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# The Right to Destroy

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# Article

# The Right To Destroy

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## INTRODUCTION

In 1999, *Black's Law Dictionary* seems to have erased a long-recognized right of property owners. The revision went mostly unnoticed, which is perhaps unsurprising given its placement on page 1130 of the newly revised text. A comparison of the sixth and seventh editions' texts illustrates the nature of the revision:

> Owner. The person in whom is vested the ownership, dominion, or title of property; proprietor. He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases, even to spoil or destroy it, as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right.[1]

> Owner. One who has the right to possess, use, and convey something; a proprietor.[2]

The earlier definition had been remarkably stable, with virtually identical definitions appearing in legal dictionaries from the mid-nineteenth century.[3] And yet, as part of an extensive revision, the seventh edition's editors decided to exclude what many would perceive to be the most extreme feature of property ownership—the right to destroy.

This revision is in many ways surprising. As a matter of everyday experience, the right to destroy one's own property seems firmly entrenched. Rational people discard old clothes, furniture, albums, and unsent letters every day. Most of this "junk" is worth little or nothing, so its destruction proves entirely uncontroversial. Indeed, it is difficult to imagine how a modern capitalist economy would function if owners were barred from destroying obsolete refrigerators, unfashionable clothes, or rough drafts of written work. Even in the context of valuable property, popular sentiment seems to tolerate substantial property destruction. For example, American cadavers are frequently buried wearing wedding rings, other jewelry, and expensive clothing.[4] And no one took seriously historic

1. BLACK'S LAW DICTIONARY 1105 (6th ed. 1990).

2. BLACK'S LAW DICTIONARY 1130 (7th ed. 1999).

3. *E.g.*, BLACK'S LAW DICTIONARY 1311 (3d ed. 1933); 2 JOHN BOUVIER, A LAW DICTIONARY 268 (12th ed. 1868); 2 JOHN BOUVIER, A LAW DICTIONARY 276 (5th ed. 1855); *see also* Stein v. Burden, 24 Ala. 130, 132 (1854) (quoting an earlier Bouvier edition's definition of ownership). The seventh edition of *Black's Law Dictionary* substantially revised many definitions. For a rather critical but lighthearted review, see Eugene Kontorovich & David Lisitza, *A to Zzz: Once Opinionated and Charming,* Black's Law Dictionary *Is at Risk of Becoming Another* Webster's, LEGAL AFF., July/Aug. 2003, at 18.

4. *See* Lane DeGregory, *'Til Death Parts Us*, ST. PETERSBURG (Fla.) TIMES, July 21, 2002, at 1F; A.J. Holly & Sons, What To Do Before the Funeral, http://www.hollyfuneralhome.com/html/funeral_before.html (last visited Dec. 10, 2004); Rochester Funeral Homes, Resource Guide:

preservationists' protests when a Chicago restaurant chain spent $113,824 to purchase and destroy the infamous "cursed" baseball that Steve Bartman deflected during game six of the 2003 National League Championship Series.[5]

That said, *Black's Law Dictionary*'s apparent abrogation of the right to destroy is neither an accident nor an outlier. Indeed, the seventh edition's implicit rejection of the right to destroy mostly tracks current trends in American law. When asked to resolve cases where one party seeks to destroy her property, courts have reacted with great hostility toward the owner's destructive plans. Despite the existence of a norm that tolerates the burial of wedding rings, courts might well refuse a decedent's humble request to wear such jewelry for eternity.[6] If a testator orders her executor to destroy her home upon her death, the law probably will render the executor unable to carry out her wishes.[7] And if a landlord requests the city's permission to demolish a venerable but badly burned building that has become an eyesore, a teetering hazard, and a financial burden, the government can thwart her wishes.[8] Confronted with arguably hard cases and high stakes, many American courts have rejected the notion that an owner has the right to destroy that which is hers, particularly in the testamentary context.

This trend of substantially curtailing property owners' destruction rights was given further momentum recently by two of the nation's most capable property scholars. Joseph Sax's book *Playing Darts with a Rembrandt* argues that American law is far too deferential to the wishes of those who seek to destroy property that might have cultural significance.[9] Sax advocates depriving owners of the right to destroy works of art; literary works; items of antiquity; correspondence with public officials; and newly built, architecturally important buildings.[10] Indeed, the logic of Sax's approach even seems applicable to famous, cursed baseballs. Similarly, Edward McCaffery has argued that there is no place for a right to destroy or waste one's own property in a modern economy,[11] at one point referring to

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Funeral Planning Checklist, http://www.rochesterfuneralhomes.com/Resource_Guides/Funeral_Planning_Checklist.html (last visited Dec. 10, 2004).

5. *See* Monica Davey, *Long-Suffering Cubs Fans Hope Blasted Ball Puts End to 'Curse,'* N.Y. TIMES, Feb. 27, 2004, at A16 (noting the Chicago Historical Society's futile opposition to the baseball's destruction).

6. *See* Meksras Estate, 63 Pa. D. & C.2d 371, 373 (C.P. Phila. County 1974).

7. *See* Eyerman v. Mercantile Trust Co., 524 S.W.2d 210, 217 (Mo. Ct. App. 1975).

8. *See* J.C. & Assocs. v. D.C. Bd. of Appeals & Review, 778 A.2d 296, 308-09 (D.C. 2001).

9. JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES (1999). Sax's book does not discuss most of the cases analyzed in this Article.

10. *Id.*

11. Edward J. McCaffery, *Must We Have the Right To Waste?*, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 76 (Stephen R. Munzer ed., 2001). McCaffery

the right as "an embarrassment in Anglo-American law."[12] To McCaffery, the only good reason for retaining the right to destroy is the rarity with which owners intentionally destroy permanent assets.[13]

In advocating further substantial limitations on the owner's right to destroy, Sax and McCaffery are not picking a fight with anyone in particular. The right to destroy presently lacks a constituency within the American legal academy.[14] This Article responds to Sax, McCaffery, and the various judicial antidestruction rulings by presenting a qualified defense of an owner's right to destroy valuable resources.[15] On my account, empowering owners to destroy their property can promote important expressive interests, spur creative activity, and enhance social welfare. Moreover, a relatively laissez-faire attitude toward property destruction avoids the enormous transaction costs that would be incurred in a Saxist world. That is not to say that the right to destroy should be absolute. Indeed, I will identify a few contexts and considerations in which restrictions on the destruction of property are highly desirable.

The ambition of this Article, then, is to consider two questions: (1) What interests are furthered by permitting an owner to destroy his property? and (2) When should those interests give way to societal concerns about wasted resources and negative externalities?

Part I of the Article sets forth the historical treatment of the right to destroy and explores some conceptual difficulties inherent in any discussion of property destruction. Under Roman law, the right to destroy or abuse—the *jus abutendi*—served the important function of demarcating the boundaries of an owner's rights in property. Under this conception, destruction functioned as the most extreme recognized property right, so the

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discusses the topic of property destruction as an abstract matter. Accordingly, he does not discuss any of the cases herein.

12. *Id.* at 81.

13. *Id.* at 85-86; *see also Time, Property Rights, and the Common Law: Round Table Discussion*, 64 WASH. U. L.Q. 793, 843 (1986) (transcribing Jack Carr's statements on the infrequency with which valuable property is intentionally destroyed by its owner); *infra* note 32.

14. *Cf.* McCaffery, *supra* note 11, at 81 ("The *jus abutendi* stands as an embarrassment in Anglo-American law. Blackstone condemns it in moral terms; Honoré finesses it, because he sees the right to waste as an inconsequential, perhaps difficult to remove, and in any event inevitable ancillary of the important *jus disponendi*; and Epstein essentially follows suit—he sees no problem of waste, because he denies the prevalence of it." (some italics omitted)).

15. By this I mean to limit my topic to instances where the sole fee simple owner of a useful resource wishes to destroy it. In other words, I am *not* discussing instances of waste by a life tenant, the destruction of co-owned property by one owner, *A*'s destruction of *B*'s property, or the government's destruction of private property owned by a citizen. These are all interesting topics about which much has been written. *See, e.g.*, Hughes v. State, 56 P.3d 1088, 1094-95 (Alaska Ct. App. 2002) (involving property destruction by one co-owner); Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 B.U. L. REV. 699, 718-20 (1992) (discussing takings); John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 533-36 (1996) (discussing waste in the life tenant and co-ownership contexts); Lior J. Strahilevitz, Case Note, *When the Taking Itself Is Just Compensation*, 107 YALE L.J. 1975 (1998) (discussing the government's destruction of private property).

owner who could destroy his property necessarily had the right to use it in less extreme fashions. Blackstone's characterization of the English common law echoed similar themes, limiting the owner's right to destroy only in those cases where destruction occurred in a manner that threatened the property rights of third parties. In this sense, we shall see that Blackstone rejected John Locke's arguably narrower notion of ownership. In the twentieth century, the right to destroy fell out of favor, and the most recent literature has argued that such a right, if it exists at all, should be substantially circumscribed on public policy grounds. Part I then offers a definition of property destruction that steers the reader toward the interesting, contested cases of destruction that affect future generations.

Part II examines the major argument courts have put forth to justify limitations on the right to destroy one's own property—the fear that valuable resources will be wasted. Most of the case law that limits the right to destroy does so on this basis. While waste prevention is a valid basis for restricting one's right to destroy, an analysis of the case law suggests that courts often fail to appreciate the ways in which protecting the right to destroy can enhance social welfare by protecting privacy, creating open spaces, encouraging innovation and creation, or promoting candor and risk taking. A critical reading of the cases suggests the various antiwaste rules that courts have promulgated might well have resulted in diminished social welfare by discouraging the creation of the valuable property courts are so keen on protecting. Part II also considers contexts in which the law tolerates substantial waste, focusing on organ transplantation policy and patent suppression. These examples can help develop the broader case for destruction generally. Indeed, society's unfortunate willingness to tolerate substantial organ destruction renders the law's hostility to less harmful destruction somewhat perplexing.

Part III explores the intangible benefits associated with property destruction. When rational people destroy valuable property, they often do so because of deeply held expressive interests. History provides many examples in which valuable pieces of property have been destroyed by owners who used destruction to gain attention for a cause or message. The Article argues that under certain circumstances, these expressive interests ought to trump the social waste that results from the destruction of valuable property. It then suggests that the antidestruction provisions of the United States's Visual Artists Rights Act provide a useful model for reconciling society's interest in preserving irreplaceable works of art with the expressive interests of property owners and the general public. Finally, Part III concludes by exploring whether those who create property, particularly intellectual property, ought to have expanded destruction rights.

Part IV examines testamentary destruction, a thread that runs through much of the right-to-destroy case law. Most litigated cases involving property destruction appear to arise in the testamentary context. The

conventional wisdom, expressed in the case law and scholarship, consists of the idea that decedents' destructive will provisions should be invalidated, because the dead have "nothing to lose" by destroying their property via will. In other words, the self-interest that keeps most living owners from destroying their valuable property during life fails to deter posthumous destruction. I take issue with this conventional wisdom. An application of the law governing future interests demonstrates that when a testator executes a will providing for the destruction of property following her death, she makes an immediate economic sacrifice by virtue of her inability to alienate a future interest in the property. To the extent that there is a moral hazard here, it arises if an unsophisticated testator does not recognize the present value of a future interest in property she wishes to have destroyed. Accordingly, I propose a novel safe harbor rule whereby a testator who markets a future interest in her property and elects to forgo the future interest's market value would be entitled to destroy valuable property via will. This provision not only solves the moral hazard problem, but also addresses the other objections to permitting posthumous destruction—namely, concerns about testators' lack of information, social norms, transaction costs, and the government condemnation process.

## I. FUNDAMENTALS OF THE RIGHT TO DESTROY

The right to destroy evidently received more attention in antiquity than it does today. It appears that its historical and linguistic connections to the Roman law right to abuse one's property have caused the right to fall into disfavor via a form of guilt by association. Semantic and conceptual difficulties related to the nature of destruction may have contributed to this trend.

### A. *The* Jus Abutendi

Under Roman law, the ability to destroy one's own property was considered an important right of ownership. A Roman's property rights consisted of the *jus utendi fruendi abutendi*: the rights to use the principal (i.e., the property), to use the income generated by the property, or to completely consume and destroy the property.[16] The Roman attitude toward private property was often shorthanded to *jus utendi et abutendi*—an owner had the right to use or to misuse his private property without the state's interference.[17]

16. Max Radin, *Fundamental Concepts of the Roman Law*, 13 CAL. L. REV. 207, 209 (1925).

17. *See* Anton Hermann Chroust & Robert J. Affeldt, *The Problem of Private Pro[p]erty According to St. Thomas Aquinas*, 34 MARQ. L. REV. 151, 175 (1951). By the later years of the

A few early American courts picked up the notion of the *jus abutendi* and incorporated it into their understanding of the property owner's basic rights. They viewed the owner's right to destroy his property as the most extreme use of property imaginable and suggested that if a landowner had the right to destroy property, he certainly had the right to use or dispose of it in a less dramatic manner.[18] Several subsequent American decisions eschewed the Latin phraseology, referring instead to a property owner's common law "right to destroy" that which was his.[19]

The English courts were rather sympathetic toward the destruction of property as well, at least according to Blackstone's *Commentaries*. Indeed, Blackstone read the common law of property so as to make it compatible with his absolutist conception of ownership: "[T]he right of property [is] that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[20] The common law's purported embrace of the *jus abutendi* is more precisely indicated in Blackstone's discussion of arson. Blackstone regarded arson as an "offence of very great malignity, and much more pernicious to the public than simple theft . . . because in simple theft the thing stolen only changes [its] master, but still remains *in esse* for the benefit of the public, whereas by burning the very substance is

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Roman Empire, the extreme version of the right to abuse was scaled back somewhat. *Id.* at 175 n.131. This was particularly true with respect to the owner's treatment of his slaves:

> Masters who murder their slaves are guilty of crime. But, if a slave dies during a beating, there will be no investigation, even if it appears that the owner intended to kill the slave. If, however, the owner employed means such as poison or threw the slave over a cliff, the owner will be charged with murder. Even in this latter case, slaves and freedmen cannot accuse their owner. It is suspect that Roman owners were seldom convicted of murdering their slaves.

Alan Watson, *Roman Slave Law: An Anglo-American Perspective*, 18 CARDOZO L. REV. 591, 598 (1996). Watson argues that the basis for these restrictions stemmed not from an interest in protecting slave welfare or preserving public order, but from a desire to prevent an owner from wasting a valuable asset that his heirs might otherwise inherit. *Id.* at 596.

18. *See, e.g.*, Kingsbury v. Whitaker, 32 La. Ann. 1055, 1062 (1880) (opinion of Fenner, J., on application for rehearing) ("Suffice it to say, that the civil law recognizes [the right of testamentary disposition] as a clear and distinct corollary of the right of property, jus utendi et abutendi, under which the owner, provided he harm no other, may destroy and annihilate that which belongs to him. If he may thus destroy it, and thereby defeat all possible control of the law, it is difficult to perceive why, in exercising the option of leaving it in existence, he should not have the right of determining its disposition after his death.").

19. *See, e.g.*, Cass v. Home Tobacco Warehouse Co., 223 S.W.2d 569, 571 (Ky. 1949) (noting a property owner's common law right to destroy his building); State v. Durant, 674 P.2d 638, 648 (Utah 1983) (Stewart, J., dissenting) ("Surely an attribute of ownership of property is the right to destroy it unless it is done for the purpose of defrauding or injuring another in his person or property. One who destroys his own habitation must surely be considered to have a 'license or privilege'—indeed a right—to destroy it."). *But cf.* Voss v. State, 236 N.W. 128, 130 (Wis. 1931) (rejecting an arsonist's claim that his conviction for burning his own property was unconstitutional in light of its infringement of an asserted "right to destroy one's own property").

20. 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

absolutely destroyed."[21] This hostility to wasteful destruction notwithstanding, Blackstone suggested that under the common law a property owner is free to burn down his own house, so long as the fire does not threaten to spread to other people's property.[22]

John Locke's *Second Treatise of Government* is sometimes interpreted to have questioned the existence of a right to destroy property.[23] Locke wrote,

> As much as any one can make use of to any advantage of life before it spoils; so much he may by his labour fix a Property in. Whatever is beyond this, is more than his share, and belongs to others. Nothing was made by God for Man to spoil or destroy.[24]

Locke thus invoked divine justice as a basis for restricting the destruction of property—a bold claim, given the prevalence of biblical property destruction that was explicitly designed to demonstrate piety and curry God's favor.[25] In any event, it seems clear that under a Lockean conception of waste, it is improper to kill a wild animal and then leave it to rot in the forest.

While Locke's hostility to certain forms of property destruction seems unambiguous, his text leaves a great deal of uncertainty regarding his attitude toward destruction writ large. Does a man have the right to destroy his property after mixing substantial amounts of his labor with it? Does a man have the right to destroy his dwelling after living in it for decades and extracting much of its value? Does a man have the right to destroy property that he created out of thin air (e.g., a poem he composed)? If not, then why doesn't man have an obligation to avoid wasting any of his labor as well? These questions go unanswered by Locke. Indeed, some of Locke's readers deem such questions irrelevant because the Lockean prohibition against waste disappears as soon as man joins other men in a civil society.[26]

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21. 4 *id.* at *220.

22. 4 *id.* at *221 ("The offence of arson (strictly so called) may be committed by wilfully setting fire to one's own house, provided one's neighbour's house is thereby also burnt; but if no mischief is done but to one's own, it does not amount to felony, though the fire was kindled with intent to burn another's. . . . However such wilful firing one's own house, *in a town*, is a high misdemesnor, and punishable by fine, imprisonment, pillory, and perpetual sureties for the good behaviour.").

23. *See, e.g.*, Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1542 n.53 (1993); Holmes Rolston, III, *Property Rights and Endangered Species*, 61 U. COLO. L. REV. 283, 302 (1990).

24. JOHN LOCKE, *Second Treatise of Government*, *in* TWO TREATISES OF GOVERNMENT 285, 308 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1970) (1690).

25. *See, e.g.*, *Genesis* 22:13-14; *Exodus* 29:38-42; *Judges* 6:18-22. On animal sacrifice generally, see *infra* note 41.

26. *See, e.g.*, Leo Strauss, *On Locke's Doctrine of Natural Right*, 61 PHIL. REV. 475, 494 (1952).

Perhaps because of this ambiguity, early American jurists and scholars seemed unmoved by Lockean condemnations of waste. To this day, American courts evidently have ignored Locke's language regarding spoilage or destruction, having failed to quote from it altogether.

In an often cited 1939 essay, Roscoe Pound identified six rights of property ownership, the last of which was a *jus abutendi* right to destroy or abuse.[27] Pound characterized then-recent jurisprudence as limiting the power to abuse,[28] but did not discuss whether these same limits were being imposed on the power to destroy. Indeed, it is not clear that he differentiated between abuse and destruction. Yet, upon reflection, abuse and destruction cannot be conflated. One can destroy property without abusing it (e.g., burning a confidential letter), and one can abuse property without destroying it (e.g., whipping a donkey mercilessly). While there are good reasons to limit the right to abuse property,[29] I argue here that destroying valuable property is sometimes socially beneficial.

Evidently dissatisfied with Pound's list of six, Tony Honoré engaged in a more ambitious effort to articulate the incidences of property ownership, identifying eleven in his 1961 essay *Ownership*.[30] One of these includes the right to destroy property:

> The right to the capital consists in the power to alienate the thing and the liberty to consume, waste or destroy the whole or part of it . . . . The latter liberty need not be regarded as unrestricted; but a general provision requiring things to be conserved in the public

27. Pound's six rights were

> a *jus possidendi* or right of possessing, a right in the strict sense; a *jus prohibendi* or right of excluding others, also a right in the strict sense; a *jus disponendi* or right of disposition, what we should now call a legal power; a *jus utendi* or right of using, what we should now call a liberty; a *jus fruendi* or right of enjoying the fruits and profits; and a *jus abutendi* or right of destroying or injuring if one likes—the two last also what today we should call liberties.

Roscoe Pound, *The Law of Property and Recent Juristic Thought*, 25 A.B.A. J. 993, 997 (1939).

28. Pound wrote,

> As to the liberty of abusing, both courts and legislators took this in hand long ago. The Roman law early forbade cruel treatment of slaves. The law has long forbidden cruelty to domestic animals. Statutes and judicial decisions have dealt with spite fences and malicious diversions of water out of pure spite. While English law has not been willing to create a general liability for malicious exercise of the *jus utendi*, yet it has become willing to prevent exercise of that liberty out of spite to the detriment of a business carried on by a neighbor.

*Id.* (some italics omitted).

29. Abusing property, by definition, is not socially beneficial. To "abuse" is "[t]o depart from legal or reasonable use in dealing with (a person or thing); to misuse." BLACK'S LAW DICTIONARY 10 (8th ed. 2004).

30. A.M. Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 107 (A.G. Guest ed., 1961); *see also* McCaffery, *supra* note 11, at 76-80 (discussing Pound's and Honoré's views of destruction).

> interest, so far as not consumed by use in the ordinary way, would perhaps be inconsistent with the liberal idea of ownership.[31]

That is essentially all Honoré wrote about the right to destroy.[32] He recognized that the right to destroy may well be an essential part of a property owner's rights, but he left the reader wondering about why that is so. I will argue that there are strong justifications, liberal and otherwise, for permitting individuals to destroy their property. But because Honoré never elaborated on the point and very few thoughtful scholars have given the issue much consideration, these justifications remain rather elusive.[33]

With the recent publication of Joseph Sax's *Playing Darts with a Rembrandt*,[34] the right to destroy one's own property has received its most hostile treatment to date. On Sax's account, an art collector does not exactly own a valuable painting that hangs in her living room. Rather, she is the work's steward and ought to incur permanent legal obligations to preserve it and make it accessible to scholars, art lovers, and members of the general public.[35] While Sax spends far more time discussing the problem of destroyed cultural property than the solution, he appears sympathetic to the enforcement of legal rules that bar the owner of such property from destroying it, except in those cases where its owner is the artist or writer who created it in the first place.[36] Sax would abandon altogether the traditional notion of the *jus abutendi* with respect to valuable or potentially valuable cultural property. Instead, Sax favors limited ownership rights: An owner of cultural property can continue to use it for her personal enjoyment, but the law will prohibit destructive uses that deprive the general public or future generations of a potential cultural resource.

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31. Honoré, *supra* note 30, at 118.

32. Honoré also noted that "[m]ost people do not wilfully destroy permanent assets; hence the power of alienation is the more important aspect of the owner's right to the capital of the thing owned." *Id.* It should be noted that Honoré served as an academic adviser to the seventh edition of *Black's Law Dictionary*, which seems to regard the right to destroy as peripheral or nonexistent. *See supra* text accompanying notes 1-3.

33. By far the best discussion of the American case law regarding the destruction of one's own property is contained in Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33 (1999). Hirsch's article advocates a more unified approach to bequests for purposes, and his discussion of cases involving the destruction of property via will is contained in a section dealing with antisocial or bizarre bequests. *Id.* at 69-84. Other papers dealing with similar topics are Frances Carlisle, *Destruction of Pets by Will Provision*, 16 REAL PROP. PROB. & TR. J. 894 (1981), and Abigail J. Sykas, Note, *Waste Not, Want Not: Can the Public Policy Doctrine Prohibit the Destruction of Property by Testamentary Direction?*, 25 VT. L. REV. 911 (2001).

34. SAX, *supra* note 9.

35. *Id.* at 68-72.

36. *Id.* at 200-01.

B. *What Is Destruction?*

Before proceeding to the heart of the Article, a conceptual clarification is necessary. What does property destruction mean? We have seen that prior scholarly discussions of the *jus abutendi* varied in their conceptions of destruction. It turns out that property destruction is harder to define than it appears at first glance.

On the broadest reading of a right to destroy, an owner destroys property every time she eats a piece of cake, falls asleep watching television instead of working, or leaves an extra bedroom empty instead of renting it to boarders. Such examples reference a right to destroy that includes both consuming nondurable assets and failing to exploit economic opportunities fully. McCaffery refers to the latter as wasteful nonuse.[37] He also introduces the concept of "nonurgent waste," meaning "nonurgent, frivolous, or excessive consumption: poor choices of how to spend time or value."[38] Under these broad definitions, human beings constantly destroy property and virtually any antidestruction property rule would be unworkable.[39]

Narrower conceptions of the right to destroy are possible. Destruction might be defined as the elimination of all the value in a productive resource. On this understanding of destruction, demolishing a historic castle would not be destructive so long as the rubble was used by others for building materials. Nor would suicide be destructive as long as the deceased's body was used for compost. Now the universe of destructive acts has shrunk beyond recognition. Every act of obliteration surely produces at least a small benefit to someone or something—consider the nihilist who takes pleasure in learning that a great building has been destroyed.[40]

Neither the broad nor the narrow economic definition of property destruction seems particularly attractive, and even a middle-of-the-road economic definition of property destruction (eliminating most of the present value of a productive asset) will not comport perfectly with ordinary usage. Creating a permanent crease in the center of a valuable baseball card may render it essentially worthless as a collectible, but such folding seems more like damaging than destruction. And it is certainly possible to destroy things that have no market value: Killing an ailing, elderly hermit is indubitably an act of destruction, even if the hermit makes nothing and knows no one. As an analytical matter, then, the right to destroy is an elusive concept.

37. McCaffery, *supra* note 11, at 88-89.

38. *Id.* at 86.

39. McCaffery advocates administering antiwaste rules of this kind through the tax system. *Id.* at 97-102.

40. McCaffery refers to a category of "dissipatory waste," meaning "the pure loss of value, with none but some possibly perverse—to an Anglo-American at least—pleasure in the loss." *Id.* at 85.

Moving from economics to sociology, one finds that the meaning of destruction has varied in different eras and among divergent cultures and social groups. Slaughtering an edible animal and setting part of it ablaze, to be consumed by no one, was considered a righteous act in biblical times,[41] but most major religions frown on the practice today. Similarly, burial practices vary among the different cultures of the world, with societies reaching very different conclusions about what property, if any, should be destroyed along with a deceased person's body.[42] While modernity has curtailed the destruction of property that accompanies death, property destruction retains cultural significance throughout much of the world. The piñata is a staple of childhood festivities in many Latin American cultures, and Americans regularly spend hundreds of dollars on elaborate ice sculptures for business functions and other important gatherings.[43] Different communities within a society may also disagree about the meaning of destruction. While an artist would regard the nonconsensual separation of his painting into multiple parts as destruction of the work, an entrepreneur might regard such activity as socially beneficial unbundling.[44]

Given these considerations, there can be no perfect definition of destruction. For reasons that will become apparent in Part IV, I adopt a relatively narrow, economics-oriented definition of property destruction. Destruction occurs when an owner's acts or omissions eliminate the value of all otherwise valuable future interests in a durable thing. This definition is more doctrinal than analytical, though it relies on a notion of value that encompasses both legitimate and black market valuations. That said, a definition that steers clear of cake, castle rubble, elderly hermits, and leisure time will focus the reader's attention on the contested, and therefore interesting, exercises of the right to destroy. More important, the definition I have adopted captures what makes the destruction of a durable resource different from all other uses of the same resource. Destroying property, unlike selling or mortgaging it, necessarily has intergenerational

41. *See* sources cited *supra* note 25. Biblical passages differ on the fate of sacrificed food. In some instances it was destroyed, *see, e.g.*, *Leviticus* 1:2-13; in some instances it was used to feed religious leaders, *see, e.g.*, *Leviticus* 2:1-3; and in other instances it was consumed by those who engaged in the sacrifice, *see, e.g.*, *Genesis* 31:54. For a compilation of biblical references to animal sacrifice, see William R. Harper, *Constructive Studies in the Priestly Element in the Old Testament*, *in* 18 THE BIBLICAL WORLD § 83, at 120, § 83, at 120-21 (William R. Harper ed., 1901).

42. *See generally* CLARE GITTINGS, DEATH, BURIAL AND THE INDIVIDUAL IN EARLY MODERN ENGLAND (1984); LESLIE V. GRINSELL, BARROW, PYRAMID AND TOMB: ANCIENT BURIAL CUSTOMS IN EGYPT, THE MEDITERRANEAN AND THE BRITISH ISLES (1975).

43. The appeal of an ice sculpture stems largely from its fleeting existence. Sculptors could easily work in longer-lasting translucent mediums, but the choice of a one-use-only medium highlights the importance of the event at which the ice sculpture is displayed. An ice sculpture essentially conveys the following message: "We've hired a talented artist to produce this unique sculpture, and the people who attend this event are the only ones who will ever see it."

44. *See, e.g.*, 136 CONG. REC. 12,609 (1990) (statement of Rep. Markey); Timothy M. Casey, Note, *The Visual Artists Rights Act*, 14 HASTINGS COMM. & ENT. L.J. 85, 86 (1991).

consequences, for better or worse. Given the centrality of intergenerational justice as a consideration in the law generally,[45] we can understand the right-to-destroy debate as an illuminating case study of the duties an individual owner owes, not only to her contemporaries, but also to future generations.

### C. *The Nature of the Right*

While the right to destroy one's property has ancient origins, the functional justifications for that right have not been well developed. Indeed, the affirmative right-to-destroy literature has not progressed far beyond early Roman law and its brief modern restatements by Pound and Honoré. Until the publication of Sax's book and McCaffery's work, few scholars had devoted much attention to the right to destroy, while a great deal of attention has been lavished on some of the other property rights that Pound and Honoré recognized—the right to exclude, the right to alienate, the right to use, the right to testamentary disposition, the right to mortgage, and the like.

Why have these other rights gotten so much attention? The answer may stem, in large part, from the high frequency with which they are placed at issue in litigation. There are, by contrast, relatively few published opinions that squarely implicate an owner's right to destroy his property. This fact should not be surprising. A new homeowner is more likely to want to exclude outsiders from his home than he is to want to raze it. Less valuable kinds of property are destroyed all the time, but the low stakes involved and restrictions on third-party standing combine to keep any resulting disagreements out of the courts.

That said, the relatively small number of right-to-destroy cases that have been litigated provide a rich opportunity to illuminate property law's first principles. The right to destroy property is, after all, often an extreme exercise of some of the more widely recognized sticks in the bundle of rights. The right to destroy is an extreme version of the right to exclude; by destroying a vase, I permanently exclude third parties from using it. The right to destroy is also an extreme version of the right to use; by destroying a piece of jewelry, I do not merely use it—I use it up. Finally, we might understand the right to destroy as an extreme right to control subsequent alienation. By destroying property, the owner can prevent it from *ever* being resold or used in a manner that displeases her without running afoul of the Rule Against Perpetuities. Indeed, the justifications traditionally

45. For explorations of intergenerational equity in various legal contexts, see Axel P. Gosseries, *What Do We Owe the Next Generation(s)?*, 35 LOY. L.A. L. REV. 293 (2001); Lawrence B. Solum, *To Our Children's Children's Children: The Problem of Intergenerational Ethics*, 35 LOY. L.A. L. REV. 163 (2001); and R. George Wright, *The Interests of Posterity in the Constitutional Scheme*, 59 U. CIN. L. REV. 113 (1990).

given for inalienability rules are both similar to[46] and different from[47] the justifications given for restricting the destruction of one's property.

A discourse on this extreme property right quickly implicates some of the most interesting, fundamental, and contentious questions in property law. What is the nature of ownership? What obligations does a property owner owe his neighbors? Are the foundations of property law libertarian or instrumentalist? To what extent is a private property system wealth maximizing? What are the appropriate roles of the dead hand and the interests of future generations? Each of the right-to-destroy cases implicates some of these important questions.[48]

There is also an important sense in which property destruction raises one-of-a-kind issues. Scholars are conditioned to think about property law as the way in which society divides up resources that have perpetual life. Much of property law, most notably those provisions dealing with future interests, presumes that the resource in question will survive forever. But land is the only inherently perpetual form of property. Chattels, fixtures, corporate entities, currency, and even intellectual property all can be destroyed, meaning that an owner potentially has the ability to deprive property of its perpetual life. The law of property destruction, then, is the

46. There are obvious connections between the law's increasing hostility toward the right to destroy and its traditional resistance to restraints on alienation. Richard Epstein, Margaret Jane Radin, and others have defended restrictions on alienability in particular circumstances. While there is not enough space here to rehash the many interesting arguments in the literature, *see, e.g.*, Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970 (1985); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987), it is worth noting that some of the same reasons that prompt society to impose inalienability rules may prompt it to enact antidestruction rules. For example, paternalistic concerns may explain why society bars an individual from selling her kidney (alienation) or taking her own life (destruction). And concerns about negative externalities may explain why the law bars both the sale of some sex acts and the destruction of some valuable paintings. My arguments in this Article have implications for the broader debate regarding restraints on alienation and dead hand control, but I will leave those implications for future scholarship.

47. Hostility to restraints on alienation and openness to individuals' destruction of their own property might be able to coexist peacefully in some cases. Part of the modern hostility to restraints on alienation stems from the restraints' tendency to keep a resource away from its highest-value user. *See* Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1258-60 (1985). As I will argue below, the destroyer of property is sometimes its highest-value user and is using the resource to obtain privacy, media attention, reputation, open space, or some other economically valuable resource. Moreover, the objections to restraints on alienation might stem in part from additional factors, including the transaction costs of enforcing inalienability rules and the demoralization costs experienced by the would-be owner who wants to put property to its highest-value use but is prevented from doing so. In both these instances, the destruction of a resource actually may fare better than a restraint on the alienation of that resource.

48. For those reasons, the omission of the right-to-destroy cases from property casebooks is disappointing. Among the leading casebooks, I believe that only Dwyer and Menell's includes a case on the right to destroy. JOHN P. DWYER & PETER S. MENELL, PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE 384-92 (1998).

law that governs whether and under what circumstances the owner may deprive a resource of its immortality.

## II. PROPERTY DESTRUCTION AND WASTED RESOURCES

Based on a reading of recent judicial opinions, it appears that the conventional wisdom has turned against permitting a property owner to destroy valuable property. Courts have identified two closely related bases for restricting the right to destroy. While excising theological strains from Locke's antiwaste argument, they have embraced his notion that society must not tolerate the waste of valuable resources. Moreover, courts have stressed the negative externalities that might be associated with an individual owner's destruction of her property.

### A. *Justifications for Preventing Destruction: Waste and Other Externalities*

Concern about wasting valuable resources is, by far, the most commonly voiced justification for restricting an owner's ability to destroy her property.[49] In cases where a living person seeks to destroy her property, the courts express concern about the diminution of resources available to society as a whole. Where someone tries to destroy her property via will, the court's focus is generally on preventing a loss to the estate and the beneficiaries. In all circumstances, however, the court is concerned about the negative externalities that would result from respecting property owners' right to destroy.

#### 1. *The Destruction of Buildings*

Perhaps the most prominent set of cases prompting concerns about waste involve efforts by landowners to destroy their homes via will. The leading case of this kind is *Eyerman v. Mercantile Trust Co.*[50] The *Eyerman* court was called upon to decide whether a provision in the will of Louise Woodruff Johnston ought to be enforced. The will directed her executor to have Johnston's attractive house on St. Louis's Kingsbury Place razed, the land underneath it sold, and the proceeds from the land sale transferred to

49. *See, e.g.*, McCaffery, *supra* note 11, at 91-96; *Time, Property Rights, and the Common Law*, *supra* note 13, at 845-46. McCaffery's argument focuses on what he describes as "nonurgent waste," rather than "dissipatory waste," which is my concern in this Article. *See supra* notes 37-40 and accompanying text.

50. 524 S.W.2d 210 (Mo. Ct. App. 1975). For additional discussions of *Eyerman* and some of the other cases cited herein, see Hirsch, *supra* note 33, at 69-84; Sykas, *supra* note 33, at 924-39; and Teresa Wear, Recent Case, Eyerman v. Mercantile Trust Co. Nat'l Assoc., 41 MO. L. REV. 309 (1976).

the residue of the estate.[51] Johnston's beneficiaries evidently did not object to the razing of the home,[52] but the neighbors did, and one month after Johnston's death they convinced the city government to have Kingsbury Place declared a historic landmark.[53] The neighbors then sought injunctive relief to prevent Johnston's executor from razing the home, arguing, inter alia, that the destruction would depress property values in the neighborhood.[54]

The court held that the provision directing the executor to destroy the home was unenforceable on public policy grounds. In the court's words, "Destruction of the house harms the neighbors, detrimentally affects the community, causes monetary loss in excess of $39,000.00 to the estate and is without benefit to the dead woman."[55] Such destruction, the court held, was simply intolerable in a "well-ordered society."[56] While this waste of resources and damage to third parties cautioned against permitting Johnston's wishes to be carried out, the court saw no countervailing justification for respecting those wishes: "No reason, good or bad, is suggested by the will or record for the eccentric condition."[57] Seeing nothing but caprice in Johnston's instructions, the court refused to respect them.

*Eyerman* contains within its pages many of the pertinent threads in the right-to-destroy debate. Indeed, it begins to confront the institutional competency questions that are at the heart of the matter. American property law ordinarily deems the individual property owner to be in the best position to evaluate how her property should be used. Exceptions arise in two primary circumstances: (1) where certain uses will engender negative externalities and (2) where the owner lacks the capacity to make a rational judgment about how the property should be used. Although the *Eyerman* court primarily focuses on the negative-externalities point in the destruction context, its characterization of Johnston's will as "eccentric" and its emphasis on Johnston's failure to explain her motivations suggests that the second consideration is important here, too. I will focus first on the externalities point and then consider issues involving a destroyer's capacity in Part IV.

Most of the home destruction cases echo *Eyerman*'s concerns about wasted resources. For example, the *In re Will of Pace* court invalidated a will provision directing the demolition of two homes on the grounds that

51. *Eyerman*, 524 S.W.2d at 211-12.

52. *Id.* at 218 (Clemens, J., dissenting).

53. *Id.* at 219. The applicable landmark law evidently did not bar owners from destroying their landmarked property.

54. *Id.* at 211, 213 (majority opinion).

55. *Id.* at 214.

56. *Id.* at 217.

57. *Id.* at 214.

their destruction would reduce neighborhood property values, lower the property tax base, and harm the estate's beneficiaries.[58] In *National City Bank v. Case Western Reserve University*, the court held that a will provision directing the destruction of a home was not contrary to public policy, but nevertheless directed the sale of the home to the local historical society.[59] The only reported case in which a court actually ordered the razing of a home in accordance with a will provision presented an odd set of facts. The municipality that sought, on public policy grounds, to prevent the testator's executor from razing the home had in previous years tried to demolish the same home as part of an urban renewal project.[60]

Courts also strain to construe written instruments so as to avoid acquiescing in the destruction of property. *In re Estate of Jones* involved a will provision whereby the testator willed his real estate to the Society for the Protection of New Hampshire Forests, subject "'to the condition that all of the buildings on the homestead, with the exception of the original house, shall be dismantled and disposed of by my executor as he, in his discretion,

58. 400 N.Y.S.2d 488, 492-93 (Sur. Ct. 1977). Joel Dobris brought to my attention an unreported Rhode Island case, involving facts quite similar to *Eyerman*, discussed in Fox Butterfield, *Recluse's Will Creates Puzzle for Rhode Island*, N.Y. TIMES, July 4, 1986, at A9. The *New York Times* story quotes the speculation of several community members about the decedent's motivations. Her neighbor, a psychiatrist, opined that "'the will represents anger, spite and extreme jealousy' . . . . 'She was a very fussy, peculiar old lady and didn't want anyone else to ever live there.'" *Id.* Another neighbor, a trusts and estates attorney, speculated that "'she felt no one could love the house the way she had.'" *Id.* These explanations are hardly incompatible, but reflect differing moral judgments about the acceptability of her motivations. Dobris's correspondence with one of the attorneys involved in the case reveals that the court eventually invalidated the destructive will provision on public policy grounds. Letter from David T. Riedel to Joel C. Dobris (Aug. 24, 1990) (on file with author).

59. 369 N.E.2d 814, 818-19 (Ohio Ct. Com. Pl. 1976). The court's reasoning in this case was interesting. The court heard testimony on the testator's motivations for destroying her valuable, architecturally significant home. Such testimony revealed that her "motive and purpose was to prevent the house from being used as a rooming house or for commercial or business purposes like many of the other former homes in the immediate neighborhood." *Id.* at 818. In the court's view, that made the *Eyerman* case distinguishable.

> The razing of the Vair house will not, like the razing of the house in the *Eyerman* case, be a first step toward the deterioration of an exclusively residential neighborhood, but rather would be an effective means of preventing a beloved home from debasement to rooming house, business or commercial uses, as has already happened to many of the homes in the neighborhood.

*Id.* This analysis seems strange at first glance, as the court essentially holds that permanently preventing a building from being put to its highest-economic-value use does not violate public policy. The court's analysis perhaps will make more sense in light of the expressive justifications for a right to destroy discussed *infra* Part III.

60. *In re* Estate of Beck, 676 N.Y.S.2d 838, 841 (Sur. Ct. 1998) ("The Beck home, which Anna Beck personally treasured and once fought to preserve from the city's very own wrecking crews, was . . . clearly titled to her. At her death, it was [hers] to dispose of as she intended. Ironically, the agency which now claims to champion its preservation on the basis of an undefined public interest, was the very same agency that once went to court seeking its demolition under the banner of urban renewal. That twist of fate is not lost on the court.").

may deem best.'"[61] With respect to the remaining house, the will continued, "'My executor shall have the further power . . . to decide whether the original house is to be preserved for use and benefit of the Society or whether it shall be *also* dismantled and removed.'"[62] Although these words eliminated any ambiguity as to what the testator wanted done with all his buildings but one, the New Hampshire Supreme Court somehow managed to construe this language to give the executor discretion to sell all the buildings to a third party.[63] This was true even though demolition of the buildings was consistent with the forest-loving decedent's intent to allow forests on the property to reclaim the land where the other dwellings had once stood.

In these home destruction cases, a number of third-party interests were invoked to justify restricting a testator's right to destroy a home—the will's beneficiaries' economic interests, the neighbors' economic interests in neighborhood continuity, the public's interest in property tax revenues, and the community's need for housing. Yet public policy rationales that seem plain in one era evaporate during another era.[64] Jones's forest preservation sentiment makes more sense to the contemporary reader familiar with the goals of the environmental movement than it did to a New Hampshire court in 1978. A homeowner's gift of open space in a built-up neighborhood

61. 389 A.2d 436, 437 (N.H. 1978).

62. *Id.* (emphasis added).

63. *Id.* at 438. Exercising extreme creativity, the court noted, "In essence, such a conveyance amounts to no more than a constructive dismantling of the buildings with the materials preserved and later given to the museum for reconstruction on the same land." *Id.* So, assuming the executor had the power to demolish and then rebuild these buildings, the executor presumably could opt for the functional equivalent of refusing to demolish the buildings in the first place.

64. At least one court used some of the same public policy justifications to invalidate will provisions that seek to *prevent* the destruction of existing buildings. In *Colonial Trust Co. v. Brown*, 135 A. 555 (Conn. 1926), the Connecticut Supreme Court of Errors invalidated a will that sought to bar the construction of new buildings exceeding three stories on the site of an existing three-story building. The court noted that, given the building's location and the cost of maintaining the old building, the construction of newer, taller buildings might well be necessary to maximize the value of the land. *Id.* at 564. The court noted that the restrictions were to remain in place for seventy-five years and viewed their enforcement as against public policy because they would "benefit no one" and pose "a serious threat against the proper growth and development" of the neighborhood. *Id.* The *Brown* court deemed behavior that modern observers would consider preservationist to be destructive. It should not be surprising that in the fifty years between *Brown* and *Eyerman*, the courts' emphasis shifted from preventing testators' preservation efforts to preventing testators from destroying buildings. After all, societal preferences regarding the desirability of historic preservation shifted substantially during that time. *See* ANTHONY M. TUNG, PRESERVING THE WORLD'S GREAT CITIES: THE DESTRUCTION AND RENEWAL OF THE HISTORIC METROPOLIS 346-49 (2001). More surprising is the fact that the *Eyerman* court cited *Brown* with approval and relied on its reasoning. Eyerman v. Mercantile Trust Co., 524 S.W.2d 210, 216-17 (Mo. Ct. App. 1975) (quoting and relying on *Brown*, 135 A. at 564). While these results exhibit courts' shifting attitudes toward building destruction and preservation, they can be reconciled on the basis of both courts' hostility toward dead hand control.

might seem like an act of generosity, not capriciousness, to the modern reader.[65]

2. *Destruction by Burial: Laws and Customs*

A different set of public policy considerations emerges in cases involving the destruction of chattel property via burial. In the case of *Meksras Estate*, Eva Meksras wrote a will directing her executor to deposit her diamonds, other jewelry, and other items of value in her casket for burial.[66] Invoking public policy to invalidate the will provision, the court speculated that permitting the burial would be an invitation to grave robbers, who would have access to the will given its status as a public record.[67] In the court's words,

> If a practice is developed in our State to foster the burying of valuables with a deceased, our cemeteries like the tombs of the Phar[ao]hs will be ravaged and violated. The loved ones of the deceased will experience the horror of the desecration, looting and destruction of burial grounds, heaping indignities on the memory of the dead.[68]

Deviating from the home destruction cases, the *Meksras* court did not mention waste of scarce resources as a basis for denying the decedent's request.[69] *Meksras* is apparently the only published American case on the question of the legality of burying valuable chattels along with a cadaver, and it comes from a lower court in Pennsylvania. This is puzzling, given the disparity between its holding and prevalent social norms, whereby people are often buried wearing their wedding rings, expensive clothing, and other

65. *See* Hirsch, *supra* note 33, at 72 n.141 ("Whereas it is a commonplace among realtors that expensive homes raise the value of less expensive adjoining ones by increasing the attractiveness of a street or a neighborhood, there is another side to the economic coin—open spaces in a neighborhood are also attractive, and, as an elementary exercise in supply and demand, the fewer homes available in a neighborhood, the higher the price of those left standing.").

66. Meksras Estate, 63 Pa. D. & C.2d 371, 371 (C.P. Phila. County 1974). The property slated for burial had considerable value. *Id.* at 372.

67. *Id.* at 373.

68. *Id.*

69. Given the court's rationale, the failure to mention waste was appropriate. If grave robbers were likely to reclaim the valuable jewelry buried in graves, then the resources would not be wasted from society's perspective. Rather, they would be recycled through the black market or returned to the heirs of the decedent if recovered by the authorities. *See* Charrier v. Bell, 496 So. 2d 601, 604-05 (La. Ct. App. 1986) (holding that artifacts recovered from Native American burial sites are the property of the descendants of those tribes). If one wholeheartedly embraces a waste avoidance theory with respect to buried property, then one begins to see the actions of grave robbers in a rather positive light. *Cf.* GARDEN STATE (Fox Searchlight Pictures 2004) (showcasing Peter Sarsgaard's sympathetic portrayal of a grave robber).

items of considerable value.[70] Indeed, the reported cases dealing with grave robbing suggest that the *Meksras* rule is not adhered to universally.[71]

The *Meksras* court supposed that grave robbers will examine wills at the county courthouse and then target those graves that contain buried treasures.[72] This premise only seems plausible if the probate process necessitated an accounting or inventory of estate property, but such documents are not always made public for probated wills.[73] Thus, a testator might deflect grave robbers' attention by directing his burial along with the "contents of the top drawer of my bedroom desk." The court's logic also assumes that grave robbers can obtain information about probated wills without attracting the attention of authorities. Even taking the court's suppositions at face value, though, most of the harm associated with grave robbing would be internalized by each estate. A testator would come to understand that she *can* take it with her, but that if she does so, she will run a higher risk that her grave will be targeted by grave robbers.[74] One

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70. Indeed, the law of at least one state recognizes the need to bury clothed cadavers. *See* N.D. CENT. CODE § 11-19.1-15 (2001). Other cultures have had strong norms directing the burial or cremation of valuables along with their owners. *See* GITTINGS, *supra* note 42, at 111; GRINSELL, *supra* note 42, at 30-38, 50-53; Francis King Carey, *The Disposition of the Body After Death*, 19 AM. L. REV. 251, 254-61 (1885); Sykas, *supra* note 33, at 917-22 (discussing various ancient cultures' practices of burying or cremating valuables along with the deceased). Henry Ordower characterizes past and present practices in the following manner:

> In early cultures, it was customary to inter considerable property . . . with the corpses of wealthy decedents to provide for the decedent in the next life. Most later cultures generally abandoned this practice, in part because it was economically inefficient. The practice deprived the society of the current use of the wealth after death and cultivated the grave robbing industry. On the positive side, burial finds provide archaeologists opportunities to study cultures for which no, or only a sparse, written record exists.
>
> With limited exceptions for specific items with particular sentimental value to the decedent, most decedents today do not attempt to take personal property with them, although courts occasionally abide by exceptional wishes of decedents, such as interment in an automobile.

Henry M. Ordower, *Trusting Our Partners: An Essay on Resetting the Estate Planning Defaults for an Adult World*, 31 REAL PROP. PROB. & TR. J. 313, 331 n.47 (1996) (citation omitted).

71. *See, e.g.*, Ternant v. Boudreau, 6 Rob. 488, 491 (La. 1844) (involving a property dispute over "a gold chain, a gold buckle, a pair of diamond earrings, two diamond rings, [three] gold rings, two broken rings, . . . six small diamonds[,] and . . . a diamond necklace" that were recovered from criminals who had robbed Madame Ternant's grave); State v. Lewis, 293 S.E.2d 638, 639 (N.C. Ct. App. 1982) (involving the removal of jewelry from graves); *see also* VT. STAT. ANN. tit. 13, § 3761 (1998) (criminalizing the intentional removal of "an object interred or entombed with a human body"); Julie Brienza, *Advocates for Reform of Funeral, Cemetery Industry Are Never at Rest*, TRIAL, Nov. 1998, at 14, 14 (noting the desecration of a Florida woman's grave that included family heirlooms, a gold wedding band, and other jewelry). For a scholarly perspective on the prevalence of grave robbing in many cultures, see GRINSELL, *supra* note 42, at 101-09.

72. *Meksras*, 63 Pa. D. & C.2d at 373.

73. *See* UNIF. PROBATE CODE §§ 3-706, 3-708 (amended 2003); Mary F. Radford & F. Skip Sugarman, *Georgia's New Probate Code*, 13 GA. ST. U. L. REV. 605, 752-54 (1997); Earl D. Tanner, Jr., *Wills v. Trusts*, UTAH B.J., Oct. 1997, at 18, 18.

74. A savvy decedent may wish to have her jewelry destroyed or cremated along with her body, thereby precluding the valuables from coming into the possession of the grave robber. *See*

supposes that a person who cares about her postmortem environment enough to request burial with valuable jewelry is particularly likely to be offended by the prospect of her grave being pillaged.[75] Assuming, arguendo, the enactment of a mandatory will and inventory disclosure law, permitting decedents to be buried with their property would give will drafters and heirs all the right incentives. Indeed, it is hopefully not too grotesque to suggest that such a policy would give grave robbers the right incentives too, by preventing scattershot desecration. Efficient grave robbers no longer would target graves haphazardly, digging up graves that contain nothing of value.

That is not to say that allowing people to be buried with their valuables engenders no third-party harms. The court simply latched onto the wrong negative externalities. The primary inefficiency that would have resulted from a prodestruction rule stems from increased expenditures on cemetery security, which would seem to be a deadweight loss. There also would be substantial welfare losses associated with third parties' revulsion at the thought that nonrelatives' graves might be robbed.

So was *Meksras* rightly decided or not? Ordinary people seem to get a lot of utility, during life, from the thought that they will be buried wearing a wedding ring or that a particularly sentimental item will be deposited in their casket. On a personhood account of property, one can say that such property is likely to have merged with the decedent.[76] A loyal deceased

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*generally* GRINSELL, *supra* note 42, at 60-67 (discussing the prevalent custom in foreign cultures of smashing valuables deposited in the decedent's grave); Carey, *supra* note 70, at 269-70 (hypothesizing that cremation eventually will become the norm as a means of preventing grave robbers from stealing one's corpse).

75. Grave robbing also harms the deceased victim's loved ones, as the *Meksras* court mentions. *Meksras*, 63 Pa. D. & C.2d at 373; *see also* King v. Smith, 72 S.E.2d 425, 426 (N.C. 1952) (recognizing that the blood heirs of a deceased person whose grave is desecrated have a cause of action); Bennett v. 3 C Coal Co., 379 S.E.2d 388, 392 (W. Va. 1989) (same). Indeed, the heirs of a decedent evidently have the legal right to take action to prevent the desecration of their loved one's grave, including the right to disinter the grave and retake possession of buried valuables. On this point, see the remarkable case of *Ternant v. Boudreau*:

> [T]he jewels which were put in the tomb of the defendant's mother . . . . may have been placed there in compliance with the last wishes of the deceased, . . . but although concealed in the bottom of a grave, and perhaps protected only by the respect which the living are naturally disposed to bear to the ashes of the dead, it cannot be denied, that they were corporeal things within the domain of ownership, and therefore subject to be taken possession of by the rightful owner, (the heir of the deceased,) and to be by him sold or alienated. *If, however indecorous, and even infamous, the act might have been, the heir of the deceased had claimed those jewels, or taken them in possession, who could, under our laws, have disputed his right?* The right of ownership belonged to him, and no one could have prevented him from exercising it in its fullest extent.

6 Rob. at 492-93 (emphasis added) (citations omitted). In other words, jewels buried in a decedent's grave belong to the heirs and can be removed by the heirs at any time. English law seemingly is in accord regarding the ownership of such property. *See* DAVIES' LAW OF BURIAL, CREMATION AND EXHUMATION 65 (David A. Smale ed., 7th ed. 2002).

76. *See generally* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959-60 (1982) (noting that wedding rings are often "bound up" with their owners' personalities).

spouse, then, really is the highest-value user of a valuable wedding ring. Hence, a rule permitting such burials, rather than *Meksras*'s harsh antidestruction rule, follows the proper approach.

That said, there is a point at which the destruction may become excessive, and we ought to, in the absence of a bona fide religious custom, require the decedent to designate only the few objects that mean the most to her for burial. There is little plausible economic benefit associated with permitting extravagant burials, and they might prompt wasteful spending on graveyard security. Furthermore, it seems unlikely that the market for jewels and heirlooms would be adversely affected if people were barred from taking them to the grave.[77] Nor is it likely that a rule barring the interment of valuables will prompt people to destroy these jewels during their lifetimes. Given the low transaction costs of imposing antidestruction rules on the heavily regulated funeral home industry, capping the value of such buried goods seems appropriate.

In the real world, funeral homes appear to behave in precisely the manner I have just described. The harsh *Meksras* antidestruction rule is softened by a social norm that evidently permits the destruction of reasonable amounts of valuable jewelry and heirlooms.[78] It evidently is left to the discretion of next of kin and funeral directors to decide how much destruction crosses the line. In this instance, at least, what the law gets wrong, the applicable social norm gets right.

### B. *Contexts in Which We Tolerate Substantial Waste*

It turns out that burial practices are not the only context in which American traditions permit the destruction of valuable property. Indeed, there are contexts in which both the law and prevalent social norms encourage the destruction of especially valuable societal resources.

When a young man or woman is killed in an automobile accident, society suffers a terrible loss. Yet in most cases, an even more senseless loss transpires in the hours following death. That deceased young adult is likely to be able to contribute a "usable heart, pancreas, liver, two kidneys, two lungs and intestines, . . . enough to save a half-dozen or more lives in some cases."[79] But most transplantable organs in the United States are

77. The market for those types of property that all people expect to take with them to the grave would be adversely affected by restrictions on the right to destroy property. Coffins, which are created for the purpose of being destroyed, are the quintessential example. *See* Ware v. State, 121 S.E. 251, 251 (Ga. Ct. App. 1924) (affirming the larceny conviction of a man who dug up a grave, removed the coffin, and reinterred the cadaver, with the intent of reusing the coffin in a subsequent funeral).

78. *See supra* note 4.

79. Richard Pérez-Peña, *Downside to Fewer Violent Deaths: Transplant Organ Shortage Grows*, N.Y. TIMES, Aug. 19, 2003, at B1.

needlessly destroyed.[80] As a result, there are more than 82,000 Americans on organ transplant waiting lists,[81] and 6000 Americans die preventable deaths every year, waiting for organs that never arrive.[82] It is difficult to imagine a more perplexing waste of scarce societal resources.[83]

In the United States, the law by and large respects the wishes of those who want to have these valuable organs decompose along with their bodies.[84] Indeed, the government makes it rather difficult for someone to avoid organ destruction. An American wishing to donate his organs or those of a recently deceased relative generally must affirmatively opt in to organ donation,[85] and this opt-in requirement substantially lowers donation rates.[86]

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80. *See* Ellen Sheehy et al., *Estimating the Number of Potential Organ Donors in the United States*, 349 NEW ENG. J. MED. 667, 671 (2003) (finding that forty-two percent of potential organ donors donate); Randi Hutter Epstein, *How Diplomacy in Handling Death Can Save Lives*, N.Y. TIMES, Aug. 19, 2003, at F5 (discussing the Sheehy study).

81. Sheehy et al., *supra* note 80, at 668.

82. Pérez-Peña, *supra* note 79; *see also* Michele Goodwin, *Altruism's Limits: Law, Capacity, and Organ Commodification*, 56 RUTGERS L. REV. 305, 311 (2004) (noting that the 6000-deaths statistic "does not include those who were never placed on the waitlists, died while on dialysis, or had limited access to medical treatments").

83. The discussion that follows treats organs as a societal resource, just like other forms of property. Some readers may question whether organs are sensibly categorized as "property." I regard the issue of whether any particular resource is or is not "property" as a meaningless and indeterminate question. *See generally* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 93-94 (5th ed. 2002) (discussing this issue in the context of *Moore v. Regents of the University of California*, 793 P.2d 479 (Cal. 1990)). Organs are generally market-inalienable forms of property, but that does not stop them from being property. *Id.* at 93 & n.42. Nor does a resource's status as a market-inalienable good preclude the possibility of government condemnation. Through conscription, the government seizes rights over conscripts' bodies and labor that no employer could ever hope to obtain via contract. Indeed, Locke's opposition to slavery was predicated on the idea that humans *were* property, but that each individual necessarily owned his own body. LOCKE, *supra* note 24, at 305-06 ("[E]very Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his." (emphasis omitted)).

In any event, the law generally refers to quasi-property rights in bodies of decedents, because of discomfort with the notion of property in the human body. *See* Charles M. Jordan, Jr. & Casey J. Price, *First* Moore, *Then* Hecht*: Isn't It Time We Recognize a Property Interest in Tissues, Cells, and Gametes?*, 37 REAL PROP. PROB. & TR. J. 151, 172 (2002); Paul M. Quay, *Utilizing the Bodies of the Dead*, 28 ST. LOUIS U. L.J. 889, 914-15 (1984). Evidently, the linguistic difference between quasi-property and property does not dictate divergent legal treatment unless quasi-owners wish to use a body in a manner that runs counter to the social interest in avoiding the mistreatment of cadavers. For an illuminating discussion of the relationship between property and quasi-property in this context, see Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 382-87 (2000).

84. *See* UNIF. ANATOMICAL GIFT ACT § 2(e), (i) (1987); Fred H. Cate, *Human Organ Transplantation: The Role of Law*, 20 J. CORP. L. 69, 71-74 (1994). For an argument that the law provides too little protection for the testator who wishes to avoid having his organs used for transplant, see Quay, *supra* note 83, at 891-95.

85. *See* Cate, *supra* note 84, at 81-83.

86. *See* Adam J. Kolber, *A Matter of Priority: Transplanting Organs Preferentially to Registered Donors*, 55 RUTGERS L. REV. 671, 688-89 (2003); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1191-92 (2003). When the decedent has remained silent on his willingness (or lack thereof) to become an organ

Although the Uniform Anatomical Gift Act provides that the decedent's decision to donate his organs is decisive, hospitals typically will not harvest them unless his family also consents, even where the decedent has signed an organ donor card.[87] In many cases where a decedent has indicated a desire to donate his organs on his driver's license, family objections prevent the transplantation of organs.[88] Finally, in cases where a decedent has multiple next of kin (e.g., a parent survived by several children), the objections of any one relative can prevent a transplant as a practical matter.[89] In short, either a decedent or his heirs usually can block physicians from transplanting his organs. The impediments that American law and

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donor, the decedent's next of kin may elect to donate his organs. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 7151(a) (West Supp. 2004); UNIF. ANATOMICAL GIFT ACT § 3(a). But, again, if the next of kin are silent or cannot be located, donation typically will not occur. *See* Daniel G. Jardine, Comment, *Liability Issues Arising out of Hospitals' and Organ Procurement Organizations' Rejection of Valid Anatomical Gifts: The Truth and Consequences*, 1990 WIS. L. REV. 1655, 1658. Some states have embraced limited exceptions to this regime. *See, e.g.*, Maryellen Liddy, Note, *The "New Body Snatchers": Analyzing the Effect of Presumed Consent Organ Donation Laws on Privacy, Autonomy, and Liberty*, 28 FORDHAM URB. L.J. 815, 827-29 (2001).

87. *See* Leonard H. Bucklin, *Woe unto Those Who Request Consent: Ethical and Legal Considerations in Rejecting a Deceased's Anatomical Gift Because There Is No Consent by the Survivors*, 78 N.D. L. REV. 323, 327-34, 337-42 (2002); Anthony J. Langone & J. Harold Helderman, *Disparity Between Solid-Organ Supply and Demand*, 349 NEW ENG. J. MED. 704, 704 (2003); Donald D. Hensrud, *Brother, Can You Spare a . . .*, FORTUNE, May 26, 2003, at 176. This rule, assuming it is widely understood by members of the public, should create an ex ante effect, whereby those who wish to donate their organs take precautions to ensure that their relatives understand their wishes. Of course, many organ donors are killed unexpectedly and did not want to contemplate their own premature demise, so the topic of organ donation may never have come up in conversation.

88. *See* Bucklin, *supra* note 87, at 337, 340-42; Monique C. Gorsline & Rachelle L.K. Johnson, *The United States System of Organ Donation, the International Solution, and the Cadaveric Organ Donor Act: "And the Winner Is . . . ,"* 20 J. CORP. L. 5, 32 nn.284-85 (1994); Hensrud, *supra* note 87, at 176. The best data on this subject comes from a study by William DeJong and coauthors, who noted that 10% of nondonor families elected not to donate even though their dead relative had expressed a wish that his or her organs be used for transplantation. William DeJong et al., *Requesting Organ Donation: An Interview Study of Donor and Nondonor Families*, 7 AM. J. CRITICAL CARE 13, 17 tbl.3 (1998). Among nondonor families, 30% knew that the deceased did not wish to donate his or her organs, and 61% did not know the deceased's wishes. *Id.* By contrast, 32% of donor families knew the deceased wished to donate, only 1% of donor families knew that the deceased did not wish to donate, and 67% of donor families did not know the deceased's wishes. *Id.* In short, families were usually ignorant about whether the deceased wanted his or her organs to be transplanted, but in cases where they knew the deceased's wishes, families were noticeably more likely to override the deceased's preference for donation than the deceased's preference for nondonation. For a discussion of the DeJong findings, see E. Guadagnoli et al., *The Public's Willingness To Discuss Their Preference for Organ Donation with Family Members*, 13 CLINICAL TRANSPLANTATION 342, 342 (1999).

89. *See* DeJong et al., *supra* note 88, at 20. DeJong reports that there were disputes among next of kin in 22% of situations where more than one person was involved in the decision about whether to donate. *Id.*

custom place in the path of the socially responsible would-be donor are substantial.[90]

Maybe a moral society should implement a stringent antidestruction rule barring posthumous destruction to prevent this waste. The government might, for example, nationalize the cadavers of all those who perish in the United States and allow for burial or cremation only after any usable organs have been transplanted into those who need them most.[91] The United States instead embraces the owner's seemingly absolute right to destroy his own organs at death and gives heirs the right to destroy organs despite the decedent's contrary wishes, regardless of the consequences that will be suffered by innocent third parties. Is this deferential attitude toward destructive wishes justifiable?

Perhaps. Several sensible justifications for deferring to destructive wishes emerge. If many Americans view organ harvesting as an act of desecration, one that violates deeply held moral or religious convictions,[92] then a government that attempts to use force to prevent organ destruction will encounter substantial social and political resistance from relatives of the deceased.[93] Moreover, those who earnestly wish to keep their bodies intact may adopt deathbed strategies designed to thwart the government's initiative or may direct the removal of their bodies to friendlier

90. They also help contribute to a sense of regret among a sizeable minority of next of kin who elect not to donate a loved one's organs. Whereas 94% of donor respondents said, four to six months after their loved one's death, that they would make the same decision in hindsight, only 66% of nondonor respondents said the same. *Id.* at 14, 20.

91. *See* A.H. Barnett & David L. Kaserman, *The Shortage of Organs for Transplantation: Exploring the Alternatives*, 9 ISSUES L. & MED. 117, 123 (1993). Barnett and Kaserman sensibly note that kidney conscription "is likely to meet with overwhelming objections" from the public. *Id.* China and Serbia have instituted kidney-conscription regimes for executed prisoners. *See* Curtis E. Harris & Stephen P. Alcorn, *To Solve a Deadly Shortage: Economic Incentives for Human Organ Donation*, 16 ISSUES L. & MED. 213, 225 (2001).

92. Perhaps surprisingly, 73% of next of kin who do not consent to donate their loved one's organs do not believe that organ donation violates the tenets of their religions. DeJong et al., *supra* note 88, at 18 tbl.4. By contrast, the same percentage of people evidently agree with the statement that "[i]t is important for a person's body to have all of its parts when buried." *Id.* Families who elect not to donate a loved one's organs thus appear to be acting for moral or aesthetic reasons that operate independent of religious beliefs. For an analysis of the religious context in which some organ donation occurs, see Khalil Jaafar Khalil, Comment, *A Sight of Relief: Invalidating Cadaveric Corneal Donation Laws via the Free Exercise Clause*, 6 DEPAUL J. HEALTH CARE L. 159, 160-64 (2002).

93. *See* James F. Childress, *Ethical Criteria for Procuring and Distributing Organs for Transplantation*, *in* ORGAN TRANSPLANTATION POLICY: ISSUES AND PROSPECTS 87, 98-99 (James F. Blumstein & Frank A. Sloan eds., 1989) (discussing public opposition to nonconsensual organ harvesting). Even voluntary transactions with relatives might encounter substantial moral and practical difficulties. *See* Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, *in* ORGAN TRANSPLANTATION POLICY, *supra*, at 57, 70 (noting the ethical dilemmas associated with asking grieving relatives to donate their loved ones' organs). *But see* Richard A. Epstein, *Are Values Incommensurable, or Is Utility the Ruler of the World?*, 1995 UTAH L. REV. 683, 712-14 (advocating a market approach for the allocation of organs).

jurisdictions.[94] Finally, government exercises of the condemnation authority with respect to human body parts will strike many as inherently unacceptable. So while respecting an individual's right to destroy his kidney seems highly questionable on welfarist grounds, a reasonable person might remain sympathetic to exercises of the right in light of the existence of a well-developed prodestruction norm.

### C. *Houses Versus Organs: An Exploration*

It appears from the previous discussion that the law defers to destructive impulses that are widely shared and typically ignores more idiosyncratic destructive requests. Hence, someone's expressed wish to allow his organs to decay after his demise will be respected in every jurisdiction, but his expressed wish to have his house destroyed upon his death will be thwarted by most courts. To the extent we can read these policies as efforts to maximize welfare, the law appears to be conflating widespread practices with morally correct and socially beneficial practices. As a proxy for social welfare, the law appears to have looked primarily to the presumed motives of the destroyer—when judges believe that the destroyer is acting because of antisocial motivations, they prohibit destruction, and when they believe that the destroyer is acting out of prosocial motivations, they permit it. But what could be more antisocial than allowing one's kidney to rot in one's grave instead of using it to save the life of a fellow human being? The act/omission distinction cannot justify the law's divergent treatment of houses and organs: If someone ordered his executors to leave his cat in his empty house for sixty days, without food or water, surely that omission would be invalidated by the court, because it would result in the cat's death.[95]

Two factors seem to explain the divergent treatment of organs and houses. The first is society's uneasiness with certain kinds of expressive acts, and the second is divergent social norms. Part III explores the expressive point in detail, but it is worth addressing the norms point here. It is common for people to destroy their own organs upon death but uncommon for people to destroy their own homes upon death. One supposes that if the norms were reversed, such that posthumous home destruction was common and posthumous organ destruction was rare, the

94. *Cf.* Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 11 (1992) ("Were lawmakers to rescind the power of the will, testators would find other, less efficient ways to direct the distribution of their wealth.").

95. *See* Capers Estate, 34 Pa. D. & C.2d 121, 133 (C.P. Allegheny County 1964); *see also id.* at 134 (referring to an unpublished Florida case that invalidated a will provision directing the destruction of the decedent's pet dog); Sykas, *supra* note 33, at 930-34 (discussing unreported pet destruction cases from several states).

law's relative tolerance for these two kinds of destruction would flip as well.

There is some appeal to an approach that defers to existing norms, no matter how inefficient those norms may become.[96] After all, laws that comport with dominant social norms can be enforced more efficiently than those that do not.[97] But the law also plays an important and necessary role in shaping social norms,[98] and it seems likely that the law is partially responsible for the unconscionable waste of transplantable organs that kills thousands of Americans every year. There is no justification for a legal presumption that usable organs should be destroyed where relatives fail to object to their removal. In sixteen percent of all cases involving transplantable organs, families *are never even asked* whether they are willing to donate the organs.[99] Here the law and prevailing practices are perplexing. A decedent's unambiguous instructions to destroy a home are disregarded, but parents often are presumed to believe that their children's valuable organs should be destroyed.[100] A better rule would permit organ destruction only in those cases where the decedent or a majority of his heirs have requested such action unambiguously. The government's aim ought to be the inculcation of an anti-organ-destruction norm among American citizens.

### D. *Justifying Destruction: When Destruction Is Creation*

So far, this Article has focused on ex post analysis to evaluate the law regarding destruction. On occasion, however, it has pointed to the relevance of ex ante considerations.[101] This Section gives that line of argument more sustained attention and shows how an ex ante perspective can be determinative when society must decide whether to permit or prohibit the destruction of certain kinds of property.

The destruction of valuable property rarely fares well when viewed from an ex post perspective. The Johnstons have built a house, and it is a perfectly habitable house; destroying it would be a terrible waste of scarce societal resources. Indeed, the *Eyerman* court seemed particularly resistant to allowing Johnston to destroy her home in light of the reduction in

96. For a discussion of inefficient norms and possible governmental responses, see Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697 (1996).

97. *See* Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607-09 (2000); Saul Levmore, *Norms as Supplements*, 86 VA. L. REV. 1989, 1998-99, 2006-08 (2000).

98. Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 910 (1996).

99. Sheehy et al., *supra* note 80, at 671.

100. This destructive presumption is particularly maddening in light of the statistics showing that when families *are* asked to donate their loved ones' organs, fifty-four percent agree to do so. *See id.*

101. *See supra* text accompanying notes 74, 77, 94.

housing stock that St. Louis had experienced during the 1960s.[102] What sense does it make for society to allow someone to remove a valuable, durable asset from the marketplace? And yet for nearly one hundred years, American patent law has recognized the patentee's right to do just that.

1. *Patent Suppression*

In a fascinating 1908 opinion called *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, the Supreme Court held that Eastern Paper Bag Company, the patentee of William Liddell's improved technology for manufacturing paper bags, was entitled to suppress the Liddell patent during the full life of the patent term.[103] Eastern neither developed the patented invention nor licensed it to competitors who wished to bring it to market.[104] Instead, Eastern continued selling its inferior (previously patented) paper bag machines, which the company believed would be more profitable than the improved machines.[105]

Continental Paper Bag Company sought to bring the Liddell invention to market and, in light of Eastern's refusal to license the patent, did so. Predictably, Eastern sued for infringement and sought injunctive relief. Continental argued that while damages would be appropriate, no court of equity should issue an injunction to protect a patentee who intended to suppress an invention for the full patent term.[106] Surely, Continental argued,

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102. Eyerman v. Mercantile Trust Co., 524 S.W.2d 210, 214 (Mo. Ct. App. 1975) ("We are constrained to take judicial notice of the pressing need of the community for dwelling units as demonstrated by recent U.S. Census Bureau figures showing a decrease of more than 14% in St. Louis City housing units during the decade of the 60's. This decrease occurs in the face of housing growth in the remainder of the metropolitan area." (footnote omitted)).

103. 210 U.S. 405, 429 (1908). The connection between the right to destroy real property and the right to retain patent rights without exploiting the invention was noted briefly in Valerian E. Greaves, *The Social-Economic Purpose of Private Rights: Section 1 of the Soviet Civil Code: A Comparative Study of Soviet and Non-Communist Law* (pt. 2), 12 N.Y.U. L.Q. REV. 439, 462 (1935).

104. *Cont'l Paper Bag*, 210 U.S. at 427-28 ("The record also shows that the complainant, so to speak, locked up its patent. It has never attempted to make any practical use of it, either itself or through licenses, and, apparently, its proposed policy has been to avoid this. . . . We have no doubt that the complainant stands in the common class of manufacturers who accumulate patents merely for the purpose of protecting their general industries and shutting out competitors." (internal quotation marks omitted)).

105. *Id.* at 428-29 ("It was the purpose to make more money with the existing old reciprocating Lorenz & Honiss machines and the existing old complicated Stilwell machines than could be made with new Liddell machines, when the cost of building the latter was taken into account. And this purpose was effective to cause the long and invariable non-use of the Liddell invention, notwithstanding that new Liddell machines might have produced better paper bags than the old Lorenz & Honiss machines or the old Stilwell machines were producing." (internal quotation omitted)). Eastern's behavior only could have been profit maximizing if its earlier machines were patented.

106. *Id.* at 423.

it violated equitable principles to protect a monopolist's profits at the cost of withholding from the public a valuable technological innovation.

Eight Justices sided with Eastern. The Court used Blackstonian, formalist rhetoric, noting that an "'inventor is one who has discovered something of value. It is his absolute property. He may withhold [the] knowledge of it from the public, and he may insist upon all the advantages and benefits which the statute promises to him who discloses to the public his invention.'"[107] Because property rights were absolute, the Court reasoned, a patentee had an absolute right to exclude anyone who wanted to develop the invention: "[S]uch exclusion may be said to have been of the very essence of the right conferred by the patent, as it is the privilege of any owner of property to use or not use it, without question of motive."[108]

Although the majority invoked the notion of an absolute right to exclude in affirming the lower court's injunction against Continental, the case as the Court understood it seems to implicate the right to destroy. At least on the facts presented to the Court, Eastern intended neither to bring the invention to market nor to allow anyone else to do so for the full term of the patent.[109] On this account, the seventeen-year monopoly is granted and then essentially destroyed in its entirety. Consumers plainly are left holding the bag, as it were, having to make do with inferior products while the possibility of a superior product is cruelly dangled in front of them on the patent registry. Revealingly, Justice Harlan's brief dissent suggests he saw this turn of events in the same way the *Eyerman* court would see Johnston's will decades later.[110] The suppression of a useful invention is a waste of a valuable economic resource that the public cannot tolerate.[111] Ultimately,

107. *Id.* at 424 (quoting United States v. Am. Bell Tel. Co., 167 U.S. 224, [250] (1897)).

108. *Id.* at 429.

109. There is some reason to be skeptical of this claim. Surely there was some amount of money that Continental or another competitor could have paid Eastern to license the Liddell patent, but such a sum exceeded the anticipated profits that the competitor could have earned from sales of the improved machine. One further expects that, toward the end of the term for its previous patents, Eastern would have brought the improved Liddell machines to market as a way of maintaining its dominant market share. It is not clear from the record how long the lapse was between the expiration dates of the earlier patents held by Eastern and the expiration date of the Liddell patent. For a helpful discussion of the economics of patent suppression, see ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 290 (3d ed. 2003).

110. Justice Harlan's two-sentence opinion noted that "the facts are such that the court should have declined, upon grounds of public policy, to give any relief to the plaintiff by injunction." *Cont'l Paper Bag*, 210 U.S. at 430 (Harlan, J., dissenting).

111. Nearly four decades later, in *Special Equipment Co. v. Coe*, 324 U.S. 370 (1945), the Court reaffirmed its holding in *Continental Paper Bag*. This time, the vote was five to four, the majority's opinion was less self-assured, and the dissent more vigorous. *See, e.g.*, *id.* at 383 (Douglas, J., dissenting) ("It is difficult to see how [the suppression] of patents can be reconciled with the purpose of the Constitution 'to promote the progress of science and the useful arts.' Can the suppression of patents which arrests the progress of technology be said to promote that progress? . . . Take the case of an invention or discovery which unlocks the doors of science and reveals the secrets of a dread disease. Is it possible that a patentee could be permitted to suppress that invention for seventeen years . . . and withhold from humanity the benefits of the cure?").

the majority's view carried the day, as Congress codified part of the holding in *Continental Paper Bag*, so that a patentee's failure to use or license an invention does not excuse third parties' infringement.[112]

Viewing the patent process ex post, the holding of *Continental Paper Bag* appears nonsensical. There is no good reason to grant someone a monopoly right to a valuable invention if he intends to use that right to suppress the invention. Conditioning the continuation of patent rights on the patentee's reasonable use or licensing of the invention seems like a no-brainer.[113] As Justice Harlan's dissent indicated, a court should, on public policy grounds, refuse to enjoin a third party's infringement of a suppressed patent. This hostility to patent suppression sounds in Lockean themes: If someone removes an idea from the public domain, he cannot waste it by prohibiting society from using it altogether.

Viewed ex ante, however, a plausible justification for the result in *Continental Paper Bag* emerges. It might be the case that were companies like Eastern not permitted to obtain blocking patents to protect their previous patents, they would not make the necessary investment of resources into inventing either the previous inventions or the blocking improvements. In other words, the availability of blocking patents may be a necessary part of the incentives that the patent system uses to encourage innovation in particular industries.[114] When faced with the choice between (a) a decent paper bag machine and a blocking patent on an improved, but suppressed, machine and (b) a substantial probability that neither machine will be invented, choice (a) seems acceptable.

There is, of course, a real chance that this defense of *Continental Paper Bag*'s holding amounts to a just-so story more often than not, and there is a

112. 35 U.S.C. § 271(d)(4) (2000) (providing that the refusal to "license or use any rights to the patent" does not amount to patent misuse).

113. Or perhaps not. In some instances, we might imagine a civic-minded organization purchasing patent rights in order to suppress an invention that, while demanded by some consumers, would generate substantial perceived negative externalities. Imagine the Sierra Club's purchase of a patent on an automobile engine that would generate enormous horsepower and substantial pollution. More provocatively, reasonable people might disagree about what the courts should do if a group wanted to acquire the patent to a morning-after pill such as RU-486 for the purpose of suppressing the drug.

The suppression of a patented invention may be less troublesome than the destruction of a durable economic resource like a house or a piece of jewelry. After all, a patent is necessarily time limited, and upon the expiration of the patent term, the invention will be resurrected, available to all as part of the public domain. That said, Eastern's suppression of the Liddell invention seems much more troublesome than Johnston's destruction of a solitary house. Patent suppression can prevent anyone from using not only the invention itself, but also all reasonable functional equivalents. Whereas Johnston's home could be rebuilt following its destruction, albeit at a substantial cost, there is no corollary right to replace or substitute an invention that has been removed from the stream of commerce during the patent term.

114. *See generally* Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1013 (1997) (discussing the role that blocking patents might play in promoting the invention of improvements upon existing patented products).

lot of empirical uncertainty here that should not be ignored. Perhaps the possibility of licensing the earlier invention without the opportunity to suppress the second invention would have given Eastern enough incentive to invent the first. And perhaps other companies would have developed both the first and second inventions within a few months or years had Eastern never done so. In such cases, permitting Eastern to suppress the second invention for the full patent term seems a high price to pay for speedier introduction of the first invention. All we can say with certainty is that there will be some instances where permitting the destruction of intellectual property helps establish the right incentives for the creation of valuable intellectual property, and we never will know whether *Continental Paper Bag* was such a case. This raises the question of whether the right to destroy other kinds of property can be understood in a more favorable light if viewed ex ante.[115]

### 2. *Presidential Papers*

The destruction of diaries and other papers is commonplace, even when those written works have enormous economic value. As *Nixon v. United States* makes clear, American presidents repeatedly have destroyed diaries, correspondence, and other personal effects, either during their lifetimes or via will.[116] Throughout the nation's history, a powerful custom existed giving the President ownership of his presidential papers.[117] Private ownership of these papers evidently entailed a right to destroy them. According to the D.C. Circuit's opinion in *Nixon*, there are "numerous examples of Presidents willfully and intentionally destroying their presidential papers."[118] They include Van Buren, Garfield, Arthur, Grant, Pierce, and Coolidge.[119] The heirs of Presidents Harding and Fillmore also destroyed large numbers of presidential papers following the deaths of those Presidents.[120] Some of Abraham Lincoln's papers were destroyed by

115. *Cf.* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 68 (2004) (suggesting that constraints on the testamentary disposition of property can diminish incentives to create such property in the first place); Hirsch & Wang, *supra* note 94, at 8-11 (discussing and critiquing the connection between deference to the wishes of testators and incentives for testators to create and accumulate wealth).

116. 978 F.2d 1269, 1279-80 (D.C. Cir. 1992). Years after the D.C. Circuit's remand, I worked on this case for the Nixon estate, researching issues relating to just compensation for Nixon's presidential papers.

117. *Id.* at 1282-84.

118. *Id.* at 1279.

119. *Id.* at 1279-80.

120. President Fillmore willed his presidential papers to his son, and the son's will directed that all the papers be destroyed. *Id.* at 1291. President Harding's widow destroyed many of his papers following Harding's death. *Id.* at 1294.

his heirs as well.[121] The destruction of these papers occurred even though the Library of Congress repeatedly approached presidents and their heirs, offering "fancy sums" to purchase collections of presidential papers.[122] Presidents and presidential descendants well understood the economic and historical value of their official papers and nevertheless set them ablaze. Numerous Supreme Court Justices behaved likewise.[123] These presidents and other public officials were not behaving irrationally. Rather, they were destroying the papers to protect their privacy and the privacy of their associates.[124]

The case of President Garfield is particularly striking. Garfield was shot by an assassin on July 2, 1881 and was ailing until his death on September 19, 1881.[125] During these last months of his life, he destroyed large portions of his personal and political files.[126] After Garfield's death, his children donated the remaining papers to the Library of Congress.[127]

Largely in response to the fallout from Watergate and the Nixon papers dispute, Congress enacted the Presidential Records Act of 1978,[128] prospectively abolishing private ownership of presidential papers.[129] The Act makes it difficult for the President to destroy any of the presidential papers that are produced during his tenure. The President may not dispose of any records that have "administrative, historical, informational, or evidentiary value,"[130] a category that presumably includes virtually all presidential records.[131] If the President wishes to destroy presidential records that lack administrative, historical, informational, and evidentiary

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121. Jonathan Turley, *Presidential Papers and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Ownership and Control of Presidential Records*, 88 CORNELL L. REV. 651, 660 (2003).

122. *Nixon*, 978 F.2d at 1282, 1282-83 (internal quotation marks omitted).

123. SAX, *supra* note 9, at 94-95.

124. Turley, *supra* note 121, at 731 ("Still others view the value of ownership as the right to destroy the papers to preserve a legacy."). According to Turley,

> Presidents and their heirs could clearly have sold these documents for some profit, rather than destroy them. No rational actor would destroy an item of value that could be sold at a profit, except if the presence of "tastes" or soft variables supplied a different type of benefit in destruction. These tastes are often highly personal and directly at odds with the public value of the documents. For Nixon, the destruction of incriminating material was of tremendous personal value. In fact, the personal value in the destruction of the records to Nixon was directly proportional to the public's value in preservation, due to a shared view of the importance of the records in evaluating his presidency.

*Id.* at 718 (footnote omitted).

125. *Nixon*, 978 F.2d at 1292.

126. *Id.* at 1279.

127. *Id.* at 1292.

128. 44 U.S.C. §§ 2201-2207 (2000).

129. *Id.* § 2202.

130. *Id.* § 2203(c).

131. "Personal records," which are documents that do not concern the President's official duties, are excluded from the Act and can be destroyed by the President. *Id.* § 2201(2)(B)(ii), (3); *see also* Turley, *supra* note 121, at 667 & n.89.

value, he may petition the Archivist of the United States for permission to do so. If the Archivist concludes that said records are of no "special interest to the Congress" and that "consultation with the Congress regarding the disposal of these particular records" is not "in the public interest," then he may provide the President with written authorization to destroy the records in question.[132] Only upon receiving the Archivist's written authorization may the President destroy a particular record.[133]

One strongly suspects that given the hassle associated with destroying even the most insignificant scrap of presidential parchment, a rational president whose rights are restricted by the Presidential Records Act of 1978 will create a less interesting paper trail than his relatively unconstrained predecessors. When in doubt, the President simply will neglect to memorialize an important idea or communication.[134] Indeed, in discussing the right to destroy presidential papers, President Taft noted that the historically interesting documents are the ones least likely to be preserved by their creators:

> It has long been the custom for the important Ambassadors of Great Britain to carry on a personal correspondence with the Secretary of State for Foreign Affairs, which is not put upon the files of the department, but which gives a much more accurate and detailed account of the diplomatic relations of Great Britain than the official files. The only way in which historians can get at this, is through the good offices of the families of the deceased Ambassadors and Foreign Secretaries in whose private files they may be preserved.[135]

If a president anticipates that at a later date he will be able to decide whether to destroy an embarrassing, revealing, or controversial document, he will be more likely to create and save it in the first place.[136] Historians

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132. 44 U.S.C. § 2203(c), (e).

133. *Id.* § 2203(c). As Turley points out, Executive Order 13,233, 66 Fed. Reg. 56,025 (Nov. 1, 2002), issued by President George W. Bush, strengthens the hand of the President vis-à-vis the Archivist if the President wishes to restrict access to certain papers. Turley, *supra* note 121, at 671-76. Notably, the Executive Order does not restore the President's traditional power to destroy presidential papers. *Id.* at 687.

134. The Act does provide that "the President shall take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of his constitutional, statutory, or other official or ceremonial duties are adequately documented." 44 U.S.C. § 2203(a). It is difficult to imagine a less enforceable provision in the United States Code.

135. Nixon v. United States, 978 F.2d 1269, 1280 (D.C. Cir. 1992) (quoting W[ILLIAM] H[OWARD] TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 34 (1916)) (internal quotation marks omitted).

136. Joseph Sax recognizes this point, and then dismisses its importance:

> Undoubtedly the prospect of public access discourages putting very candid, politically sensitive material down on paper, though the exigencies of the job impose limits on the ability of officials to refrain from making a paper or electronic record. According to Stephen Hess, a White House staff member for both President Eisenhower and President Nixon, most presidential advisers do not have unlimited access to the

writing in the future hopefully will be able to evaluate whether the 1978 Act's antidestruction rule caused post-Carter presidents to leave behind less revealing paper collections than previous executives did.[137]

While perhaps best illustrated in the context of the right to destroy personal papers, the ex ante perspective illuminates a number of other areas in which incentives for the creation of valuable property might depend on the presence of a robust right to destroy. E-mail use is another example. Because investigators and litigants have become capable of reconstructing e-mails that the senders and recipients believed were erased,[138] many people have become much more reluctant to discuss controversial or sensitive matters in e-mails, and some valuable communication has been deterred altogether.[139]

### 3. *Historic Preservation*

Historic preservation of buildings presents an interesting illustration of this ex ante perspective in the real property context. Historic preservation statutes typically limit the rights of landowners to demolish buildings that

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> President and so must commit their views and advice to writing to get it before him. In addition advisers write memoranda to protect themselves by assuring that their positions are accurately memorialized. Former presidential advisers as well as former cabinet officials who testified before a National Study Commission set up to examine the status of presidential papers agreed that so long as confidentiality could be protected for a reasonable time, disincentives to creation of written records would be effectively eliminated.

SAX, *supra* note 9, at 86. This analysis, of course, does not apply to presidential papers created by the President himself. A president's concern about the judgment of historians, combined with the certainty of historians' scrutiny, may well prevent him from memorializing revealing notes about his thoughts and motivations.

With respect to lower-level executive branch officials, one imagines that those who hope for plum postings in the future will disagree with Hess's take, particularly if they have written about matters on which popular opinion has shifted in the intervening years. Analogously, the White House and the Justice Department categorically refused to turn over to the Senate Judiciary Committee memoranda that Miguel Estrada had written while working for the Solicitor General's Office between 1992 and 1997. Helen Dewar, *Deadlock over Estrada Deepens; White House Rejects Democrats' Requests for Nominee's Memos*, WASH. POST, Feb. 13, 2003, at A4; Charles Lane, *Lawmakers Press Nominee; Democrats Seek Memos, Challenge Estrada's Credibility*, WASH. POST, Sept. 27, 2002, at A5. The failure to turn over the memoranda left Democratic senators suspicious about Estrada's views and ultimately resulted in a filibuster and Estrada's failure to gain confirmation for a seat on the D.C. Circuit. Jan Crawford Greenburg, *Embattled Judicial Nominee Withdraws*, CHI. TRIB., Sept. 5, 2003, § 1, at 1.

137. The Act has applied to all presidents since Ronald Reagan. *Nixon*, 978 F.2d at 1296-97.

138. *See* JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA 7, 55 (2000); Orna Rabinovich-Einy, *Going Public: Diminishing Privacy in Dispute Resolution in the Internet Age*, 7 VA. J.L. & TECH. 4, ¶ 129 (2002), http://www.vjolt.net/vol7/issue2/v7i2_a04-Rabinovitch-Einy.pdf.

139. *See generally* K. Robert Bertram, *Avoiding Pitfalls in Effective Use of Electronic Mail*, 69 PA. B. ASS'N Q. 11, 13 (1998) (urging limitations on the inclusion of sensitive information in company e-mails).

have been designated as landmarks.[140] When someone tries to destroy his own property, and courts have a chance to prevent the destruction, there is a danger that loss aversion will steer judges in the wrong direction.[141] This is particularly true in cases involving homes and other buildings. Judges may grow fond of vintage buildings or defer to people who love buildings that have long been part of a neighborhood landscape. Judges, legislators, and ordinary citizens have a much more difficult time imagining the structures that will replace these venerable buildings, even though virtually every landmark building in a major city stands on a site that was previously occupied by some other structure.[142]

For much of the nation's history, the judiciary's Blackstonian, absolutist notions of ownership trumped these tendencies to preserve the old regardless of the cost to the new. So when it considered *People ex rel.*

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140. *See, e.g.*, Kalorama Heights Ltd. P'ship v. D.C. Dep't of Consumer & Regulatory Affairs, 655 A.2d 865, 869 (D.C. 1995); *see also* Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 954 (1985) (noting that the New York City landmarks law "only rarely allows demolition" of historic buildings); David F. Tipson, *Putting the History Back in Historic Preservation*, 36 URB. LAW. 289, 306 (2004) ("Most ordinances require a permit for demolition within the historic district, but many allow demolition after a certain period of time if the landowner has made a good-faith effort to sell the property. Savannah, Charleston, and Alexandria take this approach. Some ordinances do contain an absolute prohibition on demolition without a permit from the review board." (footnote omitted)).

141. *See* Georgette C. Poindexter, *Light, Air, or Manhattanization?: Communal Aesthetics in Zoning Central City Real Estate Development*, 78 B.U. L. REV. 445, 500 (1998) ("The endowment effect suggests that an existing building is more valuable than one not yet built."). For a brief synopsis of the loss aversion phenomenon, see REID HASTIE & ROBYN M. DAWES, RATIONAL CHOICE IN AN UNCERTAIN WORLD: THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 308-10 (2001).

142. Perhaps no city illustrates the creative possibilities of destruction better than Rotterdam. In 1940, the German Luftwaffe leveled the entire city center. H.W. Koch, *The Strategic Air Offensive Against Germany: The Early Phase, May-September 1940*, 34 HIST. J. 117, 129 (1991). Following the war, city planners saw the destruction of the historic center as an opportunity to build a new kind of ultramodern European city. They succeeded. *See, e.g.*, Rodney Bolt, *The City Doesn't Give a Damn*, SUNDAY TELEGRAPH (London), Apr. 1, 2001, Travel, at 3; Joan Ockman, *Urban Rebirth: Cities Coping with Disaster Offer Lessons for Rebuilding New York's World Trade Center Site*, ARCHITECTURE, Sept. 2002, at 41, 42-43. The enormous scale of the destruction provided an opportunity to rethink, and improve upon, the urban environment. Of course, other cities facing similar circumstances have done less with the opportunity than Rotterdam. *See* Ockman, *supra*, at 43 (discussing the botched postwar reconstruction of Plymouth, England).

No reasonable person would deny the harm that is done when buildings with great historic or architectural value are demolished or destroyed, *see generally* CARLA LIND, LOST WRIGHT: FRANK LLOYD WRIGHT'S VANISHED MASTERPIECES 10 (1996) (noting that 118 of the approximately 500 buildings designed by Frank Lloyd Wright no longer exist). One claim of this Article, however, is that overprotection of existing buildings will result in some future buildings never getting built. As society becomes increasingly hostile to the right to destroy, there is a strong possibility that the pendulum will swing too far toward overprotection of extant structures. Indeed, the British architect George Ferguson has begun advocating government subsidies to tear down ugly high-rises that blight urban landscapes and have not endeared themselves to neighbors in the decades since their construction. *See* Alan Riding, *A Building Is an Eyesore and Must Go? Grade It X*, N.Y. TIMES, Aug. 30, 2004, at E1.

*Marbro Corp. v. Ramsey* in 1960, an Illinois appellate court found it quite natural to hold that a building owner was entitled to a demolition permit where the costs of repairing and maintaining a historically significant building were high and where the owner would still lose money operating the building if it were fully renovated at the public's expense.[143] Implicit in this holding is the sensible view that destroying a building in order to maximize the value of the land on which it sits is not property destruction at all—rather, it is an improvement to the parcel as a whole.[144]

Three decades later, the Blackstonian notion of absolute ownership had receded to the point where courts ratified ill-considered policies that forced landowners to expend large sums maintaining teetering buildings. In one such case, *J.C. & Associates v. District of Columbia Board of Appeals & Review*, the District of Columbia Court of Appeals denied a property owner's request to destroy a fire-damaged building that, in the opinion of several experts and a city building inspector, was on the brink of collapse.[145] The building had been designated a historic landmark before the fire, but the fire had rendered it an eyesore and the costs of rehabilitating it appeared prohibitive to several experts who testified or filed reports.[146]

Some commentators have argued that the possibility of future landmark designation and the associated limitations on future uses will discourage property owners from commissioning great buildings.[147] I agree with

143. 171 N.E.2d 246, 247-48 (Ill. App. Ct. 1960). This rule in some ways anticipates the Supreme Court's ruling in *Lucas v. South Carolina Coastal Council*, which held that a per se taking occurred where a government regulation deprived a landowner of the entire value of his property. 505 U.S. 1003, 1027 (1992). The landowner in *Marbro* argued that if he was forced to maintain the current structure on his property, he could not make any money off it—meaning that the preservation regulation essentially reduced the land's value to zero. *Marbro*, 171 N.E.2d at 247-48.

144. Somewhat similar issues can arise in the context of chattel property. Fans of Babe Ruth and Elvis Presley recently watched in horror as entrepreneurs announced plans to cut up a game-worn jersey and an intact master tape associated with these respective dead celebrities. *See* Ross Forman, *In 2004, Part of Bambino's Legacy Will Go to Pieces*, USA TODAY, June 26, 2003, at 3C; Robin Pogrebin, *All Shook Up over Cutting and Selling of Elvis Tape*, N.Y. TIMES, Jan. 28, 2004, at E1. Rules that barred the disaggregation of these pieces of memorabilia might prevent their highest-value use, although such regulation probably would not engender takings liability. Unlike a building owner who is forced to maintain a building that is draining his wealth, an owner of a unique Babe Ruth jersey or Elvis tape retains a valuable asset even if the state forces her to keep it intact. *Cf.* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (setting forth a balancing test used to evaluate most regulatory takings claims, which includes the extent of the diminution in the property's value as part of the takings calculus).

145. 778 A.2d 296, 298-300 (D.C. 2001). The District presented evidence to suggest that the building was salvageable. *Id.* at 300.

146. *Id.* at 299-300.

147. *See, e.g.*, Mendes Hershman, *Critical Legal Issues in Historic Preservation*, 12 URB. LAW. 19, 28 (1980) ("One untoward and unfortunate consequence of the *Penn Central* decision may be the discouragement of distinguished architecture, of design which represents an outstanding illustration of a certain architectural style or period because of the developer's fear of thereby freezing the building against future demolition, alteration, or redevelopment.").

William Fischel that this precise possibility is a "bit far-fetched."[148] Under existing laws, the time lag between a building's groundbreaking and its designation as a historic landmark is usually long enough that any concerns about future landmarking will be discounted by most developers.[149] That said, there will be instances in which the decisions a building owner makes *after* the completion of construction affect the building's chances of being designated a historic landmark. For example, the owner of a building that has some historic or architectural merit—but that will not become eligible for landmark designation for ten more years—might maintain the exterior of the building poorly or remove the most architecturally interesting ornamentation in the years preceding landmark eligibility.[150] These acts or omissions might substantially reduce the likelihood of costly government regulation in the not-too-distant future.

Those who wish to limit the right to destroy further, however, propose to eliminate the time lag that currently causes developers to discount the possibility of future landmark designation when designing a new building. Joseph Sax argues that "[w]e already have well-established systems for classifying and protecting historic structures, and it would be a rather *small step* to create a new category that designates distinguished, newer architectural masterworks, and offers them some protection."[151] Sax then suggests that governments could adopt a range of regulatory options to protect new architectural triumphs.[152]

Sax's proposal is no "small step." Restricting the alteration or destruction of new buildings could have enormously deleterious

148. William A. Fischel, *Lead Us Not into Penn Station: Takings, Historic Preservation, and Rent Control*, 6 FORDHAM ENVTL. L.J. 749, 754 (1995) ("There is one other thing that might discipline landmarks preservation laws in the long run. It is the possibility that because sometime in the future a building might be designated a landmark or otherwise subjected to uncompensated regulation, landlords will begin hiring mediocre architects or asking good architects to design mediocre buildings that will not be landmarked. Now, this idea struck me as a little bit far-fetched.").

149. *See* Gregory A. Ashe, *Reflecting the Best of Our Aspirations: Protecting Modern and Post-Modern Architecture*, 15 CARDOZO ARTS & ENT. L.J. 69, 71 (1997) (discussing the thirty-year time lag required under New York City's historic preservation law); Angela C. Carmella, *Landmark Preservation of Church Property*, 34 CATH. LAW. 41, 43 (1991) (noting that the minimum age required for a building to be landmarked can range from twenty-five to seventy-five years).

150. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 67 (5th ed. 1998). Dean Lueck and Jeffrey Michael support a similar claim with respect to endangered species habitats. Their study of forest land in North Carolina revealed that landowners harvest timber prematurely if their land is proximate to red-cockaded woodpecker habitat as a means of preventing the woodpeckers from establishing habitats on their land. Dean Lueck & Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 J.L. & ECON. 27 (2003). On their account, the Endangered Species Act's substantial restrictions on landowners' use of land containing the habitat of endangered species encourage landowners to destroy habitat that might be suitable for endangered species but is not yet populated by them.

151. SAX, *supra* note 9, at 199 (emphasis added).

152. *Id.*

consequences with respect to developers' incentives to commission great architectural works. Such a developer would be locking in a particular parcel to its current use perpetually, without regard to changes in market conditions or social tastes. The developer also would need to invest substantial resources in ensuring that the architect selected the appropriate designs and building materials because the local government could deter or even preclude functional or aesthetic changes at a later date.[153] Contemporaneous limitations on the destruction or modification of buildings would also deny landmark commissions the hindsight and perspective that can be so useful in evaluating a building's merits. Simply put, the destruction or modification of a new building is usually supported by compelling circumstances. The prospect of immediate limitations on the right to destroy almost certainly would do more harm than good and would substantially dampen builders' incentives to commission great works.[154]

Whatever the economic consequences of immediate landmarking, Sax sees a moral basis for imposing such requirements on the owners of new buildings:

> [W]hile the patrons (or owners) of an important work of architecture were not obliged to engage with a masterwork, having done so they have by their own voluntary act potentially made the community *worse* off than it would have been if they had never acted. It is insufficient to say that the work would not have existed without their patronage. For they have diverted the time and effort of an artist from other work he might have done, and that—in other hands—might have been better protected . . . .[155]

According to Sax, the patron who decides to destroy a great building has wasted the architect's time and prevented him from working on other masterpieces that would have been preserved for generations.

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153. During the 1980s, several new skyscrapers clad in Carrara marble had to be resurfaced because the marble unexpectedly failed in cold-weather conditions and had the potential to fall off the buildings. Michael Arndt, *Amoco Tower's Fate May Be Carved in Stone*, CHI. TRIB., May 22, 1988, § 7, at 4. Most famously, Chicago's 1136-foot Amoco Building (now Aon Center) had its marble replaced with granite seventeen years after its construction, at a cost of sixty to eighty million dollars. Lindsey Tanner, *Amoco Caught Between Rock, Hard Place*, WASH. POST, Mar. 31, 1990, at E16.

154. There is a way in which Sax's proposal might be improved. The law could permit a developer to opt out of subsequent landmark designation by paying a fee to the city government during the construction process. By paying such a fee, the developer would obtain a long-term, or even perpetual, transferable right to modify or demolish her structure. A carefully calibrated fee structure could diminish the incentive to avoid building grand structures by giving developers on the margins a more palatable alternative option. Such a regime would be similar in many ways to the Visual Artists Rights Act's waiver provision, whereby artists who do not particularly care whether their works are destroyed can reap higher payments from patrons in exchange for waiving their rights to prevent destruction. *See infra* text accompanying notes 187-190.

155. SAX, *supra* note 9, at 58.

Sax's argument ultimately is unconvincing. Great architects have strong economic and artistic motivations for seeing that their better works are preserved for future generations. Architects are thus good agents for the public. But there are other things, besides preservation, that great architects are trying to maximize when negotiating projects with clients. Architects typically want clients who can offer substantial resources, high-profile building sites, favorable zoning environments, hands-off supervision, and many other perks. Renowned architects will select their projects based on a combination of all these factors, and there will be difficult tradeoffs among them. It therefore seems strange to impose preservation requirements on clients without simultaneously mandating that clients fully fund architects' visions (and happily pay for unanticipated overruns), provide large building sites that maximize architects' flexibility, generously pay off neighbors and zoning board officials to ensure that their objections do not limit the architects' freedom of action, and so on. Indeed, because preservation covenants will be at least somewhat costly to architecture clients, we can expect that forced preservation will leave clients with fewer resources to spend on building materials, zoning variances, extra land, and all the other factors that might make a building worth preserving.

Requiring the preservation of great buildings may ensure that some beautiful and potentially influential designs never get built. The 1893 Chicago World's Columbian Exposition provides perhaps the most famous example of an architect trading off permanence for other project attributes. The gifted architect Daniel Burnham oversaw the construction of glorious white buildings made of plaster of Paris and hemp fibers. The buildings were temporary structures, but they proved profoundly influential, helping to usher in a neoclassical revolution in architecture and providing a blueprint for the great Chicago civic structures that would be built in the decades that followed.[156] Had Burnham's "Great White City" been built of anything sturdier, it never would have been as large, nor would it have been built as quickly, as cheaply, or as magnificently. Permanence is neither a necessary nor a sufficient condition for great architecture.[157] There is a place in our landscape for gorgeous sandcastles.

In short, there can be a clear connection between property destruction and creation. When individuals and businesses destroy valuable property, they often do so for rational reasons. Denying owners the right to destroy

156. DONALD L. MILLER, CITY OF THE CENTURY: THE EPIC OF CHICAGO AND THE MAKING OF AMERICA 380-85 (1996).

157. Indeed, some great architecture or art is only permitted because of its fleeting nature. Germany allowed Christo to wrap the Bundestag after he promised that the wrapping would be temporary. Mary Williams Walsh, *Artist Christo Puts the Reichstag Under Wraps*, L.A. TIMES, June 24, 1995, at F4. Were the law to require Christo's wrappings to be permanent, he would have a hard time executing such works.

property that becomes embarrassing, unfashionable, unproductive, or obsolete threatens the impulses that spur future creation.

### E. *Our Distaste for Waste: An Assessment*

To the extent that society has curtailed the property owner's common law right to destroy that which is his, waste avoidance has been the primary basis for doing so. In principle, there is nothing wrong with this. Setting aside ex ante considerations, social welfare generally is diminished when valuable resources are obliterated. That said, some segments of society sincerely wish to destroy valuable property from time to time. These destructive sentiments can be common (as with personal papers, wedding rings, or transplantable organs) or rare (as with buildings or patents), but when they do arise, individual motivations to destroy seem rather powerful. As the prevalence of these sentiments increases and the transaction costs associated with monitoring and preventing destruction rise, the case for antidestruction rules generally becomes weaker.

Even in those settings where destructive impulses are idiosyncratic and the transaction costs of preventing destruction are low, courts have reached rather unsatisfying conclusions. In the home destruction cases, courts seemed oblivious to positive externalities that might be associated with the creation of open space or woodlands. And as preferences changed over time, as with respect to historical preservation, the social meaning of destruction was flipped on its head.

In other instances, antiwaste sentiments can obscure the social waste that results from excessive preservation or insufficient creation. Urban real estate is a scarce commodity, and the city that places too many of its structures off limits to modern architects risks economic and aesthetic stagnation. Limiting the right to destroy based on waste and other negative externalities may be reasonable in theory, but a review of the published cases suggests courts have trouble applying this defensible rule.

Once we begin thinking about the ex ante effects of antidestruction rules, additional concerns come to the forefront. At some level, a right to destroy property is essential to the functioning of a market economy. The value of a new refrigerator would decrease substantially if its owner was required to keep it working as a refrigerator ad infinitum.[158] This suggests that property destruction can produce economic gains for its owner. Where a rational individual or business makes a plausible claim that the destruction of a valuable asset is wealth or welfare maximizing, limitations

158. Of course, society might well choose to regulate the *manner* of a refrigerator's destruction. For example, the law might require the removal of refrigerator doors (to prevent children from being trapped inside) or regulate the release of ozone-depleting refrigeration chemicals. As a general matter, such regulations will be socially desirable and do not impermissibly restrict the owner's right to destroy his property.

on the destruction of the property seem inappropriate.[159] Exceptions arise only where the property in question is economically productive and produces positive externalities sufficient to offset the owner's lost revenue.

If an owner wants to destroy property that generates negligible positive externalities, he ought to have the right to do so. Surely, such destruction can constitute resource waste. But because the waste does not harm third parties substantially, it is tolerable. As long as the owner has an incentive to preserve valuable property, the transaction costs associated with trying to monitor and prevent this destruction will far exceed the value of any resources spared from waste. Hence, the living owner ought to be entitled to destroy his ordinary furniture, automobile, or vacuum cleaner, so long as his sanity is unquestioned.

Where a structure retains genuine historical or architectural value and has been landmarked through the ordinary processes, destruction is plainly undesirable. If the house has substantial market value but does not produce substantial positive externalities, by contrast, its owner ought to have the right to destroy it. The case for permitting the destruction of structures is weakened to some degree because the transaction costs of monitoring building destruction are so low. For that reason, it would be appropriate for the government to condemn the property from the owner and then resell it to the highest bidder. The sovereign always has this power and can exercise it to protect a neighborhood's tax base and housing supply.[160] In short, legislatures, not courts, are the appropriate bodies to prevent the waste associated with the destruction of structures.

159. There are, of course, instances where people destroy objects that they believe to be worthless but come to regret the destruction after the fact. For example, middle-aged men frequently complain that their mothers threw away priceless baseball card collections during spring cleaning, and the prevalence of such destruction helps account for the rarity, and hence the value, of certain cards from the 1950s and 1960s. *See* James Werrell, Op-Ed, *Boomers Coping with Mountains of Clutter*, HERALD (Rock Hill, S.C.), July 12, 2002, at 5A. Still, property destruction exists all around us, and it seems daft to limit or even monitor such destruction in order to rescue the occasional Mickey Mantle card that might be sitting at the bottom of someone's trash bin. After all, the owner had a strong economic incentive to discover the property's value before destroying it, and any ex post regrets about a lost economic opportunity probably will train him to be more careful in the future.

160. *See* Berman v. Parker, 348 U.S. 26 (1954). Shortly before this Article went to press, the Supreme Court agreed to hear *Kelo v. City of New London*, which provides a vehicle for the Court to reconsider *Berman*'s very deferential approach to legislative exercises of eminent domain. *See* 843 A.2d 500 (Conn. 2004), *cert. granted*, 73 U.S.L.W. 3178 (U.S. Sept. 28, 2004) (No. 04-108). It is conceivable that the *Kelo* Court could overreact to abuses of the eminent domain authority, handing down a broad ruling that will preclude the state from using eminent domain to transfer valuable property from an owner who has announced plans to destroy it to someone who promises to preserve it. Let us hope that the Court is careful enough to avoid this pitfall.

## III. DESTRUCTION, DISCOURSE, AND VALUES

It is worth exploring why the organ donation example upsets some people's intuitions about property destruction. Those who feel disdainful of Johnston's desire to destroy her home might empathize with her desire to avoid donating her liver, kidneys, or corneas. Those who are sympathetic to Johnston's privacy- or sentiment-driven destruction of an unexceptional house might be angered by the thought that her transplantable organs will go to waste, contributing to the deaths of innocent third parties. What is going on here?

The answer does not lie in the comparative values of the underlying assets. Indeed, the black market value of a young accident victim's organs may well exceed the market value of all her real and personal assets. Nor can a completely satisfying answer rely on the prevalence of a prodestruction norm for organs and an antidestruction norm for houses. True, the norms here differ, but there seems to be substantial feedback between the law and social norms, and such analysis merely begs the question of whether the government should try to undermine inefficient antidestruction norms.

We can begin to address this puzzle by reflecting on what's missing from both the *Eyerman* equation and the organ donation equation. In each case, the decedent seems to be destroying the asset at issue because of nonmarket, largely psychological considerations. In the organ donation case, religion, superstition, and aesthetic considerations may explain why someone would want his organs to decay upon his death. These considerations, even if based on ignorance, selfishness, spite, or a refusal to ponder one's own mortality, are deemed legally sufficient to justify enormous social waste. In the home destruction case, one supposes that sentiment, expressive interests, or privacy concerns may have convinced the homeowner to destroy her home. Yet courts generally deem these interests insufficient to justify a less substantial waste of resources.

On one view, there is nothing objectionable about courts deferring to only those destructive decisions that comport with widely shared norms. Yet if one considers the substantial expressive component of some decisions to destroy valuable resources, disregarding the idiosyncratic views that prompt destructive acts becomes more troubling.

This Part examines the expressive characteristics of property destruction. It suggests that expressive motivations help explain otherwise puzzling destructive acts and situates the right to destroy within First Amendment law. It then examines the connection between antidestruction rules and compelled speech or other forced creative activities. It turns out that analysis from First Amendment cases and disputes involving forced procreation undermines the case for broad antidestruction rules.

### A. *The Expressive Value of Destruction*

In a nation whose colonists famously expressed their desire for independence by dumping large quantities of perfectly good tea into Boston Harbor, it hardly should be surprising that property destruction remains a common and effective means for communicating ideas and grabbing others' attention. A student of American law will appreciate the expressive possibilities of property destruction upon realizing that several landmark First Amendment precedents revolve around the incineration of private property.[161] Because the destruction of a wooden cross, an American flag, or a draft card conveys an obvious political or social message, courts contemplating property destruction in the First Amendment context generally have proved sympathetic to the interests of the destroyers.[162] The Supreme Court has indicated that to be communicative, an act of destruction must be more than "mindless nihilism"; rather, the destroyer must intend "to convey a particularized message," and it must be likely that the audience for the message would have understood it.[163]

When it comes to flag or draft card burning, the expressive component of the destructive act is substantial and the monetary value of the underlying resource is insubstantial. So, absent concerns about hurt feelings

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161. *See* Virginia v. Black, 538 U.S. 343, 360 (2003) ("[T]he burning of a cross is symbolic expression. The reason why the Klan burns a cross at its rallies, or individuals place a burning cross on someone else's lawn, is that the burning cross represents the message that the speaker wishes to communicate. Individuals burn crosses as opposed to other means of communication because cross burning carries a message in an effective and dramatic manner."); R.A.V. v. City of St. Paul, 505 U.S. 377, 380 (1992) (invalidating on First Amendment grounds an ordinance that barred the display of a burning cross "'which one knows or has reasonable grounds to know arouses anger, alarm, or resentment on the basis of race, color, creed, religion, or gender'" (quoting ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990))); Texas v. Johnson, 491 U.S. 397, 406 (1989) (holding that burning an American flag is expressive conduct covered by the First Amendment); United States v. O'Brien, 391 U.S. 367, 382 (1968) (upholding the conviction of an antiwar protester who burned his Selective Service certificate in light of the government's substantial interest in assuring the continued availability of these certificates).

162. *O'Brien* is the exception. The Court noted that Selective Service cards were useful in promoting the smooth administration of the draft process and in promoting communications between potential draftees and the Selective Service. *O'Brien*, 391 U.S. at 378-79.

163. Spence v. Washington, 418 U.S. 405, 410-11 (1974). The Third Circuit, relying on post-*Spence* case law, such as *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), has adopted a different test:

> [C]onduct is expressive if, considering the nature of[ ][the] activity, combined with the factual context and environment in which it was undertaken, we are led to the conclusion that the activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments. . . . [T]his is a fact-sensitive, context-dependent inquiry, and . . . the putative speaker bears the burden of proving that his or her conduct is expressive.

Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 160-61 (3d Cir. 2002) (third alteration in original) (internal quotation marks omitted). Most other courts continue to adhere to the *Spence* test. *Id.* at 160 n.18.

or weakened symbols, the law ought to privilege the owner's destruction.[164] In a society that tolerates dissent, destruction of this kind of property appears to be a high-value use.[165] There are, of course, harder cases. As Saddam Hussein's control over Baghdad was disintegrating, American soldiers toppled a large statue of Hussein that had stood in Baghdad's central square.[166] Because the destruction of the statue apparently constituted a belligerent attack on a foreign nation's cultural property in the absence of any military necessity, it seems likely that the statue's destruction violated international law.[167] American soldiers were destroying a statue they did not own and had no need to demolish. But let us imagine that the statue had been toppled by its owner—a legitimate Iraqi government. In such circumstances, few would bemoan the statue's destruction. Although the statue surely had some artistic value and perhaps significant historical value in memorializing a deposed regime, our concerns about waste would be outweighed by the expressive and symbolic value associated with this destruction. The destruction of the statue would be a liberating act, and few would begrudge an Iraqi government's decision to destroy public property in order to send a particular message.[168]

Similar examples abound. Formerly communist nations destroyed many Lenin statues in the years following the 1989 revolutions.[169] President Bush called for the destruction of Abu Ghraib prison after the prisoner abuse

164. In *Johnson*, the defendant burned a flag that had been stolen from its rightful owner, although Texas did not prosecute him for any crime other than flag desecration. *Johnson*, 491 U.S. at 421, 431 (Rehnquist, J., dissenting). In *O'Brien*, the government's property interest in the draft card seemed decisive to the Supreme Court. *O'Brien*, 391 U.S. at 382. I believe the government's property and administrative interests in the draft cards were overblown and that the case was wrongly decided. For a persuasive critique along these lines, see John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 96-98 (1996).

165. For a provocative argument in opposition, see Eric Rasmusen, *The Economics of Desecration: Flag Burning and Related Activities*, 27 J. LEGAL STUD. 245, 253-55 (1998).

166. *See* R.W. Apple Jr., *A High Point in 2 Decades of U.S. Might*, N.Y. TIMES, Apr. 10, 2003, at A1. A small group of Iraqis evidently had tried to topple the statue with a sledgehammer prior to the U.S. troops' offer of assistance. Tim Cuprisin, *A Statute Topples; What Does It Mean?*, MILWAUKEE J. SENTINEL, April 10, 2003, at 12B.

167. *See generally* Hirad Abtahi, *The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia*, 14 HARV. HUM. RTS. J. 1, 6-30 (2001).

168. Joseph Sax recognizes the expressive possibilities of artwork destruction:

> [I]t is not surprising that destruction or rejection of art has been a conventional way of communicating that the message is not, or is no longer, welcome. A pope's wish to obliterate a work that is seen as promoting impiety is perfectly understandable. . . . Even today we would not rest easily if the greatest artists of the twentieth century had made magnificent paintings depicting Hitler or Eichmann.

SAX, *supra* note 9, at 17.

169. *See* Marc Fisher, *In Berlin, Lenin's Last Stand*, WASH. POST, Nov. 9, 1991, at G1; Henry Kamm, *Icons Are Toppled*, N.Y. TIMES, Aug. 24, 1991, at 1; David Remnick, *The Day Lenin Fell on His Face*, WASH. POST, Sept. 5, 1990, at D1.

scandal there.[170] A Jewish group sunk a boat believed to be Hitler's yacht off the Florida coast to commemorate the fiftieth anniversary of the United States's refusal to accept an ocean liner filled with Jews fleeing the Nazis.[171] A devout Catholic purchased Gustave Courbet's anticlerical *Return from the Conference* so that he could destroy it.[172] The Rockefeller family destroyed a mural that Diego Rivera had painted for Rockefeller Center after the artist refused to remove Lenin's image from the painting.[173] Lady Churchill smashed and then instructed an employee to burn a portrait by an important artist that Parliament had presented to her husband in 1954.[174] The Churchills hated the portrait, which they believed depicted Winston as a "gross and cruel monster,"[175] and on at least one account Lady Churchill destroyed the portrait to provide Winston "peace of mind."[176] People regularly burn mementos from romantic relationships that have ended as a way of marking the relationship's permanent cessation.[177] Various religious groups have challenged government restrictions on the demolition and renovation of their places of worship, citing the Free Exercise Clause.[178] And, as mentioned at the outset of this Article, the Harry Caray's restaurant chain publicly destroyed a historically significant baseball with a market value in excess of $100,000.[179]

Now consider a much more disconcerting incident of expressive destruction—the Taliban's destruction of the Buddhas of Bamiyan despite outcry from foreign governments and offers from museums to purchase some of the works.[180] This destruction had an obvious religious motivation and meaning. These were not irrational acts of destruction; they were

170. Remarks at the United States Army War College in Carlisle, Pennsylvania, 40 WEEKLY COMP. PRES. DOC. 944, 947-48 (May 24, 2004).

171. Associated Press, *Sunk as Holocaust Symbol, Hitler Yacht Poses Problem*, L.A. TIMES, June 13, 1989, at A2. Due to a crew member's mistake, the yacht was sunk in the middle of a shallow shipping lane and had to be moved. *Id.*

172. SAX, *supra* note 9, at 19.

173. *Id.* at 13-16.

174. *Id.* at 37.

175. *Id.* at 38 (internal quotation marks omitted).

176. *Id.* at 39 (internal quotation marks omitted).

177. *See* Laurel Richardson, *Secrecy and Status: The Social Construction of Forbidden Relationships*, 53 AM. SOC. REV. 209, 215 (1988). In *Titanic*, currently the highest-grossing film ever, the elderly protagonist melodramatically tosses the priceless "Heart of the Ocean" necklace into the Atlantic, evidently as a tribute to her deceased lover. TITANIC (Paramount Pictures & 20th Century Fox 1997).

178. *See, e.g.*, Rector of St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990); Keeler v. Mayor of Cumberland, 940 F. Supp. 879 (D. Md. 1996). California has exempted religious organizations from the burdens of its historic preservation laws for noncommercial property, evidently because of these concerns. This exemption has survived an Establishment Clause challenge. *See* E. Bay Asian Local Dev. Co. v. State, 13 P.3d 1122 (Cal. 2000).

179. *See supra* text accompanying note 5.

180. *See* Agence France-Presse, *Pre-Islam Idols Being Broken Under Decree by Afghans*, N.Y. TIMES, Mar. 2, 2001, at A9.

rational acts that conveyed unmistakable and attention-getting messages. The fact that the cash-strapped Taliban spurned purchase offers from foreigners shows how much it valued the expressive opportunity. And yet, the same act of expression can be cast as an abhorrent, spiteful act. Still, given property destruction's expressive value, barring messages deemed hostile to a person or group is potentially problematic.[181]

In all these cases, the destruction of valuable property had a substantial expressive component. Humans are fascinated and intrigued when someone destroys a valuable commodity—the more valuable the resource, the more attention the destruction draws. Yet there is something unsettling about the nature of the expression here. Tearing down or obliterating a statue sends a powerful message that the destroyer disagrees with the symbolic expression manifested in the work.[182] But the destructive act is unlikely to contribute to a healthy public discourse or point society toward truth. How is a painter to respond to someone who has set his still life ablaze? Asking him to create a new painting from scratch, as a response to the destroyer's "artistic criticism," is asking quite a lot.

Under a collectivist reading of the First Amendment, then, the government could regulate destructive acts.[183] Destroying a unique, irreplaceable[184] piece of property is, in some ways, closer to heckling a speaker than to responding to what he has to say. It also may deter others from devoting the necessary time and resources to future creative activities.[185] So the law might differentiate between *A*, who gives a speech, and *B*, whose contribution to the debate is to ensure that no record of *A*'s speech survives. All the government is doing by privileging creation over

181. None of this suggests that the government cannot properly penalize those whose expressive conduct causes tangible harm to others that is unrelated to their sentiments concerning the expression itself. John Wilkes Booth's yelling "*Sic semper tyrannis!*" ("Thus always to tyrants!") upon assassinating Lincoln hardly rendered the assassination protected conduct. Nor is the performance artist who burns down his house immune from liability if the fire spreads to a neighboring lot.

182. *See* Jeffrey Zaslow, *In Detroit, a Blow to 'the Fist' Touches a Sensitive Nerve*, WALL ST. J., Mar. 4, 2004, at A1 (describing several instances of expressive attacks on statues). *See generally* Vera Zlatarski, *"Moral" Rights and Other Moral Interests: Public Art Law in France, Russia, and the United States*, 23 COLUM.-VLA J.L. & ARTS 201, 232-34 (1999) (discussing the conflicting values implicated by public art and its criticism).

183. For free speech scholarship in the collectivist tradition, see ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1948); Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 3, 23-25; and Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255 (1992). For a critique of these collectivist understandings of the First Amendment, see Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993).

184. In explaining the reason why society regards a great painting as an object that should not be broken apart, we might point to the piece's irreplaceable nature. *See* MARTHA C. NUSSBAUM, *Objectification*, *in* SEX & SOCIAL JUSTICE 213, 218-21 (1999).

185. *Cf.* Owen M. Fiss, *The Supreme Court and the Problem of Hate Speech*, 24 CAP. U. L. REV. 281, 287-90 (1995) (justifying hate speech restrictions on the grounds that in the absence of such restrictions, minority groups will be deterred from participating in public debate).

destruction is establishing a procedural rule that the artist who intends to make a lasting aesthetic contribution cannot have her speech cut off without her consent. If the First Amendment is about the nation's commitment to producing a public debate that is "uninhibited, robust, and wide-open,"[186] then the law might well view the symbolic destruction of irreplaceable property as low-value speech that can be restricted in order to facilitate the success of a deliberative process.

Federal regulation of art destruction, probably unwittingly, has reinforced these collectivist themes. In 1990, Congress enacted the Visual Artists Rights Act (VARA).[187] Among other things, the law prohibits the destruction of visual art that is "of recognized stature" during an artist's lifetime.[188] Artists can waive their VARA rights contractually,[189] but the artist cannot transfer her VARA rights to a third party.[190]

Taken together, VARA's antidestruction provisions likely contribute to a robust public debate within the artistic community. VARA says that when an artist has made a substantial artistic contribution (by creating a work of recognized stature), it is inappropriate for an owner to destroy that work, even if he does so for expressive purposes, unless the artist consents to the destruction in writing. VARA thus recognizes that when an artist creates an important work of art, she generally intends to make a lasting contribution to aesthetic discourse. During the artist's life, the work can be criticized or parodied, but it cannot be destroyed unless the artist consents. This regime is consistent with the collectivist conception of the First Amendment—both creation and destruction convey messages and therefore have some value, but creation generally is more socially valuable than destruction, because creation contributes an idea whereas destruction of unique property attempts to wipe out an existing idea.[191] For most works of art, creation also

186. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). For an argument that promoting such debate is a central goal of the First Amendment, see OWEN M. FISS, THE IRONY OF FREE SPEECH 22-25 (1996).

187. Pub. L. No. 101-650, §§ 601-610, 1990 U.S.C.C.A.N. (104 Stat.) 5089, 5128-33 (codified in scattered sections of 17 U.S.C.). For an illuminating discussion of VARA's effects, see William M. Landes, *What Has the Visual Artist's Rights Act of 1990 Accomplished?*, 25 J. CULTURAL ECON. 283 (2001).

188. 17 U.S.C. § 106A(a)(3)(B) (2000); *see also* Martin v. City of Indianapolis, 192 F.3d 608, 612 (7th Cir. 1999); Robert J. Sherman, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 CARDOZO L. REV. 373, 426 n.320 (1995).

189. Landes, *supra* note 187, at 286.

190. 17 U.S.C. § 106A(e)(1).

191. Eric Rasmusen makes a related point:

> Desecration, while sometimes meant to convey an idea, has simple speech as a substitute. Saying that I am opposed to the Vietnam War may not be as effective as if I burnt a flag and then made my statement, but the content is the same. The idea can still be expressed, even if I cannot get as much attention as if I burnt a flag, tortured a kitten, spent money to buy television coverage, or were allowed to subpoena listeners. The marginal social return from increasing the number of ways in which ideas can be communicated is decreasing, so a comparison of the costs and benefits naturally leads to some ways being allowed and some prohibited.

will be far more time-consuming than destruction. After the artist has died, there is little expressive interest to be balanced against the living destroyer's expressive interest, and, in the case of works exhibited well before the artist's demise, the idea in question already has been voiced for a substantial period of time, so destruction may be justified on collectivist grounds.[192]

VARA rights to prevent destruction remain with the artist, unless waived, because it is the artist's speech at issue.[193] Critics who have argued that VARA is unconstitutional have ascribed equal value to the creation and the destruction of artwork or focused primarily on the restrictions that VARA imposes on owners who wish to destroy art for expressive purposes,[194] but a collectivist framework shows how the statute might be reconciled with First Amendment principles.

Those who harbor individual-autonomy-oriented views of the First Amendment will have a more difficult time countenancing restrictions on property destruction that may have expressive consequences.[195] From an individual rights perspective, it is difficult to see why Lady Churchill's right to destroy a portrait she and her husband detest shouldn't be given as much protection as the artist's right to have his portrait preserved. Indeed, from this perspective, the destruction of the Buddhas of Bamiyan seems completely uncontroversial—the artists and workers who created these statues are long dead and presumably lack any posthumous expressive

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Rasmusen, *supra* note 165, at 259.

192. There will be an interest in permitting the public to hear the dead artist's speech. *See* Dana R. Wagner, Case Note, *The First Amendment and the Right To Hear*, 108 YALE L.J. 669 (1998). But visual art, like other copyrighted expression, typically has the greatest impact on artistic discourse in the months or years following its initial public display.

193. VARA's default rule could be socially efficient if artists cared about preventing destruction but did not care enough about destruction to warrant the costs of formalizing antidestruction agreements. Indeed, contracts involving the sale of art are usually unwritten and often informal. Marina Santilli, *United States' Moral Rights Developments in European Perspective*, 1 MARQ. INTELL. PROP. L. REV. 89, 105-06 (1997). If most art purchasers do not place much value on the right to destroy artwork, VARA's antidestruction default rule might impose contractual provisions that the parties would have agreed to had transaction costs not deterred the formalization of a complete contract. That said, there are reasons to be skeptical about these empirical claims. *See* Landes, *supra* note 187, at 288-89, 300-01. So VARA might be easier to support on free speech grounds than on economic efficiency grounds.

194. *See, e.g.*, Joseph Z. Fleming, *Materials on the Representation of Artists:* Leviton v. Hollywood Art & Culture Center, Inc. *(No. 97-7175 Civ.)*, SF39 A.L.I.-A.B.A. 859, 869-70 (2001); Kathryn A. Kelly, *Moral Rights and the First Amendment: Putting Honor Before Free Speech?*, 11 U. MIAMI ENT. & SPORTS L. REV. 211, 242-50 (1994); Eric E. Bensen, Note, *The Visual Artists' Rights Act of 1990: Why Moral Rights Cannot Be Protected Under the United States Constitution*, 24 HOFSTRA L. REV. 1127, 1139-40 (1996).

195. For a helpful review of some of this literature and a comparison to the work of modern collectivist theorists, see Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 311-24 (2003).

interests, but the Taliban that ordered their destruction had cognizable expressive interests.[196]

Regardless of one's animating theory of expressive conduct, there is a real danger of leakage here. If the law must defer to expressive property destruction but not to economically motivated or spite-motivated property destruction, then sophisticated property owners who are motivated by economic interests will claim to be motivated by expressive interests. Courts may have a difficult time discerning owners' actual motivations, and errors will be inevitable. Indeed, instances like the Buddhas of Bamiyan destruction show that spiteful acts can be spiteful expressions too. This is a substantial problem, and one that points in favor of a relatively unified treatment of the right to destroy.

### B. *If I Made It, Can I Destroy It?*

Does a creator have more leeway to destroy a piece of property than an ordinary owner who acquires the property via purchase, inheritance, or gift? Joseph Sax says yes, at least in the case of works of art, because an "artist should be entitled to decide how the world will remember him or her."[197] I agree with his bottom line, though I will elaborate on the justifications for this conclusion.

Creators often attempt to destroy their property. This Article already has discussed the widespread destruction of private papers by various American presidents. We find an analog to this destructive intent among great writers and artists. Franz Kafka famously decided to have his unpublished manuscripts, letters, and diaries destroyed while he was in a sanitarium, dying of tuberculosis. To that end, he wrote his executor and friend, Max Brod, two separate notes directing him to burn, unread, all of Kafka's writings immediately.[198] In addition to these notes, Kafka verbally

196. If the destruction of the Buddhas amounted to "fighting words" or a "true threat," then some individual-liberty-oriented First Amendment scholars might favor restricting their destruction. For a discussion, see G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 BYU L. REV. 829, 936-37.

197. SAX, *supra* note 9, at 200. Sax would not favor according public figures who create historical documents the same rights, but he recognizes the practical limitations associated with holding government officials to formal antidestruction rules:

> [P]ublic figures—including our Supreme Court justices—should be strongly discouraged from destroying working papers, even though we may continue to recognize private ownership in them. . . . The Supreme Court could help by articulating nonbinding guidelines that acknowledged the importance of historical knowledge, and sought to draw some line (in time) to accommodate the competing demands of confidentiality and of public understanding of its judiciary.

*Id.* at 200-01.

198. Paul Kurt Ackerman, *A History of Critical Writing on Franz Kafka*, 23 GERMAN Q. 105, 105 (1950).

directed Brod to destroy his written works.[199] Included in the materials Kafka asked Brod to destroy were the only copies of his two then-unpublished masterpieces, *The Castle* and *The Trial*. Brod "did not honor his friend's last wish."[200] Instead, he edited and published Kafka's novels, short stories, diaries, and other writings.

Kafka's dying wishes of artistic destruction were not unusual. The author Jacqueline Susann similarly directed her executor to burn her diary upon her passing. The diary had been valued at $3.8 million.[201] Virgil evidently wanted the *Aeneid* burned upon his death, but he appears to have changed his mind after friends convinced him that Augustus would never allow such destruction.[202] In 1954, at the age of twenty-four, an obscure artist decided to destroy all the paintings he had previously executed, as a way of "beginning afresh with a blank canvas."[203] Within a few years, that artist, Jasper Johns, would produce a world-famous painting of the American flag and become one of the most talked-about artists of his era.[204] More recently, Brett Weston, a well-known photographer, publicly

199. Douglas E. Litowitz, *Franz Kafka's Outsider Jurisprudence*, 27 LAW & SOC. INQUIRY 103, 115 (2002). There is a debate concerning Kafka's sincerity. Litowitz suggests that when Kafka verbally instructed Brod to destroy the unpublished works, Brod refused, so Kafka must have understood that Brod would not destroy the writings after Kafka's death. *See id.* Brod himself suggested that he did not know whether Kafka was being sincere but that he thought Kafka understood he never would have destroyed Kafka's works even if he had known that Kafka steadfastly wished their destruction. *See* Max Brod, *Postscript to the First Edition (1925) of Franz Kafka's* The Trial, *in* WILLIAM R. BISHIN & CHRISTOPHER D. STONE, LAW, LANGUAGE AND ETHICS: AN INTRODUCTION TO LAW AND LEGAL METHOD 1, 3 (1972). That said, a dying Kafka did burn many of the manuscripts to which he had access, a fact Brod found lamentable. *Id.* at 4. Had he not been confined to a tuberculosis sanitarium during most of the final years of his life, Kafka might have had the opportunity to burn the other works as well.

It does not appear that Brod's doubts over Kafka's true intentions made any difference. Brod candidly admitted that he would not have destroyed the writings even if he had known that Kafka adamantly wished to see them destroyed:

> My decision . . . rest[s] . . . solely on the fact that Kafka's unpublished work contains the most wonderful treasures, and, measured against his own work, the best things he has written. In all honesty I must confess that this one fact of the literary and ethical value of what I am publishing would have been enough to decide me to do so, definitely, finally, and irresistibly, even if I had had no single objection to raise against the validity of Kafka's last wishes.

*Id.*

200. Ackerman, *supra* note 198, at 105.

201. Sykas, *supra* note 33, at 926.

202. *Id.* at 919. Accounts of this story differ. According to a leading Virgil scholar, "[O]n leaving Italy for Greece, [Virgil] had instructed Varius to burn the *Aeneid* 'if anything should happen to him[.'] On his death bed, he seems to have wavered a little: he asked for the manuscript in order to burn it, yet he did not insist when no one complied with his request." BROOKS OTIS, VIRGIL: A STUDY IN CIVILIZED POETRY 1 (1964). On another account, Virgil did leave instructions to destroy the *Aeneid*, but "Emperor Augustus ordered the executors to disregard the order." JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 33 (6th ed. 2000).

203. Louis Menand, *Capture the Flag*, SLATE, Oct. 30, 1996, http://slate.msn.com/id/2905.

204. *Id.*

incinerated a lifetime's worth of valuable negatives to commemorate his eightieth birthday.[205]

Suppose the Kafka case, or something like it, had been litigated. Let us imagine a modern-day American Kafka, who we'll call *K*, and a will that is being probated. Say the will contains unambiguous instructions for Brod to destroy all copies of *K*'s unwritten work. And yet Brod approaches the court seeking direction. Brod argues that the texts have great literary and commercial value and that to destroy them would constitute an unconscionable waste. What should a court do? Richard Posner states that these types of cases arise commonly and that courts typically would strike the direction to destroy the papers on public policy grounds.[206] Assume our hypothetical court embraces this approach and directs Brod to publish the valuable *K* works, with the proceeds to be distributed among *K*'s named beneficiaries. Is this the right result? I submit that the *K* papers and manuscripts should be destroyed, on the basis of any of four rationales.

First, we might reiterate the ex ante argument. A society that does not allow authors to have their draft works destroyed posthumously could have less literary product than a society that requires the preservation of all literary works not destroyed during the author's life. Protecting authors' rights to destroy should encourage high-risk, high-reward projects, and might prevent writers from worrying that they should not commit words to paper unless they have complete visions of the narrative structures for their work.[207] Indeed, the society that respects the dead author's wish for his unfinished writings to be burned avoids putting the ailing artist in the terrible position of having to burn unfinished works that might be completed if he recovers.[208] In the past, great artists have erred on the side of destruction out of fear that their unfinished works would tarnish their reputations.[209]

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205. *See infra* note 212.

206. POSNER, *supra* note 150, at 559. In Denmark, by contrast, the law appears to defer to the testator who wishes to destroy his unpublished writings. *See* Susanne Storm & Hans Viggo Godsk Pedersen, *Denmark*, *in* 1 INTERNATIONAL ENCYCLOPAEDIA OF LAWS: FAMILY AND SUCCESSION LAW 1, 160 (W. Pintens ed., 1998) ("A condition within a will is invalid if it demands a use or destruction of parts of the estate and this condition has no reasonable meaning. . . . The testator must be given a large degree of freedom to decide, for example, whether or not letters and certain personal effects should be destroyed and to support certain causes even though these may not be normally considered appropriate.").

207. As in *Continental Paper Bag*, there is a possibility that *K* would have produced the writings even if he had known he would not be able to destroy them in the future.

208. *See* Richard A. Epstein, *Justice Across the Generations*, 67 TEX. L. REV. 1465, 1488 n.43 (1989).

209. Joseph Sax offers an illuminating anecdote:

> Georges Rouault, in the presence of a photographer, threw into a furnace some 315 of his own canvases . . . . Rouault's act was explained by his daughter: "Conscientious as he was, what worried him was not doubt that he would not be able to finish a particular canvas to his satisfaction, but fear lest he would never have the time to do so. His principal concern in making the painful choice . . . was the stage of progress of each

Second, we might accept an economic rationale. *K* is in the best position to determine which of his works should form his artistic legacy. *K* has an economic interest (via his concern for the welfare of his beneficiaries) in assuring that the value of his published works is not diminished by the conceivably inferior quality of the unpublished works. After all, the law does not force Hugo Boss to ship its irregular or substandard clothing to discount sellers. Rather, it lets Hugo Boss opt for a reputation as a maker of high-status, invariably high-quality garments. By the same token, the court should defer to *K*'s judgment about what actions will maximize the value of his estate.[210] Because *K*'s heirs would have the same economic interest in the value of his collective works, they should have the same opportunity to destroy works that might diminish his reputation.[211]

Third and relatedly, we might shoehorn *K*'s wishes into the types of expressive theories so far discussed. By destroying his unfinished works, *K* may wish to send a message to the public that he is not the type of artist who will tolerate, let alone publish, inferior works.[212] A dramatic destruction of *K*'s unfinished works certainly would garner the public's attention. Brod's publicized destruction of the work that had taken so much of *K*'s time perhaps would rekindle public interest in those few works that *K* thought were worthy of publication.

Finally, there is another expressive component to *K*'s destruction, and it deviates substantially from the expressive theories previously explored. If a court decides to bar Brod from destroying *K*'s unpublished works, it is forcing the departed *K* to speak when he would have preferred to remain silent. From a First Amendment perspective, a judicial remedy barring the destruction of literary documents would be problematic if it occurred during

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painting. Thus it was only after long hesitation, and not without great anxiety, that Rouault decided to burn those works which he felt so little advanced that completion would demand too long a time."

SAX, *supra* note 9, at 43 (second omission in original).

210. The fact that *K* has directed the destruction of these papers by will, as opposed to destroying them himself, should not make a difference. While he was alive, *K* had an opportunity to improve the written works. Accordingly, it may have been perfectly rational to hold on to them in the hopes that he would recover and complete them, while expecting that Brod would destroy them if they were not perfected by the end of *K*'s life.

211. *Cf.* SAX, *supra* note 9, at 146 (describing the destruction of 550 Robert Henri paintings by his heir in order to increase the value of the approximately 3450 remaining works).

212. In 1991, Brett Weston burned "all but 12 of the thousands of negatives he had produced since his youth," which prompted the *Los Angeles Times* to speculate on whether this destruction would "enhance Weston's status by controlling the quality of his work." Suzanne Muchnic, *A Bonfire of the Vanities? Admirers of Brett Weston Question Why He Destroyed a Lifetime's Worth of Negatives*, L.A. TIMES, Dec. 19, 1991, at F1. Weston had long provided in his will that his negatives were to be burned upon his death, and he had publicly promised that he would carry out the destruction himself if he lived to eighty. *Id.* Evidently, Weston was partly concerned with the possibility that others might use his negatives to make posthumous prints of his work that would not reflect his artistry.

*K*'s life.[213] This may be particularly problematic in the context of a controversial or envelope-pushing work. *K* may have concluded that he only was willing to publish his novel if he could be around to defend it against the inevitable but unpredictable literary criticism that its publication would provoke.

*K*'s death probably would obviate the possibility of a constitutional violation,[214] but the state's action of forcing a dead person to share his private written words still seems to run afoul of the principles underlying the First Amendment right to remain silent.[215] The line of First Amendment cases barring compelled speech sounds in the individual-autonomy-oriented conception of speech. Permitting someone to bar the publication of his own unspoken words enhances expressive liberty without destroying the expression of someone who wished to be heard. From this perspective, destruction of an expressive work by its creator is very different from destruction of a creative work by anyone else.

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213. Exceptions would arise, of course, if the papers were valuable for evidentiary or law enforcement purposes.

214. We know that people contemplating death value postmortem opportunities to express themselves. *See* Ciran Giles, *Spanish Internet Site Offers Clients After-Death E-Mail Service*, CANADIAN PRESS, Sept. 25, 2004, 2004 WL 93701112 (describing a website that charges customers a fee and, in exchange, agrees to send e-mails to the customers' loved ones, written by the customer, after the customer's death). At the same time, dead people presumably have no First Amendment rights. What about testators? They were alive when they engaged in the communications at issue. Many of us would recoil if the government began censoring epithets that people wanted placed on their own tombstones. Say that *A* contracted with a cemetery to have his tombstone read: "Loyal Husband, Die-Hard Mariners Fan, and Committed Anarchist." Assume that the government is hostile to anarchism and that all of *A*'s heirs view *A*'s ideological affiliation as an embarrassment. Could the government really direct the cemetery to strike the partisan affiliation from the tombstone text without running afoul of the First Amendment? Our instincts suggest not. Alternatively, if the courts were to squelch testators' expressive conduct, one might conceptualize such an act as an infringement of a living person's speech, with the cause of action descending to the speaker's heirs. Of course, in some cases, the descent of this cause of action will complicate matters, because the heirs will be attempting to prevent the destruction of property at issue.

215. *See* Wooley v. Maynard, 430 U.S. 705 (1977) (invalidating on First Amendment grounds a state law barring motorists from obscuring the New Hampshire state motto printed on their vehicle license plates); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (invalidating on First Amendment grounds a school regulation requiring public school students to recite a pledge and salute the American flag). French law accomplishes the same objective by recognizing a "right of disclosure," which is an artist's right to decide when a work is complete. This right of disclosure necessarily protects the artist's ability to destroy a work prior to completion. Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 136-37 (1997).

Note the tension that results from alternative free speech theories. Compelled speech is anathema to individual autonomy conceptions of the First Amendment, but First Amendment collectivists may be sympathetic to compelled speech when the resulting expression adds something important to the public discourse. *See supra* notes 182-186 and accompanying text. Of course, a First Amendment collectivist still would be concerned about compelled speech if it deterred other potential speakers from committing their private words and thoughts to paper. *See supra* notes 207-209 and accompanying text.

There are, in short, strong reasons to defer to the destructive wishes of those who have created cultural property, particularly when that property has not been published or publicly displayed. As long as the creator possesses testamentary capacity, deferring to destructive wishes in a will is appropriate.

### C. *Biological Exceptionalism?*

In an analogous set of cases, courts have recognized the problem of forced creative activity and have come down squarely on the side of the right to destroy. Indeed, the procreative context has seen perhaps the greatest degree of judicial deference to an individual's right to destroy. These decisions are in many respects remarkable and reveal an alternative way for courts to balance the individual's right to destroy property against society's "collectivist" interest in avoiding the waste of scarce resources.

In the past decade or so, several state supreme courts have been called upon to resolve disputes among divorcées concerning the disposition of cryogenically frozen embryos. The first published case on this subject in the United States was *Davis v. Davis*, a 1992 decision by the Tennessee Supreme Court.[216] Mary Sue Davis and Junior Davis were a married couple who were unable to conceive a child naturally. The couple then tried in vitro fertilization. Ova were removed from Mary Sue and fertilized with Junior's sperm in a petri dish, and then some of them were transferred back into Mary Sue's uterus for implantation. The remaining fertilized embryos were frozen cryogenically for subsequent implantation.[217] The couple's initial efforts to conceive were unsuccessful, and Junior filed for divorce in February 1989.[218]

Junior and Mary Sue agreed on all terms of the dissolution, save one: custody of the remaining frozen embryos.[219] Mary Sue wanted to donate the embryos to a childless couple, and Junior wanted the embryos to be destroyed.[220] The trial court held the interest in preserving the embryos' viability to be paramount and directed that Mary Sue receive custody of the embryos so as to ensure that the potential children be given a chance to survive through implantation.[221] It handed down, in essence, an *Eyerman*-like antiwaste decision. The court of appeals reversed, holding that Junior Davis had a constitutional right to avoid fatherhood in this circumstance.[222]

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216. 842 S.W.2d 588 (Tenn. 1992).
217. *Id.* at 591-92.
218. *Id.* at 592.
219. *Id.* at 589.
220. *Id.* at 590.
221. *Id.* at 589.
222. *Id.*

The Tennessee Supreme Court then sought to balance Mary Sue's interest in avoiding destruction of the embryos and in "knowing that the lengthy . . . procedures she underwent were [not] futile"[223] against Junior's interest in avoiding "unwanted parenthood . . . with all of its possible financial and psychological consequences."[224] The court ultimately held that Junior's interest in avoiding parenthood trumped Mary Sue's interest in seeing the embryos preserved and, more generally, that "[o]rdinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by [other] means."[225] A number of other courts have been called upon to resolve similar conflicts, and in most instances the courts have sided with the party seeking to destroy the embryo.[226] In none of the cases did the court force someone to become a parent without that person's consent.

The cases considering the destruction of preembryos are particularly challenging because there are weighty societal interests on both sides of the issue. Recall the facts of *Davis*. Mary Sue wanted to donate the fertilized embryos to a childless couple, and Junior wanted them destroyed. Mary Sue had a strong interest in preventing the destruction of her potential progeny, but Junior had a strong interest in avoiding unwanted fatherhood. As in the organ donation cases, society had a powerful interest in permitting the embryos' transfer to a couple that was otherwise unable to conceive. Finally, a prodestruction or antidestruction ruling would have important ex ante effects. In cases where a sperm donor and an egg donor might disagree about the disposition of the embryo, either rule could change the way in which eggs are extracted from the mother or prompt marginal parties to forgo the in vitro fertilization process altogether. Indeed, given the nature of

223. *Id.* at 604.

224. *Id.* at 603.

225. *Id.* at 604.

226. *See, e.g.*, A.Z. v. B.Z., 725 N.E.2d 1051, 1057-58 (Mass. 2000) ("[W]e conclude that, even had the husband and the wife entered into an unambiguous agreement between themselves regarding the disposition of the frozen preembryos, we would not enforce an agreement that would compel one donor to become a parent against his or her will. As a matter of public policy, we conclude that forced procreation is not an area amenable to judicial enforcement. It is well-established that courts will not enforce contracts that violate public policy." (footnote omitted)); J.B. v. M.B., 783 A.2d 707, 719 (N.J. 2001) ("The public policy concerns that underlie limitations on contracts involving family relationships are protected by permitting either party to object at a later date to provisions specifying a disposition of preembryos that that party no longer accepts. . . . [O]rdinarily the party choosing not to become a biological parent will prevail . . . ."); Litowitz v. Litowitz, 48 P.3d 261, 271 (Wash. 2002) (directing the thawing of frozen embryos and prohibiting their further development). *But cf.* Kass v. Kass, 663 N.Y.S.2d 581, 590 (App. Div. 1997) (holding the parties to their written agreement executed at the time of the procedure, which provided that the fertilized embryos would be used for scientific research by a fertility center).

Because the embryo cases are so close and contentious, New York's approach in *Kass* seems to be the best solution—parties shall be required to agree at the time of the procedure upon the disposition of the fertilized embryos in the event that one party no longer desires implantation, and any such agreement will be enforced.

the fertilization process, courts cannot fall back on the general rule regarding such disputes, which is that the wishes of the potential mother trump the conflicting wishes of the potential father.[227]

The courts' treatment of the embryo cases might help us understand the expressive nature of destruction. Reading *Davis* and the other procreation cases, one is struck by the variations between those opinions and other opinions involving the right to destroy other kinds of property. The right to destroy frozen embryos is deemed a paramount right because of its linkage to a constitutional privacy right to avoid procreating. In none of the cases does the appellate court place *any* weight on society's interest in avoiding the destruction of a human preembryo. Indeed, there is no discussion of the various childless couples who could benefit from embryo donation, and *Davis* went so far as to say that a mother who wanted to have an embryo implanted in her own uterus would have a stronger claim than a parent who wanted to donate an embryo to an infertile couple.[228] The libertarian tone of these opinions is unmistakable, and the courts' concern for the interests of third parties (including the frozen potential human life, infertile couples, and research scientists) is nonexistent.

Consider the implications of this analysis for the questions surrounding the posthumous publication of *K*'s manuscripts. The embryo destruction cases suggest that the constitutional right not to procreate trumps society's right to use an embryo for reproductive or scientific purposes. By the same token, one might argue that the writer's right to avoid speaking (i.e., to direct the destruction of his unpublished works) ought to trump any societal interest in disseminating artistic speech.

In cases where the state is called upon to decide whether a document should be published against the author's will, there may be good reasons to defer to the author's choice, even if the result is the incineration of the only surviving copies of *The Castle* and *The Trial*. That said, both lines of authority seem to ignore something important: In the posthumous publication cases, the artist's privacy and perhaps even his expressive interests have to be balanced against the social value that might result from publication. In the procreation cases, the interests of people who wish to avoid biological parenthood ought to be balanced against the interests of an

227. Courts generally will not force a prospective mother to have an abortion at the father's request, nor will they prevent a woman from having an abortion if her partner wants the fetus carried to term. *See generally* Geoffrey P. Miller, *Custody and Couvade: The Importance of Paternal Bonding in the Law of Family Relations*, 33 IND. L. REV. 691, 717-25 (2000) (discussing the Supreme Court's jurisprudence with respect to a prospective father's right to prevent an abortion). These rules have been justified on the basis of the disparate costs that pregnancy (and often child rearing) impose on mothers.

228. *Davis*, 842 S.W.2d at 604.

infertile couple that would like to conceive children using an already fertilized embryo.[229]

## IV. DISFAVORED TREATMENT FOR TESTAMENTARY DESTRUCTION

Several of the cases discussed in Parts II and III of this Article involve testamentary destruction, a topic that, by itself, deserves sustained attention. As a general matter, the law recoils at the idea of allowing the dead hand to destroy property. In this Part, I argue that the law's reluctance to permit testamentary destruction is worth rethinking.

My defense of testamentary destruction may prompt resistance from many readers. Whatever one thinks about the right of a living person to destroy her property, it is harder, instinctively, to develop sympathy for the owner who wishes to destroy her property via will. The interests of the dead generally do not count in a utilitarian calculus, except insofar as individuals worry about what happens to them after they die and take actions during life to safeguard their graves, legacies, or descendants' welfare. Yet most of the litigated right-to-destroy cases arise in the probate context, and the law generally gives the living owner much greater power to destroy property than the dead owner.[230]

A legal rule that empowers living destroyers and disempowers testamentary destroyers can be circumvented quite easily. Clever estate attorneys could satisfy a testator's destructive wishes by creating SmashCorp, a firm whose business model would consist of destroying any property it received in exchange for a small fee. The testator could then, by contract, trust, or perhaps even will,[231] transfer all to-be-destroyed property to SmashCorp, secure in the knowledge that her wishes would be carried out by the company's demolition experts. The ease of circumventing the prevailing rule raises questions about the reasons for its persistence. Even setting aside these pragmatic concerns about circumvention, however, a regime that gives dead people no power to destroy their property will influence, perhaps for the worse, living souls contemplating their own demise. And the law's resistance to dead hand destruction pushes against the grain of American trusts and estates law, which is for the most part

229. The issue of posthumous procreation rights has already arisen in the courts. *See* Hecht v. Superior Court, 20 Cal. Rptr. 2d 275 (Ct. App. 1993); Michael K. Elliot, *Tales of Parenthood from the Crypt: The Predicament of the Posthumously Conceived Child*, 39 REAL PROP. PROB. & TR. J. 47, 54-67 (2004).

230. There are isolated exceptions. For example, while a testator can direct the destruction of his heart via will, a living person cannot lawfully destroy his own heart.

231. For a discussion of how wills have been displaced as the instrument of choice for gratuitous wealth transfers, see John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984).

relatively deferential to the wishes of testators and settlors regarding the disposition of their property.[232]

A. *Why a Testator Has a Stake in Destroyed Property*

There is one justification for restricting the rights of people to destroy their property via will that emerges repeatedly in the literature and case law. The third edition of Jesse Dukeminier and Stanley Johanson's leading casebook on trusts and estates sets forth the argument:

> The law gives a living person much more power over his property than it gives a dead person. . . . [*D*]*uring life a person personally suffers the economic consequences, which is a deterrent to foolish decisions ordering property destroyed.* If a person destroys his property during life, the person usually assumes this act will make him better off. And society assumes that the totality of individual choices of this kind will maximize society's wealth. *Ordering property destroyed after death imposes no economic consequences upon the testator, who is dead*; the testator's decision, which is not effective until death, does not (and cannot) take into account pecuniary loss suffered by the decision-maker. The inhibiting effect of immediate economic loss does not affect a direction in a will to destroy property. Hence a court will ordinarily order property destroyed only if there is a convincing justification.[233]

On this account, we only defer to the person who is willing to put her money where her mouth is by destroying property while she might otherwise live to enjoy it. Courts deciding right-to-destroy cases such as *Eyerman* and *In re Will of Pace* have adopted reasoning substantially similar to Dukeminier and Johanson's,[234] even as subsequent editions of their casebook softened the claims made in the third edition.[235]

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232. *See, e.g.*, Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 657-66, 674-77 (2004).

233. JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 22-23 (3d ed. 1984) (emphasis added). *But cf.* SHAVELL, *supra* note 115, at 68-70 (arguing that an owner implicitly takes into account the private loss resulting from imposing dead hand restrictions on his property).

234. Eyerman v. Mercantile Trust Co., 524 S.W.2d 210, 215 (Mo. Ct. App. 1975) ("While living, a person may manage, use or dispose of his money or property with fewer restraints than a decedent by will. One is generally restrained from wasteful expenditure or destructive inclinations by the natural desire to enjoy his property or to accumulate it during his lifetime. Such considerations however have not tempered the extravagance or eccentricity of the testamentary disposition here on which there is no check except the courts."); *In re* Will of Pace, 400 N.Y.S.2d 488, 492 (Sur. Ct. 1977) (quoting extensively from *Eyerman* with approval).

235. DUKEMINIER & JOHANSON, *supra* note 202, at 33 ("A person can, if she wishes, destroy her property during life (unless it is subject to historic preservation or similar laws), but she

I believe that Dukeminier and Johanson's analysis of posthumous destruction misses the mark. I will use the facts of the *Eyerman* case to explain why. Recall that *Eyerman* involved Johnston's will provision directing that her house be razed. Dukeminier and Johanson are obviously correct that upon Johnston's death, she had no incentive to preserve the house. But she presumably did not draft her will on her deathbed.[236] On some earlier date, when she did create her will, Johnston knew she wanted to spend the remainder of her life living in her home. She faced a choice about what to do with the remainder interest in her home. If she wanted, she could have retained a life estate in her home and sold the remainder interest to a third party for a substantial sum of money.[237] She then could have used that money immediately to improve the quality of her life. If she wished to destroy the home, by contrast, she would have to forgo this present income from the sale of the remainder. So by forgoing a substantial amount of current income and retaining fee simple ownership over her home, Johnston did put her money where her mouth was.

The closer Johnston got to death, the higher the value of the remainder interest she was forgoing and the greater her current monetary sacrifice. As a property owner's demise approaches, the sacrifice associated with the posthumous destruction of her property more closely approximates that made by a property owner who is alive. Under this reasoning, Dukeminier and Johanson's broad claim is false, and the difference between the living and dead destroyer is a mere matter of degree. The first destroys one hundred percent of his asset, and the second destroys, if elderly, perhaps seventy-five percent of her asset. Both the living destroyer and the testamentary destroyer incur costs as soon as they decide to destroy their property.

To be sure, the testator can always change her mind and alter the destructive provisions of her will. Because wills are revocable until death, one might argue that writing such a provision into a will entails no immediate sacrifice. But I believe this tempting argument should be resisted. The testator does not know when she will die. Nor does she know that her efforts to amend the will at a subsequent date will be effective. They might not be, because of lack of capacity, bad legal advice, or judicial

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suffers the economic consequences of her decision, plus or minus. Should a testator be permitted to order the destruction of property at death when the economic loss is not visited upon the testator but on others? Consider . . . Eyerman v. Mercantile Trust Co." (citations omitted)).

236. The opinion in *Eyerman* does not say when Johnston executed her will. Nevertheless, one can be fairly certain that hers was not a deathbed will, because the neighbors did not challenge Johnston's testamentary capacity. Had Johnston drafted a destructive will provision on her deathbed, a competent lawyer certainly would have raised the capacity issue on the neighbors' behalf.

237. *See* Treas. Reg. § 20.2031-7(d) (as amended in 2000) (outlining how to compute valuations for life estates based on the life expectancy of the life tenant, the applicable interest rate, and the market value of the property).

error. Executing a valid will, then, necessarily creates a risk that the testator will not be able to prevent the destruction, even if she might change her mind in the future.[238] This represents a real, immediate economic sacrifice on the part of the testator.

A destructive will provision represents an immediate sacrifice in other respects as well. First, a savvy testator is well advised to use an attorney to amend a will, thereby generating legal costs for altering the status quo. Second, the persistence of a destructive will provision deters transactional partners who are aware of its existence.[239] Third, when a decision to destroy property has been recorded in a will and ratified by the testator's subsequent decision to avoid selling a future interest, the testator has sacrificed the opportunity to trade present income in exchange for the future interest. Although the will itself is immediately revocable, the failure to revoke after time has passed may generate sunk costs for a testator that could prove psychologically difficult to ignore, particularly if the most opportune time to alienate a future interest has passed. For all these reasons, inserting a destructive provision into a will is immediately costly.

That cost will not always suffice to deter destructive intentions, and for some testators the cost will be trivial. A dying property owner might liquidate future interests in order to pay for expensive medical intervention, a private hospital room, travel costs for old friends and relatives who wish to visit her one last time, and the like. But some wealthy individuals have more than enough money to cover even the most lavish end-of-life expenditures.[240] In such cases, where the additional income to be gained from a sale of future interests in one's property is essentially superfluous, there would be a stronger case for limiting the owner's power to destroy that which is hers. If, however, the decision to destroy property is made by an owner who faces ordinary resource constraints or who does not anticipate her imminent demise, the case for deferring to those wishes is strong.

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238. Executing a valid will containing a destructive provision is akin to lighting a fuse that is connected to a bomb, where the fuse has an indeterminate length. The person who lit the fuse can always try to extinguish the flame if he changes his mind, but there is a real chance he will be unable to do so before the bomb explodes.

239. Suppose that *A* has executed a will ordering his car destroyed. If *A* contracts with *B*, who wishes to purchase a future interest in *A*'s car, *B* is unlikely to be favorably disposed toward the will provision. Even if the will provision is ultimately voided or trumped by the inter vivos transfer, its existence will create legal complexity and uncertainty. A sophisticated *B* will either demand that *A* amend his will before the contract is finalized or offer *A* a reduced price for the future interest. If *A* insists on keeping the will provision in place, he will face an economic sacrifice.

240. Howard Helsinger, who teaches and practices trusts and estates law, suggested to me that some clients might value the postmortem expressive opportunities associated with property destruction far more than they would value the stream of present income that could be garnered from the sale of a future interest.

More serious problems arise if an individual destroys property either because he does not recognize the potential to obtain immediate income in exchange for the sale of a future interest or because he underestimates the value of a remainder interest in the property. Destruction in either case might well make society worse off. In the former case, the owner fails to realize that sparing the property might benefit both himself and society in general. In the latter case, the owner might falsely believe destruction to be the property's highest-value use.

The increasing popularity of reverse mortgages may alleviate these informational concerns in the coming years. In recent decades, financial institutions have begun marketing reverse mortgages to elderly property owners who want to liquidate the remainder interests in their homes in exchange for present income.[241] A homeowner who obtains a "tenure" reverse mortgage will receive a monthly payment from a lender.

> After the borrower moves or dies, the house is sold and the loan is repaid. The amount the borrower receives in monthly installments during the life of the loan depends on several factors, including the amount of equity the borrower has in the house, the interest rate on the loan, the borrower's age and life expectancy and the projected rate of house price appreciation.[242]

Yet firms marketing reverse mortgages to elderly homeowners have encountered substantial obstacles, including consumers' unfamiliarity with the product and unfavorable treatment of reverse mortgage income for the purpose of determining eligibility for Supplemental Security Income and Medicaid.[243] To the extent that these obstacles can be overcome, we can expect that property owners will gain an increasingly sophisticated understanding of the value of remainder interests in their durable property. In the meantime, in Section E, I propose a reverse-mortgage-inspired solution to the problems created by unsophisticated owners.

### B. *State Action and Transaction Costs*

Courts sometimes have suggested that the law's disfavored treatment of testamentary destruction is appropriate because of the state's role in the probate process. A living owner's destruction of her own property usually

241. *See* Christopher J. Mayer & Katerina V. Simons, *Reverse Mortgages and the Liquidity of Housing Wealth*, 22 J. AM. REAL EST. & URB. ECON. ASS'N 235, 235 (1994); *see also* Nandinee K. Kutty, Demographic Profiles of Elderly Homeowners in Poverty Who Can Gain from Reverse Mortgages 7 (Apr. 1999), *available at* http://ssrn.com/abstract=161909 (noting that more than 32,000 reverse mortgages were sold between 1989 and 1999, including 7877 in 1998 alone).

242. Mayer & Simons, *supra* note 241, at 237.

243. *Id.* at 252.

entails no state action or involvement, whereas the destruction of property via will often does. As such, allowing the destruction of property via will arguably makes the state a partner of the wasteful decedent.[244] Hence, a court might hold that the difference between inter vivos destruction and testamentary destruction is that the state is involved only in the latter, and the sovereign can use this involvement as an appropriate basis for asserting an antiwaste public policy interest.

Upon reflection, the state action argument seems to be little more than a makeweight. It merely begs the question of when the state should get involved in a property owner's decision to destroy. The state does get involved whenever someone tries to destroy a building (via the demolition permit process), domestic currency (via criminal law),[245] and in most instances where an important work of visual art by a living artist is to be destroyed (via the Visual Artists Rights Act of 1990).[246] It does not get involved in the destruction of jewelry, most foreign currency, or important artwork by old masters. The conceptual bases for these distinctions are not obvious, and so it seems questionable to hang one's hat on state action theory. Indeed, the probate process itself might be dealt with effectively through private contracts and dispute resolution, and it is generally the decedent's agent, not a state agent, who will do the actual destroying. Nothing forces the state's involvement in the probate process, and only transaction costs and countervailing policy concerns prevent the state's more active role in preventing living owners from destroying their property. So it is not clear why one should conceptualize the testator as forcing the state's complicity in a destructive act.

Another implication of the state action argument is that the state ought to become more vigilant in protecting against resource destruction. For example, on a state action rationale, when two litigants both claim ownership of a particular resource, the courts ought to make the claimants' intended uses of the resource an important factor in the decision calculus. If

244. *Cf.* Eyerman v. Mercantile Trust Co., 524 S.W.2d 210, 214-15 (Mo. Ct. App. 1975) ("[T]he taking of property by inheritance or will is not an absolute or natural right but one created by the laws of the sovereign power. . . . [T]he state 'may foreclose the right absolutely, or it may grant the right upon conditions precedent, which conditions, if not otherwise violative of our Constitution, will have to be complied with before the right of descent and distribution (whether under the law or by will) can exist.' Further, this power of the state is one of inherent sovereignty which allows the state to 'say what becomes of the property of a person, when death forecloses his right to control it.'" (quoting State *ex rel.* McClintock v. Guinotte, 204 S.W. 806, 808-09 (Mo. 1918) (in banc))); *In re* Will of Pace, 400 N.Y.S.2d 488, 492 (Sur. Ct. 1977) ("To violate public policy the act in question need not be something which the testator could not have done with his own land while he was alive. . . . After his death . . . it is against public policy to permit the decedent to confer this power upon someone else where his purpose is merely capricious.").

245. 18 U.S.C. §§ 331, 333 (2000) (criminalizing the mutilation of U.S. coins, paper money, and national bank obligations).

246. Pub. L. No. 101-650, §§ 601-610, 1990 U.S.C.C.A.N. (104 Stat.) 5089, 5128-33 (codified in scattered sections of 17 U.S.C.).

Pierson wants to destroy the fox, and Post wants to donate it to the local natural history museum for display, then the state's interest in avoiding complicity in destruction ought to make the court more likely to award custody of the fox to Post. By the same reasoning, it would seem that the state ought to maintain tax policies that penalize destroyers of property. But in fact tax rules often do not penalize destruction.[247]

There is a related, far more persuasive basis for distinguishing between destruction by an owner and destruction by an executor. On this account, the state has some interest in preventing the waste of valuable, privately owned resources but faces monitoring and enforcement costs every time it seeks to do so. Because the probate process already involves lawyers and the judicial system, and because litigant-driven will contests or construction proceedings make it relatively inexpensive for the state to monitor probated wills to find instances of property destruction, the state can prevent inefficient destruction without expending substantial resources. The same may be said of the destruction of buildings by living owners, because such destruction is ordinarily noticeable by neighbors or city inspectors. Monitoring living owners' surreptitious destruction of artwork, on the other hand, would be quite costly, and the costs of monitoring and enforcing antidestruction rules would exceed the cost of allowing some private destruction.

That said, if transaction cost minimization is the appropriate rationale for the law's restrictions on property destruction, then the law needs to be adjusted in several respects. For example, the government is involved in the regulation of funeral homes and might require licensed funeral home directors to guarantee that wedding rings and other valuable jewelry are not buried in graves. But evidently, *Meksras*'s common law antidestruction rule is not enforced via funeral home regulations.[248] Moreover, in those instances where a living person publicly announces his intent to destroy a particular piece of property, the government's monitoring costs approach zero, and the enforcement costs might be relatively low. In all these situations, the government's failure to intervene to prevent waste can be second-guessed.

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247. *See* Citizens Bank & Trust Co. v. Comm'r, 839 F.2d 1249, 1254-55 (7th Cir. 1988) ("If you own the Mona Lisa and paint (indelibly) a mustache on it before giving the painting to your child, with the result that its value is greatly reduced, still your gift tax will be computed at the reduced value."); Ahmanson Found. v. United States, 674 F.2d 761, 768 (9th Cir. 1981) ("[I]f a public figure ordered his executor to shred and burn his papers, and then to turn the ashes over to a newspaper, the value to be counted would be the value of the ashes, rather than the papers."); Holland v. United States, 311 F. Supp. 422 (C.D. Cal. 1970) (holding that taxpayers are allowed a deduction against ordinary income for a loss resulting from a building demolition). *But see* Sykas, *supra* note 33, at 926 n.144 (noting that the IRS has adopted a contrary rule in at least one instance).

248. *See, e.g.*, 16 C.F.R. §§ 453.1-.9 (2004); *supra* note 4.

C. *Publicity and Social Norms*

In explaining the law's hostility toward will provisions directing the destruction of property, scholars have noted the potential for people affected by destruction to persuade the living owner to reconsider. Adam Hirsch makes the argument succinctly:

> Living persons face the . . . social repercussions of their actions; dead persons do not. One consequence is that a testator can, if she is so inclined, wash her hands of her dependents, without suffering the opprobrium that a living person would bear for such behavior. Death spares the testator from interpersonal costs.[249]

Hirsch thus argues that a testamentary destroyer avoids having to witness the consequences of her actions to her heirs and immunizes herself against the social retaliation that might follow.

Posner offers a related explanation for courts' hostility to testamentary destruction. If the destroyer is alive at the time of the destructive act, affected neighbors or kin might be able to persuade her to alter her course. The person who destroys her property via will, on the other hand, is no longer susceptible to such persuasion.[250] Someone who has written a destructive provision into her will can keep her intentions secret, precluding third parties from trying to persuade her to preserve her property. Courts construing destructive wills have been troubled by the prospect that a testator might have changed her mind if only she had known certain facts not available at the time.[251] Indeed, the law's suspicious treatment of testamentary disposition is not limited to the destruction of property—in a handful of other contexts, courts bar testators from doing via will what those same testators could have done had they lived.[252]

Hirsch's and Posner's arguments are not without force. But it is hard to establish definitively which way they cut. Assuming that testators care about their reputations after death, we might be particularly worried when a court refuses to honor a person's wishes at a time when she no longer can respond. A court deciding whether to enforce a destructive will provision

249. Hirsch, *supra* note 33, at 72-73.

250. POSNER, *supra* note 150, at 558-59; *see also* John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1110-11 (2004) (endorsing this argument).

251. *See* Nat'l City Bank v. Case W. Reserve Univ., 369 N.E.2d 814, 818-19 (Ohio Ct. Com. Pl. 1976); Capers Estate, 34 Pa. D. & C.2d 121, 129 (C.P. Allegheny County 1964).

252. *See, e.g.*, Carolyn L. Dessin, *The Troubled Relationship of Will Contracts and Spousal Protection: Time for an Amicable Separation*, 45 CATH. U. L. REV. 435, 473-75 (1996) (discussing the law of elective shares); John A. Robertson, *Posthumous Reproduction*, 69 IND. L.J. 1027, 1039-45 (1994) (arguing that a state would have more leeway in regulating the testamentary disposition of frozen sperm than in regulating a living donor's use of his sperm). Clare Gittings discusses the long history of English law ignoring the wishes of decedents regarding the character of their funerals. GITTINGS, *supra* note 42, at 86-88.

would have to do so without the benefit of the owner's testimony regarding her motivations. This happened in *Eyerman*. Such hearings are one-sided affairs where no party advocates the decedent's expressed interests or explains her motivations. By contrast, the possibilities for judicial error will be lower during the homeowner's lifetime, when the destroyer and those opposed to the destruction both have an opportunity to explain their positions and critique each other's arguments in open court.

Even setting aside this point, the arguments set forth by Posner and Hirsch make presumptions that are unwarranted. More precisely, both suppose that (1) a living donor's destruction of property will be noticed by those who would prefer that the property be preserved, (2) a living donor who destroys property will be susceptible to persuasion or social sanctions, and (3) heirs and other affected third parties are more likely to want to see property preserved than destroyed. It is not clear that all three presumptions would hold true in most of the property destruction cases where valuable resources are at stake.

First, chattel property usually can be destroyed surreptitiously by a living owner. There is little reason to think that owners generally will consult third parties before electing to destroy the chattels in question. Indeed, to the extent that living people care about their reputations after death, directing the destruction of a chattel via will probably attracts more attention than destroying it during life. Because posthumous chattel destruction must be spelled out in a will, one anticipates that some testators who believe their heirs will object to this destruction will be deterred from putting destructive instructions in their wills. To them, surreptitious destruction during life will be the preferred route—heirs might never learn about what they had lost.

Second, in many instances the living owner of destroyed property will not stick around long enough to be ostracized. Take the paradigmatic home destruction case of *Eyerman*. By attempting to destroy the home via her will, Johnston indeed escaped the social ostracism of her neighbors. But had she destroyed the home during her lifetime, said destruction would have required Johnston to move elsewhere, where she similarly would have escaped her neighbors' disapproval. Because it appears that Johnston's relatives, the would-be beneficiaries, did not object to the home's razing,[253] it is not clear that she would have suffered serious social repercussions in the wake of the destruction. Presumably, the only opportunities for norm enforcement would have occurred during the window of time necessary to obtain a demolition permit. Further, it seems plausible that someone who destroys her habitable home is the type of nonconformist who is generally

253. *See* Eyerman v. Mercantile Trust Co., 524 S.W.2d 210, 218 (Mo. Ct. App. 1975) (Clemens, J., dissenting).

immune to peer pressure from neighbors.[254] Even close-knit communities contain deviants, whose imperviousness to reputational sanctions threatens the efficacy of informal mechanisms for social control.[255]

Third, there are important cases where heirs and other third parties may prefer to see a testator's valuable property destroyed and where disregarding owners' testamentary wishes can result in increased destruction and social waste. Here I am thinking about transplantable organs, a type of property that has figured prominently in this Article. As Part II suggested, the law surely plays a role in discouraging organ donation, but that law appears at least somewhat responsive to existing norms. Effective organ transplantation is a relatively recent phenomenon, and inefficient social and religious norms characterizing the removal of organs as bodily desecration have not been displaced completely.

Now recall Hirsch's discussion of norms and consider two alternative regimes. In Regime One, the would-be donor must disclose to his heirs apparent his intentions to donate his organs upon his death in order for that choice to be effective. In Regime Two, he may opt to donate his organs secretly, for example, by filling out a form to be placed in his medical records. If the relatives are more resistant than the would-be donor to organ donation, then a disclosure requirement will result in added waste, because it will give them an opportunity to dissuade the would-be donor from his intended course of action. A would-be donor who thought his donation would be socially beneficial might be surprised to learn that his donation would compound his next of kin's grief. Those heirs who would have felt uncomfortable trumping the deceased's wishes to donate will feel much more comfortable destroying the organs if they can persuade their loved one to change his mind during life.

In sum, the supposition that Hirsch and Posner both make—that heirs and other third parties are likely to dissuade owners from destroying their property—may be incorrect in the context of transplantable organs.[256] It appears that peer pressure, persuasion, and socialization operate to increase the destruction of these enormously valuable organs. For this reason, deference to the secretive testamentary wishes of a decedent may well result in less waste than a regime that only respects the wishes of a decedent that were articulated to his kin prior to his death.

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254. *See supra* note 58.

255. *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 56-59 (1991).

256. Their supposition may be incorrect for other resources as well. A testator might tell his spouse that he intends to pass on his wedding ring to her after he dies. It is not difficult to imagine a scenario whereby she tells him that she does not want it and would prefer that he "keep it" for an eventual reunion in the afterlife.

### D. *Testamentary Capacity*

Having assumed a sane and rational testator during this discussion, it is worth exploring what happens when that assumption is relaxed. Certainly the law is justified in disregarding the wishes of an insane testator, regardless of the contents of those wishes.[257] When an owner of a valuable resource who is genuinely incapable of making rational decisions destroys the resource, no one benefits. In such circumstances, the state is plainly justified in intervening to protect the welfare of the owner and society as a whole. As long as the costs of evaluating the owner's decisionmaking capacity do not dwarf the value of the affected resources, the law ought to bar destruction.[258]

The interesting legal questions arise in the closer cases, where a testator's lack of capacity is disputed. Evidence that the testator destroyed or tried to destroy her own property is sometimes introduced to show that she lacked testamentary capacity.[259] At least one (Canadian) court has been unreceptive to these kinds of arguments in the destruction context, preferring a waste or externality rationale for refusing to follow the testator's wishes.[260] Thoughtful scholars already have argued that the text of idiosyncratic will provisions should be admissible, but by no means decisive, in determining whether the testator was of sound mind.[261] In the destruction context, however, there is a particular danger that eccentricity will be mistaken for insanity. People who wish to destroy their homes or paintings via will are outliers, to be sure, but their unusual behavior may stem from the types of unorthodox expressive interests that, in other contexts, the law goes to great lengths to protect.

### E. *A Sui Generis Solution: A Safe Harbor for Testamentary Destroyers*

Recall the recently covered terrain. Some people in society wish to use particular property during their lifetimes and then direct the property's destruction upon their deaths. These preferences are sincere much of the

257. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.1 (2003). Under the Restatement, such instructions are voidable. For a recent interdisciplinary examination, see Daniel C. Marson et al., *Testamentary Capacity and Undue Influence in the Elderly: A Jurisprudent Therapy Perspective*, 28 LAW & PSYCHOL. REV. 71 (2004).

258. There is, of course, a related question about whether the expressive benefits of property destruction "count" if the destroyer is insane. For an exploration of this issue under First Amendment law, see Bruce J. Winick, *The Right to Refuse Mental Health Treatment: A First Amendment Perspective*, 44 U. MIAMI L. REV. 1, 41-58 (1989).

259. *See, e.g.*, *In re* Ellis' Estate, 210 P.2d 417, 424 (Kan. 1949).

260. *See, e.g.*, *In re* Wishart, [1992] N.B.R.2d 397, 404, 419-20 (Can.).

261. *See* Hirsch, *supra* note 33, at 80-83; *see also* Langbein, *supra* note 250, at 1110 n.31 ("It is true that an owner with capacity to conduct his own affairs may destroy his Rembrandt, but destroying Rembrandts would be likely to cause capacity to be questioned.").

time, and savvy testators will expend resources trying to circumvent legal rules that prohibit posthumous destruction. In some of these cases—especially those involving wedding rings—it seems that, because living people care about what happens to their bodies after their deaths, the would-be destroyers really are the resources' highest-value users. Perversely, well-informed testators sometimes destroy property prematurely because they recognize that death will deprive them of the opportunity to destroy it altogether. Limiting posthumous destruction therefore imposes substantial costs on society.

Yet persistent concerns that the dead have "nothing to lose" by destroying property make courts reluctant to permit testamentary destruction. To be sure, a sophisticated living testator demonstrates her seriousness of purpose by forgoing the present income that could result from the sale of a future interest in the property. At the same time, some people may destroy their property because they do not realize that they have the opportunity to retain a life interest in it and sell the remainder for present cash, or because they underestimate the amount of money that a remainder interest will fetch.

Further, destroying valuable property sometimes runs afoul of prevalent social norms in the United States, with wedding rings and organs forming important exceptions. These norms may check individuals' destructive impulses in life but are ineffective once the would-be destroyer has died. Thus, the law might allow destruction by the living, while restricting destruction by the dead, as a means of ensuring that owners are willing to suffer the reputational sanctions that would accompany destruction.

Finally, some percentage of those who attempt to destroy property are incapable of making rational judgments. In such circumstances paternalistic restrictions on their ability to destroy property generally promote testators' best interests and social welfare.

In short, there are some instances where respecting destructive will provisions is welfare enhancing and other instances where it is not. Is the appropriate legal response a strict antidestruction rule? Hardly. An owner's exercise of any property right—the right to exclude, the right to mortgage, or the right to sell—can diminish social welfare in certain circumstances. But the law does not respond to this possibility by eliminating the property right in question. Rather, the law recognizes the persistence of the right but imposes limitations on how it can be exercised.[262] This raises the following question: Is there a legal rule that can help courts distinguish between the types of posthumous destruction that ought to be permitted and those that ought to be prohibited? Namely, we want a rule that addresses our concerns

262. *See, e.g.*, State v. Shack, 277 A.2d 369 (N.J. 1971) (limiting exercises of a landowner's right to exclude legal aid and health care workers from his land, based on constitutional considerations and the welfare of the migrant workers who worked and lived on the property).

about testators underestimating the value of the future interest in property slated for destruction, testators using the will process to dodge efforts to persuade them to preserve valuable property, would-be owners never learning about the existence of property until after it has been destroyed, and testators lacking testamentary capacity.

Property law can respond to all these concerns through a rather simple requirement: Destructive instructions contained in wills shall be honored only if the owner, during his lifetime, notified the public of the opportunity to purchase a future interest in the property. For example, a testator interested in destroying his home could be required to market a future interest in the property through an auction service. The advertisement for the future interest would have to list detailed information about both the property in question and the life tenant himself.[263] The testator would establish a minimum reserve price, which could be kept secret by the testator. If the owner's reserve price was exceeded by a bidder or the government decided to condemn the future interest, then the property would be spared from destruction. But if no bid exceeded the would-be destroyer's minimum asking price, and he was unwilling to sell his property to the highest bidder, then the owner would have demonstrated that he valued destruction of the property more than anyone else valued its preservation. Turning down the highest bid for a future interest would give owners safe harbor to destroy their property via will.

Note that this policy lever addresses all the concerns that have prompted the divergent legal treatment of testamentary and inter vivos destruction. From a welfarist perspective, where the owner of property has forgone a market price for the property's future interest, he has earned the right to consume that future interest by destroying the property.[264] Moreover, the policy would substantially lower the transaction costs associated with monitoring living people's decisions to destroy property. Marketing future interests in the property would alert community members

263. A buyer would want access to information that helps establish the life tenant's life expectancy, such as age, gender, and health.

264. Sometimes high transaction costs create a false impression that the owner of property, who wishes to destroy it, is the resource's highest-value user. Situations surely exist where a large number of people derive substantial "existence value" from knowing that a particular piece of property survives, and these people would be willing to pay some amount to ensure the property's preservation, but the highest bidder at an auction nevertheless wishes to destroy it. If the aggregate willingness to pay of the preservationist bidders exceeds the aggregate willingness to pay of any destructive bidders, then we can say that transaction costs will result in the socially wasteful destruction of property. This seems like a plausible account for the destruction of the Buddhas of Bamiyan, discussed *supra* text accompanying notes 180-181. For a discussion of existence value, see Matthew D. Adler & Eric A. Posner, *Implementing Cost-Benefit Analysis When Preferences Are Distorted*, 29 J. LEGAL STUD. 1105, 1117-18 (2000). There ought to be cases where the reverse is true—i.e., where a large number of people would derive substantial "nonexistence value" from knowing that a particular piece of property had been destroyed. The destruction of the "cursed" Steve Bartman baseball and the destruction of a yacht purported to belong to Adolf Hitler seem like good examples of this. *See supra* text accompanying notes 5, 171.

and heirs apparent to the owner's intentions while they were still in a position to influence him to change his mind.

A major advantage of this approach is that it would facilitate the condemnation of property that might benefit the community more generally. By acquiring a future interest, the government would be paying less than the full market value for the property in fee simple, while simultaneously ensuring that the property would be spared from destruction.[265] Posthumous condemnation in right-to-destroy cases necessarily thwarts the wishes of the testator without conferring any meaningful benefit on him.[266] Condemnation during the testator's lifetime thwarts his wishes too, but it at least provides him with money that he can enjoy during the rest of his life.

Finally, the process of marketing a future interest in anticipation of one's death would require that the testator have some sophistication and a capacity to plan for the future. One imagines, therefore, that those lacking testamentary capacity rarely would be able to jump through the appropriate hoops. And while legal counsel can be expected to facilitate this process, the decision to consult counsel regarding such intentions seems, independently, to offer some evidence of the testator's capacity. Moreover, to the extent that dementia or other limitations on capacity become increasingly probable as the testator's life nears its end, requiring the testator to market the future interest at some earlier date increases the likelihood that destructive decisions would be authorized by people still possessed of their senses.

For all these reasons, the law should harmonize its treatment of inter vivos and posthumous destruction in cases where the posthumous destroyer has marketed the future interest in the property and elected to forgo the full market value of this future interest. Such a rule will make all testamentary destroyers behave like sophisticated market actors and enable them to weigh the costs and benefits of property destruction.

This discussion raises the inevitable question of whether the same regime should apply to transplantable organs. I have, in the past, expressed reservations about the wisdom of permitting market transactions in human organs.[267] Without getting into the contentious issue of whether it would be

265. These cases are all instances in which the owner wishes to continue using the property during his lifetime, so there is little risk that it would get destroyed while in the testator's possession. After all, if the testator had wanted to destroy the property prior to his own demise, he could have done so. In any event, even if the testator changed his mind and sought immediate destruction following condemnation, the doctrine of waste would prevent him from doing so.

266. The testator's estate receives the market value of the property that the state condemned. But the testator is dead, so the heirs are the sole beneficiaries of these proceeds. If the testator had wanted the heirs to receive this money, he would not have directed his executor to destroy the property at issue.

267. Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California's Carpool Lanes*, 75 IND. L.J. 1231, 1293-96 (2000).

desirable to create a lawful market for organs, I will simply explore two possibly appealing aspects of this policy innovation in the organ donation context. First, permitting a living donor to sell the right to harvest his kidneys upon his death is far less troubling than permitting a living donor to sell his kidney, effective immediately.[268] Second, to the extent that many people are inclined to donate but do not do so because they are unaware of the need for organs or underestimate their worth, the process of marketing a future interest in one's organs might solve both problems. So a law that permitted people to destroy their organs only if they had forgone the highest market price for a future interest might serve an educational function for potential donors and their heirs. It also could help society differentiate between those who sincerely want their cadavers to remain intact and those whose preferences are weak or driven by the default rule.

My proposed safe harbor rule lacks obvious analogs to existing doctrines in property law. Given the lack of analogs and the arguable need for regulation in the area of future interest sales,[269] legislative action may be the most natural avenue for reform. That said, a trusts and estates lawyer whose client wishes to destroy valuable property via will would be wise to advise the client to market the future interest in his property during his lifetime. Doing so would address every objection that courts have lodged against testamentary destruction. A common law court then would be in the position to hold that marketing a future interest prior to death is one way (but perhaps not the only way) for a sincerely destructive testator to convince a court to respect his wishes.

## CONCLUSION

The recent trend in American law has been to curtail property owners' traditional rights to destroy their own property. Given Joseph Sax's advocacy for a hastening of that trend, it makes sense to review the law regarding property destruction and evaluate whether limiting owners' right to destroy is socially beneficial.

Those who wish to curtail the right to destroy base their argument almost exclusively on the resource waste that results from property destruction. Usable resources may be squandered; neighborhoods may

268. *See* Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 GEO. WASH. L. REV. 1 (1989); Hansmann, *supra* note 93, at 62-78.

269. The law would need to create rules that could distinguish between good faith marketing of a future interest (e.g., selling it through a reputable auction house) and sham marketing of a future interest (e.g., posting a vague flyer in an obscure location for one hour). Practical difficulties would arise in the case of unpublished writings or other art that the author would like to destroy. The law should require that the author's name be marketed, perhaps along with a very broad description of the work's contents, but the author should not have to make the contents of the work available to potential bidders. All of these practical issues seem most readily surmountable by legislators or administrators.

empty; and historians may have more difficulty studying artistic, political, or cultural traditions. These are all substantial concerns. But as I have argued, prohibiting people from destroying their property can result in waste too. Historic preservation laws can lock inefficient land uses into place. Rules barring patent suppression can discourage firms from investing in innovations. Rules requiring presidents to preserve all presidential papers can deter them from memorializing controversial or sensitive ideas. Particularly in cases involving high transaction costs, widely held prodestruction norms, or substantial adverse ex ante effects, the cure of preventing destruction is worse than the disease of allowing it.

The Article then uses the destruction of internal organs as a starting point for an examination of the expressive benefits associated with destruction. Rational people usually do not destroy valuable property intentionally. So where the government witnesses a rational person destroying her valuable property, it should presume that the destructive act furthers expressive objectives. This deferential approach still raises the question of whether expressive interests should trump the usual concerns about wasted resources and associated negative externalities.

Cases that require courts to balance expressive interests against substantial economic or social welfare interests may become very difficult. Courts have an unfortunate tendency to try to make them easier by disregarding the interests on one side of the equation. For example, cases involving the destruction of frozen embryos ignore the interests of infertile couples who would like to have the embryos preserved for implantation. Indeed, in these cases, courts give no thought to the ordinary critiques of property destruction. Similarly, courts generally disregard artists' substantial First Amendment interests in ensuring that incomplete, inferior, or otherwise disfavored unpublished works in their collections are destroyed upon their passing. That attitude is disturbing. Sane artists should decide which of their works are presented to the world—they have the correct economic incentives and greater familiarity with their own work than anyone else. Disregarding an unambiguous destruction provision in a will raises the specter of compelled speech. Moreover, an antidestruction rule creates perverse incentives for ailing artists to destroy works that they might not be able to finish during their lives and to avoid committing high-risk thoughts to paper until they have fully conceptualized the entire project.

Congressional legislation on the destruction of visual art provides a more balanced and sophisticated approach to destruction cases where important interests exist on both sides. Under a collectivist reading of VARA, the law privileges the creation of art over the destruction of art, while recognizing that both creative and destructive acts have expressive value. After the artist who created a work has displayed it publicly for a substantial period of time or contracted away his rights to prevent

destruction, his expressive interests fade, and the interests of the owner who wishes to destroy a work to criticize its content or capture the public's attention must prevail. Hence, the law's protection of important new works by living artists and its lack of protection of works by old masters constitute puzzling economic regulation but sensible free speech law.

The conflict between individual autonomy and collectivist orientations is a recurring trope in any discussion of property destruction. The law of property, and any intelligible theory of destruction, necessarily flirt with both conceptions. The relative simplicity of engaging in autonomy-oriented analysis helps explain what may be perceived as this Article's tilt toward an individual autonomy perspective on the right to destroy. Property and speech collectivists have yet to confront the tremendous uncertainty explored in this Article. There is empirical uncertainty surrounding the circumstances under which antidestruction rules result in a net increase in the quantity of property that is worth preserving. The individual liberty issues involved seem easier to understand and, for the time being, may provide a more appropriate basis for policy formulations.

Finally, the law's attitude toward dead hand property destruction is overly restrictive and creates perverse incentives for sincere testators who care about what happens to their property after their deaths. Courts have continued to give living owners some leeway in destroying their property, while ordering executors to disregard destructive instructions contained in wills. The stated bases for this hostility to posthumous destruction are the ideas that only a living owner will suffer the consequences of her act and that self-interest will deter most living owners from destroying valuable resources. On this account, the courts can disregard destructive will provisions because the testator never "put her money where her mouth was." I argue that this account is incorrect. The testator's refusal to sell a future interest in the destroyed property during her life demonstrates her willingness to forgo present income to secure the property's destruction. If testators are fully informed and rational, they have the proper incentives to avoid destroying valuable property capriciously. To that end, I propose a legal regime whereby testators would be privileged to destroy nonlandmarked property if they marketed a future interest in the property and turned down the highest price offered for that future interest. The only exception to this rule would arise in situations where the government elected to exercise its condemnation authority. In cases involving wedding rings, family heirlooms, personal papers, and sometimes even homes, individuals seem to gain substantial utility from knowing that "they can take it with them" upon their passing. As long as the government can be assured of their sincerity, testamentary capacity, and recognition of the property's beneficial postmortem uses, it ought not prevent these people from directing the destruction of their property via will.