per year in the United States. *See* Marcia E. Herman-Giddens, *Newborns Killed or Left to Die by a Parent: A Population Based Study*, 58 Obstetrical & Gyn. Survey 580, 580 (2003). In our age, these instances often do not approximate true abandonment. A newborn is sufficiently fragile that being left alone for any significant amount of time may result in its death, and about a third of the infants abandoned in public places are found dead, so these acts seem more akin to attempted murder or manslaughter. *Id*. Moreover, such babies are not deemed "up for grabs" by either the law or social norms. Birth parents presumably recognize that the finder will almost certainly notify law enforcement upon finding that baby, and the baby will be placed in a suitable home.

[101] *Cf.* Elsbeth Neil, *The Reasons Why Young Children Are Placed for Adoption: Findings from a Recently Placed Sample and a Discussion of Implications for Subsequent Identity Development*, 5 Children & Family Social Work 303, 312 (2000) (providing data about British birth parents).

[102] Antonia J.Z. Henderson, *The Living Anonymous Kidney Donor: Lunatic or Saint?*, 3 Am. J. Transplant. 203, 203 (2003) ("In the last two years, 31 anonymous donations out of a total of 11672 living donations were performed in the U.S."); Daniel Akst, *Taste: The Kindness of Strangers*, Wall St. J. , July 25, 2008, at W11 (describing one of the 534 Americans who have "given a kidney away without a recipient in mind" since 1984).

Interestingly enough, the donor profiled by Akst, a securities trader named Anthony DeGiulio who wanted his kidney to go to a stranger, was someone the journalist met "in the spring of 2006 when he advertised some free mulch on Craigslist. . . . Subsequently, after clearing some land, he gave away thousands of dollars of firewood to all comers." Akst, *supra*, at W11. Perhaps the list of Craigslist abandoners and kidney abandoners have significant overlap.

[103] *See* Bernard S. Kaplan & Karen Polise, *In Defense of Altruistic Kidney Donation by Strangers*, 14 J. Pediatric Nephrology 518, 518-21 (2000). Evidently, these policies are based on a refusal to believe that such donations are genuinely altruistic. Of course, there is reason to be concerned that many directed kidney donations within families are coercive, but these donations tend not to be closely scrutinized. *See* N. Scheper-Hughes, *The Tyranny of the Gift: Sacrificial Violence in Living Donor Transplants*, 7 Am. J. Transplant. 507, 507-10 (2007).

[104] Cheryl L. Jacobs, et al., *Twenty-Two Nondirected Kidney Donors: An Update on a Single Center's Experience*, 4 Am. J. Transplant. 1110, 1114 (2004).

than those associated with surrendering a kidney but higher than donating blood,[105] donation to a stranger is more common, but still unusual.[106] Most blood is donated to strangers, though relatives may bank blood to be used by a loved one before an operation.[107] The trend with donations of biological material appear to be, then, that random transfers are very uncommon when the donor is most reluctant to part with the resource in question and become more common as the donor approaches indifference as to whether or not to part with the resource. Seen in this light, some biological parents' willingness to roll the dice with respect to the identities of adoptive parents makes more sense. These birth parents' motivation to part with their offspring is quite strong.

Plainly, the decision costs associated with the abandonment of a child or the relinquishment of a transplantable organ are going to dwarf the decision costs associated with the abandonment of most property. As suggested above, relinquishing a child often results in significant regret and psychological trauma. But one need not equate the magnitude of these costs in order to recognize the similarities. Deciding to abandon property is no easier than deciding to donate it, but having decided on abandonment the owner need no longer worry about the identity of the subsequent recipient.[108] Historical and contemporary practice suggests that this benefit was substantial in the case of very high stakes resources and there is little reason to think that the benefits of reduced decision costs would not manifest themselves in lower stake contexts too.

The transaction costs savings associated with abandonment also can be significant. Suppose an owner has a positive market-value asset that he no longer wants. Consider the alternatives to abandonment. A sale will bring the owner revenue, but may also require the expenditure of time, money, and effort. If the market for a product is well-developed, then the owner will be drawn toward a sale. For that reason the rise of eBay probably resulted in a large decline in the prevalence of abandoned property.[109] But even in a nation of ubiquitous eBay access and scores of eBay drop centers, many owners still put chattel property on the sidewalk. From this we can infer that the transaction costs of even eBay sales are not negligible. Sellers

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[105] Galen E. Switzer, *Understanding Donors' Motivations: A Study of Unrelated Bone Marrow Donors*, 45 Soc. Sci. Med. 137, 139 (1997).

[106] *See* Roberta G. Simmons et al., *The Self-Image of Unrelated Bone Marrow Donors*, J. Health & Soc. Behav. 285, 288 (1993) (noting that 965 people donated bone marrow to a stranger between 1987 and 1991).

[107] *See* Theresa W. Gillespie & Christopher D. Hillyer, *Blood Donors and Factors Impacting the Blood Donation Decision*, 16 Transfusion Med. Rev. 115, 120 (2002) (noting that 10% of blood donors surveyed were giving blood "to cover their own potential needs in the future"); Simone A. Glynn, *Motivations to Donate Blood: Demographic Comparisons*, 42 Transfusion 216, 218 (2002) (noting that among 52,650 blood donors sampled only 7,062 were excluded because they had given an apharesis or directed blood donation).

[108] For a rich discussion of the relationship between randomization and decision costs in adjudication, see Adam M. Samaha, Randomization in Adjudication 9-18 (unpublished manuscript, on file with author). Samaha picks up some of the provocative threads concerning randomization in criminal investigations and punishment contained in Bernard E. Harcourt, *Post-Modern Meditations on Punishment: On the Limits of Reason and the Virtues of Randomization (A Polemic and Manifesto for the Twenty-First Century)*, 74 Soc. Res. 307, 330-35 (2007).

[109] *See generally* David Lucking-Reiley, *Pennies from eBay: The Determinants of Price in Online Auctions*, 55 J. Indus. Econ. 223 (2007) (discussing the mechanics of auctions on eBay).

must compose an advertisement for the product, specify a duration for the auction, communicate with the winning bidder about payment and shipping, arrange for delivery, and run the risk that the buyer will defraud them. A repeat player seller may well find it worth his while to lawyer up as well, so as to reduce the risk that he will be sued if buyers emerge from their transactions unhappy or if the property sold injures its purchaser.

The transaction costs of gifts are not negligible either. In deciding upon a recipient for a gift, the donor must evaluate that donee's preferences and existing assets. No one wants to be the resented gift giver who donates a tyrannical heirloom to a loved one, a gift that the recipient does not want but feels guilty discarding.[110] Then, having decided upon a recipient, the donor must arrange for delivery, which again will entail the costs and inconvenience of a trip to the post office to the recipient's home.

A recent exogenous shock illustrates some of these transaction costs. Recently, most major American airlines have begun charging their customers for bringing checked luggage on flights. It is almost certainly the case that this new pricing policy has increased the prevalence of property abandonment.[111] Suppose a family is going on a two-week vacation and renting a condominium that does not provide infant cribs. A two-week crib rental typically exceeds the cost of a travel crib purchase, so the rational traveler will simply buy a travel crib upon reaching his destination, use it for two weeks, and then abandon it at the conclusion of the trip. Surely, the crib purchaser would prefer to donate the crib to a needy family, but the costs of locating a local needy family and arranging for delivery on the last day of a vacation will be prohibitively high. The cost of bringing the crib home in checked luggage will exceed the crib's market value. Destruction of the crib seems wasteful, so abandonment is almost certainly going to be the most sensible option for our vacationers.

In short, both sales and gifts are bilateral transactions, and such transactions necessarily entail transaction costs. In some cases, the property to be transferred is sufficiently valuable that these transaction costs are easily overcome. But where the property in question does not have a particularly high value, where the nature of the property raises the transaction costs of a sale or gift (e.g., a bulky item, like a refrigerator, or an item that cannot be sent via the mail readily, like a firearm) or where the possessor wishes to hide the fact of his possession (perhaps because the goods are stolen), the odds that the owner will opt for a unilateral means of relinquishment increase.

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

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[110] *See supra* note 21 and text accompanying note 20.

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

Even this simple axiom about negative market value property, however, is subject to two caveats.

First, note that there are two kinds of negative value assets. The first sort is a resource with no intrinsic value, such as a rotting pineapple, a broken stapler, or a sound recording by William Hung. For these assets, society certainly prefers that the owner destroy the asset rather than abandoning it, which externalizes the disposal costs to society. The second kind is a resource that comes bundled with a liability that exceeds its positive intrinsic value. Consider a house worth $50,000 with tax liens against it totaling $75,000. Recall that such an asset's negative value stems entirely from the bundling of different sticks in the bundle of property rights, such that unbundling will yield a positive-value resource.[112] Here, destruction of the underlying asset is extremely undesirable, because it eliminates a productive resource and imposes a $75,000 loss on the lien holder. Permissive abandonment—a rule that would allow the owner to walk away from the resource and the liability—is not as bad, because it preserves the intrinsically valuable asset while imposing the same loss on the lien holder, though a rule permitting such abandonment may well spark a lawless race. The superior rule in these instances would prohibit abandonment and require the lien holder to foreclose on or otherwise take possession of the property and force its sale. This is precisely what U.S. law does.[113] The lien holder can now auction off an unencumbered asset, presumably fetching a $50,000 return, resulting in a loss of only $25,000. Foreclosure thus dominates permissive abandonment because it forestalls a lawless race and provides the lien holder with some security in the event of a default, which will increase a lien holder's willingness to extend credit ex ante.

Second, recall our concern over lawless race costs. If abandonment of a positive value asset causes a large number of people to engage in violent jostling or other tortious behavior to be the first to retrieve it, then society suffers. It is conceivable that with respect to valuable property where the expected disposal costs are low, the transaction costs of a bilateral transfer are high, and the expected risk of a lawless race is high, destruction—rather than abandonment—is social welfare maximizing.[114] Though these cases can be expected to be rare, this analysis suggests that society's openness toward abandonment ought to be a function of its baseline level of law-abiding behavior.

There are other important considerations that bear on the question of whether the law should attempt to shift owners between abandonment and its alternatives. Abandonment is the method of intentionally relinquishing property that most frequently gives rise to confusion costs. That is a legitimate reason for curtailing the practice. Sales and gifts are rarely confusing, though it might not seem that way to law students and legal academics because cases involving

[112] *See supra* text accompanying notes 70-72.
[113] *See supra* text accompanying note 72.
[114] Sales and gifts, like destruction, avoid the costs that may be associated with a lawless race. This explains the reference to transaction costs in the above sentence.

ambiguity are a staple of law school casebooks.[115] There can be no confusion about the ownership of property that has been destroyed. But historically, when property has been abandoned, the result is ambiguity that imposes costs on the third parties who are charged with respecting in rem rights.[116] To push the point further, as the fraction of seemingly unpossessed property that is abandoned rises, the odds that lost or mislaid property will be returned to its rightful owner fall.[117]

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

One can imagine a regime taking a hard line against both abandonment and destruction. Deprived of both unilateral means of relinquishment, how might we expect property owners to behave? They might fall back on the gift or sale strategies. Or, quite possibly, they might allow property to gather dust. This is another common, and generally undertheorized property right. When exercised it removes productive assets from the economy, contributes to clutter, and can impose significant costs on next of kin when the property remains in storage until the owner's demise. Contrasted with this alternative, abandonment and perhaps even destruction seem rather attractive.

II. The Law of Abandonment

In the United States there are a variety of statutes governing abandonment. All are subject-matter-specific. We can identify five basic approaches that manifest themselves in American law: A) Permissive regimes; B) Prohibition regimes; C) Escheat regimes; D) Licensing regimes; and E) Encouragement regimes.

A. Permissive Regimes

As the name implies, a permissive regime is one in which the abandonment of property by its owner is typically lawful, and the first person who takes possession of the property becomes its new owner, with rights good against the entire world. Setting aside pets and

[115] *See, e.g.*, Gruen v. Gruen, 496 N.E.2d 869 (N.Y., 1986) (ambiguity in a famous gifts case); Newman v. Bost, 29 S.E. 848 (N.C. 1898) (ambiguity in another famous gifts case); Raffles v. Wichelhaus, 2 Hurlstone & Coltman 906 (1864) (ambiguity in a famous contracts case).

[116] *See, e.g.*, Poggi v. Scott, 139 P. 815, 816 (Cal. 1914) (holding that the owner of a building who sold barrels, which he in good faith thought to be empty and abandoned was liable for conversion when it turned out that the barrels were filled with $2,000 worth of wine and had been stored pursuant to a contract with the building's prior owner).

[117] Finders of lost and mislaid property do not become its owners. Rather, they have duties to return the property to its true owner, a prior possessor, or, in some cases, the owner of the land on which the property was found. Finders of abandoned property have no such duty. *See supra* text accompanying notes 51-53.

hazardous waste, this is the rule that governs the majority of abandoned chattel property. While there may be time, place, and manner restrictions on such abandonment (e.g., via anti-littering laws, attractive nuisance causes of action in tort, or restrictions on abandoning a car in the middle of the road), the law's attitude is appropriately characterized as a permissive one. Hence, a newspaper publisher may leave two-thousand copies of its newspaper in a publicly accessible place, to be picked up by whomever wants some free reading materials,[118] and consumers may happily drink free beverage samples at a grocery store without worrying about being confronted with a bill or violating the law.[119]

The Trademark regime under the Lanham Act is perhaps the most widely known example of a permissive abandonment regime. Under the section 45 of the Lanham Act, a mark is considered abandoned if its "use has been discontinued with intent not to resume use."[120] The statute provides further that nonuse for three years will establish a prima facie case of abandonment.[121] As interpreted by the courts, "intent not to resume use" is a lower standard than "intent to abandon," with the result being that if a trademark holder intends to resume use at some point in the indefinite future, a finding of statutory abandonment is appropriate.[122] The permissive nature of the abandonment regime stems from the policies underlying trademark law. Trademark is an intellectual property regime in which rights are conferred upon firms for the benefit of consumers. Trademark rights are like water rights or the rights to remain in rent controlled housing, and unlike fee simple rights, in that use is a condition of continued ownership.[123] Truly permanent ownership of a mark may, therefore, be more achievable in theory than in practice. In the trademark context, the user removes a word, phrase, or symbol from the public domain, but in so doing lessens the likelihood of consumer confusion, permits the user to invest in good will, and lowers consumer search costs.[124] When a trademark falls into disuse, there is no longer any justification for impoverishing the public domain, however slightly, so the mark is returned to the commons, where it can be appropriated by any other firm that wishes to use it in commerce. Note that in this important sense copyright diverges from trademark. Once a copyrighted work is dedicated to the public domain, it can never be privately

[118] *See* Right Reason Publications v. Silva, 691 N.E.2d 1347, 1351 (Ind. App. 1998).
[119] Greenville Dairy Co. v. Pennsylvania Milk Control Comm'n, 68 Pa. D & C. 597, 607-08 (Pa. Comm. Pleas 1949).
[120] 15 U.S.C. § 1127.
[121] *Id.* For a review of the law of trademark abandonment, see Christopher T. Micheletti, *Preventing Loss of Trademark Rights: Quantitative and Qualitative Assessments of Use and Their Impact on Abandonment Determinations*, 94 Trademark Rep. 634 (2004).
[122] Silverman v. CBS Inc., 870 F.2d 40, 45-47 (2d Cir. 1989) (holding that 21 years of nonuse of the Amos & Andy trademark amounts to abandonment of the mark, despite the trademark holder's intent to resume use if "the social climate become[s] more hospitable").
[123] Daphna Lewinsohn-Zamir, *More Is Not Always Better than Less: An Exploration in Property Law*, 92 Minn. L. Rev. 634, 657 (2008).
[124] Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 34 (2003); Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. Ill. L. Rev. 1119, 1163. For a provocative argument that expands on this rationale for trademark protection, see Shahar J. Dilbary, *Famous Trademarks and the Rational Basis for Protecting "Irrational Beliefs,"* 14 Geo. Mason L. Rev. 605 (2007).

owned again.[125] Copyright "abandonment" is therefore in some sense an inapt phrase in the same way that abandonment of incorporeal interests in land and bankruptcy abandonments are misnomers.[126] There is no "roll" of the dice following the abandonment of a copyright—ownership of an abandoned copyrighted work is necessarily public.

A good example of the permissive approach being embraced by the common law courts, despite the possibility of negative externalities associated with abandonment, is *Long v. Dilling Mechanical Contractors*.[127] In that case, Dilling placed trash in an unlocked dumpster on its personal property, two feet from the sidewalk. Long, a labor organizer hoping to unionize Dilling's workplace, removed several bags of trash from Dilling's dumpster, hoping to find the names and contact information of Dilling employees so that he could contact them. After learning about this conduct, Dilling alleged that Long had stolen its property—which it asserted had not been abandoned but rather left in the dumpster to be taken away by a trash-hauling company with which Dilling had contracted.[128] Dilling sued Long for civil violations of Indiana's laws against theft, burglary, criminal trespass, and corrupt business practices. The appellate court reversed a finding of liability against Long, holding that the trash had been abandoned successfully when Dilling placed it in the dumpster.[129] Implicit in this analysis is the idea that it would have been proper for Dilling to abandon its refuse in a dumpster, even if it had ceased paying a waste removal company to empty the dumpster at particular intervals. Such a rule might pose problems if the waste piles up because no one comes along to remove the refuse voluntarily—a situation that has described Naples, Italy, for much of the last year.[130] But the *Long* court presumably thought that nuisance law could kick in at that point, particularly in the case of an owner who dumped trash on his own property. In *Sharpe v. Turley*, a recent case with very similar facts and the same arguments posed by counsel, the Texas courts parted ways with *Long*, holding that trash left in a dumpster was not abandoned. The court held that the party depositing its trash in a dumpster does not intend to leave the property to whomever wishes to take possession of it, but rather wishes to transfer it to a waste-hauling firm for disposal.[131] The *Sharpe* court seemed to think it was decisive that the property owner and waste hauling firm had a contract requiring the latter to remove the former's waste. But it is not clear whether this contract's existence or terms resolved the issue one way or another. The contract could well have been construed to require the waste hauling firm to remove only that waste which had not been disposed of by a third party prior to the hauling firm's arrival upon the premises.

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[125] *See* National Comics Publications v. Fawcett Publications, 191 F.2d 594, 597-98 (2d Cir. 1951); Dennis W.K. Khong, *Orphanworks, Abandonware, and the Missing Market for Copyrighted Goods*, 15 Int. J. L. Info. Tech. 54, 62 (2007); Robert A. Kreiss, *Abandoning Copyrights to Try to Cut Off Termination Rights*, 50 Mo. L. Rev. 85, 92-101 (1993); Lydia Pallas Loren, *Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright*, 14 Geo. Mas. L. Rev. 271, 319-20 (2007);
[126] *See supra* text accompanying notes 70-73.
[127] 705 N.E.2d 1022 (Ind. App. 1999).
[128] *Id*. at 1025.
[129] *Id*. at 1025-27.
[130] *See European Union Tells Italy to Clean Up Naples*, N.Y. Times, Feb. 1, 2008, at A7.
[131] *See* Sharpe v. Turley, 191 S.W.3d 362, 367 (Tex. App. 2006).

B. Prohibition

Prohibition regimes sometimes arise in the context of chattel property. For example, most American states explicitly categorize the abandonment of pets or livestock as animal cruelty, punishable as a misdemeanor.[132] One rationale for the prohibitory rule is that an unowned animal may create negative externalities by spreading disease, breeding strays, or colliding with motor vehicles. The dominant explanation for the prohibitory rule, however, likely stems from the animals' status as living things that are capable of suffering. The abandonment of an animal typically diminishes its welfare. The criminal prohibition against abandonment thus encourages owners to relinquish ownership in a manner that will be less harmful to the animal in question by donating the animal to a shelter.

Prohibition regimes are most prominent in the context of real estate. The leading case here is *Pocono Springs Civic Association v. MacKenzie*,[133] which held that perfect title to real property cannot be abandoned. Note, however, that lesser interests in land are treated differently. The conventional account holds that at common law, corporeal hereditaments like fee simple interests could not be abandoned, but incorporeal interests (e.g., easements, mineral interests, and licenses) could.[134] This account is incorrect as a matter of logic.[135] In any event, the common explanation for the distinction in the legal treatment of corporeal and incorporeal interests is historical. Essentially, in the English feudal system, the crown could not tolerate the non-ownership of land between the time of abandonment and reclamation because no feudal incidents would be paid in the interim. As one commentator notes:

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

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[132] *See, e.g.*, Al. St. Ann. §S 13A-11-14 & 13A-11-240 (requires unnecessary or unjustifiable pain to result); Ariz. Stat. Ann. § 13-2910; Ark. Stat. Ann. § 5-62-101 (requires knowing abandonment); Cal. Penal Code § 597.1(a) (animal abandonment is a misdemeanor); Col. Rev. Stat. Ann. § 18-9-202 (intentional abandonment of cat or dog or knowing abandonment of another animal is a misdemeanor).

[133] 667 A.2d 233 (Pa. 1995).

[134] James C. Roberton, *Recent Development -- Abandonment of Mineral Rights*, 21 Stan. L. Rev. 1227, 1228 (1969). Texas once was, and Idaho evidently remains, an exception. *See* Hawe v. Hawe, 406 P.2d 106, 113 (Idaho 1965) (citing O'Brien v. Best, 194 P.2d 608 (1948)) (holding that you can abandon real property in Idaho, though the court didn't notice that *O'Brien* actually dealt with railway rights of way); Harris v. O'Connor, 185 S.W.2d 993, 1012 (Tex.Civ.App. 1944) (pointing out that real property could be abandoned in Texas, under existing Mexican civil law, prior to the adoption of the common law in Texas in 1840).

[135] Because the abandonment of real property necessarily entails indifference as to the identity of the subsequent owner, it is wrong to refer to the abandonment of an incorporeal hereditament. When such an interest is "abandoned," the interest in question reverts to the owner of the previously burdened estate. For example, if an oil and gas interest is abandoned, any deposits on the land come to be owned by the fee simple owner. It is thus accurate to say that real property cannot be abandoned under the common law. Forfeited yes, abandoned no. *See supra* note 8.

> abandonment . . . was designed to protect the lord by ensuring that he would always have a tenant to whom he could look for performance of the incidents.[136]

Superficially, there appears to be a contemporary analog to these feudal incidents that would justify the law's antagonism toward the abandonment of real property. Real property taxes are the modern-day equivalent of feudal incidents. Hence state and local governments might conclude that for some period of time, there will be no one to pay a tax bill on an abandoned parcel, even though the parcel presumably requires some expenditure of state resources (e.g., for preventing crime on the property or maintaining nearby roads). In theory, the same policy argument could preclude the abandonment of chattel property. But chattel property is not typically subject to state and local property taxes, at least not in the United States. Hence the interim period where there is no record owner ordinarily does not directly deprive the government of revenue.

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

A better argument for the common law rule prohibiting abandonment of fee simple interests in land tackles the problem not from the static perspective outlined above, but from a dynamic one. Namely, a regime that prevents individuals from abandoning real property might encourage them to use the property in a more sustainable way. We can look to the Brazilian rain forests for an example of how the common law might improve social welfare. It is common for Brazilian ranchers to chop down portions of the Amazon rain forest, use the land quite intensively for ranching cattle, and then, typically within eight years, abandon the land, which will have become worthless scrubland thanks to overgrazing.[137] The rancher then moves on to greener pastures (or forests) and begins the process anew. As a civil law country, Brazil permits the abandonment of real property.[138] Were it to prohibit abandonment, the law might encourage

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[136] Roberton, *supra* note 134, at 1228 n. 13.

[137] UMA LELE ET AL., BRAZIL FORESTS IN THE BALANCE: CHALLENGES OF CONSERVATION WITH DEVELOPMENT 19 (2000); John Batt & David C. Short, *The Jurisprudence of the 1992 Rio Declaration on Environment and Development: A Law, Science, and Policy Explication of Certain Aspects of the United Nations Conference on Environment and Development*, 8 J. Nat. Res. & Envtl. L. 229, 282 (1993).

[138] ANGUS LINDSAY WRIGHT & WENDY WOLFORD: TO INHERIT THE EARTH: THE LANDLESS MOVEMENT AND THE STRUGGLE FOR A NEW BRAZIL 271 (2003); Roberton, *supra* note 134, at 1228 n.13. For further discussion of the

land owners to evaluate their own practices with a longer time horizon in mind, shifting strategies from slash-and-burn to techniques more in line with maximizing the long term value of the property.[139] On this account, the common law rule regarding abandonment might function as a defense against economic conditions that encourage short-sighted uses of land.[140]

Needless to say, prohibiting the abandonment of real property is hardly the optimal legal intervention for furthering these objectives. Suppose that the legal system sensibly assesses property taxes based on a parcel's peak value rather than its current value as a mechanism to buttress a rule against abandonment. Ranchers might try to circumvent the law by selling the property if it has been depleted for a very low amount to a judgment-proof buyer.[141] Direct prohibitions on consumptive uses of land or Pigouvian taxes on such uses are bound to be more effective, assuming they can be enforced to the same degree as a prohibition on abandonment. On this point there is little reason to think that the prohibition on abandonment can be enforced any more efficiently than these alternatives.[142] For instance, if the remedy for abandonment is the imposition of continued tax liability on the abandoner, then a Pigouvian tax—which could be imposed on a landowner while he still possesses and has an economic interest in the property—always will be superior to a remedy that tries to extract tax revenue from an owner who has left the property behind.

Note that there may be contexts in which promoting "sustainability" by prohibiting abandonment is questionable or even undesirable. To analogize, consider two hypothetical ivory tower workplaces. The first faculty is extremely risk averse, finding the prospect of a tenure battle intolerable. As a result, it virtually never hires untenured professors and those rare souls that do get hired are extremely "safe" scholarly prospects. The second faculty is less risk averse. Although it regards tenure denials as tragic for the scholars involved and very unfortunate for the institution, it is willing to "abandon" a scholar at tenure time if he or she has not demonstrated excellent scholarship and teaching. If upside reward and downside risk are correlated, then we can expect that the second faculty's hires will have greater potential to become stars than the first faculty's. In a world where faculties one and two are competing for talent, it is by no means obvious that either strategy will dominate, and a great deal of self-sorting may occur. But flatly prohibiting abandonment in this academic context has costs that are more apparent here than they

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Roman law approach to real property abandonment, see Randall Lesaffer, *Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription*, 16 Eur. J. Int'l L. 25, 38-46 (2005).

[139] This was the rationale for the regulation of public lands in the American west in the 1890s. *See* Robert B. Keiter, *Public Lands and Law Reform: Putting Theory, Policy, and Practice in Perspective*, 2005 Utah L. Rev. 1127, 1133.

[140] The example suggested in the text is oversimplified. In Brazil, it is evidently the case that some deforestation results from squatters clearing land so as to obtain informal property rights to it. *See* LELE ET AL., *supra* note 137, at 34; Andrea Cattaneo & Nu Nu San, *The Forest for the Trees: The Effects of Macroeconomic Factors on Deforestation in Brazil and Indonesia*, *in* SLASH-AND-BURN AGRICULTURE: THE SEARCH FOR ALTERNATIVES 170, 183-85, 192 (2005).

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

[142] In Brazil's Amazon region, both land use regulations and property taxes are widely ignored by property owners and users. *See* LELE ET AL., *supra* note 137, at 20-24, 30.

are in the Amazon.[143] This analogy might help us see a downside to overly restrictive abandonment rules in real and chattel property contexts. Suppose there are a large number of distressed homes in a community, or polluted parcels that may have substantial mineral wealth underneath. A rule prohibiting abandonment in these contexts might ensure that these resources go underutilized because of the risks associated with trying to repair and exploit the resources in question. Seen in this light, a rule permitting abandonment functions as a kind of insurance policy for investors in high-risk, high-reward property.

C. Escheat

An escheat regime is one in which abandoned property automatically becomes the property of the jurisdiction in which it is abandoned or in which the abandoning owner resides. It is worth mentioning that an escheat regime, by its nature, entails no "roll of the dice," at least if the abandoning owner is informed of the law. Put another way, we might conceptualize abandonment in an escheat jurisdiction as a gift to the state.[144]

The leading example of an escheat regime is the Uniform Unclaimed Property Act of 1995, which has been enacted in all fifty states and provides a framework by which unclaimed property is transferred to state governments after a specified period of time. The Act provides, for example, that travelers checks become the property of the state fifteen years after issuance and the same happens to money orders after seven years.[145] The contents of a safe deposit box belong to the state five years after the expiration of the lease for the box, presuming the owner has not reclaimed them in the interim.[146] The Act provides that states must advertise the availability of the unclaimed property for a period of time, usually three years, and may auction the property and retain the proceeds thereafter.[147] Critically, there is no inquiry into the owner's intent under the statute. Even if an owner has forgotten about, lost, or mislaid property, it will be presumed abandoned at the end of the applicable statutory term.[148] The chief advantage of uniformity here is that it facilitates the creation of a national registry of unclaimed property. This registry is readily searchable on the Internet, where one popular clearinghouse contains data about unclaimed property in 44 states.[149]

The rationale for state ownership, then, is to increase the chances that the lost, mislaid, or forgotten property will be reunified with its original owner by enabling the growth of a single

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[143] For a similar argument in a very different employment setting, see Julie C. Suk, *Discrimination at Will: Job Security Protections and Equal Employment Opportunity in Conflict*, 60 Stan. L. Rev. 73 (2007).
[144] Query whether the abandoning owner ought to be entitled to a tax deduction if the asset has positive market value.
[145] Unif. Unclaimed Property Act §2(a) (1995).
[146] *Id*. at § 3.
[147] *Id*. at §§ 10-12.
[148] *Id*. at § 2.
[149] See < http://www.missingmoney.com/GeneralHelp/Help.cfm?Type=WhoWeAre> (visited Aug. 3, 2008).

database where original owners can recover their belongings.[150] It is likely, however, that state ownership is not optimal in this regard—besides passively making information about lost property available to people who are savvy enough to search for it, and incurring storage costs (usually trivial in the case of currency or other paper assets), the states appear to do little to justify their possession of the property. States have returned merely 4% of the unclaimed property obtained under the Act to its original owners.[151] Almost certainly, private firms given financial incentives to track down owners could achieve a better success rate. Perhaps the argument for state ownership is that it is the least bad of the alternatives—returning the property in question to the bank, landlord, or gift-certificate issuing vendor might encourage that party to take steps to increase the odds that property will be unclaimed.[152] That is a strategy that ought not to be particularly successful in a competitive marketplace, however, if consumers are well-informed and will avoid doing business ex ante with companies that have less forgiving policies in this regard. It may be that the stakes are sufficiently low, optimistic bias is sufficiently prevalent, or the perceived salience of the unclaimed property issue is negligible, which would help buttress the justification for the escheat regime. Indeed, it is worth wondering whether the goal of reunifying individuals with property they have forgotten about is a worthy one—perhaps the law should encourage owners to take more precautions with their travelers checks and money orders.

Another well-established escheat regime is the federal Abandoned Shipwreck Act of 1987 (ASA). The Act provides that any abandoned ship that is embedded in or located on the submerged lands of a state (extending into the ocean up to three miles from land) are the property of that state.[153] The meaning of abandonment under the act is quite similar to the common law meaning of property abandonment—the owner has deserted it and manifested an intention of relinquishing ownership.[154] Intent, which is ignored in the Uniform Unclaimed Property Act, therefore becomes quite important under the ASA. To show abandonment, it is not necessary that the original owner actively disclaimed title, unless the vessel was a military or other governmental ship.[155] There is some disagreement in the federal courts as to whether the party seeking to show abandonment must do so via clear and convincing evidence of express abandonment.[156] The typical posture of ASA litigation is that someone has found an undiscovered shipwreck and purchased any claims to it from the successors of the vessel's owner

[150] A similar rationale explains Japan's well-developed system of governmental lost and found centers. For a fascinating exploration, see Mark West, *Losers: Recovering Lost Property in Japan and the United States*¸ 37 L & Soc'y Rev. 369 (2003).
[151] Ellen P. Aprill, *Inadvertence and the Internal Revenue Code: Federal Tax Consequences of State Unclaimed Property Laws*, 62 U. Pitt. L. Rev. 123, 125 n.9 (2000).
[152] *See, e.g.*, Azure Ltd. v. I-Flow Corp., 163 Cal.App.4th 303, 306 (2008).
[153] 43 U.S.C. § 2105(a); Robert Iraola, *The Abandoned Shipwreck Act of 1987*, 25 Whittier L. Rev. 787, 790-92 (2004).
[154] Iraola, *supra* note 153, at 807.
[155] *Id*. at 808-15.
[156] *Compare* Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450 (4th Cir. 1992) (clear and convincing evidence requirement), with Fairport Int'l Exploration Inc. v. The Captain Lawrence, 72 F.Supp.2d 795 (W.D. Mich. 1999) (lower burden for party seeking to show abandonment).

(usually an insurance company).[157] The government then argues that the vessel was abandoned, whereas the discoverer argues that it was not. The primary criticism of the ASA suggests that it underincentivizes the socially useful task of finding abandoned shipwrecks and prompts some salvaging companies to fail to report their finds.[158] Its defenders argue that states have stronger incentives to ensure that abandoned shipwrecks will be preserved for historical and archeological purposes, rather than stripped of valuable assets in a hasty way.[159]

D. Licensing

A licensing regime is one in which governmental consent is required in order for an individual or entity to abandon property. A railway seeking to abandon an unprofitable or otherwise undesired line has needed the permission of the federal government to do so since 1920.[160] The right to block railway abandonments was initially vested in the Interstate Commerce Commission, and has been exercised by the Surface Transportation Board (STB) since the Commission's demise.[161] The petition for a declaration of abandonment can be brought by either the railway line owner itself or an affected landowner.[162] In deciding whether to approve an application for abandonment, the STB is to weigh the interests of those who have been served by the existing line against the interests of the railroad and the transportation system as a whole.[163]

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

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[157] *See, e.g.*, Yukon Recovery v. Certain Abandoned Property, 205 F.3d 1189 (9th Cir. 2000).
[158] *See, e.g.*, Christopher Z. Bordelon, *Saving Salvage: Avoiding Misguided Changes to Salvage and Finds Law*, 7 San Diego Int'l L.J. 173 (2005); Paul Hallwood & Thomas J. Miceli, *Murkey Waters: The Law and Economics of Salvaging Historic Shipwrecks*, 35 J. Legal. Stud. 285 (2006).
[159] *See, e.g.*, Shelly R. McGill, *Are Criticisms of the Abandoned Shipwreck Act Anchored in Reality?*, 29-Fall Environs. Envtl. L. & Pol'y J. 105 (2005).
[160] RLTD Railway Corp. v. Surface Transp. Bd., 166 F.3d 808, 810 (6th Cir. 1999).
[161] *Id*.
[162] *Id*.
[163] Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 321 (1981).

that is responsive to changed circumstances. On the other hand, because decision making is committed to an administrative agency, there is a risk of interest group capture. If such capture occurs, then railway abandonment may begin to resemble a permissive regime.

E. Promoting Abandonment?

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

Under Mississippi law, if the owner of an animal abandons it, the remedy for that abandonment is seizure by the state.[164] The statute provides a series of procedural protections for the owners of such animals to reclaim them if they can show that they would care for it adequately in the future. Upon their failure to do so, the law provides for transfer of title to an animal control agency for the purposes of providing euthanasia where appropriate, or the animals may be auctioned off, with the proceeds used to repay the state for boarding costs, and any remainder *returned to the abandoning owner*.[165] No other jurisdiction has the same statutory language on the books, and whereas animal abandonment is a crime in most other jurisdictions, it appears not to be one in Mississippi. The regime in Mississippi is thus a strange hybrid of systems for regulating abandonment. It has aspects of an escheat regime, in that the state plays a large role in disposing of the property. But in its operation, it most closely resembles a permissive regime taken to the extreme. If an animal owner abandons the animal, the state will go to the trouble of selling off or destroying it, and, in the case of sale—which seems most likely in the case of livestock—the state will forward any profits to the owner. It is hard to come up with any rational explanation for why Mississippi would embrace this regime—it most likely reflects poor drafting of a legal framework that was designed to minimize the resistance of an abusive or neglectful owner to state intervention. Extending that regime to cover animal abandonment may have been an instance of cognitive dissonance by legislators. In any event, the unusual law as written appears to have generated little controversy and has gone unnoticed in the legal scholarship.[166]

[164] *See* Miss. Stat. Ann. 97-41-2.
[165] Miss. Stat. Ann. 97-41-2(5).
[166] Westlaw's citing references to the statute include several sources including it in a string-citation of state animal cruelty laws, but no mention of its evidently unique animal abandonment provision.

III. A Proposal for Rationalizing the Law of Abandonment

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

A. Negative Market Value Property

Let us begin by recalling the different types of abandoned property and the bright-line-rules that the law has created to govern their abandonment. The abandonment of positive subjective value, negative market value goods is plainly undesirable, though it almost never occurs. When such resources are abandoned, we can expect that no one will claim the abandoned property, which may cause it to be reclaimed by the owner if its subjective value has not deteriorated too much in the interim. The decision to abandon this type of property is a mistake, one that arises because of the unilateral nature of abandonment. If an owner were to propose a sale of such a resource, there would be no meeting of the minds as to a price. If the owner were to offer the resource to someone as a gift, the intended recipient could refuse to accept it. Abandoning such property may deprive the owner of the opportunity to get feedback from the market about the resource's valuation, and it is that lack of information that causes the owner to make a transfer that leaves everyone worse off.

With respect to positive subjective value, negative market value resources, then, there are two plausible legal approaches. First, the law might prohibit abandonment altogether. This is a sensible rule if it can be enforced at a low cost and if law enforcers can determine readily which properties are positive subjective value, negative market value resources. Second, the law might require a means of abandonment that will expose the owner to information about market valuations. The best way to do this in the case of chattels is to insist that the abandoning owner leave the chattel property at issue on a portion of her own real property adjoining a public way.[167] If an owner sees that no one is taking the object in question, then she eventually will conclude that the market does not value the item as highly as she does, and she will reclaim it if it has not deteriorated.[168] Keeping the item on her own real property also prevents third parties from having to shoulder unwanted disposal costs, and it subjects the abandoning owner to any reputational sanctions if the item in question is regarded as an eyesore. Ordinarily, when abandonment is proscribed or restricted, one should worry that individuals will destroy that

[167] Of course this approach only works well for owners of single family homes. Condominium owners and apartment owners . . . not so much.
[168] *See supra* text accompanying note 67.

which cannot be abandoned. But it is difficult to imagine circumstances in which an owner would be motivated to destroy positive subjective value, negative market value property.[169]

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

Surveying the two categories of negative market value properties, then, we arrive at the conclusion that a prohibition regime works best for negative subjective value properties. For positive subjective value properties, prohibition and a safe harbor rule permitting abandonment on one's own property appear to be the sensible alternatives. In theory, one might try to adopt a fine-grained legal rule whose dictates differed based on the subjective value of the property. In practice, however, a more complex doctrinal framework is not attractive because the act of abandonment suggests that property probably lacks subjective value to its owner, and subjective valuations of abandoned property will comprise private information that the state has a great deal of difficulty discovering. Assuming such a rule can be enforced with reasonable effectiveness, the law should prohibit the abandonment of negative market value resources. A rule of escheat, where the state takes possession of negative-market value resources at taxpayer expense would be justified only where baseline levels of law-abiding behavior are quite low or illegal dumping is particularly difficult to detect.

B. Positive Market Value Property

Positive market value properties present the most compelling case for a permissive rule regarding abandonment. The thorny question is whether the law should restrict abandonment so as to privilege other forms of property transfer, such as sales or gifts. As the analysis in Part II.C.

[169] Pets may again present an exceptional case. There are cases where an individual contemplating imminent death seeks to destroy his animals because of a concern that they will not be well taken care of after his passing. *See, e.g.,* In re Capers Estate, 34 Pa. D. & C.2d 121, 133 (Orphans' Court 1964); In re Wishart, 46 E.T.R. 311, 129 N.B.R.2d 397, 325 A.P.R. 397 (New Brunswick Queen's Bench 1992) .

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

The sensible legal response is one that seeks to control most of the negative externalities associated with the abandonment of positive market value property by supplementing the information that is available to members of the public. This can be done by encouraging an abandoning owner to (1) physically mark abandoned property as "abandoned" and (2) advertise the availability of property on one of the many free Internet forums that have sprung up to alert consumers as to the availability of "free stuff." These measures will reduce, but not eliminate, confusion and lag time costs.[170] Such behavior could be incentivized through tax policy, giving abandoned property of this sort some of the same tax advantages that property donated to charity presently receives. Alternatively, the law might regard property abandonment that does not comport with steps 1 and 2 as a misdemeanor, akin to littering, or it might enforce laws prohibiting the destruction of property in those cases. Owners wishing to rid themselves of property would still find that abandonment represents the lowest transaction cost option for doing so, especially if destruction is taken off the table.

Permitting abandonment, provided that adequate publicity is given to the abandoned property, will mitigate all the negative externalities associated with abandonment save one: lawless race costs. If there is reason to believe that lawless races are likely, and will engender large social costs when they do occur, requiring that abandonment be publicized will entail more races, with more participants, resulting in more lawlessness. So what is the evidence on that score? No one keeps accurate statistics on the question of lawless races, so one needs to turn to data on behavior that may function as a proxy for propensity to engage in lawless races. Here, the data suggests that compared to the rest of the world, the United States has relatively high

[170] When a British firm hired a nondescript gentleman to stand on a street corner wearing a sign saying "If you ask me for a 5 pound note you can have one," only 28 out of 1800 passers by took him up on the offer. *See* Steven J. Dubner, *There's No Free Lunch, or Money*, at <http://freakonomics.blogs.nytimes.com/2008/07/29/theres-no-free-lunch-or-money/> (visited October 14, 2008). This failure to claim the money is probably explained by skepticism that the offer was bona fide.

rates of property crimes,[171] though a slightly lower rate than, say, Canada.[172] Of course, scholars working on serious studies of cross-national crime statistics warn against relying on crime report data, because the methodologies for reporting and collecting such data vary so much across nations.[173] Seen in relative terms, Americans *might* have a relatively high propensity to engage in lawless races, but it is unlikely that the social costs from marginally more races would trump the reduction in lag time, decay costs, confusion costs, and the greater warm glow associated with higher rates of utilization of abandoned property.

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

Property law offers a better avenue for curtailing lawless races. The law might both require publicity via Craigslist or one of the other information clearinghouses that have emerged, and provide the first person who puts in an online claim to receive a time-limited window during which only she could lawfully take possession of the abandoned asset. Put another way, after I announced that I was abandoning a dining room set, the first person to note in a linked follow-up posting on Craigslist that she was putting in a claim would get an exclusive two-hour window to take possession. If she failed to take possession within that timeframe, the dining room set would be up for grabs once again.[174] In settings where the use of Craig's List is impractical, with the *Popov v. Hayashi* home run ball dispute being the paradigmatic case, such a rule would give the first chance to catch the ball without interference to the fan in the best position to catch it. That

[171] Jan van Dijk & Kristiina Kangaspunta, *Piecing Together the Cross-National Crime Puzzle*, Nat. Inst. Justice J., Jan 2000, at 39.

[172] Maire Gannon, *Crime Comparisons Between Canada and the United States*, 21 Statistics Canada no. 85-002, at 6-7.

[173] Richard R. Bennett & P. Peter Basiotis, *Structural Correlates of Juvenile Property Crime: A Cross-National, Time-Series Analysis*, 28 J. Research Crime & Delinquency 262, 272 n.16 & 284 (1991).

[174] A colleague who has used craigslist to transfer property for free points out that no-show claimants impose a substantial cost on the would-be-donor, who often must wait around for the claimant who has promised to pick up the item. Ideally, the property owner would require the claimant to post a small bond to protect the owner against the costs of a no-show, but such a transaction effectively would convert the quasi-abandonment into a sale. An advantage of pure abandonment over quasi-abandonment is that the abandoning owner can avoid these no-show costs. An associated disadvantage is that true abandonment may discourage an item's highest value user from trying to claim a valuable abandoned resource based on a fear that another claimant will take possession first. This analysis suggests that in quasi-abandonment situations, where a would-be-claimant detrimentally relies on an owner's promise to hold an item until the would-be-claimant arrives, and the owner instead gives it to another claimant, liability for detrimental reliance under an estoppel theory would be appropriate. *See supra* note 79.

would have been Popov on the facts of the case.[175] This proposed rule echoes the "reasonable prospect . . . of taking" the fox rule articulated by Judge Livingston in the canonical case of *Pierson v. Post*.[176] Although a regime privileging first online or offline would-be claimants slightly increases lag time costs, it would substantially curtail lawless races, so such a doctrinal tweak would make sense in high violence environments. Alternatively, criminal law or tort law could help deter owners from abandoning property in ways that spark lawless races. Criminal liability for disturbance of the peace is one mechanism that law enforcement might use in cases where lawless races occur.[177] An alternative approach would make abandoning owners liable if their act of abandonment sparked a foreseeable lawless race that resulted in injuries or littering qua looting.[178] Any of these remedies, alone or used in combination, ought to bring down the lawless race costs associated with the abandonment of high value property.

In underscoring the attractiveness of an abandonment doctrine that hinges on the market value of the property rather than its character as real property or chattels, a final consideration emerges: problems of proof. What if courts and other government bodies charged with enforcing the law are particularly bad at differentiating between positive and negative value property? In that case, it might make sense to prohibit abandonment generally, reasoning that positive market value properties are likely to be transferrable via gift or sale, and negative market value properties are not. So, at the end of the day, we will want to know how great these problems of proof are likely to be. My impression is that they are not particularly severe. In the case of real property, data on comparable sales is readily obtainable, as is data on liens encumbering the property. Where complexity arises, it will largely be because of the presence of easements on the property that diminish its value in ways that may be difficult to monetize. In the chattel property context, we ordinarily need not worry about easements and other servitudes.[179] Unless chattel property is unique, calculating its market value—let alone determining whether that value is positive—should be a simple matter. In short, absent significant skepticism about the cognitive capacities of courts and other judicial decision makers, there is little reason to think that the inefficiencies associated with a prohibition on all abandonment are justified.

C. Is Land Different?

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

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[175] *Popov v. Hayashi*, 2002 WL 31833731, at *1. Popov's attempt to claim the abandoned property would then give him title to the ball once either (a) he took certain control of it, or (b) a third party's unlawful act impeded his ability to do so.

[176] 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. 1805) (Livingston, J., dissenting).

[177] *See* Allen, *supra* note 33, at C1.

[178] *See supra* note 61.

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

Land differs from chattel property in three relevant respects: (a) it is immobile, (b) it cannot be destroyed; and (c) a sophisticated recording system is already in place for land throughout the United States.[180] Real property's immobility eliminates the possibility that it will be lost or mislaid, which reduces the significance of confusion costs in the policymaking calculus. Real property's indestructibility mitigates the damages associated with resource decay.[181] The presence of a recording system means that there already exists, and long has existed, a low-tech version of Craigslist, which might function as an effective clearinghouse for information about abandoned real property, thereby reducing confusion and lag-time costs. In short, the unique attributes of land suggest that the problems created by abandonment are *more significant* in the context of chattels than they are in the context of real property. On this reasoning, the rule regarding the abandonment of real property should be at least as permissive as the rule regarding chattel property.

Alas, there are two complicating factors. First, if abandoned real property has a higher propensity than abandoned chattel property to have negative value, then the common law rule might make more sense. Such property is unlikely to be claimed by well-informed third parties if abandoned, so permitting abandonment will not diminish the harms associated with lag time. Unfortunately, reliable data about the proportions of abandoned real and chattel property that have negative value is in short supply. One study suggests that 98% of all properties that are *foreclosed on* by New York City had negative value at the time of foreclosure, but this does not tell us whether the same is true of abandoned properties at the time of abandonment.[182] If the 98% figure holds for abandoned real property and the figure is much lower for abandoned chattels, then a plausible argument for the common law rule exists.

Second, we must consider the relationship between adverse possession law and the law of abandonment. Like foreclosure, adverse possession may function as a substitute for abandonment, though it is an awkward one. The primary conceptual difference between abandonment and adverse possession stems from adverse possession's requirement of non-permissiveness. If the owner has intentionally relinquished title, then the trespasser's presence on the land becomes permissive, precluding the possibility of adverse possession.[183] What the thwarted abandoner therefore must do is either incur the transaction and decision costs associated

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

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

[182] Scafidi et al., *supra* note 5, at 293, 297.

[183] St. Louis Union Trust Co. v. Smith, 182 S.W.2d 945, 946-47 (Ark. 1945). The occasional sloppily reasoned case holds that the same facts give rise to both abandonment and adverse possession. *See, e.g.*, Sackett v. O'Brien, 251 N.Y.S.2d. 863, 868 (Supreme Ct. Monroe County1964) This holding is incoherent because abandonment transfers title to the first claimant immediately. The *Sackett* holding would have been coherent had the court instead held that if the prior holder of the incorporeal interest in land did not lose it by abandonment, then subsequent events show it must have been lost by adverse possession.

with a sale or gift to a willing recipient, or engage in an elaborate kabuki dance with a faux adverse possessor, whereby the abandoner pretends that he objects to the "trespasser's" entry. Such scenarios are not merely hypothetical; they are reflected in the case law.[184] This latter approach will not be attractive to a real property owner, precisely because under adverse possession law it takes so long—typically six to ten years—for title to transfer.[185] This lag creates a great deal of uncertainty for the would-be-transferor, who may see a trespasser work the land for five years, only to move elsewhere, likely requiring the would-be-transferor to start from scratch.

Given that abandonment would be far more attractive than adverse possession to a land owner who wishes to lose his interest in land, what could possibly explain, why the law might prohibit the abandonment of land but permit its transfer via adverse possession? To put the point even more provocatively, we might ask why the law would favor consensual transfers of land masquerading as nonconsensual transfers over genuinely consensual transfers of land? There is no obvious answer to this question. The conventional response would be that adverse possession ensures that someone who values the property is using it at all times. But this response is deprived of its force once we recognize that (1) a rational trespasser will hesitate to improve the land any more than the law of adverse possession requires before title transfers at the end of the statute of limitations period, whereas a party that claims abandoned property will not hesitate to put property to its highest value use immediately; and (2) property doctrine can reduce the consequences of lag time by requiring that the owner advertise his act of abandonment. Indeed, the comparison between the very sensible law of chattel property—which makes transfer via adverse possession rather difficult[186] and transfer via abandonment easy—and the law of real property—where the reverse is true—is puzzling.[187]

Assuming that the real property that is abandoned is not overwhelmingly characterized by negative value, the common law rule embraced in *Pocono Springs* and numerous similar common law cases should be overruled.[188] With respect to positive market value property, the

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

[185] JESSE DUKEMINIER ET AL., PROPERTY 115 (6th Ed. 2006).

[186] *See* O'Keefe v. Snyder, 416 A.2d 862 (N.J. 1980) (holding that adverse possession of chattels should be displaced by the discovery rule, which dictates that the statute of limitations start running only when the true owner reasonably knows or should know the whereabouts of the property and the identity of its possessor); Guggenheim Found. v. Lubell, 569 N.E.2d 426 (N.Y. 1991) (holding that the statute of limitations does not run until the true owner demands return of chattel property and a good faith purchaser refuses to hand it over).

[187] Note further the contrast to the law governing government-owned lands. Here too, abandonment is typically permitted and adverse possession is largely prohibited. *See, e.g.*, McCauley v. Thompson-Nistler, 10 P.3d 794, 800-01 (Mont. 2000).

[188] Perhaps, as Eduardo Peñalver has suggested to me, *Pocono Springs* could be defended on much narrower grounds than those embraced by the court. Namely, whatever the rule ought to be regarding the abandonment of

law should permit abandonment of corporeal interests, requiring only that the owner record a notice of abandonment, so that all parties interested in the land will learn of its availability, and that the successful claimant records his interest in the land, so third parties and government taxing authorities are informed of the title transfer. With respect to negative market value property, the same considerations relevant in the chattel context have enough force to warrant similar treatment for real and chattel property. An owner seeking to abandon land should be able to do so upon cleaning up or improving the property sufficiently to give it positive market value.[189] An owner should not be forced to find a seller to take the property off his hands in order to be rid of it, in light of the substantial transaction costs associated with land sales.

Conclusion

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

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land, the law should restrict landowner's ability to abandon obligations to pay homeowner's associations dues required under the covenants, conditions, and restrictions of a common interest community. Even this narrower and more sensible approach might be inapt in a case like *Pocono Springs*, where the landowners evidently purchased their holdings under the mistaken impression that the land could be developed. It is scenarios like the one in *Pocono Springs*, where real estate becomes an inescapable money pit, that explained the common law courts' historic refusal to let affirmative covenants bind successors in interest. *See, e.g.*, Miller v. Clary, 103 N.E. 1114, 1117 (N.Y. 1913). The common law rule was rejected in the landmark case of Neponsit Property Owners' Ass'n, Inc. v. Emigrant Indus. Savings Bank, 15 N.E.2d 793, 797 (N.Y. 1938).

[189] If the landowner in question is the party that polluted it, abandoning the property would not relieve the polluter of the legal liabilities resulting from that pollution. *See* Baird, *supra* note 11, at 187-91.

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