

# THE RIGHT TO DESTROY

Lior Jacob Strahilevitz<sup>□</sup>

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<sup>□</sup> Assistant Professor, University of Chicago Law School. Thanks to Al Alschuler, Emily Buss, Melody Drummond, Bob Ellickson, Richard Epstein, Carolyn Frantz, Dick Helmholz, Todd Henderson, Bill Landes, Saul Levmore, Doug Lichtman, Joanna Martin, Tracey Meares, Eric Posner, Rob Sitkoff, Kirk Stark, Christopher Stone, and Cass Sunstein for their comments on an earlier draft. Thanks also to those who attended a University of Chicago faculty workshop and the University of Chicago Emeritus Luncheon for their helpful questions and criticisms, and to Sean Griffin for excellent research assistance.

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. In any event, a comparison of the sixth and seventh edition's text 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.”

Black's Law Dictionary 1105 (6th ed. 1990).

**Owner** – “One who has the right to possess, use, and convey something; a proprietor.”

Black's Law Dictionary 1130 (7th ed. 1999).

The earlier definition had been remarkably stable, with virtually identical definitions appearing in legal dictionaries from the mid 19th-century.<sup>1</sup> 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 incidence 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, and 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 attractive clothing.<sup>2</sup> And no one took seriously historic preservationists' protests when a restaurant chain spent \$113,824 to purchase and destroy the infamous “cursed” baseball that Steve Bartman deflected during Game 6 of the 2003 National League Championship series.<sup>3</sup>

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<sup>1</sup> *E.g.*, JOHN BOUVIER, A LAW DICTIONARY 276 (5th ed. 1855) (“Owner – The owner is he who has dominion of a thing real or personal, corporeal or incorporeal, which he has a right to enjoy and to 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.”). Earlier editions of the dictionary appear to have used the same definition. *See* Stein v. Burden, 24 Ala. 130, 1854 WL 349 (Ala.) at \*6, 60 Am. Dec. 453 (1854) (quoting an earlier edition's definition of ownership).

<sup>2</sup> Ronnie Caplane, *The Ring Is Not the Thing*, CONTRA COSTA TIMES, Dec. 12, 2003, at 4; Lane DeGregory, *'Til Death Parts Us*, ST. PETERSBERG TIMES, July 21, 2002, at 1F; A.J. Holly & Sons, *About the Funeral*, available in [http://www.hollyfuneralhome.com/html/funeral\\_before.html](http://www.hollyfuneralhome.com/html/funeral_before.html) (visited Dec. 29, 2003); Rochester Funeral Homes, *Resource Guide: Funeral Planning Checklist*, available in [http://www.rochesterfunderalhomes.com/Resource\\_Guides/Funeral\\_Planning\\_Checklist.html](http://www.rochesterfunderalhomes.com/Resource_Guides/Funeral_Planning_Checklist.html) (visited Dec. 29, 2003).

<sup>3</sup> 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).

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.<sup>4</sup> If a testator orders her executor to destroy her home upon her death, the law will probably render the executor unable to carry out her wishes.<sup>5</sup> And if a landlord requests the city's permission to demolish a venerable but badly-burned building that has become an eye-sore, a teetering hazard, and a financial burden, the government can thwart his wishes.<sup>6</sup> Confronted with arguably hard cases and high stakes, most American courts have rejected the notion that an owner has the right to destroy that which is his.

This trend of substantially curtailing property owners' destruction rights was given further momentum recently by some of the nation's most capable property scholars. Joseph Sax's book, *Playing Darts with a Rembrandt*, argues that the American law is far too deferential to the wishes of those who wish to destroy property that might have cultural significance.<sup>7</sup> 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. 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,<sup>8</sup> at one point referring to the right as "an embarrassment in Anglo-American law."<sup>9</sup> To McCaffery, the only good reason for retaining the right to destroy is the rarity with which owners intentionally destroy permanent assets.<sup>10</sup>

In advocating further substantial limitations on the owner's right to destroy, Sax and McCaffery were not picking a fight with anyone in particular. The right to destroy presently lacks a constituency within the American legal academy.<sup>11</sup> This paper responds to Sax, McCaffery, and the various judicial anti-destruction rulings by presenting a qualified defense of the owner's right to destroy valuable resources.<sup>12</sup> On my account,

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<sup>4</sup> *In re Meksras Estate*, 63 Pa. D. & C.2d 371, 373 (Common Pleas 1974).

<sup>5</sup> *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210, 217 (Mo. Ct. App. 1975).

<sup>6</sup> *J.C. & Assoc v. District of Columbia Bd. of App. & Rev.*, 778 A.2d 296, 308-09 (D.C. 2001).

<sup>7</sup> JOSEPH L. SAX, *PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES* (2001). Sax's book does not discuss most of the cases that are analyzed in this article.

<sup>8</sup> Edward J. McCaffery, *Must We Have the Right to Waste?*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 76 (Steve Munzer ed. 2001). McCaffery discusses the topic of property destruction as an abstract matter. Accordingly, like Sax, he does not discuss any of the cases that are analyzed herein.

<sup>9</sup> *Id.* at 81.

<sup>10</sup> *Id.* at 85-86.

<sup>11</sup> *Id.* at 81.

<sup>12</sup> 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-

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 transactions costs that would be incurred in a Saxon world. That is not to say that the right to destroy should be absolute. Indeed, my paper identifies a few contexts and considerations, ignored by scholars and courts, in which restrictions on the destruction of property are highly desirable.

The ambition of this paper, then, is to consider more broadly 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 paper 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 an important function of demarcating the boundaries of the owner’s rights in property. Under this conception, destruction functioned as the most extreme recognized property right, and so the owner who destroys 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, 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 concludes by offering a definition of property destruction that steers the reader toward the interesting, contested cases of destruction.

Part II examines the major argument that 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, and promoting candor and risk-taking. A critical reading of the cases suggests that the various anti-waste rules that courts have promulgated might well have resulted in diminished social welfare by discouraging the creation of the valuable properties that the courts are so keen on protecting.

Part III examines a thread that runs through much of the right-to-destroy case law. Most litigated cases involving property destruction involve efforts by an owner to destroy property via will. The applicable conventional wisdom, expressed in the case law and scholarship, consists of the idea that decedents’ destructive will provisions should be invalidated because the dead had “nothing to lose” by destroying their property via will. Hence, the self-interest that keeps most living owners from destroying their valuable property during life fails to deter posthumous destruction. I argue that this conventional wisdom is wrong. An application of the law governing future interests demonstrates that when a testator executes a will providing for the destruction of property following her

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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.

death, she makes an immediate economic sacrifice because of her inability to alienate a remainder interest following her life estate. 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 he wishes to destroy. Accordingly, I propose a novel “safe harbor” rule whereby testators who market a future interest in their property and elect to forego 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 it also addresses the other objections to permitting posthumous destruction – namely, concerns about modification, social norms, transaction costs, and the government condemnation process.

Part IV explores the intangible benefits associated with property destruction. When rational people destroy valuable property, they often do so because of deeply held expressive or religious interests. History provides many examples in which valuable pieces of property have been destroyed by owners who used this destruction to gain attention for a cause or message. Relatedly, the law’s willingness to tolerate the widespread destruction of transplantable organs can only be defended on the basis of pro-destruction religious and moral sentiments held by large segments of the population. The paper argues that under certain circumstances, these expressive or religious interests ought to trump the social waste that results from the destruction of valuable property. It then suggests that the United States’ Visual Artists’ Rights Act’s anti-destruction provisions provide a useful model for reconciling society’s interests in preserving irreplaceable works of art and permitting owners to criticize art or ideas embodied therein through destructive acts. Finally, the part concludes by exploring whether those who create properties, particularly intellectual property, ought to have expanded destruction rights.

A conclusion in Part V argues that the law’s pendulum is swinging too far toward restrictions on the destruction of property. It then reviews the case law, and proposes more satisfying rules for courts to apply in controversies where one party invokes the right to destroy that which is his.

## **I. Fundamentals of the Right to Destroy**

The right to destroy evidently received more attention in antiquity than it does today. It appears that the right’s historical and linguistic connection to the Roman law right to abuse one’s property has caused the right to destroy to fall into disfavor via a form of guilt by association.

### **A. 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, use the income generated by the property, or completely consume and destroy the property, respectively.<sup>13</sup> To have these rights with respect to a thing made someone that thing’s owner under Roman law.<sup>14</sup> The

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<sup>13</sup> Max Radin, *Fundamental Conceptions of the Roman Law*, 13 CAL. L. REV. 207, 209 (1924-25).

<sup>14</sup> *Id.* at 210.

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.<sup>15</sup>

A few early American civil law decisions 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 land owner had the right to destroy property, he certainly had the right to use or dispose of it in a less dramatic manner.<sup>16</sup> Several other American decisions eschewed the Latin phraseology, referring instead to a property owner’s common law “right to destroy” that which was his.<sup>17</sup>

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 – “the 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.”<sup>18</sup> 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 effe* for the benefit of the public, whereas by burning the very

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<sup>15</sup> Some commentators define “abutendi” with respect to misuse of property; others have it refer to the destruction of property. Anton Hermann Chroust & Robert J. Affeldt, *The Problem of Private Property According to St. Thomas Aquinas*, 34 MARQUETTE L. REV. 151, 175 (1950-51). By the later years of the 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. Alan Watson, *Roman Slave Law: An Anglo-American Perspective*, 18 CARDOZO L. REV. 591, 598 (1996) (“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.”) 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.

<sup>16</sup> See, e.g., *Kingsbury v. Whitaker*, 32 La. Ann. 1055, 36 Am. Rep. 278, 1880 WL 8529, at \*6 (“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 or annihilate that which belongs to him. If he may 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.”).

<sup>17</sup> 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.”); *Voss v. State*, 236 N.W. 128, 130 (Wisc. 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”).

<sup>18</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*2 (facsimile ed. 1979) (1766).

substance is absolutely destroyed.”<sup>19</sup> This hostility to wasteful destruction notwithstanding, Blackstone suggests 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:

The offense of arson (strictly so called) may be committed by willfully setting fire to one’s own house, provided one’s neighbor’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 willful firing one’s own house, *in a town*, is a high misdemeanor, and punishable by fine, imprisonment, pillory, and perpetual sureties for the good behavior.<sup>20</sup>

Blackstone thus takes the position that one is free to set fire to one’s house, provided that no third parties are thereby injured or exposed to danger, but if neighbors, tenants, or other third parties are threatened because of their proximity to the blazing building, the burning is a crime.<sup>21</sup>

John Locke’s *Second Treatise of Government* is sometimes interpreted to have questioned the existence of a right to destroy property. Locke wrote that as “much as anyone 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.”<sup>22</sup> Locke thus invoked divine justice as a basis for restricting the destruction of property – a bold claim, given the prevalence of property destruction in the Bible that was explicitly designed to demonstrate piety and curry God’s favor.<sup>23</sup> In any event, it seems clear that under a Lockean conception of waste, it is improper for a man 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 a property after mixing quite 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 human 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.<sup>24</sup> Perhaps because of all this ambiguity, Post-Locke jurists and scholars seemed unmoved by Lockean condemnations

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<sup>19</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \* 220 (facsimile ed. 1979) (1769).

<sup>20</sup> *Id.* at \* 221.

<sup>21</sup> *Id.* at \*221-22.

<sup>22</sup> JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 130 (Mark Goldie ed. 1993).

<sup>23</sup> *See, e.g.*, GENESIS 22:13-:14; EXODUS 29:38-42.

<sup>24</sup> Leo Strauss, *On Locke’s Doctrine of Natural Right*, 61 PHILOSOPHICAL REV. 475, 494 (1952).

of waste. American courts have evidently 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.<sup>25</sup> Pound referred to the right to destroy as a liberty to act "as one likes, free of legal restraint."<sup>26</sup> Pound characterized then-recent jurisprudence as limiting the power to abuse, but did not discuss whether these same limits were being imposed on the power to destroy.<sup>27</sup> 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, I argue here that destroying valuable properties is sometimes socially beneficial.

Evidently dissatisfied with Pound's list of six, Tony Honore engaged in a more ambitious effort to articulate the incidences of property ownership, identifying eleven in his 1961 essay, *Ownership*.<sup>28</sup> 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 interest, so far as not consumed by use in the ordinary way, would perhaps be inconsistent with the liberal idea of ownership.<sup>29</sup>

That is essentially all Honore wrote about the right to destroy.<sup>30</sup> He recognized that the right to destroy may well be an essential part of the property owner's rights, but he left

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<sup>25</sup> Roscoe Pound, *The Law of Property and Recent Juristic Thought*, 25 A.B.A. J. 993, 997 (1939) ("According to the civilians, property involves six rights: 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 not call a legal power; a *jus utendi* or right of using, what we 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 last two also what today we should call liberties.").

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* ("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 *jus utendum*, 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.").

<sup>28</sup> A.M. Honore, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE (A.G. Guest ed. 1961); see also McCaffrey, *supra* note 8, at 5-9 (discussing Pound and Honore's views of destruction).

<sup>29</sup> Honore, *supra* note 28, at 118.

<sup>30</sup> Honore also noted that "[m]ost people do not willfully 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 Honore 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 note 1.

the reader wondering about why that is so. I will argue that there are indeed strong justifications, liberal and otherwise, for permitting individuals to destroy their property. But since Honore never elaborated on the point, and very few thoughtful scholars have given the issue much thought, these justifications remain rather elusive.<sup>31</sup>

With the recent publication of Joseph Sax's *Playing Darts with a Rembrandt*,<sup>32</sup> the right to destroy one's own valuable 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 the work and make it accessible to scholars, art lovers, and members of the general public.<sup>33</sup> 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 a work 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.<sup>34</sup> Sax would abandon altogether the traditional notion of *jus abutendi* with respect to valuable or potentially valuable cultural property. Instead, Sax favors limited ownership rights: Owners of cultural property can continue to use it for their personal enjoyment, but the law will prohibit destructive uses that deprive the general public or future generations of a potential cultural resource.

## B. 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 in the literature. Indeed, the affirmative right-to-destroy literature has not progressed far beyond early Roman Law and its brief modern restatements by Pound and Honore. Until the publication of Sax's book and McCaffrey's work, the right to destroy had been ignored by most scholars, while a great deal of attention was been lavished on some of the other rights that Pound and Honore 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. At first glance, this 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 properties are destroyed all the time, but the low

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<sup>31</sup> 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 anti-social or bizarre bequests. *See id.* at 70-84. Other papers dealing with similar topics are Frances Carlisle, *Destruction of Pets by Will Provision*, 16 REAL PROPERTY, PROBATE & TRUST 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).

<sup>32</sup> SAX, *supra* note 7.

<sup>33</sup> *Id.* at 68-72.

<sup>34</sup> *Id.* at 200-01.

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 both third parties and myself from using it in the future. 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 him without running afoul of the Rule Against Perpetuities. Indeed, the justifications traditionally given for inalienability rules are both similar to<sup>35</sup> and different from<sup>36</sup> the justifications given for restricting the destruction of one's property.

Relatedly, a discourse on this most 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.<sup>37</sup>

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<sup>35</sup> The law's hostility to the owner's right to destroy property perhaps stems from the widely-accepted view that restraints on alienation of property are inadvisable. Richard Epstein, Margaret Jane Radin, and others have defended restrictions on alienability in particular circumstances, *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). While there is not enough space here to rehash the many interesting arguments in the literature, it is worth noting that some of the same reasons that prompt society to impose inalienability rules may prompt it to enact anti-destruction 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.

<sup>36</sup> Hostility to restraints on alienation and openness to property owners' 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. Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1259 (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, reputational protection, 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 a property to its highest-value use but is prevented from doing so. In both these instances, the destruction of a resource may actually fare better than a restraint on the alienation of that resource. Once a resource is destroyed, the costs of keeping it destroyed are generally zero. Furthermore, a destroyed object is generally out of sight, and out of mind, and so the would-be purchaser who did not observe the resource's destruction would not encounter the frustration associated with seeing a useful object and not being able to use it.

<sup>37</sup> For those reasons, the omission of the right-to-destroy cases from Property law casebooks is disappointing. Among the leading casebooks, I believe that only Dwyer and Menell's *Property Law and*

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 perpetual form of property. Chattels, fixtures, corporate entities, currency, and intellectual property can all 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 law that governs whether and under what circumstances the owner may deprive a thing of its immortality.

### C. What Is Destruction?

Before proceeding to the heart of the paper, a conceptual clarification is necessary. It turns out that property destruction is harder to define than it might appear at first glance.

On the broadest reading of a right to destroy, an owner destroys property every time he eats a banana, kills a plant by watering it too infrequently, falls asleep watching television instead of working, or leaves a guest room empty instead of renting it to visitors. Such examples reference a right to destroy that includes both consuming non-durable assets and failing to exploit an economic opportunity fully. McCaffery refers to the latter as wasteful nonuse.<sup>38</sup> He also introduces the concepts of “nonurgent waste,” meaning “nonurgent, frivolous, or excessive consumption: poor choices of how to spend time or value.”<sup>39</sup> Under these broad definitions, human beings constantly destroy property, and virtually any anti-destruction property rule would be unworkable.<sup>40</sup>

Narrower conceptions of the right to destroy are possible. Destruction might be defined as eliminating all the value in a productive resource. On this understanding of destruction, demolishing a historic castle would not be destructive, as long as the rubble was used by others for building materials. Nor would suicide be destructive, so long as the deceased’s organs were harvested for transplantation in others. 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.<sup>41</sup>

Neither the broad nor the narrow economic definition of property destruction seems particularly attractive, and even a middle-course economic definition of property destruction (eliminating most of the value of an existing asset) will be overbroad and

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*Policy* includes a case on the right to destroy. JOHN P. DWYER & PETER S. MENELL, PROPERTY LAW & POLICY 384-92 (1998).

<sup>38</sup> McCaffery, *supra* note 8, at 88.

<sup>39</sup> *Id.* at 86.

<sup>40</sup> McCaffery advocates administering anti-waste rules of this kind through the tax system. *Id.* at 97-102.

<sup>41</sup> McCaffery refers to a category or “dissipatory waste,” meaning “the pure loss of value, with none but some possibly perverse – to an Anglo American at least – pleasure in the loss. Think of letting the farm go to seed or burning down the house. Such ‘dissipatory’ waste represents no tangible good to anyone; the value disappears into the ether.” *Id.* at 85 McCaffery therefore appears to exclude nihilistic glee, but not rubble or organ harvesting.

underbroad simultaneously. As an analytical matter, then, the right to destroy is a confusing and elusive concept.

Moving from economics to sociology, one finds that different historical eras, cultures, and subpopulations have varying conceptions about the meaning of destruction. Slaughtering an edible animal and setting it ablaze, to be consumed by no one, was considered a righteous act in biblical times,<sup>42</sup> but most major religions frown on the practice today. Similarly, burial practices vary among the different cultures of the world, with societies reaching quite different conclusions about what property, if any, should be destroyed along with a deceased person's body.<sup>43</sup> 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. Different communities within a society will disagree about the meaning of destruction too. While an artist would regard the nonconsensual separation of her painting into multiple parts as destruction of the work, an entrepreneur might regard such activity as socially beneficial unbundling.<sup>44</sup>

Given these considerations, there can be no perfect definition of destruction. For reasons that will become apparent in Part III of the paper, I adopt a relatively narrow, economics-oriented definition of property destruction for the purposes of this paper. 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, as it relies on an admittedly imprecise notion of value. That said, a definition that steers clear of bananas, clay pigeons, castle rubble, and leisure time will focus the reader's attention on the contested, and therefore interesting, exercises of the right to destroy.

## II. Property Destruction and Wasted Resources

Based on a reading of recent judicial opinions, it appears that the conventional wisdom has turned against permitting the 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 anti-waste 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.

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<sup>42</sup> See *supra* note 23.

<sup>43</sup> See, e.g., 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).

<sup>44</sup> 136 Cong. Rec. E3111-02 at H3115 (statement of Rep. Markey); Timothy M. Casey, Note, *The Visual Artists Rights Act*, 14 HASTINGS COMM. & ENT. L.J. 85, 86 (1991); Charles Ossola, *Law for Art's Sake*, LEGAL TIMES, Dec. 10, 1990, at 27.

## A. Waste of Resources and Other Externalities

The concern about wasting societal resources is, by far, the most commonly voiced justification for restricting an owner's ability to destroy her property.<sup>45</sup> 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.

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 Company*.<sup>46</sup> 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 the residue of the estate.<sup>47</sup> Johnston's beneficiaries evidently did not object to the razing of the home,<sup>48</sup> but the neighbors did, and one month after Johnston's death, they convinced the city government to have Kingsbury Place declared a historic landmark.<sup>49</sup> 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.<sup>50</sup>

The court held that the provision directing the executor to destroy the home was unenforceable on public policy grounds.<sup>51</sup> In the Court's words, "[d]estruction 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." Such destruction, the court held, was simply intolerable in a "well-ordered society."<sup>52</sup> While this waste of resources and damage to third parties cautioned against permitting Mrs. 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 the record

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<sup>45</sup> See, e.g., McCaffery, *supra* note 8, at 91-96. McCaffery's argument focuses on what he describes as "nonurgent waste," rather than "dissipatory waste," which is my concern in this paper. See *supra* notes 38-41 and accompanying text.

<sup>46</sup> *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210, 217 (Mo. Ct. App. 1975). For additional discussions of *Eyerman* and some of the other cases cited herein, see Hirsch, *supra* note 31, at 69-83; Sykas, *supra* note 31, at 936-39; and Teresa Wear, Recent Case, *Wills – Direction in Will to Destroy Estate Property Violates Public Policy*, 41 MO. L. REV. 309, 309-14 (1976).

<sup>47</sup> *Id.* at 211.

<sup>48</sup> *Id.* at 218 (Clemens, J., dissenting).

<sup>49</sup> *Id.* at 219. The applicable landmark law evidently did not itself bar owners from destroying their landmarked properties.

<sup>50</sup> *Id.* at 211.

<sup>51</sup> *Id.* at 217.

<sup>52</sup> *Id.*

for the eccentric condition.”<sup>53</sup> Seeing nothing but caprice in Mrs. 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. The American law of property 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 the destroyers’ capacity in Part III.

Most of the destruction cases echo *Eyerman*’s concerns about wasted resources. For example, the *In re Pace* court invalidated a will provision directing the demolition of two homes on the grounds that their destruction would reduce neighborhood property values, lower the property tax base, and harm the estate’s beneficiaries.<sup>54</sup> 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.<sup>55</sup> The only reported case in which a court actually ordered the razing of a home in accordance with a will provision presented a strange 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.<sup>56</sup>

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<sup>53</sup> *Id.* at 214.

<sup>54</sup> 400 N.Y.S.2d 488, 492-93 (Surrogate Court 1977).

<sup>55</sup> 369 N.E.2d 814, 818-19 (Ohio Common Pleas 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.” 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.* at 818. This analysis seems strange at first glance, as the court is essentially holding that permanently preventing a building from being put to its highest value use does not violate public policy. The court’s analysis will perhaps make more sense in light of the expressive justifications for a right to destroy, discussed *infra* Section IV.

If pop culture is any indication, then the living sometimes destroy valuable commodities as a tribute to the dead. In *Titanic*, currently the highest grossing film ever, the elderly protagonist Rose DeWitt Bukater, played by Gloria Stewart, melodramatically tosses the priceless “Heart of the Ocean” necklace into the Atlantic, evidently as a tribute to her deceased former lover, Jack Dawson. A discussion of why Rose might have destroyed the priceless necklace can be found on the Internet at <[http://www.greenspun.com/bboard/q-and-a-fetch-msg.tcl?msg\\_id=0002MW](http://www.greenspun.com/bboard/q-and-a-fetch-msg.tcl?msg_id=0002MW)> (visited July 17, 2003).

<sup>56</sup> *In re Estate of Beck*, 676 N.Y.S.2d 838, 841 (Surrogate’s Court 1998) (“The Beck home, which Anna Beck personally treasured and fought to preserve from the city’s very own wrecking crews, was . . . clearly titled to her. At her death, it was her’s [sic] to dispose of as she intended. Ironically, the agency which now

Courts also strain to construe written instruments in a manner that allows them to avoid acquiescing in the destruction of property. *In re 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, may deem best.”<sup>57</sup> 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 *also* be dismantled and removed.”<sup>58</sup> 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.<sup>59</sup> This was true even though the demolition of the buildings was consistent with the forest-loving decedent’s intent to allow the forests on the property to reclaim the land where the other dwellings had once stood.

Curiously, at least one court has 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*, the Connecticut Supreme Court invalidated a will that sought to bar the construction of new buildings exceeding three stories on the site of an existing three-story building.<sup>60</sup> The court noted that, given the building’s location, and the cost of maintaining the old building, the construction of a newer, taller building may well be necessary to maximize the value of the land.<sup>61</sup> The court noted that the restrictions were to remain in place for 75 years, and viewed their enforcement as intolerable:

The effect of such conditions . . . would carry a serious threat against the proper growth and development of the parts of the city in which the lands in question are situated. The restrictions militate too strongly against the interests of the beneficiaries and the public welfare to be sustained, particularly when it is remembered that they are designed to benefit no one, and are harmful to all persons interested, and we hold them invalid as against public policy.<sup>62</sup>

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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.”).

<sup>57</sup> 389 A.2d 436, 437 (N.H. 1978).

<sup>58</sup> *Id.* (emphasis added).

<sup>59</sup> *Id.* at 438. Exercising extreme creativity, the court noted that, “[i]n 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 could presumably opt for the functional equivalent of refusing to demolish the buildings in the first place.

<sup>60</sup> 135 A. 555 (Conn. 1926).

<sup>61</sup> *Id.* at 564.

<sup>62</sup> *Id.*

The *Brown* court deemed behavior that modern observers would consider preservationist to be destructive. Perhaps it should not be surprising that in the 50 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 era.<sup>63</sup> More surprising is the fact that the *Eyerman* court, in holding that the provision destroying a house in Kingsbury Place was contrary to public policy, cited *Brown* with approval and relied on its reasoning!<sup>64</sup>

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 economic interests of the will's beneficiaries, 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. *Brown*'s effort to preserve a venerable building via will seems like an act of preservation, not economic destruction, as the court deemed it. Jones's forest preservation sentiment makes more sense to the contemporary reader familiar with the goals of the environmentalist movement than it did to a New Hampshire court in 1978. The various homeowners' gifts of open space in built-up urban neighborhoods might seem like an act of generosity, not capriciousness, to the modern reader.<sup>65</sup>

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.<sup>66</sup> The property slated for burial had considerable value.<sup>67</sup> 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.<sup>68</sup> In the court's words:

If a practice is developed in our State to foster the burying of valuable with a deceased, our cemeteries like the tombs of the Pharoahs [sic] will be ravaged and violated. The loved ones of the deceased will experience

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<sup>63</sup> ANTHONY M. TUNG, PRESERVING THE WORLD'S GREAT CITIES: THE DESTRUCTION AND RENEWAL OF THE HISTORIC METROPOLIS 346-49 (2001).

<sup>64</sup> *Eyerman*, 524 S.W.2d at 216-17 (quoting and relying on *Brown*). A parallel redefinition of the notion of destruction has occurred in property law generally. The Lockean anti-waste proviso was invoked by those who sought to deny Native Americans' claims to land on the ground that they were wasting the land by failing to develop it. See Blake A. Watson, *The Thrust and Parry of Federal Indian Law*, 23 DAYTON L. REV. 437, 445 (1998).

<sup>65</sup> See Hirsch, *supra* note 31, 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 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.").

<sup>66</sup> *In re Meksras Estate*, 63 Pa. D. & C.2d 371, 371 (Common Pleas 1974).

<sup>67</sup> *Id.* at 372.

<sup>68</sup> *Id.* at 373.

the horror of the desecration, looting and destruction of burial grounds, heaping indignities on the memory of the dead.<sup>69</sup>

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.<sup>70</sup> *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 items of considerable value.<sup>71</sup> Indeed, the reported cases dealing with grave robbing suggest that the *Meksras* rule is not adhered to universally.<sup>72</sup>

The *Meksras* court explicitly supposes that grave robbers will examine wills at the county courthouse and then target those graves that contain buried treasures. This premise only seems plausible if courthouse employees are unable to verify the identities of those who read a particular will.<sup>73</sup> Taking the court's premise at face value, though,

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<sup>69</sup> *Id.*

<sup>70</sup> 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). Indeed, if one whole-heartedly 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.

<sup>71</sup> Indeed, the law of at least one state recognizes the need to bury clothed cadavers. See N.D. Stat. Ann. 11-19.1-15. Other cultures have had strong norms directing the burial or cremation of valuables along with their owner. GITTINGS, *supra* note 43, at 111; GRINSELL, *supra* note 43, at 30-38, 50-53; Francis King Carey, *The Disposition of the Body After Death*, 19 AM. L. REV. 251, 254-61 (1885); Henry W. Ordower, *Trusting Our Partners: An Essay on Resetting the Estate Planning Defaults for an Adult World*, 31 REAL PROPERTY, PROBATE & TRUST J. 313, 331 n.47 (1996) ("In early cultures, it was customary to inter considerable property, and sometimes live servants (and wives--an unfortunate custom that may continue in India today despite legal prohibitions), 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.") (citation omitted); Sykas, *supra* note 31, at 917-922 (discussing various ancient cultures' practices of burying or cremating valuables along with the deceased).

<sup>72</sup> See, e.g., *Ternant v. Boudreau*, 6 Rob. (La. ) 488, 1844 WL 1761, at \*2 (La. 1844) (involving a property dispute over a gold chain, a gold buckle, a pair of diamond earrings, two diamond rings, three golden 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. App. 1982) (involving the removal of jewelry from graves); see also 13 VT. STAT. ANN. § 3761 (criminalizing the intentional removal of "an object interred or entombed with a human body"). See generally Julie Brienza, *Advocates for Reform of Funeral, Cemetery Industry are Never at Rest*, TRIAL 14, 14 (Nov. 1998) (noting the desecration of a Florida woman's grave, revealing 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 43, at 101-109.

<sup>73</sup> At the risk of belaboring the obvious, in most instances, the only people who would have reason to examine a will would be those who knew or were related to the testator. If the county courthouse requires

the harm associated with grave robbing will be internalized by each estate. A testator will come to understand that she *can* take it with her, but if she does so, she runs a higher risk that her grave will be targeted by grave robbers.<sup>74</sup> One supposes that the types of people who want to be buried with valuable jewelry are precisely the types of people who would be most offended by the prospect of their graves being pillaged.<sup>75</sup>

With the will disclosure law already on the books, permitting decedents to be buried with their properties would have, it seems, given 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.

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everyone to identify himself before gaining access to a will, then developing a list of suspects in any grave robbing investigation would not take much imagination on the part of the police.

<sup>74</sup> A savvy decedent may wish to have her jewelry destroyed or cremated along with her, thereby precluding the valuables from coming into the possession of the grave robber. *See generally* GRINSELL, *supra* note 43, at 60-67 (discussing the prevalent custom of smashing of valuables deposited in the decedent's grave); Carey, *supra* note 71, at 269-270-71 (hypothesizing that cremation eventually will become the norm, as a means of preventing grave robbers from stealing one's corpse).

<sup>75</sup> Grave robbing also harms the deceased victim's loved ones, as the *Meksras* court mentions. *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). That said, on the above analysis, the interests of the decedent would seem to be well-aligned with the interests of the heirs, as people commonly recoil at the prospect of their own graves being robbed. Indeed, the heirs of a decedent evidently have the legal right to take action to prevent the desecration of their loved one's graves, including the right to disinter the grave and re-take possession of buried valuables. On this point, see the remarkable case of *Ternant v. Boudreau*, 6 Rob. (La.) 488, 1844 WL 1761, at \*3 (La.):

It is true, however, that the jewels which were put in the tomb of the defendant's mother, were destined to remain there; and that although they never became a part of the monument, it may be fairly presumed if they had not tempted the covetousness of evil doers, they would never have been disturbed. They 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 this right?* The right of ownership belonged to him, and no one could have prevented him from exercising it in its fullest extent.

6 Rob. (La. 488, 1844 WL 1761, at \* 3 (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 is seemingly in accord regarding the ownership of such property. *See* M.R. RUSSELL DAVIES, *THE LAW OF BURIAL, CREMATION AND EXHUMATION* 29-30 (1982).

Had the *Meksras* court gone the other way, the best opportunity for the testator to take some of her wealth with her would be to will jewelry to a trusted relative, based on the unstated understanding that the property would be deposited (quietly) in the decedent's casket before burial. In such instances, the relative is gaining the peace of mind associated with a diminished risk of grave-robbing at a cost of possible estate tax liability, and the decedent is running the risk that her wishes will not be honored if the designated jewelry has non-trivial value.

Efficient grave robbers would no longer 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 on to the wrong negative externalities. The primary inefficiency that would have resulted from a pro-destruction rule stems from increased expenditures on cemetery security, which would seem to be a dead-weight loss. There would also be substantial welfare losses associated with third parties' revulsion at the thought that non-relatives' graves might be robbed.

## B. When Destruction Is Creation

The destruction of valuable property rarely fares well when viewed from an ex post perspective. Mrs. Johnston has built a house; it is a perfectly habitable house; destroying the house 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 reductions in housing stock that St. Louis had witnessed during the 1960s.<sup>76</sup> What sense does it make for society to allow someone to remove a valuable, durable asset from the marketplace?

And yet for nearly 100 years, American patent law has recognized the patentee's right to do just that. In a fascinating 1908 opinion called *Continental Paper Bag*, 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 that Liddell patent during the full life of the patent term.<sup>77</sup> Eastern neither developed the patented invention nor licensed the invention to competitors who wished to bring it to market.<sup>78</sup> Instead, Eastern continued selling its inferior (previously patented) paper bag machines, which the company believed would be more profitable than the improved machines.<sup>79</sup>

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<sup>76</sup> *Eyerman*, 524 S.W.2d at 214 (“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.”). Like many other cities, St. Louis saw its housing stock deteriorate in the less affluent parts of the city, not in affluent subdivisions like Kingsbury Place, so the Court's argument seems to be a makeweight.

<sup>77</sup> *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 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 briefly noted in Valerian E. Greaves, *The Social-Economic Purpose of Private Rights*, 12 N.Y.U.L. Q. REV. 439, 462 (1934-35).

<sup>78</sup> *Id.* 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.”).

<sup>79</sup> *Id.* at 428 (“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 nonuse 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.”).

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 the invention for the full patent term.<sup>80</sup> Surely, Continental argued, 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."<sup>81</sup> 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 patent, as it is the privilege of any owner of property to use or not use it, without question of motive."<sup>82</sup>

Justice Harlan was the lone dissenter. His two-sentence dissent 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."<sup>83</sup> But Harlan evidently did not feel strongly enough to belabor the point.

Although the majority invoked the notion of absolute rights 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.<sup>84</sup> On this account, the 17-year monopoly is

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<sup>80</sup> *Id.* at 423.

<sup>81</sup> *Id.* at 424 (quoting *United States v. American Bell Tele. Co.*, 167 US 249 (1897)).

<sup>82</sup> *Id.* at 429.

<sup>83</sup> *Id.* at 430 (Harlan, J., dissenting).

<sup>84</sup> 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 date of the Liddell patent and the expiration dates of the earlier patents held by Eastern. Merges, Menell, and Lemley have a helpful discussion on the economics of patent suppression that help explain what Eastern might have been up to:

In all these cases (and numerous others), patents for the allegedly suppressed products exist. What is uncertain is *why* the products were never commercialized. . . . If a new invention is truly superior to current products, [economists] argue, the patentee could sell that invention and more than make up for any losses it might sustain in the market for its current products. Indeed, economists continue, that is the definition of a superior product.

This argument has substantial force when the allegedly suppressed invention is in the same market as the patentee's current products. Thus panty hose manufacturers could

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 that he sees this turn of events in the same way that the *Eyerman* court would see Mrs. Johnston's will decades later. The suppression of a valuable invention is a waste of a valuable economic resource that the public cannot tolerate.<sup>85</sup> Ultimately, 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.<sup>86</sup>

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.<sup>87</sup> As Justice Harlan's dissent indicated, a court should, on public

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presumably switch from selling disposable hose to selling no-run hose and, assuming the no-run hose was really a better product, charge prices high enough to make up for the fact that they would sell fewer pairs of hose. This argument is not completely convincing, however. If the process for producing no-run hose requires different machinery from that which the manufacturers currently use, there will be substantial fixed costs associated with the switch. Manufacturers may prefer to delay introducing the new product until they have to replace their machines anyway; they will suppress the invention until then. By contrast, if a new entrant into the market could use the patented process, he would choose to build the new machines immediately. By suppressing the patent, therefore, the patentee causes society to lose the benefits of the immediate production of the new process.

ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 290 (3rd ed. 2003)

<sup>85</sup> Nearly four decades later, in *Special Equipment Co. v. Coe*, 324 U.S. 370 (1945), the Court re-affirmed 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 generally 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?").

<sup>86</sup> See 35 U.S.C. § 271(d)(4) (stating that the refusal to "license or use any rights to the patent" does not amount to patent misuse).

<sup>87</sup> 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 whether the courts should resist the efforts of a group to acquire the patent to a morning-after pill such as RU-486 for the purposes of suppressing the drug.

In some sense, the suppression of a patented invention is 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

policy grounds, refuse to enjoin a third party's infringement of a suppressed patent.<sup>88</sup> 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.<sup>89</sup> When faced with the choice between (A) an inferior paper bag machine and a blocking patent on an improved 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 lot of empirical uncertainty here that should not be ignored. It may be the case that 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. It may also be the case that 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 in which permitting the destruction of intellectual property helps create the right incentives for the creation of valuable intellectual property, and we will never 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*. Put another way, even if we think that permitting the suppression of inventions rarely increases net innovation, are there classes of property for which permitting destruction probably does increase net creation? Society's experience with the destruction of diaries and other personal papers will provide perhaps the strongest basis for a conclusive answer.

The destruction of diaries and other papers is commonplace, even when those written works have enormous economic value. As *Nixon v. United States*,<sup>90</sup> makes clear, American Presidents have repeatedly destroyed diaries, correspondence, and other personal effects, either during their lifetimes or via will. Throughout the nation's history

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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.

<sup>88</sup> See *supra* text accompanying note 83.

<sup>89</sup> 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).

<sup>90</sup> 978 F.2d 1269 (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 his presidential papers.

a strong custom existed giving the President ownership of his presidential papers.<sup>91</sup> Private ownership of these papers evidently entailed a right to destroy them. According to the D.C. Circuit's opinion, there are "numerous examples of Presidents willfully and intentionally destroying their presidential papers."<sup>92</sup> These Presidents include Van Buren, Garfield, Arthur, Grant, Pierce, and Coolidge.<sup>93</sup> President Harding and Fillmore's heirs also destroyed large numbers of presidential papers following the deaths of those Presidents.<sup>94</sup> Some of Abraham Lincoln's papers were destroyed by his heirs as well.<sup>95</sup> 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.<sup>96</sup> 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.<sup>97</sup> 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.<sup>98</sup>

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.<sup>99</sup> During that time, as it became increasingly clear that his life was in danger, Garfield began frantically destroying large portions of his personal and political files.<sup>100</sup> After Garfield's death, his children donated the remaining papers to the Library of Congress.<sup>101</sup>

Largely in response to the fallout from Watergate and the Nixon papers dispute, Congress enacted the Presidential Records Act of 1978,<sup>102</sup> prospectively abolishing

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<sup>91</sup> *Id.* at 1282.

<sup>92</sup> *Id.* at 1279.

<sup>93</sup> *Id.* at 1279-80.

<sup>94</sup> President Fillmore willed his presidential papers to his son, and the son's will directed that all the presidential papers be destroyed. *Id.* at 1291. President Harding's widow destroyed many of his papers following Harding's death. *Id.* at 1294.

<sup>95</sup> Jonathan Turley, *Presidential Papers and Popular Government: The Convergence of Constitutional and Property Theory in Claims of Ownership and Control of Presidential Papers*, 88 CORNELL L. REV. 651, 660 (2003).

<sup>96</sup> *Id.* at 1282-83.

<sup>97</sup> SAX, *supra* note 7, at 94-95.

<sup>98</sup> Turley, *supra* note 95, at 731 ("Still others view the value of ownership as the right to destroy papers to preserve a legacy."); *cf. id.* at 718 ("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.");

<sup>99</sup> 979 F.2d at 1293.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> 44 U.S.C. § 2201 *et seq.*

private ownership of presidential papers.<sup>103</sup> The Act makes it quite 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,”<sup>104</sup> a category that presumably includes virtually all presidential records.<sup>105</sup> If the President does wish to destroy a presidential record that lacks administrative, historical, informational, and evidentiary value, he may petition the Archivist of the United States for permission to do so. If the Archivist further 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.<sup>106</sup> Only upon receiving the Archivist’s written authorization may the President or his staff destroy a particular record.<sup>107</sup>

One strongly suspects that given a President’s inability to destroy important papers, and 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 much less interesting paper trail than his less constrained predecessors. When in doubt, the President will simply neglect to memorialize an important idea or communication.<sup>108</sup> 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 is a little like what Mr. Charles Francis Adams told me of the diplomatic records of the British Foreign Office. 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 in 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.<sup>109</sup>

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<sup>103</sup> 44 U.S.C. § 2202.

<sup>104</sup> 44 U.S.C. § 2203(c).

<sup>105</sup> “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. Turley, *supra* note 95, at 667 & n.89.

<sup>106</sup> 44 U.S.C. § 2203(c) & § 2203(e)(1)-(2).

<sup>107</sup> 44 U.S.C. § 2203(c). As Jonathan Turley points out, Executive Order 13,233, issued by President George W. Bush, strengthens the hand of the President, *visa vi* the Archivist, if the President wishes to restrict access to certain papers. Turley, *supra* note 95, at 672-76. Notably, the Executive Order does not restore the President’s traditional power to destroy presidential papers. *Id.* at 687.

<sup>108</sup> 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.

<sup>109</sup> *Id.* at 1280 (quoting W.H. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 34 (1916)).

If a President anticipates being able to decide at a later date whether to destroy an embarrassing, revealing, or controversial document, then he will be more likely to create and save it in the first place.<sup>110</sup> Historians writing in the future hopefully will be able to evaluate whether the 1978 Act's anti-destruction rule caused post-Carter Presidents to leave behind less revealing paper collections than previous executives did.<sup>111</sup>

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. Email use is another example. Because investigators and litigants have become capable of reconstructing emails that the senders and recipients believed were erased,<sup>112</sup> many people have become much more reluctant to discuss controversial or sensitive matters in emails, and some valuable communication has been deterred altogether.<sup>113</sup>

Historic preservation of buildings presents an interesting illustration of this phenomenon in the real property context. Historic preservation statutes typically limit the rights of landowners whose buildings have been designated landmarks to demolish those buildings.<sup>114</sup> Where someone tries to destroy his own property, and courts have a

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<sup>110</sup> Joseph Sax recognizes this point, and then dismisses its importance. SAX, *supra* note 7, at 86 (“Undoubtedly the prospect of public access discourage 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 president and so must commit their views and advice in 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.”). 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 their 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 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., Sep. 27, 2003, 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.

<sup>111</sup> The Act has applied to all Presidents since Ronald Reagan. *Nixon*, 978 F.2d at 1296-97.

<sup>112</sup> JEFFREY ROSEN, *THE UNWANTED GAZE* 7, 55 (2001); Orna Rabinovich-Einy, *Going Public: Diminishing Privacy in Dispute Resolution in the Internet Age*, 7 VA. J. L. & TECH. 4, 129 (2002).

<sup>113</sup> See generally K. Robert Bertram, *Avoiding Pitfalls in Effective Use of Electronic Mail*, 69 PA. BAR ASS'N Q. 11 (1998) (urging limitations on the inclusion of sensitive information in company emails).

<sup>114</sup> See, e.g., *Kalorama Heights Ltd. P'ship v. District of Columbia*, 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).

chance to prevent the destruction, there is a danger that loss aversion will steer judges in the wrong direction.<sup>115</sup> This is particularly true in cases involving homes and other buildings. Judges may grow fond of long-existing 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.<sup>116</sup>

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 the *Ramsey* case in 1960, the Illinois Supreme 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 was quite high, and where the owner would still lose money operating the building if it were fully renovated at the public's expense.<sup>117</sup> The property would invariably lose money for its owner, so the court held that the owner had a common law right to tear it down. 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.<sup>118</sup>

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<sup>115</sup> 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 308-10 (2000).

<sup>116</sup> Perhaps no city illustrates the creative possibilities of destruction better than Rotterdam, in the Netherlands. 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 ultra-modern European city. They succeeded. See, e.g., Joan Ockman, *Urban Rebirth: Cities Coping with Disaster Offer Lessons for Rebuilding New York's World Trade Center Site*, ARCHITECTURE, Sep. 1, 2002, at 41; Rodney Bolt, *The City Doesn't Give a Damn: Rotterdam Is Big and Brash and, Unlike Its Dutch Rivals, Has Lots of Attitude*, SUNDAY TEL., April 1, 2001, at 4. 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 \_\_ (discussing the botched post-war 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). The point of this paper, however, is to suggest that the 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.

<sup>117</sup> *People ex rel. Marbro Corp. v. Ramsey*, 171 N.E.2d 246, 247-48 (Ill. Ct. App. 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 *Ramsey* was arguing 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.

<sup>118</sup> Somewhat similar issues can arise in the context of chattel property. Fans of Elvis Presley and Babe Ruth recently watched in horror as entrepreneurs announced plans to cut up an intact master tape and game-

Three decades later, the Blackstonian notion of absolute ownership had receded to the point where courts ratified ill-considered policies that forced land owners to expend large sums maintaining teetering buildings. In one such case, *J.C. & Associates*, 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.<sup>119</sup> 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.

Some have argued that the possibility of future landmark designation and the associated limitations on future uses will discourage property owners from commissioning great buildings.<sup>120</sup> I agree with William Fischel that this precise possibility is a "bit far-fetched."<sup>121</sup> Under existing laws, the time lag between a building's groundbreaking and its designation as a historic landmark is long enough that any concerns about future landmarking will be discounted by most developers. 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.<sup>122</sup> These acts or omissions

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worn jersey associated with these respective dead celebrities. See Robin Pogrebin, *All Shook up over Cutting and Selling of Elvis Tape*, N.Y. TIMES, Jan. 28, 2004, at E1; Russ Forman, *In 2004, Part of Bambino's Legacy Will Go to Pieces*, U.S.A. TODAY, June 26, 2003, at 3C. Rules that barred the disaggregation of these pieces of memorabilia might prevent their highest value use, although such regulation probably would engender takings liability. Unlike a building owner who is forced to maintain a building that is draining his wealth, an owner of a unique Elvis tape or Babe Ruth jersey retains a valuable asset even if the state forces him to keep it intact. Cf. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (setting forth a balancing test used to evaluate most regulatory takings claims).

<sup>119</sup> *J.C. & Assoc v. District of Columbia Bd. of App. & Rev.*, 778 A.2d 296, 308-09 (D.C. 2001). The City presented evidence to suggest that the building was salvageable.

<sup>120</sup> See, e.g., Mendes Hershman, *Critical Issues in Historic Preservation*, 12 URB. LAWYER 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.").

<sup>121</sup> 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.").

<sup>122</sup> POSNER, *supra* note 144, at 67 ("There is, however, a danger of reducing the supply of landmarks under the designation approach; building owners may rush to demolish potential landmark facades in advance of designation."). Dean Lueck and Jeffrey A. 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*, Working Paper April 2000, at 30. On their account, the Endangered Species Act's substantial restrictions on landowners' use of land containing the

may substantially reduce the likelihood of potentially 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 we “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.”<sup>123</sup> Sax then suggests that governments could adopt a range of regulatory options to protect new architectural triumphs.<sup>124</sup>

Sax’s proposal is no “small step.” Restricting the alteration or destruction of new buildings could have enormously deleterious consequences with respect to developers’ incentives to commission great architectural works. Such a developer would be locking-in a particular parcel to continue its current use perpetually, without regard to changes in market conditions or social tastes. The developer would also 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.<sup>125</sup> Contemporaneous limitations on the destruction or modification of buildings also denies 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 would almost certainly do more harm than good and substantially dampen builders’ incentives to commission great works.<sup>126</sup>

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

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habitat of endangered species encourage landowners to destroy habitat that might be suitable for endangered species but is not yet populated by them.

<sup>123</sup> SAX, *supra* note 7, at 199 (emphasis added).

<sup>124</sup> *Id.*

<sup>125</sup> During the 1980s, several new skyscrapers clad in Carrarra 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, at 4. Most famously, Chicago’s 1,136 foot Amoco (now Aon) Tower had its marble replaced with granite 17 years after its construction, at a cost of \$60 to \$80 million. Lindsey Tanner, *Amoco Caught Between Rock, Hard Place*, WASH. POST, Mar. 31, 1990, at E16. Initial estimates suggested that the cost of replacing the marble would equal the costs of building the skyscraper in the first place. Arndt, *supra*, at 4.

<sup>126</sup> 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 is 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 note 200.

[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.<sup>127</sup>

Thus, Sax says, the patron who decides to destroy a great building has wasted the architect's time and prevented him from doing other great works that would be preserved for generations.

Sax's argument is ultimately 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 architect's 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 age of architecture, and providing a blueprint for the great Chicago civic structures that would be built during the decades that followed.<sup>128</sup> Had Burnham's "Great White City" been built of anything sturdier, it would have never been built as large, as quickly, as cheaply, or as magnificently. Permanence is neither a necessary nor a sufficient condition for great architecture. There is a place on our landscape for gorgeous sandcastles.

There can be, in short, a strong connection between property destruction and creation. When individuals and businesses destroy valuable properties, they often do so for rational reasons. Denying owners the right to destroy properties that become

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<sup>127</sup> *Id.* at 58.

<sup>128</sup> DONALD L. MILLER, *CITY OF THE CENTURY: THE EPIC OF CHICAGO AND THE MARKING OF AMERICA* 380-85 (1996).

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

### C. 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 principal, there is nothing wrong with this. Setting aside *ex ante* considerations, social welfare is generally diminished when valuable resources are obliterated. As a proxy for social welfare, courts have looked primarily to the presumed motives of the destroyer – Where they believe that the destroyer is acting because of anti-social motivations, they prohibit destruction, and where they believe that the destroyer is acting out of pro-social motivations, they permit it.

Surveying the instances in which courts have used this proxy to limit the individual's right to destroy property, however, diminishes one's confidence that courts can either discern motives accurately or separate those cases in which destruction is wasteful from those in which destruction may benefit society. In the home destruction cases, the courts seemed oblivious to the positive externalities that might be associated with the creation of open space or woodlands.<sup>129</sup> And as preferences changed over time, with respect to historical preservation, for example, the social meaning of destruction was flipped on its head.<sup>130</sup> Furthermore, as some of these cases suggest, courts limited the right to destroy on the basis of overstated negative externalities.<sup>131</sup>

In other instances, anti-waste sentiment is so persuasive that it obscures 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 the courts have trouble applying this defensible rule.

### III. Disfavored Treatment for Testamentary Destruction

Several of the cases discussed in the previous section involve testamentary destruction, a topic that, by itself, deserves sustained attention. 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. Policymakers ordinarily do not consider the dead as having a utility function, except insofar as individuals are worried about what happens to them after they die and will 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.<sup>132</sup>

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<sup>129</sup> See *supra* note 65 and accompanying text.

<sup>130</sup> See *supra* text accompanying notes 60-64.

<sup>131</sup> See *supra* text accompanying notes 66-75.

<sup>132</sup> See *infra* note 134. There are isolated exceptions. For example, while a testator can direct the destruction of his heart via will, a living testator cannot lawfully destroy his own heart.

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 receives in exchange for a small fee. The testator could then devise all to-be-destroyed properties 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, the law's reluctance to permit testamentary destruction is worth re-thinking. A regime that gives dead people no power to destroy their property will influence, perhaps for the worse, living souls who are contemplating their own demise.

#### 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. Dukeminier and Johanson's leading casebook on trusts and estates set 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 choice 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.<sup>133</sup>

On this account, we only defer to the person who is willing to put his money where his mouth is by destroying property while he might otherwise live to enjoy it. Courts deciding right-to-destroy cases such as *Eyerman* and *Pace* have adopted reasoning substantially similar to Dukeminier & Johanson.<sup>134</sup>

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<sup>133</sup> JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 22-23 (3d ed. 1984) (emphasis added). The most recent version of Dukeminier & Johanson's book articulates essentially the same view, albeit in a toned down form. JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 33 (6th ed. 2000) (hereinafter DUKEMINIER & JOHANSON 6TH) ("A person can, if she wishes, destroy her property during life (unless it is subject to historic preservation or similar laws), but she 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.*, 524 S.W.2d 210 (Mo. Ct. App. 1975) ('a well-ordered society cannot tolerate' waste.'").

<sup>134</sup> *Eyerman*, 524 S.W.2d at 215 ("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

Dukeminier and Johanson's explanation is incorrect. I will use the facts of the *Eyerman* case to explain why. Recall that *Eyerman* involved Mrs. Johnston's will provision directing that her house be razed. Dukeminier and Johanson are obviously correct that upon her death, she had no incentive to preserve the house. But Mrs. Johnston did not draft her will on her deathbed. On some earlier date, when she did create her will, Mrs. 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 had 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.<sup>135</sup> 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 forego this present income from the sale of the remainder. So by foregoing a substantial amount of current income and retaining fee simple ownership over her home, Mrs. Johnston *did put her money where her mouth was*.

The closer Mrs. Johnston got to death, the higher the value of the remainder interest she was foregoing, so the greater her current monetary sacrifice became. As a property owner's life expectancy diminishes, the sacrifice associated with the posthumous destruction of her property more closely approximates the sacrifice 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 entails a mere matter of degree. The first destroys 100% of his asset, and the second destroys, if elderly, perhaps 75% of his asset. Both the living destroyer and the testamentary destroyer incur costs as soon as they decide to destroy the property.

There will be situations during which a property owner has little use for additional wealth. 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. 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, particularly where the owner only announces her destructive intentions towards the end of her life. If, however, the decision to destroy property was made by an owner who faced ordinary resource constraints or who was not anticipating her imminent demise, the case for deferring to those wishes is strong.

More serious problems arise if individuals destroy property either because they do not recognize the potential to obtain immediate income in exchange for the sale of a future interest or because they underestimate the value of a remainder interest in their property. Destruction in either case might well make society worse off. In the former case, the owner would be failing to realize that sparing the property might benefit both herself and society in general. In the latter case, an owner might falsely believe destruction to be the property's highest value use. There is a neat solution to these

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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 Pace*, 400 N.Y.S.2d 488, 492 (Surrogate's Ct. 1977) (quoting this language from *Eyerman* with approval).

<sup>135</sup> See Treas. Reg. § 20.2031-7(d) (giving valuations for life estates, based on life expectancy of life tenant and applicable interest rate).

interesting problems created by unsophisticated owners, and it will be discussed in Section E.

## B. State Action and Transaction Costs

Courts have sometimes 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 his own property usually entails no state action or involvement, whereas the destruction of property via will often does. Allowing the destruction of property via will therefore arguably makes the state a partner of the wasteful decedent.<sup>136</sup> Hence, a court might hold that the difference between inter vivos destruction and testamentary destruction is that the state is only involved in the latter, and the sovereign can use this involvement as an appropriate basis for asserting an anti-waste public policy interest.

Upon reflection, the state action argument seems to be little more than a makeweight. The notion that restrictions on destruction are appropriate where state action is implicated 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),<sup>137</sup> and in most instances where an important work of visual art by a living artist is to be destroyed (via the Visual Artist's Rights Act<sup>138</sup>). It does not get involved in the destruction of jewelry, most foreign currency, or important artwork by Great Masters. The conceptual bases for these distinctions are not obvious, and so it seems questionable to hang one's hat on a state action theory.<sup>139</sup>

Another implication of the state action argument is that the state ought to become much more vigilant in protecting against resource destruction than it currently is. 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 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

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<sup>136</sup> See generally *Eyerman*, 524 S.W.2d at 214-15 (“[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.'”); *Pace*, 400 N.Y.S.2d at 492 (“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.”).

<sup>137</sup> See 18 USC §§ 331 & 333 (criminalizing the mutilation of U.S. coins and paper money).

<sup>138</sup> 17 U.S.C. § 106A.

<sup>139</sup> Indeed, the probate process itself might be dealt with effectively through private contracts and dispute resolution.

custody of the fox to Post.<sup>140</sup> Similarly, the government's property and gift taxation rules may affect owners' incentives to destroy property, and so 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.<sup>141</sup>

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 monitoring probated wills to find instances of property destruction is relatively inexpensive, the state can prevent inefficient destruction without expending substantial resources. The same may be true for the destruction of buildings by living owners, because such destruction is ordinarily noticeable by neighbors and/or city inspectors. Monitoring living owners' surreptitious destruction of artworks, on the other hand, would be quite costly, and the costs of monitoring and enforcing anti-destruction rules would exceed the cost of allowing some private destruction.

That said, if transaction costs 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 not be buried in graves. But evidently, *Meksras's* common law anti-destruction rule is not enforced via funeral home regulations.<sup>142</sup> Moreover, in those instances where a living person publicly announces an intent to destroy a particular piece of property,<sup>143</sup> 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.

### 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

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<sup>140</sup> *Pierson v. Post*, 3 Cai. R. 175, 2 Am. Dec. 264 (1805).

<sup>141</sup> See *Citizens Bank & Trust Co. v. .*, 839 F.2d 1249 (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. 1982) ("[I]f a public figure ordered his executor to shred and burn his papers, and then to turn the ashes over to a newspaper, then 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) (assuming that taxpayers are allowed a deduction against ordinary income for a loss resulting from a building demolition). *But see infra* note 210 (noting that the IRS has adopted a contrary rule in at least one instance).

<sup>142</sup> See, e.g., *Funeral Industry Practices*, 16 C.F.R. § 453 *et seq.* (1999); *supra* note 2.

<sup>143</sup> See, e.g., *supra* text accompanying note 3 and *infra* note 220.

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.<sup>144</sup>

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

Judge Posner offers a related explanation for courts' hostility to testamentary destruction. If the destroyer is still alive at the time of the destructive act, then 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.<sup>145</sup> The testamentary destroyer can keep his intentions secret, thereby precluding third parties from trying to persuade him to preserve his property. Courts construing destructive wills have been troubled by the prospect that the testator might have changed his mind if only he had known certain facts not available at the time.<sup>146</sup> Indeed, the law's suspicious treatment of testamentary disposition is not limited to the destruction of property – courts often bar testators from doing via will what those same testators could have done had they lived.<sup>147</sup>

Both Hirsch's argument and Posner's argument have some force. The arguments make presumptions, however, that might be 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 properties preserved than destroyed. It is not clear that all three presumptions would hold true in the most important potential property destruction cases.

First, chattel property usually can be destroyed surreptitiously by a living owner, and there is little reason to think that owners will generally consult third parties before electing to destroy the chattels in question. Indeed, to the extent that living people care

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<sup>144</sup> Hirsch, *supra* note 31, at 72-73.

<sup>145</sup> RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 558-59 (5th ed. 1998) ("Consider, however, the possibilities for modification that would exist if the gift were inter vivos rather than testamentary. As the deadline approached, the son might come to his father and persuade him that a diligent search had revealed no marriageable Jewish girl who would accept him. The father might be persuaded to grant an extension or otherwise relax the condition . . . The point just made may also explain why, although the owner of an art collection is perfectly free to destroy it during his lifetime, . . . a court might consider a condition in his will ordering its destruction to be unreasonable. Perhaps no one knew of the condition and the outcry when it was discovered would have persuaded the testator to abrogate it – had he been alive to do so.").

<sup>146</sup> See *In re Capers Estate*, 34 Pa. D. & C.2d 121, 129 (Orphans' Court 1964); *National City Bank v. Case Western Reserve Univ.*, 369 N.E.2d 814 (Ohio Common Pleas 1976).

<sup>147</sup> See, e.g., Carolyn L. Dessen, *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 it would 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 43, at 86-88.

about what people will think about them after their passing, 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 precisely in a will, one anticipates that some testators who feel 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 would 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, Mrs. Johnston indeed escaped the social ostracism of her neighbors. But had she destroyed the home during her lifetime, said destruction would have required Mrs. Johnston to move elsewhere, where she similarly would have escaped her neighbors' disapproval. Since it appears that Mrs. Johnston's relatives, the would-be beneficiaries, did not object to the home's razing, it is not clear that she would have suffered serious social repercussions in the wake of the destruction.<sup>148</sup> Presumably, the only opportunities for norm enforcement would have occurred during the window of time necessary for obtaining a demolition permit. Further, it seems plausible that the someone who destroys her habitable home is the type of nonconformist who is generally immune to peer pressure from neighbors. Even close-knit communities contain deviants, whose imperviousness to reputational sanctions threatens the efficacy of informal mechanisms for social control.<sup>149</sup>

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 will figure prominently in the rest of the paper. As the discussion that follows suggests, the law may encounter substantial difficulties in trying to confront deeply imbedded, profoundly inefficient pro-destruction norms.

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."<sup>150</sup> But most transplantable organs in the United States are needlessly destroyed.<sup>151</sup> As a result, there are more than 82,000 Americans on organ transplant waiting lists,<sup>152</sup> and 6,000 Americans die preventable deaths every year,

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<sup>148</sup> 524 S.W.2d at 218 (Clemens, J., dissenting) ("By its decision, the court officiously confers a 'benefit' on beneficiaries who have never litigated or protected against the razing.").

<sup>149</sup> See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 56-59 (1991).

<sup>150</sup> Richard Perez-Pena, *Downside to Fewer Violent Deaths: Transplant Organ Shortage Grows*, N.Y. TIMES, Aug. 19, 2003, at A19.

<sup>151</sup> Ellen Sheehy et al., *Estimating the Number of Potential Organ Donors in the United States*, 349 NEW ENG. J. MED. 667, 671 (Aug. 14, 2003) (finding that 42% of potential organ donors donate); Randi Hutter Epstein, *How Diplomacy in Handling Death Can Save Lives*, N.Y. TIMES, Aug. 19, 2003, at D5 (same). For earlier statistics, see James F. Blumstein, *Government's Role in Organ Transplantation Policy*, in *ORGAN TRANSPLANTATION POLICY* 5, 12-13 (James F. Blumstein & Frank A. Sloan eds. 1989).

<sup>152</sup> Sheehy et al., *supra* note 151, at 668.

waiting for organs that never arrive.<sup>153</sup> It is difficult to imagine a more perplexing waste of scarce societal resources.

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.<sup>154</sup> Indeed, the government makes it rather difficult for someone to avoid this senseless kidney destruction. An American wishing to donate his organs or the organs of a recently deceased relative generally must affirmatively opt in to organ donation, and this opt-in requirement substantially lowers donation rates.<sup>155</sup> Although the Uniform Anatomical Gift Act provides that the decedent's decision to donate his organs is decisive, hospitals typically will not harvest the decedent's organs unless his family also consents, even where the decedent has signed an organ donor card.<sup>156</sup> 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.<sup>157</sup> Finally, in cases where a decedent has multiple

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<sup>153</sup> Perez-Pena, *supra* note 150, at A19.

<sup>154</sup> Uniform Anatomical Gift Act §§ 2(e) & 2(i) (1987); Fred H. Cate, *Human Organ Transplantation: The Role of Law*, 20 J. CORP. L. 69, 71-73 (1995). For an argument that the law provides too little protection for the testator who wishes to avoid having his organs used for transplant, see Paul M. Quay, S.J., *Utilizing the Bodies of the Dead*, 28 ST. LOUIS U. L.J. 889, 891-895 (1984).

<sup>155</sup> *Id.* at 81-83; Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, in Organ Transplantation Policy, *supra* note 151, at 57, 60-61; Cass R. Sunstein & Richard H. Thaler, *Liberal Paternalism Is not an Oxymoron*, John M. Olin Law & Econ. Working Paper No. 185, May 2003, at 32-34 (forthcoming in U. Chi. L. Rev.). When the decedent has remained silent on his willingness (or lack thereof) to become an organ donor, the decedent's next of kin may elect to donate his organs. See, e.g., CAL. HEALTH & SAFETY CODE § 7151(a) (2003); Uniform Anatomical Gift Act § 3(a) (1987). But, again, if the next of kin are silent or cannot be located, donation typically will not occur. 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. 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 URBAN L.J. 815, 826-29 (2001).

<sup>156</sup> 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 Helderan, *Disparity Between Solid-Organ Supply and Demand*, 349 NEW ENG. J. MED. 704, 704 (Aug. 14, 2003); Traci J. Hoffman, Comment, *Organ Donor Laws in the U.S. and the U.K.: The Need for Reform and the Promise of Xenotransplantation*, 10 IND. INT'L & COMP. L. REV. 339, 346 (2000); 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 previously want to contemplate their own premature demise, so the topic of organ donation may never come up in conversation.

<sup>157</sup> Bucklin, *supra* note 156, 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 n. 284 & 285 (1995); Hensrud, *supra* note 156, at 176. The best data on this subject comes from a study by William DeJong and co-authors, who note that ten percent of non-donor 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 (1998). Roughly extrapolating from the data, it appears that a decedent's wishes to donate were respected approximately 75% of the time and that a decedent's wishes to not donate were respected approximately 95% of the time. In the vast

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.<sup>158</sup> In short, either a decedent or his heirs usually can block physicians from transplanting his organs. The impediments that American law and custom place in the path of the socially responsible would-be donor are substantial.<sup>159</sup>

Maybe a moral society should implement a stringent anti-destruction 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.<sup>160</sup> The United States instead embraces the owner's seemingly absolute right to destroy his own kidneys at death, and give heirs the right to destroy kidneys 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,<sup>161</sup> then a government that attempts to use force to prevent organ destruction will encounter substantial social and political resistance from the relatives of the deceased.<sup>162</sup> Moreover, those who earnestly wish to

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majority of cases, the decedent's wishes regarding organ donation were not known by the next of kin. *Id.* For a discussion of the DeJong findings, see Edward Guandagnoli et al., *The Public's Willingness to Discuss Their Preference for Organ Donation with Family Members*, 13 CLIN. TRANSPLANTATION 342, 342 (1999).

<sup>158</sup> Bucklin, *supra* note 156, at 337; DeJong, *supra* note 157, at 20. DeJong reports that there were disputes among next of kin in 22% of situations where a decedent's organs were usable.

<sup>159</sup> 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, 66% of nondonor respondents said they would make the same decision in hindsight. DeJong, *supra* note 157, at 20.

<sup>160</sup> See A.H. Barnett & David L. Kaserman, *The Shortage of Organs for Transplantation: Exploring the Alternatives*, 9 ISSUES L. & MED. 117, 123 (1993). Barnett & Kaserman, sensibly, note that kidney conscription "is likely to meet with overwhelming objections" from the public. *Id.* at 123 The governments of China and Serbia have instituted this kidney conscription regime with respect to 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) ("Currently, both China and Serbia are reported to remove organs from executed prisoners. What distinguishes nationalization of cadavers from presumed voluntary consent is the inability of the donor or family to 'opt out' of the donation.").

<sup>161</sup> 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, *supra* note 157, at 18. By contrast, the same percentage of people evidently agree with the statement that "it 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 are independent of religious belief. 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. OF HEALTH CARE L. 159, 160-64 (2002).

<sup>162</sup> James F. Childress, *Ethical Criteria for Procuring and Distributing Organs for Transplantation, in Organ Transplantation Policy*, *supra* note 151, at 87, 98-99; Hansmann, *supra* note 155, at 70. Even voluntary transactions with relatives might encounter substantial moral and practical difficulties. Hansmann, *supra* note 155, at 62. *But see* Richard A. Epstein, *Are Values Incommensurable? Or Is Utility*

keep their bodies intact may adopt death-bed strategies designed to thwart the government's initiative, or may direct the removal of their bodies to friendlier jurisdictions. Finally, governmental exercises of the condemnation authority with respect to human body parts will strike many as inherently unacceptable.<sup>163</sup> So while respecting the 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 pro-destruction norm.

What is the lesson from this diversion into the law of kidney donation? 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. Where a decedent has signed an organ donor card, and yet hospital employees refuse to honor the donor's wishes because his next of kin object, the heirs are obviously more receptive to organ destruction than the decedent is.<sup>164</sup> By giving both decedents and the next of kin a right to veto organ preservation, the law increases the odds that dominant pro-destruction norms will block the use of the organ for beneficial purposes.

Now recall Hirsh's discussion of norms and consider two alternative regimes. In regime 1, the would-be donor must disclose to his heirs apparent his intentions to donate his kidney upon his death in order for that choice to be effective. In regime 2, he may opt to donate his kidney secretly, for example, by filling out a form to be placed in his medical records. If the relatives are indeed more resistant to organ donation (because of misplaced concerns about the appearance of the cadaver at an open-casket funeral, for example), then a disclosure requirement will result in added waste, because it will give these relatives 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 upon learning that his donation would enhance the grief likely to be experienced by his next of kin. 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 ones to change their minds 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 well be incorrect in the context of transplantable organs and socially valuable non-commodities.<sup>165</sup> It appears that peer pressure, persuasion, and socialization may operate to increase the destruction of these enormously valuable organs. For this reason,

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*the Ruler of the World?*, 1995 UTAH L. REV. 683, 712-714 (advocating a market approach for the allocation of organs).

<sup>163</sup> See *supra* note 160.

<sup>164</sup> It is not clear that commodification of internal organs would solve this problem. If kidneys were commodified as part of the decedent's estate, some heirs would be motivated to cash them in, but others would view the sale of those kidneys as the contemptible butchering of a parent's body for financial gain. Commodification might therefore crowd out altruistic behavior.

<sup>165</sup> Indeed, their supposition may be true for valuable commodities 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.

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.

#### 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.<sup>166</sup> 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 decision-making capacity do not dwarf the value of the affected resources, the law ought to bar destruction.

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 his own property is sometimes introduced to show that the testator lacked testamentary capacity.<sup>167</sup> At least one court has proved unreceptive to these kinds of arguments in the destruction context, preferring a waste or externality rationale for refusing to follow the testator's wishes.<sup>168</sup> 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.<sup>169</sup> 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. I will explore these expressive issues in Part IV.

#### E. A Sui Generis Solution?

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

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<sup>166</sup> See RESTATEMENT OF THE LAW: PROPERTY § 8.1 (Wills and Other Donative Transfers) (tentative draft no. 3) (April 4, 2001) Under the Restatement, such instructions are voidable.

<sup>167</sup> See, e.g., *In re Ellis' Estate*, 210 P.2d 417, 424 (Kan. 1949).

<sup>168</sup> See, e.g., *In re Wishart*, 46 E.T.R. 311, 129 N.B.R.2d 397, 325 A.P.R. 397, at ¶ 12 (New Brunswick Queen's Bench 1992).

<sup>169</sup> See Hirsch, *supra* note 31, at 80-83.

them of the opportunity to destroy the property 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 does demonstrate her seriousness of purpose by foregoing the present income that could result from the sale of a future interest in the property. At the same time, some people will 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 they underestimate the amount of money that a remainder interest will fetch. And because the transaction costs of monitoring destruction via will are relatively low, the probate context seems like an appropriate opportunity for the state to assert its anti-waste policies.

Further, destroying valuable property sometimes runs afoul of prevalent social norms in the United States, with wedding rings and biological material 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, concerns about the testamentary capacity of would-be destroyers persist. Some percentage of those who attempt to destroy property are incapable of making rational judgments, and in such circumstances paternalistic restrictions on their ability to destroy property generally promote testators’ best interests and social welfare.

Property law can respond to all these situations through a rather simple requirement: The law might provide that destructive instructions contained in wills will only be honored where the owner notified the public of the possibility that future interest in the property may be purchased. For example, a testator interested in destroying her home could be required to list a future interest in the home on Ebay or a similar auction service. The advertisement would have to list detailed information about both the property in question and the life tenant herself.<sup>170</sup> The testator would establish a minimum reserve price, and if no bid exceeded the reserve price, then the testator would not be obliged to sell to the high bidder. If the owner’s “reserve price” was exceeded by another bidder, or if the government decided to condemn the future interest, then the property would be spared from destruction. But if no bid exceeded the would-be-destroyers’ minimum asking price, then the owner would have demonstrated that she valued destruction of the work 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 foregone a market price for the property’s future interest, he has earned the right to consume that future interest by destroying the property. He would be obtaining utility during the remaining years of his life. Moreover, the policy would substantially lower the transaction costs associated with monitoring

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<sup>170</sup> A buyer would want access to information that helps establish the life tenant’s life expectancy, such as age, gender, and health.

living people's decisions to destroy property. Marketing the future interests in the property would alert community members and heirs apparent to the owners' intentions while they were still in a position to influence her to change her mind.

A major advantage of this approach is that it would facilitate the condemnation of properties 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.<sup>171</sup> Posthumous condemnation in right-to-destroy cases necessarily thwarts the wishes of the testator without conferring any meaningful benefit on her.<sup>172</sup> Condemnation during the testator's lifetime thwarts her wishes too, but it at least provides her with money that she can enjoy during the rest of her life.

Finally, the process of marketing a future interest in anticipation of one's death will require that the testator have some sophistication and a capacity to plan for the future. One imagines, therefore, that those lacking testamentary capacity rarely will be able to jump through the appropriate hoops. Moreover, to the extent that dementia or other limitations on capacity becomes 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 will 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 forego 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 kidneys and other transplantable organs. I have, in the past, expressed reservations about the wisdom of commodifying human organs.<sup>173</sup> Without getting into the contentious issue of whether it would be desirable to create a lawful market for kidneys, I will simply explore two possibly appealing aspects of this policy innovation in the kidney context. First, permitting a living donor to sell the right to harvest his organs upon his death is far less troubling than permitting a living donor to sell his kidney, effective immediately.<sup>174</sup> Second, to the extent that many people are inclined to donate but do not do so because they are unaware of the need for kidneys or underestimate their worth, the process of marketing a future interest in one's organs could solve both

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<sup>171</sup> These cases, after all, are all instances in which the owner wishes to continue using the property during her lifetime, so there would be 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 her own demise, she could have done so. In any event, even if the testator changed her mind and sought immediate destruction, the doctrine of waste would prevent her from doing so.

<sup>172</sup> 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, she would not have directed her executor to destroy the property at issue.

<sup>173</sup> Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California's Carpool Lanes*, 75 IND. L.J. 1231, 1294-96 (2000).

<sup>174</sup> Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 G.W.U. L. REV. 1 (1989); Hansmann, *supra* note 155, at 62-71.

problems.<sup>175</sup> So a law that permitted people to destroy their kidneys only if they had foregone the highest market price for a future interest might both serve an educational function for potential donors and their heirs. It could also help society differentiate between those who sincerely want their cadavers to remain intact, and those whose preferences are weak or default-rule-driven.

My proposed rule evidently lacks obvious analogs to existing doctrines in property law. Indeed, to the extent that such a rule is appealing in this context, it shows how the right to destroy differs analytically from all other property rights. Given the lack of analogs, and the arguable need for regulation in the area of future interest sales, legislative action may be the most natural avenue for reform. That said, a trusts and estates lawyer with a client who wishes to destroy valuable property via will would be wise to advise his client to market the future interest during his lifetime. Doing so would address every objection that courts have lodged against testamentary destruction. A common law court would then be in the position to hold that marketing a future interest prior to death was one way (but perhaps not the only way) for a sincerely destructive testator to convince a court to respect his wishes.

#### **IV. Destruction, Discourse, and Values**

Having introduced the issue of organ transplantation, it is worth examining why that example upsets so many people's intuitions about property destruction. Those who feel disdainful of Mrs. 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, causing innocent third parties to die as a consequence. 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 satisfying answer rely on the prevalence of a pro-destruction norm for organs and an anti-destruction 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 an inefficient anti-destruction norm.

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 non-market, 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 morality, are deemed legally sufficient to justify enormous social waste. In the house 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.

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<sup>175</sup> Or it could backfire, by causing an anti-commodification backlash. See Strahilevitz, *supra* note 173, at 1295.

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

#### 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 should hardly be surprising that property destruction remains a common and effective means for communicating ideas and grabbing others' attention. A student of American law will, without much reflection, appreciate the expressive possibilities of property destruction upon realizing that several landmark First Amendment precedents revolve around the incineration of private property.<sup>176</sup> Because the destruction of an American flag, a draft card, or a wooden cross conveys an obvious political or social agenda, courts contemplating property destruction in the First Amendment context have generally proved quite sympathetic to the interests of the destroyers.<sup>177</sup> 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.<sup>178</sup>

Cases involving flag or draft card burning are easy in the sense that the expressive component of the destructive act is substantial and the monetary value of the underlying resource is insubstantial. Socially speaking, in a society that tolerates dissent, destruction of this kind of property appears to be a high-value use. There are, of course, harder cases. As Saddam Hussein's control over Baghdad was disintegrating, American soldiers

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<sup>176</sup> See *United States v. O'Brien*, 391 U.S. 367, 382 (1968) (upholding the conviction of an anti-war protester who burned his selective service certificate in light of the government's substantial interest in assuring the continued availability of these certificates); *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (holding that burning an American flag is expressive conduct protected by the First Amendment); *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 with an intent to "arouse anger, alarm, or resentment on the basis of race, color, creed, religion, or gender"); *Virginia v. Black*, 123 S. Ct. 1536, 1548 (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.")

<sup>177</sup> *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. 391 U.S. at 379-80.

<sup>178</sup> *Spence v. State of Washington*, 418 U.S. 405, 410-11 (1974). The Third Circuit, relying on post-*Spence* case law, adopts a different test. See *Tenaflly Eruv Ass'n v. Borough of Tenaflly*, 309 F.3d 144, 160-61 (3d Cir. 2002) ("[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.") (internal quotation marks omitted). Most other courts continue to adhere to the *Spence* test. *Id.* at 160 n.18.

toppled a large statue of Hussein that had stood in Baghdad's central square.<sup>179</sup> 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.<sup>180</sup> American soldiers were destroying a statue that they did not own and had no need to eviscerate. 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 fallen 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.<sup>181</sup>

Similar examples abound. Former-Communist nations destroyed many Lenin statues in the years following the 1989 revolutions.<sup>182</sup> A Jewish Group sunk a boat believed to be Hitler's yacht off the Florida coast to commemorate the 50th Anniversary of the United States' refusal to accept an ocean liner filled with Jews fleeing the Nazis.<sup>183</sup> A devout Catholic purchased Coubert's anti-clerical *Return from the Conference* so that he could destroy it.<sup>184</sup> 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.<sup>185</sup> Lady Churchill burned a portrait by an important artist that Parliament had presented to her husband in 1954.<sup>186</sup> The Churchills hated the portrait, which they believed portrayed Winston as a "gross and cruel monster,"<sup>187</sup> and on at least one account the destruction of the portrait was a boon to Winston's "peace of mind."<sup>188</sup> Various religious groups have challenged governmental restrictions on their demolition and

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<sup>179</sup> 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.

<sup>180</sup> See generally Hiram Abtahi, *The Protection of Cultural Property in Times of Armed Conflict*, 14 HARV. HUMAN RIGHTS J. 1, 6-17 (2001) (discussing the international law regarding the destruction of cultural property).

<sup>181</sup> Joseph Sax recognizes the expressive possibilities of artwork destruction. SAX, *supra* note 7, at 17 ("With this background, it 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.").

<sup>182</sup> See, e.g., Marc Fisher, *In Berlin, Lenin's Last Stand*, WASH. POST, Nov. 9, 1991, at G1; Henry Kamm, *Icons are Toppled*, N.Y. TIMES, Aug. 21, 1991, at 1; David Remnick, *The Day Lenin Fell on His Face*, WASH. POST., Sep. 5, 1990, at D1;

<sup>183</sup> Associated Press, *Sunk as Holocaust Symbol*, L.A. TIMES, June 13, 1989, at 2. 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.*

<sup>184</sup> SAX, *supra* note 7, at 19.

<sup>185</sup> SAX, *supra* note 7, at 13-16.

<sup>186</sup> *Id.* at 37.

<sup>187</sup> *Id.* at 38.

<sup>188</sup> *Id.* at 39.

renovation of their places of worship, citing the Free Exercise Clause.<sup>189</sup> And, as mentioned at the outset of this article, the Harry Caray's restaurant chain announced plans to destroy a historically significant baseball with a market value in excess of \$100,000.<sup>190</sup>

Now consider a much more disconcerting incident of expressive destruction: the Taliban's destruction of the Buddhas of Bamiyan despite offers from foreign governments and museums to purchase some of the works.<sup>191</sup> This destruction had an obvious religious motivation and meaning. By destroying the Buddhas, the Taliban were sending a powerful statement to Afghans and Muslims worldwide. These were not irrational acts of destruction; they were rational acts that conveyed unmistakable and attention-getting messages. The fact that the cash-strapped Taliban spurned purchase offers from foreigners shows how much they 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.<sup>192</sup>

In all these cases, the destruction of valuable property contained a substantial expressive component. Humans are generally 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 does send a powerful message that the “speaker” disagrees with the symbolic expression manifested in the work.<sup>193</sup> But the destructive act is unlikely to contribute to a healthy public discourse or point society toward truth. Under a collectivist reading of the First Amendment, then, the government could regulate such destructive acts.<sup>194</sup> To destroy a unique, irreplaceable<sup>195</sup> piece of

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<sup>189</sup> See, e.g., *Rector of St. Bartholomew's Church v. New York*, 914 F.2d 348 (2d Cir. 1990); *Keeler v. Mayor and City Council*, 940 F. Supp. 879 (D. Md. 1996). California has exempted religious organizations from the burdens of its historical preservation laws for non-commercial property, evidently because of these concerns. This exemption has itself survived an Establishment Clause challenge. *East Bay Asian Local Development Corp. v. California*, 24 Cal. 4th 693 (2000).

<sup>190</sup> See *supra* text accompanying note 3.

<sup>191</sup> Robert Hughes, *Buddha Bashing*, Time: Asia, Aug. 20, 2003, available in <<http://www.time.com/time/asia/arts/printout/0,9788,102096,00.html>> (visited Sep. 20, 2003); *Pre-Islam Idols Being Broken Under Decree by Afghans*, N.Y. TIMES, Mar. 2, 2001, at A9.

<sup>192</sup> 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. By the same token, the performance artist who burns down his house is not immune from liability if the fire spreads to a neighboring lot.

<sup>193</sup> Vera Zlatarsky, *Moral Rights and Other Moral Interests: Public Art Law in France, Russia, and the United States*, 23 COLUM. VLA-J. OF L. & ARTS 201, 233 (1999).

<sup>194</sup> For free speech scholarship in the collectivist tradition, see ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1960); Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 3, 23-25; Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255-263; 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 Disclosure*, 64 U. COLO. L. REV. 1109 (1993).

property is, in some ways, closer to heckling a speaker than responding to what he has to say. It may also deter others from devoting the necessary time and resources to future creative activities.<sup>196</sup> 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 temporarily privileging creation over destruction, is establishing a procedural rule that the artist who intends to make a lasting aesthetic contribution gets to "hold the floor" and cannot be cut off without his consent during his lifetime. If the First Amendment is about the nation's commitment to producing a public debate that is "uninhibited, robust, and wide-open"<sup>197</sup> 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").<sup>198</sup> Among other things, the law prohibits the destruction of visual art that is "of recognized stature" during the artists' lifetimes.<sup>199</sup> Artists can waive their VARA rights contractually,<sup>200</sup> but the artist is unable to transfer his VARA rights to a third party.<sup>201</sup>

Taken together, VARA's anti-destruction 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, he 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 is generally more socially valuable than destruction, because creation contributes an idea whereas destruction usually wipes out an existing idea. After the artist has died, there is little expressive interest to be balanced against the living destroyer's weak expressive interest, and the idea in question has already been voiced for a substantial period of time, so

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<sup>195</sup> 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* 218-221 (1999).

<sup>196</sup> 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).

<sup>197</sup> *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). For an argument that this idea represents the core of the First Amendment's values, see OWEN M. FISS, *THE IRONY OF FREE SPEECH* 22-25 (1996).

<sup>198</sup> 17 U.S.C. § 106A. 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).

<sup>199</sup> *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).

<sup>200</sup> Landes, *supra* note 198, at 286.

<sup>201</sup> 17 U.S.C. § 106(e)(1).

destruction is permitted.<sup>202</sup> VARA rights to prevent destruction must remain with the artist because it is the artist's speech that is at issue. Those who have argued that VARA is unconstitutional have ascribed equal value to the creation of artwork and the destruction of artwork,<sup>203</sup> but a collectivist framework shows how the law might be reconciled with First Amendment principles.

Those who harbor more individual-autonomy oriented views of the First Amendment will have a more difficult time countenancing restrictions on property destruction that may have expressive consequences.<sup>204</sup> 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 a libertarian 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 interests, but the Taliban who ordered their destruction had cognizable expressive interests.<sup>205</sup>

Regardless of one's animating theory of expressive conduct, there is a real danger of leakage here. If the law must defer to expressivist property destruction, but not to economically-motivated or spite-motivated property destruction, then sophisticated property owners who are motivated by economics will claim to be motivated by expressive interests. Courts may have a difficult time judging 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.

## B. If I Made You, Can I Destroy You?

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

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<sup>202</sup> At most, there may be an interest in permitting the public to hear the dead artist's speech. See Dana R. Wagner, *The First Amendment and the Right to Hear*, 108 YALE L.J. 669 (1998).

<sup>203</sup> See, e.g., Kathryn A. Kelly, 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, 1138-44 (1996); Joseph Z. Fleming, *Materials on the Representation of Artists: Leviton v. Hollywood Art & Culture Center, Inc.*, SF39 A.L.I.-A.B.A. 859, 869-70 (Jan. 18, 2001); George C. Smith, *Artistic License Takes on a New Meaning*, LEGAL TIMES, Dec. 17, 1990, at 23.

<sup>204</sup> 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).

<sup>205</sup> When dealing with human-looking statues like the Buddhas of Bamiyan, our outrage over their destruction may stem from a subconscious tendency to ascribe rights to the artworks themselves. The Buddhas of Bamiyan are inanimate objects, but they look like people, and so we may be more revolted by their destruction than we would be by the destruction of a building of similar antiquity and historical importance.

world will remember him or her.”<sup>206</sup> I agree with his bottom line, but for somewhat different reasons.

The question is no academic one. Creators often attempt to destroy their property. This paper has already 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 Joseph 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 Kafka’s writings immediately.<sup>207</sup> In addition to these notes, Kafka had verbally directed Brod to destroy his written works.<sup>208</sup> Included in the materials Kafka asked Brod to destroy were the only copies of his two still-unpublished masterpieces, *The Castle*, and *The Trial*. Brod “did not honor his friend’s last wish.”<sup>209</sup> 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 diaries upon her passing. The diaries had been valued at \$3.8 million.<sup>210</sup> Virgil evidently wanted the only written copy of *the Aeneid* burned upon his death, but he may have changed his mind after

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<sup>206</sup> SAX, *supra* note 7, at 200. Sax would not necessarily accord public figures who create historical documents the same rights, but recognizes the practical limitations associated with holding government officials to formal anti-destruction rules. *Id.* at 200-01 (“[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 nonbonding 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.”).

<sup>207</sup> Paul Kurt Ackerman, *A History of Critical Writing on Franz Kafka*, 23 GERMAN Q. 105, 105 (1950).

<sup>208</sup> Douglas E. Litowitz, *Franz Kafka’s Outsider Jurisprudence*, 27 L. & 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. *Id.* Brod himself suggested that he did not know whether Kafka was being insincere, but that he thought Kafka understood he would have never destroyed Kafka’s works even if he had known that Kafka steadfastly wished their destruction. See Max Brod, *Postscript to the First Edition of Franz Kafka’s The Trial*, in WILLIAM R. BISHIN & CHRISTOPHER D. STONE, LAW, LANGUAGE & ETHICS 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. (“Unhappily Kafka performed the function of his own executor on part of his literary estate. In his lodgings I found ten large photo notebooks – only the covers remained; their contents had been completely destroyed. In addition to this he had, according to reliable testimony, burned several writing pads.”). Had he not been confined to a tuberculosis sanitarium during most of the final years of his life, Kafka would have had the opportunity to burn the other works as well.

It does not appear that the doubts over Kafka’s true intentions made any difference. Brod quite candidly admitted that he would not have destroyed the writings even if he had known that Kafka adamantly wished to see them destroyed. *Id.* (“My decision [rests] 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.”).

<sup>209</sup> Ackerman, *supra* note 207, at 105.

<sup>210</sup> See Sykas, *supra* note 31, at 926.

friends convinced him that Augustus would never allow such destruction.<sup>211</sup> In 1954, an obscure artist decided to destroy all 24 of the paintings he had previously executed, as a way of “beginning afresh with a blank canvas.”<sup>212</sup> Within a year 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.<sup>213</sup> More recently, Brett Weston, a well-known photographer, publicly incinerated a lifetime’s worth of valuable negatives to commemorate his eightieth birthday.<sup>214</sup>

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? Judge Posner states that these types of cases arise commonly, and that courts typically strike the direction to destroy the papers on the grounds of public policy.<sup>215</sup> Say 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 a complete vision of the narrative structure for their work.<sup>216</sup> 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 the artist recovers. In the past, great artists have erred on the side of destruction out of the fear that the unfinished works will tarnish their reputations.<sup>217</sup>

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<sup>211</sup> See Hirsch, *supra* note 31, at 76 n 157 (quoting Brooks Otis, *Virgil 1* (1964)); Sykas, *supra* note 31, at 919. On another account, Virgil did leave instructions to destroy the *Aeneid*, “but the Emperor Augustus ordered the executors to disregard the order.” *DUKEMINIER & JOHANSON 6TH, supra* note 133, at 33.

<sup>212</sup> Louis Menand, *Capture the Flag*, *Slate.com*, (Oct. 30, 1996), available in <<http://slate.msn.com/id/2905/>>.

<sup>213</sup> *Id.*

<sup>214</sup> See *infra* note 220.

<sup>215</sup> POSNER, *supra* note 144, at 559 (“[A] common case is where a writer in his will directs his executor to destroy his unpublished manuscripts. These directions are usually disobeyed.”).

<sup>216</sup> 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.

<sup>217</sup> See, e.g., SAX, *supra* note 7, at 43 (“George Rouault, in the presence of a photographer, threw into a furnace some 315 of his own canvases. . . they were unfinished and unsigned works, and 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 painting. Thus it was only

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. The law, after all, does not force Prada to ship its irregular or substandard clothing to discount sellers. Rather, it lets Prada 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.<sup>218</sup> Since K's heirs would have the same economic interest in the value of his collective works, they should have the same opportunities to destroy works that might diminish his reputation.<sup>219</sup>

Third, and relatedly, we might shoehorn K's wishes into the types of expressive theories so far discussed. K may wish to send a message to the public, by destroying his unfinished works, that he is not the type of artist who will tolerate, let alone publish, inferior works.<sup>220</sup> A dramatic destruction of K's unfinished works would certainly garner the public's attention. Brod's publicized destruction of the work that had taken so much of K's time would perhaps rekindle public interest in those few works that K thought were worthy of publication.

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 K's life.<sup>221</sup> K's death might well obviate the possibility of a constitutional violation, 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

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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."); *see also infra* note 220.

<sup>218</sup> 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 is 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.

<sup>219</sup> *Cf. SAX, supra* note 7, at 146 (describing the destruction of 550 Robert Henri paintings by his heir, in order to increase the value of the remaining 3450 works).

<sup>220</sup> 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 1. 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 80. *Id.* Evidently, Weston was partially concerned with the possibility that others might use his negatives to make posthumous prints of his work that would not reflect his artistry. The prevalence of posthumous prints made from Lewis Hine's negatives has weakened the market for that photographer's prints. *See Prontoprints: Fake Vintage Photographs: As Vintage Photographs Rise in Price, Fakes Are Becoming More Common*, THE ECONOMIST, July 7, 2001.

<sup>221</sup> Exceptions would arise, of course, if the papers were valuable for evidentiary or law enforcement purposes.

Amendment right to remain silent.<sup>222</sup> 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.<sup>223</sup> From this perspective, destruction of an expressive work by its creator is very different from destruction of a creative work by anyone else.

### C. Biological Exceptionalism?

In an analogous set of cases, courts have recognized the problem with 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 divorcees concerning the disposition of cryogenically frozen embryos. The first such case in the United States was *Davis v. Davis*,<sup>224</sup> a 1992 decision by the Tennessee Supreme Court. 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, they were 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

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<sup>222</sup> See *West Va. State Board of Education v. Barnette*, 319 U.S. 624 (1943) (invalidating, on First Amendment grounds, a school regulation requiring public school children to recite a pledge and salute the American flag); *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 that was printed on their vehicle license plates). French moral rights 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 & Maria Santilli, *Author's and Artist's Moral Rights: A Comparative Economic and Legal 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 generally *supra* notes 193-205 and accompanying text. Of course, a First Amendment collectivist would still be concerned about compelled speech if it deters other potential speakers from committing their private words and thoughts to paper. See *supra* notes 216-217 and accompanying text.

<sup>223</sup> The collectivists might weigh these cases differently. If the goal of the First Amendment is to maximize the value of the information that reaches the public, then it could be appropriate to bar the destruction of particularly interesting manuscripts, even if the speaker preferred that his thoughts remain private. Presumably, collectivists would only favor destruction if the ex ante harms identified above engendered a net decrease in future creative output.

<sup>224</sup> 842 S.W.2d 588 (Tenn. 1992).

subsequent implantation.<sup>225</sup> The couple's initial efforts to conceive were unsuccessful, and Junior filed for divorce in February of 1989.<sup>226</sup>

Junior and Mary Sue agreed on all terms of the dissolution save one: custody of the remaining frozen embryos.<sup>227</sup> Mary Sue wanted to donate the embryos to a childless couple, and Junior wanted the embryos to be destroyed.<sup>228</sup> The trial court held the interest in preserving the embryo's 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.<sup>229</sup> The Court of Appeals reversed, holding that Junior Davis had a constitutional right to avoid fatherhood in these circumstances.<sup>230</sup>

The Tennessee Supreme Court then sought to balance Mary Sue's interest in avoiding the destruction of the embryos and of "knowing that the lengthy . . . procedures she underwent were futile, and that the preembryos to which she contributed genetic material would never become children"<sup>231</sup> against Junior's interest in avoiding "unwanted parenthood . . . , with all its possible financial and psychological consequences."<sup>232</sup> 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."<sup>233</sup> A number of other courts have been called upon to resolve similar conflicts, and in most instances, the court has sided with the party seeking to destroy the embryo.<sup>234</sup> In none of the cases did the court force someone to become a parent without that person's consent.<sup>235</sup>

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<sup>225</sup> *Id.* at 591-92.

<sup>226</sup> *Id.* at 592.

<sup>227</sup> *Id.* at 589.

<sup>228</sup> *Id.* at 590.

<sup>229</sup> *Id.* at 589.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 604.

<sup>232</sup> *Id.* at 603.

<sup>233</sup> *Id.* at 604.

<sup>234</sup> *See* *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."); *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, (App. Div. 1997) (holding the parties to their written agreement executed at the time of the procedure, which provided that the fertilized embryo would be used for scientific research by the fertility center).

<sup>235</sup> *See supra* note 234.

Reading *Davis* and the other procreation cases, one is struck by the variations between those opinions and other opinions involving the right to destroy 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 court place *any* weight on society's interest in avoiding the destruction of a human pre-embryo. 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 the embryo implanted in her own uterus would have a *stronger* claim than a parent who wanted to donate the embryo to an infertile couple.<sup>236</sup> 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 to not procreate trumps a partner's constitutional right to procreate. By the same token, one might argue that the writer's right to avoid speaking (i.e., to direct the destruction of one's 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 is to 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 be ignoring something important. In the posthumous publication cases, the artist's privacy and expressive interests have to be balanced against the social value that might result from publication. In the procreation cases, it is improper for the courts to ignore the potential benefits of embryo preservation to an infertile couple that would like to conceive children.

## V. 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' rights 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 empty, and historians may have more difficulty studying artistic, political, or cultural traditions. These are all substantial concerns. But I have argued that prohibiting people from destroying their property can result in waste too. Historic preservation laws can lock existing, inefficient, land uses into place. Rules barring patent suppression can discourage firms from investing in innovations. Precedents barring the posthumous destruction of unfinished writings can encourage premature shredding by ailing writers or discourage scholars from committing unfinished thoughts to paper. Rules requiring presidents to preserve all presidential papers can deter public officials from memorializing controversial or sensitive ideas. To

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<sup>236</sup> 842 S.W.2d at 604.

be sure, certain kinds of anti-destruction rules will do more harm than good, but a review of the case law leaves one with little confidence that courts will be able to overcome loss aversion or adequately analyze ex ante incentives created by legal rules.

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 basis for this hostility to posthumous destruction is the idea that only a living owner will suffer the consequences of his act, and 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 forego 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 non-landmarked properties 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 their property with them” upon their passing. As long as it can be assured of their sincerity and testamentary capacity, the government usually ought not to prevent these people from directing the destruction of their property via will.

The paper then uses the destruction of internal organs and frozen embryos 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 his valuable property, it should presume that the destructive act furthers expressive or religious objectives. This deferential approach still raises the question of whether religious or expressive interests should trump the usual concerns about wasted resources and associated negative externalities.

Cases that require courts to balance religious or 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 preserve the embryos for implantation. Similarly, the American law protects a deceased person’s right to destroy her transplantable organs upon her death, notwithstanding the enormous unnecessary loss of life that results. Indeed, in these cases, courts give no thought to the ordinary critiques of posthumous destruction. Finally, courts generally disregard the artist’s substantial First Amendment interests in ensuring that incomplete, inferior, or otherwise disfavored unpublished works in his collection be destroyed upon his passing.

Congressional legislation on the destruction of visual art provides a more balanced, sophisticated approach to destruction cases where important interests exist on both sides. Under a collectivist reading of the Visual Artists’ Rights Act, 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 died or contracted away his rights to prevent destruction, however, 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 for works by Old Masters constitutes puzzling economic regulation, but good free speech law.

The conflict between collectivist and individual-autonomy orientations is a recurring trope in any discussion of property destruction. The law of property, and any intelligible theory of destruction, necessarily flirts with both conceptions. The relative simplicity of engaging in autonomy-oriented analysis helps explain what may be perceived as this paper'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 paper. In the main, we do not know whether the enforcement of anti-destruction rules results in a net increase in the quantity of property that is worth preserving. Anti-destruction rules may be counterproductive from the perspective of maximizing speech or wealth. The individual liberty issues involved seem easier to understand, and for the time being may provide a more appropriate basis for policy formulations.

Given the paper's criticism of many common law cases involving the destruction of property, it seems appropriate to set forth how the major cases ought to have been decided. For the purposes of organizational clarity, the paper will examine the easier cases and harder cases in turn.

#### A. Easy Cases

At some level, a right to destroy property is essential to the functioning of a market economy. A new refrigerator would be worth little or nothing if its owner was required to keep it working as a refrigerator *ad infinitum*. Similarly, if Hugo Boss is barred from destroying the imperfect suits that it produces, then it might see the value of all its remaining garments, and the business as a whole, fall as a consequence. These lessons suggest that property destruction often produces 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 on the destruction of the property seem inappropriate.<sup>237</sup> Exceptions arise only where the property in question is economically productive (albeit not optimally productive) and where it produces substantial enough positive externalities to offset the owner's lost revenue.

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<sup>237</sup> There are, of course, instances in which people destroy objects that they believe to be worthless, and then 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. James Werrell, *Boomers Coping with Mountains of Clutter*, ROCK HILL HERALD, 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 in 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 the owner to be more careful in the future.

Compare two historic preservation cases. In *Ramsey*,<sup>238</sup> and *J.C. & Associates*,<sup>239</sup> once grand buildings had become money pits for their owners. Neither owner could renovate the properties and still turn a profit. Unless the state or the neighbors are willing to compensate the owner enough to make the continuation of the structure economically viable, the owner ought to have a right to tear down the building. *Ramsey* recognized this basic principle. *J.C. & Associates* did not.

Properties that generate little or no positive externalities also present easy cases. If the owner wants to destroy them, 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, this waste is tolerable. As long as the owner has an incentive to preserve valuable properties, 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, as long as his sanity is unquestioned. Similarly, someone who wishes his executor to destroy his property upon his death ordinarily ought to be entitled to do so, as long as he is of sound mind and body, and previously has put his money where his mouth is by foregoing the market price for a future interest in the property.

Cases involving the destruction of unpublished work by that work's owner and creator are easy too. There will certainly be waste associated with the destruction of such works – the Kafka writings demonstrate that. But on the whole, artists should decide which of their works should be 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 anti-destruction 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.

Most cases involving the burial of family heirlooms or wedding rings with a decedent are easy as well. 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 these properties are likely to have merged with the decedent.<sup>240</sup> A loyal, deceased spouse, then, really is the highest-value user of a valuable wedding ring. Hence the norm permitting such burials, rather than *Meksras*'s harsh-anti-destruction rule, follows the proper approach. That said, there is a point at which the destruction may become excessive, and the law can, 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 invite grave-robbing and 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.<sup>241</sup> Nor is it

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<sup>238</sup> *People ex rel. Marbro Corp. v. Ramsey*, 171 N.E.2d 246 (Ill. Ct. App. 1960).

<sup>239</sup> *J.C. & Assoc v. District of Columbia Bd. of App. & Rev.*, 778 A.2d 296 (D.C. 2001).

<sup>240</sup> See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

<sup>241</sup> 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

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 anti-destruction rules on a tightly regulated industry, capping the value of such buried goods seems appropriate.

## B. Hard Cases

The law defers to destructive impulses that are widely shared and typically ignores more idiosyncratic destructive requests. Hence, someone's expressed wish to allow her organs to decay after her demise will be respected in every jurisdiction, but her expressed wish to have her house destroyed upon her death will be thwarted by most courts. This divergence appears to have little to do with the act-omission distinction: If someone were to order her executors to leave her cat in her empty house for 60 days, without food or water, then this omission would surely be invalidated by the court because it would result in the cat's death. Rather, norms seem to explain the divergent treatment of kidneys and houses. Thus, one supposes that if the norms were reversed, such that posthumous home destruction was common and posthumous organ destruction was rare, the law's relative tolerance for these two kinds of destruction would flip as well.

There is some appeal to this approach. After all, laws that comport with dominant social norms can be enforced more efficiently than those that do not.<sup>242</sup> But the law also plays an important and necessary role in shaping social norms,<sup>243</sup> and it seems quite 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, no transplant occurs because families *are never asked* whether they are willing to donate the organs.<sup>244</sup> Here the law and prevailing practices are perplexing. A decedent's unambiguous instructions to destroy a home or diary are disregarded, but parents are presumed to believe that their children's valuable organs should be destroyed.<sup>245</sup> A better rule would permit organ destruction only in those cases where the decedent or a majority of his heirs has requested such action unambiguously.

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purpose of being destroyed, are the quintessential example. *See generally* Ware v. State, 121 S.E. 251, 251 (Geo. 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 re-using the coffin in a subsequent funeral); *see also* text accompanying note 184 (discussing the purchase of art for the express purpose of destroying it).

<sup>242</sup> Dan M. Kahan, *Gentle Nudges v. 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).

<sup>243</sup> Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 910 (1996).

<sup>244</sup> Sheehy et al., *supra* note 151, at 671.

<sup>245</sup> This destructive presumption is particularly maddening in light of the statistics showing that when families *are* asked to donate their loved ones' organs, 58% agree to do so and 42% refuse. *See* statistics drawn from *id.* (noting that, among those asked to donate, donors outnumber refusers by a 54 to 39 ratio).

The government's goal has to be the inculcation of an anti-destruction norm among American citizens. As suggested above, there are probably ways of accomplishing this that will spark less resistance than a rule depriving the deceased (and their heirs) of control over transplantable organs. But if these measures are tried and fail, then it seems sensible to hold that the deceased no longer have property rights<sup>246</sup> in their transplantable organs, and those organs should be transferred to the people whose lives they will save.

And what about houses and other structures? Where the structure retains genuine historical or architectural value, and has been landmarked through the ordinary processes, then destruction is plainly inappropriate. If the house has substantial market value, but does not produce substantial positive externalities, then its owner ought to have the right to destroy it, either during her lifetime, or via will if she has marketed a future interest in the property and foregone the highest bid. The case for permitting the destruction of structures is weakened to some degree, however, 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 decedent's estate, and then re-sell it to the highest bidder. The sovereign always has this power, and it can exercise it to protect a neighborhood's tax base and housing supply. In short, legislatures, not courts, are the appropriate body to prevent the waste associated with the destruction of structures.

The cases considering the destruction of pre-embryos 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 an equally 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 pro-destruction or anti-destruction ruling would have important ex ante effects. In cases where a sperm donor and egg donor disagree about the disposition of the embryo, either rule could change the ways in which eggs were extracted from the mother or prompt marginal parties to forego the in vitro fertilization process altogether. Indeed, given the nature of the fertilization process, courts cannot fall back on the general rule regarding such disputes that the wishes of the potential mother should trump the conflicting wishes of the potential father.<sup>247</sup> Because the embryos cases are so close and contentious, New York's approach in *Kass v. Kass*<sup>248</sup> seems to be the best solution – parties shall be required to agree at the time of the procedure upon the disposition of the fertilized

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<sup>246</sup> The law generally refers to quasi-property rights in bodies of decedents, because of discomfort with the notion of property in the human body. Charles M. Jordan, Jr. & Casey M. Price, *First Moore, then Hecht: Isn't It Time We Recognize a Property Interest in Tissues, Cells & Gametes?*, 37 REAL PROPERTY, PROBATE & TRUST J. 151, 172 (2002); Quay, *supra* note 154, at 914-15.

<sup>247</sup> Courts generally will not force prospective mothers to have abortions at the fathers' request, nor will they prevent women from having abortions if their partners want 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, 717-725 (2000) (discussing the Supreme Court's jurisprudence with respect to a prospective father's right to prevent an abortion). These rules are sensible in light of the disparate costs that pregnancy (and often child-rearing) impose on mothers.

<sup>248</sup> 663 N.Y.S.2d 581 (App. Div. 1997).

embryo in the event that one party no longer desires implantation, and any such agreement will be enforced.