
COMMENT

UP FOR GRABS: A WORKABLE SYSTEM FOR THE UNILATERAL ACQUISITION OF CHATTELS

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This paper is about the everyday occurrence of coming across an object in the world and evaluating whether or not it is up for grabs. My project explores the shared space at the precipice of the laws of finders, abandonment, destruction, and conversion: a space we often inhabit, but wherein our rights in relation to an object are indiscernible ex ante under current law. I propose a system by which actors and courts may evaluate the reasonableness of a person's actions from the moment he or she chooses to acquire a chattel unilaterally. My system derives from the signals chattels convey to us—signals that have everything to do with context and little or nothing to do with value.

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INTRODUCTION

A moment's reflection reveals the perhaps unintuitive fact that our world is populated with more objects than people.¹ With so many objects in the world, it is a marvel that one rarely, if ever, confronts a chattel for which the question "Do I own this?" proves difficult.² A more complicated question arises when one encounters a chattel one does not own and asks, "May I own this?" That question addresses the laws and norms of acquisition.

I narrow the scope of this project with two bifurcations, ultimately arriving at an analysis of unilateral sequential acquisition. The first bifurcation distinguishes bilateral and unilateral acquisition. We acquire most chattels bilaterally, in transfers governed by the laws of contract, sale, gift, bailment, and the like. Consent does much, but not all, of the work in bilateral acquisition.³ In some circumstances, the law permits chattels to be acquired

¹ "Objects" in this paper refer to choses in possession. See M.G. BRIDGE, *PERSONAL PROPERTY LAW* 3-4 (Oxford Univ. Press 3d ed. 2002) (defining choses in possession as "tangible (or corporeal) moveable things like a jacket, a book, or a bicycle"); J. CROSSLEY VAINES, *PERSONAL PROPERTY* 11 (4th ed. 1967) (defining choses in possession as "corporeal things, tangible, movable, and visible"). My study does not concern choses in action, which are intangible property like debts, good will, and intellectual property. See BRIDGE, *supra*, at 4-5 (defining choses in action as "what remain[s] after the elimination of corporal chattels," including "debts, goodwill, rights under an insurance policy, shares in a company, bills of exchange, and various forms of intellectual property"); VAINES, *supra*, at 11-14 (explaining that choses in action are "all rights and incorporeal things, not being chattels real or choses in possession"); see also FRANK HALL CHILDS, *PRINCIPLES OF THE LAW OF PERSONAL PROPERTY* § 3 (1914) (using the maxim "[*m*]obilia non habent situm"—meaning that movables have no site or locality—to show that personal property, including incorporeal property, follows its owner).

² An exception comes to mind: the familiar experience of "Is this my car?" in a crowded parking lot or "Is this my coat?" at a party. But this is really no exception at all, because "Is this my car?" is not uncertainty as to whether or not one owns the chattel. Rather, it is uncertainty as to which chattel one is encountering. For example, closer inspection of the car—or at worst, an effort to engage with it by turning the key—always reveals whether or not this particular car is the one we thought it might be. When at last we find the car we were looking for, we do not pause to wonder whether or not we own it. Put another way, being confused in the parking lot is a matter of "Is *this* my car?" When the correct vehicle is located, we do not then have to ask, "Is this *my* car?"

³ For example, in the law of involuntary bailment, control rather than consent is determinative. An account of two colorful English cases about involuntary bailment, *Elvin & Powell Ltd. v. Plummer Roddis Ltd.*, (1933) 50 T.L.R. 158 (K.B.) (Eng.) and *Hiort v. Bott*, (1874) 9 L.R. Exch. 86 (Eng.), appears in BRIDGE, *supra* note 1, at 61-62. In each, a clever "rogue" orders goods in a third party's name, and then relieves the unsuspecting third party—now, the involuntary bailee—of the allegedly misdelivered goods. In *Hiort*, the involuntary bailee was himself liable for conversion because he exercised control over the bailed chose while it was in his possession. 9 L.R. Exch. at 89; see also *Cowen v. Pressprich*, 194 N.Y.S. 926 (App. Div. 1922) (adopting the dissenting opinion from the court below which cited *Hiort* and reasoned that an involuntary bailee is not liable to the bailor absent an exercise of dominion).

unilaterally, with consent playing less of a role.⁴ The difference between bilateral and unilateral acquisition is, in verbs, one of receiving versus taking. This project is confined to unilateral acquisition.

The second bifurcation recognizes that unilaterally acquired chattels are of two kinds: chattels that have been owned before and chattels that have not been owned before. If a chattel has never been owned before, such as a thing newly created or newly captured, then the laws of unilateral *first* acquisition apply. If a chattel has been owned at some point in its history, then the new owner has acquired it in sequence, and the laws of unilateral *sequential* acquisition apply. I limit the scope of this project to the latter category: unilateral sequential acquisition.

The substance of this paper involves two further distinctions. First, while a chattel acquired by unilateral sequential acquisition is by definition one that has been owned in the past, it may nonetheless be owned or unowned *at the time it is acquired*. Second, one can effect unilateral sequential acquisition in one of two ways: legally or wrongfully. These distinctions yield the following matrix, to which I refer throughout the paper:

Figure 1: Unilateral Sequential Acquisition of Chattels

	Legal Acquisition	Wrongful Acquisition
Unowned Property Acquired	1. Abandonee	2. Wrongful Repossessor
Owned Property Acquired	3. Finder	4. Converter

Cells 1 through 4 describe the four possible statuses of an individual effecting a unilateral sequential acquisition,⁵ numbered in order from the

⁴ *But see* J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 186 (1997) (describing both abandonment and gift as manifestations of consent in unilateral acquisition). Penner's characterization of gift as a manifestation of unilateral consent is not strictly accurate. He is probably informed by the normative Anglo-American experience in which acceptance of a gift is presumed. Notwithstanding the presumption, a gift does not take legal effect unless it is accepted. *See* RICHARD HYLAND, *GIFTS: A STUDY IN COMPARATIVE LAW* ¶¶ 1056-60, 1068 (2009).

⁵ A similar matrix could be built for unilateral first acquisition. Cell 1, legal first acquisition of unowned property, concerns creation, accession, and capture. Cell 2, wrongful first acquisition of unowned property, concerns excessive capture from the common—for example, violation of fishing regulations where no property interest in the fish exists, or acquisition through wrongful means such as unfair competition. *See* *Keeble v. Hickeringill*, (1707) 103 Eng. Rep. 1127 (Q.B.) 1128

most secure title (abandonee) to the least secure title (converter). In reverse order: a wrongful acquisition of owned property (Cell 4) is a conversion.⁶ Under *nemo dat quod non habet*,⁷ a converter (along with his criminal cousins, the larcenist, the thief, and the robber) has the least secure of all unilaterally and sequentially acquired titles because the converter's title is void or, at best, voidable.⁸

More secure title vests with the legal acquisition of owned property (Cell 3). This is the finding of lost or mislaid property,⁹ as governed by the law of finders. A finder has good title against all but the true owner.¹⁰ Therefore, the finder has a greater degree of ownership than the converter, but the true owner's carve-out renders the finder's rights against the world still incomplete.

How can one wrongfully acquire unowned property (Cell 2)? I will argue that the acquisition of destroyed property and of certain kinds of abandoned property is wrongful because such chattels give notice to the acquirer that they ought not to be repossessed. Here I recognize something that scholars

(simulating an actionable property interest in wild ducks by focusing on the defendant's disruptive conduct rather than on any in rem right the plaintiff may have had in the ducks); Shyamkrishna Balganes, *Quasi-Property: Like, But Not Quite Property*, 160 U. PA. L. REV. 1889, 1906 (2012) (characterizing the quasi-property framework as "relational" in nature, thereby implicitly bringing the *Hickeringill* case within its scope). Cell 3, lawful first acquisition of owned property, concerns work for hire. Here, the artist/inventor retains *droit morale* and perhaps additional contracted-for rights, while all other rights vest in the employer upon creation of the work/invention. Finally, Cell 4, wrongful first acquisition of owned property, concerns excessive capture of natural resources held in the public trust, as by felling a tree in a national park.

⁶ See VAINES, *supra* note 1, at 18 ("Essentially, conversion amounts to an unjustifiable denial of the plaintiff's title by an act of willful and wrongful interference." (citations omitted)).

⁷ "No one can give what he does not have." This maxim evolved from "*Nemo plus iuris ad alium transferre potest, quam ipse haberet*," meaning, "No one can transfer greater rights to someone else than he possesses himself." DIG. 50.17.54 (Ulpian, Ad Edictum 46, translated in 2 THE DIGEST OF JUSTINIAN (Alan Watson trans., rev. ed. 1988)).

⁸ See *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150, 1160 (2d Cir. 1982) (affirming that under New York law, "a purchaser cannot acquire good title from a thief"); Grant Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057, 1059 (1954) (distinguishing between void and voidable title).

⁹ For a concise and very clear distinction between lost and mislaid property, as well as the rights that vest in possessors of each, see CHILDS, *supra* note 1, at §§ 331–333. For our purposes, the distinction between lost and mislaid property is only academic, and the two may be considered as one.

¹⁰ See *Armory v. Delamirie*, (1722) 93 Eng. Rep. 664 (K.B.) 664 (setting forth this foundational principle); ROSWELL SHINN, A TREATISE ON THE AMERICAN LAW OF REPLEVIN AND KINDRED ACTIONS FOR GETTING POSSESSION OF CHATTELS § 105 (1899) (stating that a finder may maintain an action for replevin against any person except the true owner); see also BRIDGE, *supra* note 1, at 22 ("The finder of a lost chattel acquires a possessory title to it that is usually effective against all but the true owner . . .").

have so far neglected¹¹: although the chattel itself may, as an empirical fact, be abandoned or destroyed, not all abandoned property is rightfully recoverable. No predetermined carve-out attaches to a wrongful repossessor's title the way, for example, a carve-out for true owners attaches to a finder's title. However, case law demonstrates that the wrongful repossessor's interest is not completely secure, because a court may upset his interest.¹²

Finally, the legal unilateral sequential acquisition of unowned property (Cell 1) is the act of claiming abandoned property, and is governed by the law of abandonment. I call one who claims abandoned property an "abandonee." Full ownership of the acquired object vests in the abandonee, and his rights are secure.¹³

It is clearly preferable to inhabit Cell 1, because only in Cell 1 does complete and secure ownership vest in the taker.¹⁴ Problematically, the law of abandonment—the governing law of Cell 1—relies not on the signals

¹¹ See, e.g., PENNER, *supra* note 4, at 84-85 (identifying abandonment as a means of transfer, and stating that "[a]n owner may abandon his property at any time and in any place," but failing to recognize that not all abandoned property may, of right, be recovered).

¹² Wrongful repossession is an important conceptual tool that can help courts articulate why similarly situated property is sometimes recoverable and sometimes not. When courts rely on abandonment terminology alone, conflicting holdings are possible. Compare *Long v. Dilling Mech. Contractors*, 705 N.E.2d 1022, 1026 (Ind. Ct. App. 1999) ("When trash . . . is placed in trash bags [in an] unlocked dumpster . . . readily accessible to others, that trash has been abandoned."), with *Sharpe v. Turley*, 191 S.W.3d 362, 368 (Tex. Ct. App. 2006) (holding that trash in a dumpster is not abandoned). Wrongful repossession harmonizes these cases by shifting the focus from the circumstances (here, the fact that the chattels were found in a dumpster) to the characteristics of the chattels themselves. See *infra* subsection II.A.4.b.

¹³ See *Commonwealth v. Wetmore*, 447 A.2d 1012, 1014 (Pa. Super. Ct. 1982) ("It is well settled law that abandoned property cannot be the subject of larceny." (citation omitted)); Anthony Hudson, *Abandonment* (tracing abandonment to the Roman law of "dereliction" and "*res nullius*—[things that are] ownerless and therefore available to be acquired by the first occupant"), in *INTERESTS IN GOODS* 595, 596 (Norman Palmer & Ewan McKendrick eds., 2d ed. 1998). But see, e.g., *In re Funds in Possession of Conemaugh Twp. Supervisors*, 724 A.2d 990, 991, 993-95 (Pa. Commw. Ct. 1999) (holding that neither a police officer nor a motorist could retain ownership of \$20,000 cash found on the roadside during a traffic stop). One who abandons a chattel, of course, may decide to become the first to recover it, and resume ownership of that object. But if an intervening party comes along and recovers the abandoned chose first, then the intervening party's rights are secure, notwithstanding the abandoner's change of heart. See, e.g., Abraham Lincoln, Proclamation No. 11, 13 Stat. 737, 737 (Dec. 8, 1863) (pardoning the Rebels "with restoration of all rights of property, except as to slaves, and in property cases where rights of third parties shall have intervened" (emphasis added)).

¹⁴ One may be able to move from Cell 3 to Cell 1 by adverse possession of chattels. See *O'Keeffe v. Snyder*, 416 A.2d 862, 867-70 (N.J. 1980) (noting that ownership can vest by adverse possession when the statute of limitations on a replevin claim has run). But see *Songbyrd, Inc. v. Estate of Grossman*, 206 F.3d 172, 181-83 (2d Cir. 2000) (ruling that the statute of limitations had expired and that a suit for recovery of chattels could not be brought, though remaining silent as to whether plaintiff's time-barred suit signified that ownership had vested in the defendant).

transmitted to the abandonee but on the intent of the abandoner.¹⁵ Placing the focus on the abandoner's intent would be less problematic if the objective intent of a person who loses a chattel were distinguishable from the objective intent of a person who abandons the same chattel.¹⁶

But consider Dorothy, a New Yorker in winter. Dorothy's mother taught her well, so Dorothy is appropriately dressed: bundled in a scarf her mother bought at a department store and sent to Dorothy early in the winter season. After a pleasant day about town, Dorothy arrives home and realizes, to her disappointment, that she and her scarf have parted company. Where and when this misfortune occurred she can only begin to guess, but certainly it was not her intent to abandon it. Although the scarf is not particularly distinctive, she is determined to scour every inch of New York, from the Bronx to the Battery, to locate the scarf her mother so lovingly sent to her. The scarf, then, is merely lost. When Stanley discovers it—let us say, on Mercer Street—and picks it up,¹⁷ is he not a finder, inhabiting Cell 3? He is.

¹⁵ See *Wetmore*, 447 A.2d at 1014 (providing a classic definition of abandoned property as that “to which an owner has voluntarily relinquished all right, title, claim and possession with the intention of terminating his ownership, but without vesting it in any other person” (citation omitted)); see also 1 AM. JUR. 2D *Abandoned, Lost, and Unclaimed Property* § 3 (2012) (enunciating the same general rule); cf. David Taintor, *Does the Commercial Felony Streaming Act Threaten Internet Freedom?*, TALKING POINTS MEMO (Nov. 2, 2011, 6:10 AM), <http://tpmdc.talkingpointsmemo.com/2011/11/does-a-senate-bill-threaten-internet-freedom.php> (quoting Shyamkrishna Balganes, who expressed a view that copyright focuses too heavily on the copyright holder and not enough on the copyright user; the article is grounded in the example of celebrated teen heartthrob Justin Bieber's meteoric rise to fame, a feat accomplished through YouTube performances of unlicensed musical content).

¹⁶ See BRIDGE, *supra* note 1, at 23 (“[T]he distinction between lost and abandoned chattels is illusory if there is no one on hand to explain the circumstances of abandonment or loss.”); John V. Orth, *What's Wrong with the Law of Finders & How to Fix It*, 4 GREEN BAG 2D 391, 394-97 (2001) (grappling with the question of how to distinguish between a finder of lost property and a finder of abandoned property and pointing to factors courts have used, such as the likelihood of misplacement); cf. Andrew Bell, *Bona Vacantia* (stating, in reference to property for which the identity of the owner is unknown, “the most that can be said is that the owner is unlikely to come forward, so that it is not unreasonable to assimilate the case to one of ownerless property”), *IN INTERESTS IN GOODS*, *supra* note 13, at 207, 212.

¹⁷ The blunt instrument of physical occupancy is sufficient to establish possession for my purposes, and may stand in for more complicated forms of possession. See, e.g., *Popov v. Hayashi*, No. 400545, 2002 WL 31833731, at *3-7 (Cal. Super. Ct. Dec. 18, 2002) (identifying a prepossessory interest in Barry Bonds's seventy-third homerun ball); *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805) (grappling, in opinion and dissent, with what degree of control over a hunted fox constitutes legal possession); 8 EMANUEL QUINT, A RESTATEMENT OF RABBINIC CIVIL LAW 43 (1997) (“The mere spying of an ownerless object is not an act of acquisition.”); Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 81 (1985) (“Possession as the basis of property ownership, then, seems to amount to something like yelling loudly enough to all who may be interested.”). Furthermore, the physical mechanism of acquisition is surely no less worthy

Now, a counterfactual: Dorothy sets out on the town as before, wearing her new scarf. But this time, just as Dorothy turns onto Mercer Street, she receives an unexpected phone call from her mother. Somehow the whole conversation gets off on the wrong foot, and after several minutes of passionate arguing about nothing significant, Dorothy ends the call, steaming. In a fury, she pulls the scarf from her neck and throws it in the street, thinking, *Take that, Mother! I don't ever want to see this scarf again!* Quite clearly, the scarf is now abandoned. So when Stanley comes across it later in the day (or at any future time) and takes it, he is an abandonee, inhabiting Cell 1.

Between the two scenarios, Stanley's perspective as to the scarf has not changed. Yet the law affords Stanley different rights depending on Dorothy's unknowable intent. This misplaced focus on Dorothy's intent leads to a real-world problem: How does an actor know whether he is in Cell 1 or Cell 3?

There are consequences to misjudging the situation. An actor who believes he inhabits Cell 1 (an abandonee) but who really inhabits Cell 3 (a finder) might exercise rights he does not have. He might, for example, consume or destroy the chattel. Unfortunately, if he does that—if he exercises dominion over it to the exclusion of the true owner's rights—the actor unwittingly relocates himself to Cell 4 (a converter).¹⁸ Any system that permits an individual to inadvertently land in Cell 4 is a flawed system.¹⁹ To foreclose the possibility of becoming an accidental converter, we need a method for determining *ex ante* whether one who unilaterally, sequentially, and legally acquires a chattel has done so in the context of Cell 1 or Cell 3.

of study than is the import of circumstances surrounding that acquisition. But the physical mechanism, too, is beyond the scope of this paper. *See, e.g.,* QUINT, *supra*, at 43 (specifying that picking up an object with one's hands is the best method of acquisition, while lying down on an object is not a reliable method of acquisition).

¹⁸ *See, e.g.,* Poggi v. Scott, 139 P. 815, 816 (Cal. 1914) (holding that a man who acquired what he believed were abandoned and empty barrels was liable for conversion because the barrels were actually full of plaintiff's wine); *see also* VAINES, *supra* note 1, at 18 (stating that conversion may occur "even though [the defendant acted] in good faith and without negligence, as where an auctioneer has innocently sold goods on behalf of a person without title to them"). The accidental converter resonates disharmoniously with both the Constitution's *ex post facto* prohibition, *see* U.S. CONST. art. I, § 9, cl. 3, and the bedrock principle that the law should be clear and knowable, *see* JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 214 (1979) (identifying as a principle of societies governed by the rule of law that laws should be clear and known). *But see* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 667-73 (1984) (challenging the utility of this bedrock principle—that the law should be clear and known—in arguing that some "decision rules," like the duress defense, are best kept unknown to all but the decisionmakers).

¹⁹ But note that *inadvertently* landing in Cell 4—doing so without the requisite *mens rea*—would almost certainly rescue the actor from criminal liability, limiting recovery to civil fines.

Here is an interesting twist: from a rule-of-law perspective, there is nothing particularly inexcusable about the ex ante uncertainty inherent in the “Cell 1 or Cell 3” problem. A rule-of-law regime values predictability in the selection of legal standards, not outcomes.²⁰ That is, a predictable legal standard is not also a guarantee that an actor will be able to predict the legal consequences of his or her actions. The most obvious example of this phenomenon is a strict liability rule.

In the “Cell 1 or Cell 3” problem, the standard is fixed and known: one who unilaterally takes possession of a chattel may be presumed to know, at the moment of taking, that his ultimate rights will rest on the prior owner’s intent. This subjective standard renders the taker’s precise *rights* in relation to the chattel unpredictable, even though the *standard* for determining those rights is known. If the taker misjudges his rights, and liability is assigned ex post, that liability will lie even if the would-be abandonee acted without fault. And so the taker takes—along with the chattel—a risk.²¹ Perhaps it is our comfort with risk-taking, and the existence of fixed rules for determining a taker’s rights ex post, which allow the “Cell 1 or Cell 3” problem to persist.

But while legal uncertainty is not per se problematic in the general case, the application of this form of strict liability to the lost and abandoned property context is ill-suited, even draconian. Strict liability is typically reserved for inherently dangerous situations²² and was extended in the twentieth century to particular contexts affecting “powerless” consumers.²³ The allocation of lost or abandoned property fits neither of those models for strict liability.²⁴

²⁰ See RAZ, *supra* note 18, at 213-20 (explaining that stable laws promote an individual’s ability, inter alia, to plan his life); see also MASS. CONST. pt. I, art. XXX (aspiring for Massachusetts that, in the words of John Adams, “to the end it may be a government of laws and not of men”).

²¹ Risk-taking is not at odds with a rule-of-law regime. In fact, it is the engine of our capitalist economy, and one can imagine that, were enough people concerned with this particular risk, a kind of finder’s insurance might evolve.

²² See *Rylands v. Fletcher*, (1868) 3 L.R.E. & I. App. 330 (H.L.) 340 (appeal taken from Eng.) (imposing strict liability because the defendant’s reservoir, which flooded the plaintiff’s mine, was a nonnatural use of the land and hence undertaken at the defendant’s own peril); RESTATEMENT (SECOND) OF TORTS §§ 519-520 (1977) (identifying high degree of risk as the first factor to consider when imposing strict liability).

²³ See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 900-01 (Cal. 1963) (in bank) (Traynor, J.) (imposing strict liability on the manufacturer of a power tool, and citing a string of cases that incrementally extended the reach of strict liability).

²⁴ The nearest analogue to strict liability in property law is the good faith purchaser for value doctrine, which awards a contested title to the bona fide purchaser, forcing an innocent true owner to incur the loss of his title. See Gilmore, *supra* note 8, at 1057-60 (providing a brief history of the doctrine); Menachem Mautner, “*The Eternal Triangles of the Law*”: *Toward a Theory of Priorities in Conflicts Involving Remote Parties*, 90 MICH. L. REV. 95, 109-13 (1991) (unpacking the traditional qualifications of a good faith purchaser for value). If the “Cell 1 or Cell 3” problem were solved by

The lack of *ex ante* guidance to actors is also troubling because *ex ante* certainty has value, both to the individual actor and to society. Certainty of our legal rights in relation to an acquired object provides actors with a sense that their rights in that object are secure, promoting investment in the object, furthering the efficient use of that object, and allowing actors to use that object in the furtherance of their own goals.²⁵ Notwithstanding the value of *ex ante* certainty, the current laws of unilateral sequential acquisition do not provide for it.

This paper proposes a workable system that I call “nesting,” which allows individuals to identify their normative position in the matrix *ex ante*, particularly in regards to Cells 1 and 3. The system also helps define the content of Cell 2, which I call “wrongful repossession.” The nesting theory provides guidance for everyday encounters with chattels, and I explicate my theory with hypotheticals geared toward the average individual. The guidelines I propose easily translate to common experience and are ready for application in the real world. The theory also has practical utility as a workable framework for courts evaluating disputes *ex post*. With this framework, courts may judge the reasonableness of a taker’s actions at the moment of taking according to something more objective than the court’s own intuition and less problematic from an evidentiary perspective than the prior possessor’s subjective intent.²⁶

Part I will briefly describe a particular aspect of the four bodies of law comprising unilateral sequential acquisition and the shortcomings of each, insofar as each attempts to provide *ex ante* guidance to a person unilaterally acquiring a chattel in the world. Part II will explicate my nesting theory and provide examples of the theory at work.

I. INSUFFICIENT GUIDANCE FROM THE LAWS OF UNILATERAL SEQUENTIAL ACQUISITION

Property is a relationship between people, mediated through a resource,²⁷ with the attendant rights operating in *rem*.²⁸ Property’s in *rem* nature

analogy to the good faith purchaser doctrine, the taker would be allowed to keep an object he, in good faith, believed had been abandoned.

²⁵ See RAZ, *supra* note 18, at 220.

²⁶ See *e.g.*, *Commonwealth v. Wetmore*, 447 A.2d 1012, 1014 (Pa. Super. Ct. 1982) (discerning the actor’s intent to abandon his property); *In re Funds in Possession of Conemaugh Twp. Supervisors*, 724 A.2d 990, 993 (Pa. Commw. Ct. 1999) (adopting the trial court’s finding that the cash at issue was lost, rather than mislaid; hence, the intent of the prior owner was not dispositive).

²⁷ See PENNER, *supra* note 4, at 26-27. *But see* WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 74-76 (Walter Wheeler Cook ed., 1923) (arguing that “all rights *in rem* are against persons” and not against things).

requires it to emit signals at its borders.²⁹ For example, Henry Smith has argued that the right to exclude lowers information costs by communicating a “keep off” message at property’s borders to would-be trespassers without requiring an owner to enter into negotiations with every individual in the world who might encounter the property.³⁰ But the message at the border of a chattel is not always “keep off.” The empirical fact that we recognize some property as up for grabs is proof that the message is malleable.

What observable factors signal that the property is abandoned, and what factors cause that signal to change to indicate that the property is not abandoned? In this part, I will show that the laws of unilateral sequential acquisition do not answer those questions. Therefore, those laws provide insufficient ex ante guidance to an individual on the cusp of a unilateral sequential acquisition as to his normative position in relation to the chattel.

A. *The Law of Abandonment (Cell 1)*

The law of abandonment ties the signal communicating an object’s status as abandoned to the abandoner’s intent, which means that many objects will look the same to third parties whether they are abandoned or simply lost. As I will demonstrate, value may be as unhelpful as the prior owner’s subjective intent in distinguishing lost and abandoned chattels ex ante, even though value is a marginally more objective measure. Consequently, one cannot choose, ex ante, to become an abandonee. One can only choose to gamble on the possibility that he is an abandonee, take the object, and learn ex post whether his gamble has earned him the full bundle of ownership rights accordant to an abandonee, or whether his bundle bears a carve-out for the true owner. The law of abandonment, therefore, creates the risk of becoming an accidental converter.

All chattels can be abandoned.³¹ This is so notwithstanding clever scholarly assertions to the contrary,³² made in light of the fact that title to real

²⁸ See Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954) (describing property as that “to which the following label can be attached: To the world: Keep off X unless you have my permission, which I may grant or withhold”).

²⁹ See generally Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 279-93 (2008) (distinguishing the right to exclude from the bundle of rights on the basis of the former’s “boundary” or “exclusion-based” approach to property, and refining the gatekeeper metaphor to focus on an owner’s agenda-setting role more than on her role as guardian at the perimeter).

³⁰ See Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 975 (2004) (arguing that exclusion reduces information costs by giving “the tort of trespass, property’s basic protection, its distinctive, hard-edged character”).

³¹ The proposition that all chattels may be abandoned is uncontroversial in relation to the abandonment of *possession*. Notwithstanding the proverbial bad penny, that proposition is

property cannot be abandoned in this country.³³ Abandoned personal property is that “to which an owner has voluntarily relinquished all right, title, claim and possession with the intention of terminating his ownership, but without vesting it in any other person.”³⁴ Abandonment focuses on the

empirically true. However, the law does not necessarily permit the correlative abandonment of *title*. For purposes of assigning liability in, for example, a nuisance action, title to the abandoned chose would remain with the original owner until another person recovers it. J.E. Penner has eloquently challenged this schismatic view:

Although the legal view respecting title might suggest otherwise, it is submitted that we do have the right to abandon property. . . . One ought not to be saddled with a relationship to a thing that one does not want, and an unbreakable relation to a thing would condemn the owner to having to deal with it. It would indeed be a funny turn of events if the norms serving our interest in property in essence gave the things a person owned a power over him.

PENNER, *supra* note 4, at 79. The debate began in Roman law, which fostered two competing schools of thought: on one hand, the Proculians maintained that abandonment of ownership did not occur until another party acquired ownership; and on the other, the Sabinians maintained that abandonment of ownership occurred when the owner severed possession with the requisite intent. *See* Hudson, *supra* note 13, at 596 (recounting the debate and noting that the Sabinians prevailed); *see also* Bell, *supra* note 16, at 211 (acknowledging there is “some controversy” as to whether “[English] common law, ownership cannot be lost by abandonment,” but stating that “the better view is that there can be divesting abandonment”).

³² *See* Eduardo M. Peñalver, *The Illusory Right to Abandon*, 109 MICH. L. REV. 191, 202-08 (2010) (arguing that chattels cannot be abandoned at all in a system that does not permit the abandonment of land). *But see* Lior Jacob Strahilevitz, *The Right to Abandon*, 158 U. PA. L. REV. 355, 414 (2010) (“My response to Peñalver’s formal argument is something along the lines of the answer given by the preacher when a skeptical congregant asks whether she believes in baptism: ‘Believe in it? Hell, I’ve seen it done!’”). Case law supports Strahilevitz’s objection to Peñalver’s claim. *See* *Hannah v. Peel*, [1945] K.B. 509 at 520-21 (Eng.) (holding that the finder of lost property generally has superior rights to the owner of the land on which the lost property was found). *But see* Norman Palmer, *Bad Apples and Blighted Windfalls: Finding, Bailment and the Fruits of Crime* (using the law of bailment to question the analysis in *Hannah v. Peel*), in PROPERTY AND PROTECTION: LEGAL RIGHTS AND RESTRICTIONS 1, 14 n.82 (F. Meisel & P. J. Cook eds., 2000).

³³ *See* Pocono Springs Civic Ass’n v. MacKenzie, 667 A.2d 233, 235-36 (Pa. Super. Ct. 1995) (holding that perfect title to real property cannot be abandoned); Hudson, *supra* note 13, at 596 (noting that land could be abandoned under Roman law, but suggesting that one “might be wary” of acquiring abandoned land “since arrears of tax might be demanded in respect of it”); *see also* Shane Bacon, *Tiger Woods’ Ex-Wife Bulldozes \$12 Million Home*, YAHOO! SPORTS (Jan. 5, 2012, 6:24 PM EST), <http://sports.yahoo.com/blogs/golf-devil-ball-golf/tiger-woods-ex-wife-bulldozes-12-million-home-232405259.html> (using photographs to demonstrate that, although real property cannot be abandoned, it certainly can be destroyed).

³⁴ *Commonwealth v. Wetmore*, 447 A.2d 1012, 1014 (Pa. Super. Ct. 1982) (quotation omitted); *see also* CHILDS, *supra* note 1, at § 330 (defining abandonment as “relinquishment of ownership with an intention not to reclaim it or not to make a transfer to another, thus leaving it to be acquired by any person who subsequently may choose to assert title by occupancy”); *see also, e.g.*, Alberto Arce, *Miners’ Risk Lives for Gold in Trash Dump Ravine*, MSNBC (Nov. 4, 2011, 2:11 PM ET), http://www.msnbc.msn.com/id/45167166/ns/world_news-americas/#.T3cgIO3DYti

intent of the abandoner, and insists on a manifestation of that intent.³⁵ But scholars acknowledge that property sporting the outward manifestation of its owner's intent to abandon may look exactly like lost property. This means abandoned property (and, correlatively, lost property) may be transmitting conflicting messages. When objective indications fail to illuminate the prior owner's intent, only subjective intent remains. Of course, without the gift of clairvoyance, subjective intent is indecipherable to third parties.

And yet we do not, for the most part, misread the signal. We do not discover Dorothy's handbag, loaded with her cell phone, wallet, cosmetics, and more, and conclude that she has abandoned it. Why not? There must be something about abandoned property that gives it a unique signature such that we recognize it as abandoned.

In a legal landscape saturated with law and economics scholarship, one might hypothesize that the answer to the "Cell 1 or Cell 3" dilemma lies in value: a valuable thing is presumptively lost, while a worthless thing is presumptively abandoned. Abandonment has generated little scholarship,³⁶ but in an important recent work Lior Strahilevitz approaches abandonment with an eye toward the value of the thing abandoned, tracking both subjective value and market value.³⁷ He observes that even property with both positive market value and positive subjective value (to the abandoner) is abandoned with some frequency, for reasons that include garnering attention, signaling wealth, triggering an entertaining scene, and benefitting others.³⁸ The abandonment of positive value property, he observes, can

(describing a practice of scavenging for scrap metal in very dangerous junk piles, hoping to "mine" enough metal to trade it for, on average, twice the Guatemalan minimum wage).

³⁵ See Strahilevitz, *supra* note 32, at 375-76 (identifying two requirements for a party seeking to abandon a chattel: "inten[t] to relinquish all interests in the property, with no intention that it be acquired by any particular person . . . [and] a voluntary act by the owner effectuating that intent"); see also QUINT, *supra* note 17, at 33 (stating that, in Jewish law, the abandonment of hope must precede the finding). The insistence on a manifestation of intent may be rooted in the law's historic distrust that a person would choose to abandon their personal property. See Haynes's Case, (1614) 77 Eng. Rep. 1389 (K.B.) 1389 (holding that burial shrouds wrapped around corpses are not abandoned because "[a] man cannot relinquish his property in goods, unless they be vested in another"); BRIDGE, *supra* note 1, at 29 (citing *Haynes's Case* to support the proposition that "[e]arly law was resistant to the idea that ownership could be abandoned"); CHILDS, *supra* note 1, at § 330 ("As human beings ordinarily do not part with ownership without the receipt of some benefit in return, especially of an article possessing value . . . abandonment is not favored by the courts, the burden of establishing it being on the person affirming it and the proof must be clear." (footnotes omitted)).

³⁶ Strahilevitz, *supra* note 32, at 358-59.

³⁷ See *id.* at 362 fig.1 (constructing a matrix with subjective value on one axis and market value on the other).

³⁸ *Id.* at 365-72.

make it “difficult to discern whether it is abandoned, lost, or mislaid, and thus challenging for the finder to determine his rights and responsibilities.”³⁹ The “confusion costs . . . [imposed on] third parties who are charged with respecting in rem rights” are relatively high in this context.⁴⁰ Value, it seems, has not solved the problem of determining *ex ante* whether an object has been abandoned or whether it has been lost. But value does help to highlight that problem.

Explicit notice is a ready fallback. In a regime that permits the abandonment of positive market value property, physically labeling abandoned property as abandoned and advertising its availability (in both the cyber and physical worlds) would dramatically reduce confusion costs.⁴¹ However, notwithstanding the Craigslist phenomenon⁴² and the occasional “free car!” placard, the world shows little sign of making the labeling of abandoned positive value property the rule rather than the exception.⁴³ And perhaps it is for the best. Although explicit labeling would surely reduce confusion costs, the hesitation costs surrounding an abandoned chattel might very well go up, thus increasing the net negative externalities of abandonment. What is the source of the abandonee’s hesitation?

The idea is a variant of the famous lemons problem. In the lemons problem, information asymmetry causes bad products (in used car lingo, “lemons”) to drive good products (“peaches”) out of the market in a self-reinforcing cycle.⁴⁴ Applied to abandonment, an information asymmetry exists between the abandoner and the abandonee as to the quality of the thing abandoned. Lacking equal information, the abandonee hesitates, suspects the worst, and likely undervalues positive value abandoned chattels, thereby depressing the market for abandoned goods. For example, when Stanley comes across a scarf in the street—a scarf up for grabs—he might be glad to take it. But when the same scarf is actually labeled “abandoned,” he may wonder why it has been so labeled.⁴⁵ Stanley’s imagination sets to work and, conjuring all

³⁹ *Id.* at 373.

⁴⁰ *Id.* at 389.

⁴¹ *Id.* at 408.

⁴² Strahilevitz supports and enhances the contemporary relevance of his argument with references to Craigslist. *See, e.g., id.* at 410.

⁴³ Indeed, it would be impossible to make explicit labeling the rule, if only because a significant fraction of abandoned property is actually lost property for which the owner has subsequently given up hope.

⁴⁴ *See* George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 489 (1970); *see also* TOM BAKER, INSURANCE LAW AND POLICY 6 (2008) (characterizing adverse selection in the insurance market as a lemons problem).

⁴⁵ In this example, Stanley is engaged with the tension between lost and abandoned objects that look the same. Without the explicit “abandoned” sign, Stanley does not know whether the

manner of fictitious histories for the garment before him, he supposes the scarf cannot be as good as it appears; otherwise it would not have been abandoned. He hesitates, and does not take the scarf. These types of refusals will increase the amount of abandoned property that is not reclaimed, increase waste, and hence raise disposal costs for the rest of society.

Distinguishing between lost and abandoned property on the basis of an abandonee's value analysis is problematic for another reason: we are notoriously bad at determining the market value of a thing.⁴⁶ Furthermore, even for *The Price is Right's* most successful player, sometimes value is simply unobservable.⁴⁷ There are easy cases. In most circumstances, the BIC pen will be less valuable than the Apple computer, and observably so. But consider a one-of-a-kind hand-knit sweater, personally constructed by hypothetical Milanese designer Giacomo and consequently worth tens of thousands of dollars or more. Now imagine that there are countless knockoffs of this celebrated sweater throughout the world, all shockingly cheap and identical in appearance to the real thing. The average finder cannot discern the difference. Even if very expensive things were never abandoned, counterfeits demonstrate why the "cheap things are abandoned; expensive things are not" rule of thumb would still fail an actor ex ante. If Stanley cannot tell whether a sweater he finds on Mercer Street is a priceless

scarf is lost or abandoned, and he might choose to believe it is a bit of both. On one hand, he might choose to believe the scarf was inadvertently lost, indicating that the scarf likely has positive value to the true owner. See Strahilevitz, *supra* note 32, at 362 ("It is widely assumed that property is only abandoned when it becomes worthless . . ."). On the other hand, Stanley might choose to believe the owner has given up hope and relinquished all claim to it. Cf. QUINT, *supra* note 17, at 33 ("The finder may keep the object . . . if the owner has abandoned hope . . ."). Stanley is having his cake (the value of the scarf is sufficiently high such that the true owner was not likely to have abandoned it) and eating it, too (the scarf is nevertheless up for grabs because it *looks* abandoned). The explicit "abandoned" sign does not permit Stanley to engage in this small duplicity.

⁴⁶ See generally *The Price is Right* (CBS television broadcast); see also Jonathan B. Berk et al., *The Price is Right, but Are the Bids? An Investigation of Rational Decision Theory*, 86 AM. ECON. REV. 954, 956-57 (1996) (using observational data from the game show *The Price is Right* for a behavioral economics study of bidding strategies, in part because the "nature of the show" eliminates subjective valuation influences); Hooman Estelami, *The Price is Right . . . or Is It? Demographic and Category Effects on Consumer Price Knowledge*, 7 J. PROD. & BRAND MGMT. 254, 254 (1998) ("Much of the current research on pricing has pointed at a disturbing lack of price knowledge for the limited number of product categories studied."); Richard H. Thaler, *Anomalies: The Winner's Curse*, J. ECON. PERSPS., Winter 1988, at 191, 200 (suggesting that people are not always rational economic agents, and that bidders frequently make mistakes in auctions).

⁴⁷ Whereas contestants on the game show enjoy a spirited description of prizes before bidding on them—including information about whether the object is new, who manufactures it, and what it can do—an individual who finds an object in the world does not enjoy any such description. The individual's knowledge is limited to what he can discern through the senses.

Giacomo original or a worthless counterfeit, then value analysis leaves him no better off than having to guess at the prior owner's unknowable intent.

Distinguishing between abandonees and finders on the basis of the prior owner's unknowable intent reveals a glitch in the law that value analysis cannot repair. Subjective value is as unknowable as subjective intent. Relying on market value does not help the actor, as market value is sometimes unobservable and our talents for accurate appraisal are limited. Finally, since even positive-value objects are frequently abandoned, perfect market valuation would be of only limited use in determining *ex ante* whether an actor is a finder or an abandonee. The solution must lie elsewhere.

B. *The Law of Destruction (Cell 2)*

What information does the law of destruction provide about an actor's position in the matrix *ex ante*? Besides abandonment, destruction is the only way one can unilaterally sever his or her ownership interest in a chattel.⁴⁸ Since both abandonment and destruction sever the ownership interest, one might presume that, like abandoned chattels, destroyed chattels are up for grabs. But as I will explain,⁴⁹ special rules ought to apply to the acquisition of destroyed chattels. Those rules will locate the acquirer of a destroyed chattel in Cell 2 (a wrongful repossessor), not Cell 1 (an abandonee). As a preliminary matter, then, it is important to understand what a "destroyed" chattel is.

Where is the meaning to be found? We know empirically that what we would, in everyday terms, call the destruction of one's own personal property is as commonplace as its abandonment. Yet there is little scholarship on an owner's right to destroy, and what scholarship does exist focuses on whether the right to destroy should be curtailed.⁵⁰ Meanwhile, the common law's aversion to waste⁵¹ has resulted in suppression of the right to destroy⁵² and,

⁴⁸ See Strahilevitz, *supra* note 32, at 360 ("An owner who wishes to dispose of property unilaterally has just two options: abandonment or destruction.").

⁴⁹ See *infra* subsection II.A.3.b.

⁵⁰ See JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES (1999) (urging limitations on the right to destroy certain kinds of chattels, including art and other culturally significant objects); Edward J. McCaffery, *Must We Have the Right to Waste?* (arguing against the utility of a right to destroy), in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 76, 76-86 (Stephen R. Munzer ed., 2001); Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 796-800 (2005) (discussing the bases on which courts have restricted the right to destroy).

⁵¹ See Strahilevitz, *supra* note 50, at 821-22 (reflecting on "Our Distaste for Waste").

⁵² See *id.* at 787-91 (chronicling the history—and decline—of the right to destroy). But see A.M. Honoré, *Ownership* (identifying the right to capital, which includes the liberty to consume

with some exceptions,⁵³ the case law has tended to focus on real property,⁵⁴ not personal property.

It may be most fruitful, then, to turn to the dictionary for a definition of “destroyed” chattels. *Black’s Law Dictionary* defines destruction as “[t]he act of destroying or demolishing; the ruining of something” and as “[h]arm that substantially detracts from the value of property, esp[ecially] personal property.”⁵⁵ By resorting to value, the dictionary definition invites the unilateral acquirer to encounter one of the same shortcomings discussed above,⁵⁶ namely that value is not always observable. For example, consider a laptop that appears new and functional. Unbeknownst to the would-be acquirer, the prior owner has irreversibly tampered with the laptop so that it shuts down automatically every sixty seconds. The value of the computer is surely “substantially” diminished, but the would-be acquirer cannot discern that *ex ante*.

In practice, destruction varies depending on the legal context, ranging from complete depletion of an item’s value to inefficient or wasteful disuse.⁵⁷ Although destruction encompasses a range of possible harms, it is nevertheless distinct from damage, which *Black’s Law Dictionary* defines as “[l]oss or injury to person or property.”⁵⁸ One enters the realm of destruction only when the loss or injury is so great as to render the value at least

and destroy, as one of the eleven incidents of ownership), in *OXFORD ESSAYS IN JURISPRUDENCE* 107 (A.G. Guest ed., 1961).

⁵³ See, e.g., Strahilevitz, *supra* note 50, at 817 n.144 (discussing the destruction of Babe Ruth and Elvis Presley memorabilia). Destruction by burial is a peculiar case. At least one court has opposed burying jewels with a cadaver because the practice might incentivize grave robbing. See *id.* at 800-03 (discussing *Mekstras Estate*, 63 Pa. D. & C.2d 371 (C.P. Phila. Coutny 1974), and destruction by burial generally).

⁵⁴ See, e.g., *People ex rel. Marbro Corp. v. Ramsey*, 171 N.E.2d 246, 247-48 (Ill. App. Ct. 1960) (compelling the issuance of a demolition permit to the owner of the historic Garrick Theatre Building in Chicago, reasoning that “[i]t is laudable to attempt to preserve a landmark; however, it becomes unconscionable when an unwilling private party is required to bear the expense”); *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210, 217 (Mo. Ct. App. 1975) (enjoining the demolition of a landmark house because “[a] well-ordered society cannot tolerate the waste and destruction of resources when such acts directly affect important interests of other members of that society”); see also Strahilevitz, *supra* note 50, at 817 (“Implicit in [the *Ramsey*] 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.”).

⁵⁵ BLACK’S LAW DICTIONARY 513 (9th ed. 2009); see also Strahilevitz, *supra* note 50, at 783-84 (observing that *Black’s Law Dictionary* excised the right to destroy from the definition of “owner” in its seventh edition).

⁵⁶ See *supra* text accompanying note 47; see also *supra* text accompanying notes 38-40. Similarly, positive value objects are destroyed with some frequency.

⁵⁷ See Strahilevitz, *supra* note 50, at 792-94 (acknowledging that “there can be no perfect definition of destruction” and adopting an economics-oriented definition).

⁵⁸ BLACK’S LAW DICTIONARY, *supra* note 55, at 445.

“substantially” diminished, or in clearer cases, “ruin[ed].”⁵⁹ I note the distinction between damage and destruction because I will argue only that it is wrong to recover destroyed chattels, not damaged chattels.

The law already proscribes the recovery of some destroyed chattels. For example, livestock and corpses are destroyed (i.e., dead) chattels with limited repossession possibilities.⁶⁰ On the other hand, shredded documents are explicitly repossessable.⁶¹ Notwithstanding these specific scenarios and a few others,⁶² the law does not make clear whether, as a general matter, destroyed property is up for grabs.⁶³ Similarly, the rights that do or do not vest in the person who unilaterally acquires a destroyed chose are so far undefined.

C. *The Law of Finders (Cell 3)*

One who acquires lost property is a finder and, with one exception,⁶⁴ a finder has good title against all but the true owner.⁶⁵ Laws governing finders

⁵⁹ *Id.* at 513.

⁶⁰ See Balganesch, *supra* note 5, at 1904 & n.64 (explicating the right of sepulcher and courts' use of quasi-property to qualifiedly protect corpses from pillaging for corneal tissue and other body parts during the mourning period); see also *R. v. Edwards & Stacey*, (1877) 36 L.T. 30 (A.C.) at 31 (Eng.) (holding that defendants, who had unearthed and sold at market three dead pigs that had been given a conscientious burial, were guilty of larceny because the pigs had not been abandoned).

⁶¹ See *e.g.*, *United States v. Scott*, 975 F.2d 927, 929 (1st Cir. 1992) (holding that seizure and reconstruction of shredded documents without a warrant does not violate the Fourth Amendment because the shredded documents were abandoned). The court was willing to conflate destroyed and abandoned property because both were found in the trash. The commingling of abandoned and destroyed property in the trash is a common experience, but it is also a problem to which courts have been insensitive in trash-rummaging cases. Under the theory of acquisition I will propose, the First Circuit reached the wrong result in *Scott*. Although the shredded documents were in the trash, destruction and abandonment are distinct: destruction gives explicit notice to the world that the destroyed chattels ought not to be repossessed, whereas abandoned chattels are recoverable. See *infra* subsection II.A.3.

⁶² See, *e.g.*, Strahilevitz, *supra* note 50, at 815 (discussing the possibility of third parties reconstructing deleted personal e-mails).

⁶³ This is distinct from recovery of wrongfully destroyed property (e.g., the suppression of evidence, including electronic spoliation of evidence). See, *e.g.*, *Walton v. Midland*, 24 S.W.3d 853, 861-62 (Tex. Ct. App. 2000) (affirming the imposition of sanctions for destruction of an expert's work product, including computer data), *abrogated by In re Estate of Swanson*, 130 S.W.3d 144 (Tex. Ct. App. 2003). See generally Marjorie A. Shields, *Electronic Spoliation of Evidence*, 3 A.L.R. 6th, at 13 (2005) (collecting state and federal cases addressing the electronic spoliation of evidence and concluding that, generally speaking, it can lead to an inference that the evidence would have been unfavorable to the destroying party).

⁶⁴ See Palmer, *supra* note 32, at 1-2 (stating that one who finds an object while trespassing on the land of someone who is not the true owner of that object “defer[s] to two rivals: the true owner and the party against whom he trespassed”).

⁶⁵ See *supra* note 10 and accompanying text.

of lost or mislaid property⁶⁶ often give effect to a prime policy objective: maximizing the likelihood of reuniting the chattel with its true owner.⁶⁷ These laws also strive to distinguish a finder from a thief.⁶⁸ However, the law of finders assumes that a finder knows he is a finder, and not an abandonee.

The law of finders seems to capitalize on confusion costs, and often takes for granted that a thing is not abandoned. This is reflected in the various approaches to finding that states have adopted.⁶⁹ The requirements are more or less onerous, depending on the jurisdiction, but reporting requirements and fines for failure to report are common.⁷⁰ In New York, for example, the law does not recognize abandoned chattels at all without explicit notice of abandonment.⁷¹ As a result, property that is de facto abandoned is de jure merely lost.⁷²

⁶⁶ See *supra* note 9.

⁶⁷ See BRIDGE, *supra* note 1, at 23-24 (describing the finder's duty to the true owner as analogous to that of a bailee); see also MARK D. WEST, *LAW IN EVERYDAY JAPAN: SEX, SUMO, SUICIDE, AND STATUTES* 24-25, 50-52 (2005) (explaining the carrots and sticks of Japanese finders laws, which promote the return of lost property to owners, and demonstrating the motivational effects of those carrots and sticks in actual Japanese practice); Strahilevitz, *supra* note 32, at 395-96 (describing escheat regimes—like the Uniform Unclaimed Property Act of 1995—whereby ownership of lost chattels passes to the state after a period of years, and identifying the rationale for such a regime as “to increase the chances that the lost, mislaid, or forgotten property will be reunified with its original owner”).

⁶⁸ See *Armory v. Delamirie*, (1722) 93 Eng. Rep. 664 (K.B.) 664 (holding that the finder of a jewel had good title against a subsequent converter); see also Orth, *supra* note 16, at 397 (“A practical law of finders would . . . always, as a general matter, recognize the right of the finder.”); 1 WILLIAM BLACKSTONE, *COMMENTARIES* *295-96 (stating that no title can be acquired in a discovered treasure trove—money found in a hiding place—and, implicitly, that one who takes a treasure trove is a converter); Comments, *Lost, Mislaid, and Abandoned Property*, 8 *FORDHAM L. REV.* 222, 222-23 (1939) (stating Justinian's rule that one who keeps found property with the intent to profit by it is a thief).

⁶⁹ See Eric W. Neilsen, Comment, *Is the Law of Acquisition of Property by Find Going to the Dogs?*, 15 *T.M. COOLEY L. REV.* 479, 490-91 (1998) (“In many states, statutes have been enacted which have abolished the distinctions [among finders of lost, mislaid, and abandoned property] developed by the court . . .” (footnote omitted)).

⁷⁰ See, e.g., IOWA CODE ANN. §§ 556F.7-556F.8 (West 2001) (requiring finders to make reports to the county sheriff and advertise the find); MASS. GEN. LAWS ANN. ch. 134, § 1 (West 2012) (requiring finders of property worth three dollars or more to report the find at the local police station within two days or, if there is no police station in town, to post an announcement in a public space or newspaper); N.Y. PERS. PROP. LAW § 252 (McKinney 2012) (threatening a fine of up to one hundred dollars or up to six months imprisonment or both for failing to report found property worth twenty dollars or more).

⁷¹ “The term ‘lost property’ . . . includes lost or mislaid property. Abandoned property . . . and other property which is found, shall be presumed to be lost property . . . unless it is established in an action or proceeding commenced within six months after the date of the finding that the property is not lost property.” PERS. PROP. § 251.3.

⁷² See *id.*; VAINES, *supra* note 1, at 11 (“Even a cigarette stub thrown away in the street remains in the possession of the smoker, in as much as he has the right to recover it; though probably if asked, he would say that he had abandoned it.”).

Perhaps to avoid the evidentiary problems that flow from abandonment's subjective intent requirement, the law makes finding a kind of default rule.⁷³ The draconian statutes codifying the law of finders therefore solve the "Cell 1 or Cell 3" difficulty by simply outlawing Cell 1, or at least making it very hard to enter Cell 1 without explicit notice of abandonment (or litigation).⁷⁴ The social cost of such a proscriptive regime is high; there are socioeconomic benefits to abandonment because abandonment is often the least costly and least wasteful method of severing one's ties to a chattel.⁷⁵ Surely a more nuanced and forgiving approach to the "Cell 1 or Cell 3" problem is needed.

D. *The Law of Converters (Cell 4)*

Lastly, we turn to conversion law for insight into whether and how an actor embroiled in the "Cell 1 or Cell 3" dilemma can avoid becoming an inhabitant of Cell 4 (a converter). From a security-in-title perspective, Cell 4 is the least desirable iteration of a unilateral sequential acquisition because a converter's title is void or, at best, voidable. Recall that a finder who believes he is an abandonee may exercise rights inconsistent with those of the true owner and inadvertently become a converter. Though it seems unlikely an equitable court would harshly punish a truly innocent converter, without a workable means of determining *ex ante* whether one is a finder or an abandonee, the good faith converter may nevertheless face a replevin action or a damages award.⁷⁶

Civil conversion⁷⁷ is the exercise of rights contrary to those of the true owner.⁷⁸ The easiest way to avoid becoming a converter of found chattels,

⁷³ See, e.g., PERS. PROP. § 251.3; see also Karen R. Neary et al., *Artifacts and Natural Kinds: Children's Judgments About Whether Objects Are Owned*, 48 DEVELOPMENTAL PSYCHOL. 149, 155 (2012) (concluding that young children believe human-made objects are more likely to be owned than are natural objects); cf. LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* 54, 59-61 (2001) (demonstrating the paradox that bright line rules that "prevent more errors than [they] will cause" nevertheless are unyielding in instances where a rational actor disobeys the rule).

⁷⁴ See, e.g., PERS. PROP. § 251.3.

⁷⁵ See Strahilevitz, *supra* note 32, at 406-07 (discussing the costs and benefits of a regime that permits the abandonment of negative market value property).

⁷⁶ See *supra* note 18.

⁷⁷ Many instances of otherwise civil conversion actually fall under the domain of criminal law. See Richard A. Epstein, *Inducement of Breach of Contract as a Problem of Ostensible Ownership*, 16 J. LEGAL STUD. 1, 7 (1987) (observing that criminal law does much of the work in otherwise civil conversion cases). However, the criminal cousins to conversion—larceny, theft, and robbery—add a culpability element that falls outside the scope of this paper. See CHILDS, *supra* note 1, § 337 (distinguishing between the larcenist of found goods and the converter of found goods on the basis of the actor's intent); see also, e.g., GA. CODE ANN. § 16-8-2 & gen. consideration cmt. (2007)

of course, is to refuse to engage with those chattels.⁷⁹ But assuming, as we must, that one *wants* to pick up the chattel and engage with it, one avoids becoming a converter by being aware of the rights the true owner may have.⁸⁰ Typically, one need not pry deeply into the relationship another owner has with his chattel. The right to exclude and the correlative duty to stay away⁸¹ do much of the work here, keeping the diligent actor safe.⁸² However, as the phenomenon of acquiring abandoned chattels proves, chattels do not always communicate a resounding “keep off” message at their borders. When that happens, it becomes possible to innocently interfere with a true owner’s rights.

An actor who picks up a found chattel has acquired possession, but possession alone does not vest full title.⁸³ In the clearest case, acquisition by wresting the object from the arms of a weaker party does not bestow title.⁸⁴ From this foundational axiom arise the correlative limitations on ownership

(defining “theft by taking” and noting in the section on construction and application that the statute is “broad enough to encompass . . . theft by conversion”); *Roberts v. State*, 9 S.E. 675, 676 (Ga. 1889) (upholding a conviction of simple larceny for a man who found money in another man’s house and wrongfully retained it); *Smith v. State*, 592 S.E.2d 871, 873 (Ga. Ct. App. 2004) (applying the theft by taking statute to uphold the conviction of a man who failed to return the unearned portion of a down payment on a project he did not complete).

⁷⁸ See, e.g., *Mueller v. Technical Devices Corp.*, 84 A.2d 620, 623 (N.J. 1951) (stating the law of conversion and describing its evolution in New Jersey case law); *Farrow v. Ocean Cnty. Trust Co.*, 2 A.2d 352, 354 (N.J. 1938) (“To constitute a conversion of goods there must be some repudiation by the defendant of the owner’s right, or some exercise of dominion over them by him inconsistent with such right, or some act done which has the effect of destroying or changing the quality of the chattel.” (quotation omitted)).

⁷⁹ See *Cowen v. Pressprich*, 194 N.Y.S. 926 (App. Div. 1922) (adopting the dissenting opinion of the court below and holding that an involuntary bailee is not liable to the bailor absent an exercise of dominion). *But cf.* QUINT, *supra* note 17, at 6-7 (stating that the Torah requires Jews to pick up certain kinds of lost objects and care for them until they are restored to their rightful owner).

⁸⁰ See, e.g., BRIDGE, *supra* note 1, at 24 (explaining that a finder has the duties of a bailee and may likewise be liable for conversion if he breaches those duties).

⁸¹ See, e.g., HOHFELD, *supra* note 27, at 35-38 (contrasting rights and duties in his famous exposition of jural relations).

⁸² See Shyamkrishna Balganes, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL’Y 593, 610-18 (explicating a taxonomy of the right to exclude that posits three meanings of that right in addition to the exclusionary relief (injunctive) model); *Smith, supra* note 30, at 981 (characterizing exclusion as “a low-cost, but low-precision, method that relies on rough informational variables like boundaries to define legal entitlements”).

⁸³ See VAINES, *supra* note 1, at 45 (“Ownership is, of course, distinct from possession, although the distinction was, and still is, not always apparent.”).

⁸⁴ See VON SAVIGNY’S TREATISE ON POSSESSION § XXX (Sir Erskine Perry trans., 6th ed. 1848) (stating that the acquisition of possession by personal violence does not carry with it a correlative transfer of rights); *id.* § 5 (summarizing a Roman law which stated that “[p]ossession may be acquired or lost by violence, although violence never can avail as a juridical proceeding”).

for objects acquired in other void *ab initio* fashions.⁸⁵ For instance, the American law concerning good faith purchasers for value holds that a thief has void title and a defrauder has voidable title.⁸⁶ Pursuant to the *nemo dat* principle,⁸⁷ a thief with void title cannot transfer a stolen object to another party. Therefore, notwithstanding possession, the good faith purchaser of a stolen object has bad title only. Even though the object itself may communicate no information as to the identity or indeed the existence of a true owner, possession alone cannot guarantee title to a possessor.

Yet a party in possession of an object that bears no information about competing owners is surely reasonable in relying on the adage that “possession is nine-tenths of the law” and in asserting ownership on that basis. Nine-tenths, after all, is a good bet, even if it is only a bet (and even if it is only an adage). Problematically, if the gamble runs afoul, ignorance of the circumstances may not be a useful defense in a subsequent conversion action.⁸⁸

It is unfortunate that unilaterally acquired chattels do not announce aloud whether they are lost or abandoned (or stolen, etc.). That intelligence would rescue from confusion, hesitation, and potential liability all of us who have ever encountered an object in the world and wondered if it was up for grabs. Perhaps, though, our chattels do speak, conveying the essential information in no uncertain terms. We only require a means of deciphering the messages they transmit.

⁸⁵ See *id.* § 30 (describing situations in which possession of an object is transferred without any corresponding ownership rights).

⁸⁶ See Saul Levmore, *Variety and Uniformity in the Treatment of the Good-Faith Purchaser*, 16 J. LEGAL STUD. 43, 57-60 (1987) (laying out the conditions under which title is void or voidable and, consequently, the conditions under which title passes to good faith purchasers for value); see also *Kotis v. Nowlin Jewelry, Inc.*, 844 S.W.2d 920, 923 (Tex. Ct. App. 1992) (applying U.C.C. § 2-403 in stating that a person with voidable—as opposed to void—title has power to transfer good title to a good faith purchaser for value). But see CHILDS, *supra* note 1, at § 51 (describing special rules for third parties who receive found money as consideration); Levmore, *supra*, at 58 (“The most important (and only real) exception to the general rule favoring the original owner is that a good faith purchaser . . . of money or bearer of instruments or documents does prevail over the original owner.”); Patty Gerstenblith, *The Acquisition and Exhibition of Classical Antiquities* (identifying the challenge of enforcing the prohibition on looting of undocumented artworks, and questioning the good faith of art museums that purchase such goods), in *THE ACQUISITION AND EXHIBITION OF CLASSICAL ANTIQUITIES* 47, 52, 57 (Robin F. Rhodes ed., 2007).

⁸⁷ See *supra* note 7.

⁸⁸ See *supra* note 18 (providing examples of conversion even where the defendant acted innocently).

II. SPECTRUMS, NESTING, AND NOTICE: A WORKABLE SOLUTION

One is not an abandonee, a finder, a converter, or any other kind of re-possessor until one acts. A review of the laws of abandonment, destruction, finders, and converters reveals that one cannot really choose to become a finder or an abandonee prior to acting, because it is so far impossible to determine *ex ante* whether the object was abandoned or lost. A person's sincere desire to avoid becoming a converter only rescues him from criminal sanctions. But there is guidance: the chattels themselves provide clues as to what kind of acquirer a person will become after he takes them. We turn now to those clues.

A. *The Nesting Theory Explained*

The critical difference between an abandoned object and a found object is that the abandoned object is no longer owned, whereas the found object is still owned. The solution to the "Cell 1 or Cell 3" difficulty therefore comes from revisiting the signals chattels communicate about ownership. As a preliminary matter, possession itself is, in essence, a communication. It is a "text" that gives notice of ownership, such that a signal of presumptive ownership attaches to objects when they are in someone's possession.⁸⁹ The notion that possession communicates something about an object's ownership means, more broadly, that the context in which the object is found can communicate something about its status as presumptively owned or presumptively unowned.

This Section proposes a system, which I call the "nesting theory," for determining whether an object is up for grabs on the basis of the signals the chattel emits. The nesting theory is a three-part analysis, which individuals can use on the cusp of acquisition in the real world, and which courts can use *ex post* to evaluate the reasonableness of an actor's actions.

⁸⁹ See Carol M. Rose, Introduction, *Property and Language, or, the Ghost of the Fifth Panel*, 18 YALE J.L. & HUMAN. (SPECIAL ISSUE) 1, 12 (2006) (describing acts as texts that signal ownership); Carol M. Rose, *Response*, 19 WM. & MARY BILL RTS. J. 1057, 1058 (2011) (discussing geographic signals); see also Robert C. Ellickson, *The Inevitable Trend Toward Universally Recognizable Signals of Property Claims: An Essay for Carol Rose*, 19 WM. & MARY BILL RTS. J. 1015, 1025-26 (2011) ("[H]umans have been developing, over the past several millennia, a *universal sign language* . . . for asserting claims to tangible property."); *Children Find Human-Made Objects More Likely to Be Owned than Natural Objects*, SCIENCE DAILY (Oct. 9, 2011) <http://www.sciencedaily.com/releases/2011/10/111006113616.htm> (describing young children's tendency to believe that a man-made object is more likely to be owned than a natural one).

The first step of the analysis measures a chattel along two spectrums: the extent to which the chattel identifies its prior owner, and the extent to which the chattel is unique. The chattel's position along these two spectrums indicates whether it emits a strong or a weak signal, communicating whether it is presumptively owned or presumptively unowned.

The second step of the analysis is grounded in physical proximity, and looks to the chattel's surroundings to determine if stronger-signaling objects are nearby. Strong signals can amplify weak signals if the latter are within the former's ambit. Here, special rules emerge for things like collections, and it becomes clear that the two spectrums in step one actually do independent work.

Step three analyzes whether the chattel or its surroundings communicate any overriding notice about whether the chattel may or may not be repossessed. Explicating step three reveals both the function of trash receptacles in the nesting theory and the content of Cell 2 in the matrix. Together, the three steps of the nesting theory make clear whether and why any given chattel in the world is or is not up for grabs.

1. Signals Along Two Spectrums: Identification and Uniqueness

Here is an extreme, but familiar, example. Walking through downtown Philadelphia, Betty perks up when she sees a five-dollar bill lying in the street.⁹⁰ She reaches for it, picks it up, puts it in her pocket, and continues on. Would anyone suggest Betty has done wrong? Certainly not. We all agree that the five-dollar bill was up for grabs.⁹¹ This is true even though it is all but certain that the previous owner did not intentionally deposit his or her five dollars in the street. Knowing that the previous owner would surely be glad to have it back, why does Betty's action—taking the five dollars—provoke no moral outrage? What signal does the five dollars communicate that makes its acquisition morally permissible?

Two equally satisfying answers justify Betty's decision. First, even if she wanted to, we know it would be essentially impossible for Betty to reliably locate the previous owner of this particular five-dollar bill. She found it, after all, in downtown Philadelphia, and the set of possible owners effectively encompasses the whole world. The second justification, and the reason why it is so difficult to identify the previous owner, is that the previous owner

⁹⁰ See BRIDGE, *supra* note 1, at 9-10 (identifying money as a chattel).

⁹¹ And the Romans would, too. See Hudson, *supra* note 13, at 596 (“[I]f any money was left in the street to be picked up later this would be a case of occupation of derelict [i.e., abandoned] property.”).

himself, were he found, could not be certain this was in fact *his* five-dollar bill. Cash is the ultimate fungible good, utterly interchangeable, and this five-dollar bill is indistinguishable from every other one. Since the chattel does not identify its owner, and the owner could not recognize his chattel, the relationship between the owner and the chattel has been severed, regardless of the owner's intent. The five-dollar bill is therefore up for grabs.

To consider the opposite extreme, imagine that Betty finds my driver's license in the street. On this little card is printed my photograph, name, address, birthday, height, eye color, and even the fact that I require corrective lenses. Now, with the five dollars, Betty was permitted to behave like an abandonee. May she do the same with my driver's license? Is my driver's license up for grabs? I think we would all agree that the license is different from the five-dollar bill. But why? In my view, there are again two equally satisfying answers. First, unlike the five-dollar bill, my driver's license is one of a kind. Betty knows that this, and this alone, is my driver's license.⁹² Second, whereas Betty could not have identified the prior owner of the five-dollar bill even if she tried, the observable characteristics of the driver's license render its true owner unequivocally identifiable. The true owner is the individual depicted and named on the card.

There are, we see, two spectrums at play. The first is the spectrum from utterly fungible goods to unique goods. The second is the spectrum from goods that do not identify their owners to goods that do.

The fungible–unique spectrum calls to mind a more famous spectrum, brought to light and explicated by Margaret Radin: the spectrum (or, as she put it, continuum) from fungible property to personal property.⁹³ Under Radin's analysis,⁹⁴ property exists along a continuum from the personal—"a thing indispensable to someone's being"—to the fungible—"a thing wholly interchangeable with money."⁹⁵ Property nearer to the personal end of the continuum is "worthier of protection."⁹⁶

⁹² Betty may know the driver's license is, strictly speaking, replaceable, but she is no doubt sensitive to the singular difficulty of replacing it. See Douglas N. Husak, *Partial Defenses*, 11 CAN. J.L. & JURIS. 167, 190 (1998) (identifying driver's licenses as "hard-to-replace items" such that a thief who leaves behind the driver's license when he steals a wallet acts less wrongfully than if he takes the whole wallet).

⁹³ See generally Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

⁹⁴ Radin's analysis is founded on the Hegelian notion of the externalization of the will. *Id.* at 958–59; see also GEORG WILHELM FRIEDRICH HEGEL, *PHILOSOPHY OF RIGHT* para. 39 (T.M. Knox trans., Oxford Univ. Press 1942) (1821) (stating that personality "struggles . . . to give itself reality . . . [and] to claim that external world as its own").

⁹⁵ Radin, *supra* note 93, at 987.

⁹⁶ *Id.*

According to Radin, a single object—such as a wedding ring—can change its position along the continuum depending on the “relationship between the holder and the thing” and can change position over time even “without changing hands.”⁹⁷ It is the “subjective”⁹⁸ nature of this relationship that makes the personhood theory of property inutile in solving the Cell 1 or Cell 3 dilemma. Even if it is assumed that personal property (i.e., property bound up with personhood) is never abandoned, a finder cannot accurately assess his rights *ex ante* because the prior owner’s relationship with the object is completely obscured. The actor simply has no way of knowing how bound up any given object is with the prior owner’s personhood.

But in a later writing, Radin recanted somewhat, saying, “the issue [of] whether or not something is appropriately considered personal property is not ‘subjective,’ . . . [but] instead depends upon whether our cultural commitments surrounding property and personhood make it justifiable for persons and a particular category of thing to be treated as connected.”⁹⁹ Here, Radin suggests that courts can and likely do privilege certain entitlements over others without determining whether the specific owner before the court actually had the personal relationship one might typically attribute to a particular kind of object. For example, a party’s interest in a wedding ring or leasehold might be privileged in court because such interests are typically and justifiably bound up with personhood, notwithstanding the possibility that a particular plaintiff secretly despises the hypothesized ring or real estate.

For the sequential acquirer, though, the inquiry about what category of objects is or is not typically and justifiably bound up with personhood is not more helpful than was the original chattel-by-chattel approach. As I noted above, proceeding chattel-by-chattel with a personhood analysis would leave the would-be acquirer at square one: guessing at the prior owner’s subjective relationship with the chattel. But a category-by-category personhood analysis would paint with too broad a brush. If the approach dictates that whole categories of usually personal items are not up for grabs, and whole categories of usually fungible items are, then the approach is bound to be plagued with too high a margin of error. To accurately and usefully assist the sequential acquirer *ex ante*, we need a more nuanced approach.

Under my system, an actor considers the position of a chattel along two spectrums: the spectrum from fungible chattels to unique chattels, and the

⁹⁷ *Id.* at 987-88.

⁹⁸ *Id.* at 987.

⁹⁹ MARGARET JANE RADIN, REINTERPRETING PROPERTY 18 (1993).

spectrum from chattels that identify their owners to chattels that do not. An item at the fungible and nonidentifying ends of the two spectrums emits weak signals of ownership. Consequently, such an item is presumptively unowned, and up for grabs. An item at the unique and identifying ends of the spectrums emits strong signals of ownership. It is presumptively owned, and not up for grabs. The system does not require any knowledge of the prior owner's intent toward or relationship with the object; rather, the object speaks for itself.

To be sure, the use of two spectrums raises questions: Does one spectrum do more work than the other? Under certain conditions, is one spectrum merely a proxy for the other? And what happens when the two spectrums point in opposite directions? A few examples provide clear answers to these questions.¹⁰⁰

2. Nesting

As I use the term, nesting is the theory by which a chattel emitting a weak signal can amplify its signal by its proximity to a stronger-signaling chattel. For example, the five dollars in the street communicates no information about an owner, but the same five dollars adjacent to a driver's license (say, in a wallet) is nested by the license, and now communicates both that it is owned and who owns it. Removing the five dollars from the wallet and letting it fall to the street—again, voluntarily or inadvertently—has the effect of de-nesting the five dollars.

The driver's license is a very strong-signaling chattel, but there are nesters that are even stronger than that. Actual possession (occupation) is the strongest nester. Possession gives notice to the world that the chattel is mine, no matter how weak the chattel's independent signal may be.¹⁰¹ Since my body and I are one and the same, my body is the strongest-signaling object in the world with which I have the power to nest. The strength of the body's signal and its ability to nest is evidenced in the common law rule that a person may use (nondeadly) necessary force to prevent the taking of personal property from his physical possession.¹⁰² Absent some explicit

¹⁰⁰ See *infra* Section II.B. I have attempted to craft examples that relate to everyday experience. *But cf.* Paul H. Robinson, *Some Doubts About Argument by Hypothetical*, 88 CALIF. L. REV. 813, 819-21, 823 (2000) (objecting to Professor Leo Katz's use of hypotheticals because they "strip away the infinite complexity of real life").

¹⁰¹ See Rose, *supra* note 17, at 74.

¹⁰² See MODEL PENAL CODE § 3.06(1)(a) (Official Draft 1962) (articulating a model rule for when "[u]se of [f]orce . . . for [p]rotection of [p]roperty" is justifiable); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 20.02(B)(1) (5th ed. 2009) ("The privilege of defense-of-

signal to the contrary, one is not presumed to have unilaterally severed one's relationship with any chattel that one occupies.

Land provides nearly as good a nest as actual possession because, throughout the United States at least, land confers perfect title when recorded and cannot be abandoned.¹⁰³ It provides chattels with a location on which they are constructively possessed¹⁰⁴ and guards them with the law of trespass. Absent some explicit signal to the contrary, the strong signal of land on which even a weak-signaling chattel rests overrides any presumption of abandonment.

The basic principle so far¹⁰⁵ is this: first, chattels convey information about whether they are presumptively owned or presumptively unowned along two spectrums.¹⁰⁶ And second, a weak-signaling thing becomes a stronger-signaling thing when in the proximity of—nested with—a stronger-signaling thing.¹⁰⁷

3. Notice

So far under the nesting theory, it would appear impossible ever to abandon a highly fungible good, such as a folding chair, in my apartment. My apartment emits a strong signal, and it must be presumed that everything

property entitles a person to use necessary force to retain rightful possession of, as distinguished from title to, person or real property.”).

¹⁰³ See, e.g., *Pocono Springs Civic Ass'n v. MacKenzie*, 667 A.2d 233, 235 (Pa. Super. Ct. 1995) (holding that “real property when owned in fee simple with perfect title” cannot be abandoned).

¹⁰⁴ Accord SAVIGNY, *supra* note 84, § 18 (“Every one [sic] has the undoubted control over his own house . . . and, as arising out of this control, the custody of everything contained in the house.”).

¹⁰⁵ For an assessment of more difficult cases, see *infra* Section II.B.

¹⁰⁶ We might say that there is another pair of spectrums at work: the continuous spectrum of how up for grabs a chattel is and the lumpy spectrum of actions available to a would-be acquirer. See generally Lee Anne Fennell, *Lumpy Property*, 160 U. PA. L. REV. 1955, 1958-62 (2012) (describing “lumpy” goods as those, like a bridge, that take on a significantly higher value once a particular level of completion has been attained). An object is not either *certainly* up for grabs or *certainly* not up for grabs. It could be “possibly up for grabs,” “probably up for grabs,” “almost certainly up for grabs,” and so on along a continuous spectrum. But the would-be acquirer's options are binary: to take the object, or not to take it. The binary nature of taking highlights a line-drawing problem in the up-for-grabs continuum that, fortunately, lies beyond the scope of this paper. The nesting theory is useful and comprehensible without attempting to specify the precise contours of that boundary line across which finders become abandonees and impermissible taking becomes permissible.

¹⁰⁷ Cf. *Pierson v. Post*, 3 Cai. 175, 177-79 (N.Y. Sup. Ct. 1805) (considering at what point the pursuit of a hunted animal—wounding it, ensnaring it, or actually killing it—constitutes possession by the pursuer and demonstrating the difficulty of drawing lines between rightful and wrongful possession).

nested within it is not up for grabs. Yet people abandon chattels on land all the time.¹⁰⁸ How is this possible?

Explicit notice can override the presumptive message that nested chattels communicate. Notice conquers all, be it notice to the world at large or to a particular party. For example, I can effectuate the abandonment of a chattel even when it is in my apartment by giving notice of my intent to abandon on Facebook or Craigslist.¹⁰⁹ Explicit notice is the only way to communicate such intent as long as the chattel remains well-nested. The notice may, however, include conditions (e.g., contact the seller; first-come, first-served; particular class of takers only¹¹⁰) and retrieval of the chattel may necessitate a license.¹¹¹

Notice can also communicate that a de-nested object—one seemingly up for grabs—is in fact not up for grabs, thus precluding possession by another. This is the function of destruction in my nesting theory. Destruction gives notice that otherwise de-nested, and thus abandoned, property may not be possessed again. The owner communicates through destruction that, when the owner unilaterally severed his relationship with the chattel, he meant to divorce the chattel from ownership *for good*. Shredding or breaking chattels, such as credit cards and personal documents, before throwing them away communicates the message effectively. As a result of the destruction carve-out, explicit notice may rebut *almost* any combination of signals and nesting to render an object up for grabs.

And that is, really, the whole of the nesting theory. It is a three-part analysis. First, a chattel communicates whether it is presumptively owned or unowned by conveying a signal along two spectrums: fungible–unique and nonidentifying–identifying. Second, nesting chattels together can alter the strength of their signals. And, third, notice conquers all.

4. Revisiting the Matrix in Nesting Terms

With the basics of the nesting theory established, it is now possible to revisit Figure 1 (the matrix depicting the four iterations of unilateral

¹⁰⁸ See Strahilevitz, *supra* note 32, at 414 (arguing that chattels can be abandoned on land and providing anecdotal examples). *But see* Peñalver, *supra* note 32, at 202-03 (arguing that chattels cannot be abandoned on land).

¹⁰⁹ See Strahilevitz, *supra* note 32, at 410 (providing a Craigslist notice of a dining-room set on real property as an example of quasi-abandonment).

¹¹⁰ See *id.* at 378-80 (discussing property abandoned to subgroups, for instance, to churches only).

¹¹¹ See generally *Hurst v. Picture Theatres, Ltd.*, [1915] K.B. 1 at 5-6, 10 (Eng.) (distinguishing mere licenses, licenses coupled with a grant, and licenses by contract).

sequential acquisition) with a fresh approach. The nesting theory will help solve the “Cell 1 or Cell 3” problem and will clarify the content of Cell 2.

a. *The “Cell 1 or Cell 3” Confusion Clarified*

The nesting theory clarifies *ex ante* whether one who unilaterally acquires a chattel does so in the context of Cell 1 or Cell 3. (Recall that Cell 1 houses the legal abandonee while Cell 3 houses the finder, who has rights against all but the true owner.)

Cell 1 is weak-signaling property. Weak-signaling property is presumptively unowned and up for grabs. Thus, it is governed by the law of abandonment. The chattel may be freely acquired, vesting full property rights in the new owner. A person seeking to unilaterally sever ownership of a chattel through abandonment must weaken the signal of the object by removing it from any amplifying nests, giving explicit notice of abandonment, or somehow making the object’s inherent signal weaker. Correspondingly, an owner who has not adequately nested his chattel ought to have no action against an abandonee who correctly reads the signals (whether inherent, amplified by a nest, or made explicit through notice) and concludes the property is up for grabs.

Cell 3 is strong-signaling property. The signal may be inherently strong, made strong by a nest, or made strong by explicit notice. In any event, well-nested property is presumptively owned by the nester, and is therefore governed by the law of finders: the chattel may usually be taken, but some duty to the true owner remains.

For difficult cases falling between Cells 1 and 3, a party will evaluate *ex ante*: (1) the strength of a chattel’s signal; (2) whether and how it is nested; and (3) if any notice applies. Those are the same three steps a court might apply when evaluating the reasonableness of an actor’s actions *ex post*.¹¹²

The nesting theory illuminates the difference between how lost and abandoned chattels present themselves to third parties. Consequently, the theory clarifies *ex ante* the fate of someone who acquires such a chattel—whether they will occupy Cell 1 or Cell 3. Here a difference emerges between the explicit notice method of abandonment¹¹³ and the method for effecting abandonment under the nesting theory. Under the nesting theory, abandonment requires not the addition of a label but the stripping of

¹¹² The consequences that flow from misreading or performing an unreasonable application of the signal, the nest, or the notice is beyond the scope of this paper, but I preliminarily suggest that a negligence standard may be suitable. Focusing the *ex post* analysis on whether the actor was reasonable may obviate the need to exactly fix the line between Cells 1 and 3. *See supra* note 107.

¹¹³ *See supra* text accompanying notes 42-45.

nesting information. Some things have such inherently strong signals that de-nesting alone cannot render them up for grabs, and those objects are abandoned only with explicit notice. And, for reasons described below, some particularly identifying objects (like a driver's license) cannot be abandoned even with explicit notice, but must be destroyed, thereby giving notice to the world that the object must not be recovered at all. This is the content of Cell 2.

b. *The Content of Cell 2*

Cell 2 represents the acquisition of unowned personal property that ought not to be recovered by anyone. I call such acquisition "wrongful repossession." An actor inhabits Cell 2 when he acquires either of two kinds of personal property: destroyed chattels or strong-signaling abandoned chattels whose signal cannot be diminished.

When I received my new driver's license recently, it came affixed to a single sheet of paper. The paper bore the seal of the State of New York Department of Motor Vehicles, my name and address, and explicit instructions to throw away my old license using a secure disposal method, such as cutting it up.¹¹⁴ When I use a pair of scissors to diligently follow the State's instruction and destroy my old license, or for that matter, an old credit card, is it ever permissible for a stranger to recover the pieces? Not under the nesting theory. Pursuant to the "notice conquers all" provision of the nesting theory,¹¹⁵ destruction of a chattel communicates an unequivocal signal to the world that when the destroyer severed his ownership relationship with the chattel, he intended for the chattel to be permanently incapable of being owned.¹¹⁶ One who disregards the clear notice of destruction is a wrongful reposessor.

A wrongful reposessor is also someone who takes an abandoned chattel emitting an irreversibly strong signal, even if the chattel is not destroyed. For example, imagine I abandon my (undestroyed) credit card by throwing it in the dumpster. The credit card, which is embossed with my name, emits

¹¹⁴ Many state motor vehicle departments issue a similar warning. See, e.g., *Miscellaneous Licensing Information*, CAL. DEPT MOTOR VEHICLES, http://www.dmv.ca.gov/pubs/hdbk/misc_lic_info.htm (last visited Jan. 11, 2013) (asking drivers to "[d]estroy the old driver license" once a replacement has arrived).

¹¹⁵ See *supra* paragraphs accompanying and following note 109.

¹¹⁶ What if a would-be acquirer discovers an object thrown into the fireplace, but retrieves it before the flames catch? The object's presence in the flames is notice of the prior owner's intent to destroy it, and so one who retrieves the object from the fire is a wrongful reposessor. It is interesting to realize that a fireproof chattel thrown into the fire is, under the nesting theory, as unrecoverable as if the flames had consumed it.

an irreversibly strong signal. But its presence in the dumpster provides overriding notice to would-be acquirers that I have abandoned it. Under the nesting theory, trash receptacles of all kinds provide notice¹¹⁷ to the world that the owner of whatever chattel is found within has severed his or her ownership ties to that chattel. And importantly, trash bins allow an owner to sever his relationship with a chattel notwithstanding the strong signal the chattel independently transmits.¹¹⁸ Yet here I draw a conceptual difference between a prior owner severing his or her relationship to a chattel and the chattel being up for grabs.

Some strong-signaling chattels ought not to be recovered by anyone other than the true owner, even when they are abandoned. The prohibition against recovery of nondestroyed abandoned chattels extends only to irreversibly strong-signaling chattels, like the credit card, whose signals cannot be made weaker without an act of destruction. The reason why the credit card may not be recovered has nothing to do with its value (I'm sure to cancel the credit card immediately), but rather with the inherent strength of the card's signal as an identifying chattel, and its correlative power to nest. If a party passing by takes my credit card out of the dumpster and uses it to nest, that party is nesting in my name. Nesting in my name violates my prerogative as an autonomous agent, because I have a right not to be used as a means to someone else's ends.¹¹⁹ This injury to my autonomy is precisely what makes the repossession of abandoned, irreversibly identifying chattels wrongful.

B. *The Nesting Theory at Work*

A series of examples will illustrate and clarify the theory. If the theory is correct, the result of its application will comport with the reader's intuition as to whether the object in a given example is up for grabs. To explicate the theory, I first classify chattels as either fungible or unique and then explore

¹¹⁷ Although trash receptacles literally "nest" trash, the trash bin serves a notice function (step three of the analysis), not a nesting function (step two of the analysis). Under the nesting theory, the nesting function is a one-way ratchet that strengthens signals.

¹¹⁸ It is, after all, necessary that an owner should be permitted to sever his relationship with his chattels in a low-cost way. Cf. PENNER, *supra* note 4, at 79 ("It would indeed be a funny turn of events if the norms serving our interest in property in essence gave the things a person owned a power over him."). *But see supra* note 103.

¹¹⁹ See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* *69-70 (Lawrence Pasternack ed., H.J. Paton trans., Routledge 2002) (1785) (introducing the categorical imperative and theorizing that a person must never be used as means to an end, but only as end in himself). I reserve a fuller discussion of Cell 2's Kantian underpinnings for another day.

the influence of the second spectrum—whether the chattel identifies its owner—within that framework.

1. Fungible Chattels

Fungible chattels, or interchangeable chattels, make up the vast majority of objects in modern American life. Though experience and customization may, with time, render these chattels less and less like the assembly line brethren with which they were born, it is nevertheless most useful to classify them first as fungibles, and then to consider the effect of distinguishing alterations. In this section, I explain the significance of fungibles in the nesting theory and which properties of fungibles make them more or less up for grabs.

a. *Cash, Part 1: Environmental Context (And Then I Found Five Dollars)*

For purely fungible, otherwise un-nested chattels, environmental context is everything. Whether an un-nested chattel is up for grabs is determined not by who owns the land upon which it is found, or whether the land is owned at all, but rather by whether the space is public or private.

Our go-to example of a fungible chattel is cash: a five-dollar bill (“FDB”). In a vacuum, the FDB is up for grabs; when I find a lone FDB, it communicates nothing to me that might help me to identify its previous owner. The “authorities” likewise lack an ability to identify the owner.¹²⁰ And, crucially, if the true owner himself were shown the FDB and given the opportunity to examine it, neither could he declare, “Ah, yes! *This* is the FDB I lost!” Even to him, the FDB is indistinguishable from all others. He might press his claim as follows: “I lost an FDB, and you found one! Clearly, then, the one you found is mine.” But we demand more evidence, as when we say, “A wallet has been found; if you can describe it over the phone, it’s yours.” The true owner of the FDB can neither describe his FDB nor distinguish it from even one other FDB with any more accuracy than a stranger could. This proves that the true owner became a stranger to the FDB when it was de-nested, or removed from any nest emanating from the true owner. A thing estranged from its owner in this way is up for grabs, and should I take it first, it becomes mine.

There is a complementary relationship between things that owners can identify and things that identify owners. In the case of the FDB, the bill

¹²⁰ Cf. WEST, *supra* note 67, at 38-41, 54-55 (explaining the procedure for turning in lost property to the authorities in Japan and hypothesizing that administrative costs and a populace uneducated in the custom might preclude adoption of the Japanese practice in the United States and other countries).

cannot identify its owner, and neither can the owner identify his bill. It is a double miss. That is why the FDB in a vacuum is unequivocally up for grabs. But FDBs do not live in vacuums. Here follow the adventures of an FDB.

The FDB is on Chestnut Street, a main thoroughfare in Philadelphia. Placed out of the vacuum and into the street, the FDB has not acquired any mark that might help the owner identify it or a finder to usefully narrow the impossibly large set of possible owners. The environmental context dictates the result: the street is a purely public place, and no individual's nest attaches to it. Therefore, the de-nested FDB does not acquire a new nest simply by being in the street. That is the nature of public places. Traffic, turnover, and anonymity preclude identifying the space with any particular individual. True, as a formal matter, the State owns the street, and the State's nest dominates there.¹²¹ But in reality, if I find an FDB in the street, it is up for grabs.

The FDB is now on the floor of a food court at the shopping mall.¹²² Under the nesting theory, it is still up for grabs. Like the street, the food court is a public space, and no person's nest attaches there. True, the food court is on privately owned land, but the space itself is public. When the owner of the shopping mall voluntarily opened his doors to the public, the space became vested with the public interest.¹²³ As a result, the FDB is as de-nested as it was in the street.¹²⁴

¹²¹ See Bell, *supra* note 16, at 207 (explaining that, in certain instances of *bona vacantia*, or ownerless property, the property automatically belongs to the Crown); Strahilevitz, *supra* note 32, at 395-96 ("The leading American example of an escheat regime is the Uniform Unclaimed Property Act of 1995, which has been enacted in all fifty states and provides a framework by which unclaimed property is transferred to state governments after a specified period of time.").

¹²² Or consider a parallel example: a gambling chip found on the casino floor.

¹²³ See *Uston v. Resorts Int'l Hotel, Inc.*, 445 A.2d 370, 374 (N.J. 1982) ("[W]hen property owners open their premises to the general public . . . they have no right to exclude people unreasonably."); *State v. Schmid*, 423 A.2d 615, 629 (N.J. 1980) ("[T]he more private property is devoted to public use, the more it must accommodate the rights which inhere in individual members of the general public who use that property.").

¹²⁴ There is another argument to be made: that the chattel found on someone else's land is up for grabs unless the owner of the land manifests intent to exercise control over all the things on the land. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 221-22 (1881) ("Common-law judges and civilians would agree that [a] finder . . . could keep [a pocketbook found on the floor of a shop] as against the shopkeeper. For the shopkeeper, not knowing of the thing, could not have the intent to appropriate it, and, having invited the public to his shop, he could not have the intent to exclude them from it."); see also *Hannah v. Peel*, [1945] K.B. 509 at 521 (Eng.) (holding that the finder of lost property has rights superior to those of the unaware owner of the land on which the thing is found). But see VAINES, *supra* note 1, at 379 ("Every householder or landowner means or intends to exclude thieves and wrongdoers from his premises, and this confers on him a special property in goods found on his land . . ."); see also, e.g., *Hudson*, *supra* note 13, at 604

What of the FDB in the reader's home? You, the reader, invite me, the author, to dinner at your home, and I accept. Between courses, I excuse myself to wash my hands. On my way to the sink, I discover an FDB, lying on the carpet in the hallway. Is it up for grabs? Let the shame one would feel at being caught in the act of pocketing that FDB guide our analysis. No, it is not up for grabs. The private home is the quintessential private space. Its nest attaches to all chattels within it. In contrast to the FDB in the street, there can be no doubt that *this* FDB belongs to the homeowner. His name is on the record title of the home and the real estate cannot be abandoned. Second only to actual occupancy, real estate is the strongest tool with which an object can nest. It matters not at all that the FDB is loose, in no one's hand and in no one's wallet. It is in the home and nested there.

An intermediate case: the FDB is on the floor of the Mom & Pop Store in Middletown, U.S.A. (not the same unseen corporate owner as in the food court). Under the nesting theory, I can still keep the FDB. Mom & Pop have allowed the public into their store no less than the food court owner has, and no individual's nest attaches to an environment where the public interest flows.

This makes sense: after all, it is extremely unlikely, finding the FDB in aisle three of a publicly accessible store, as I do, that the previous owner of the FDB was either Mom or Pop. Since the FDB did not fall out of Mom or Pop's nest, the only reason to give their nests priority over mine would be to reunite the FDB with its true owner. But we have already established that the de-nested FDB has no true owner. Fairness therefore dictates that I have as much of a chance to sweep the FDB into my nest as Mom and Pop do.

Another intermediate case: the FDB is in my law professor's office. Is the office a private space, or a public space? Although my professor does not own his office, the space is certainly private, and he is the principal gatekeeper of that space. (And I should think that, if my professor caught me retrieving five dollars from the floor of his office, it would not reflect well on me.) It is presumptively owned, and presumptively owned *by him*, not because he is the owner of the space, but because it is a private space and he is its governor.

A similar intermediate case: the FDB is back in the food court, but this time it is a very special food court. It is a food court in the Big Law Firm's

(explaining that collecting abandoned golf balls on the golf course may amount to larceny, and citing *Hibbert v. McKiernan*, [1948] 2 K.B. 142 at 149-50 (Eng.) as an example). In my view, reliance on the landowner's intent to exercise control brings us back to square one, absent the rare instance of explicit notice, such as a sign at the golf club stating, "We claim all abandoned golf balls." That a space vested with the public interest becomes, in its common spaces, a presumptively public space akin to the street is a more workable rule.

office building, and in this café, everyone has assigned seats. The partners sit at a long marble table, their names engraved on plaques mounted to the backs of their chairs. The associates sit at other long tables—no marble, though—and their names are written on masking tape, also affixed to the backs of their chairs.

An FDB found under Associate Edward's chair is not up for grabs. The assigned seating system indicates that this cafeteria is not a public space, but a private one. Like my professor in his office, Edward is, if not King, then at least Steward of his chair and the attendant square foot of real estate. The FDB is presumptively Edward's property, and is not up for grabs.

What if the whole café is a public café without assigned seats, except for the partners' area? Then the space is clearly divided, like the smoking/nonsmoking sections of a restaurant. If the FDB is found in the public section, it is up for grabs; but if it is found below Partner Fitts's chair, then due to the nesting capability of Fitts's designated area, the FDB is merely found.

Environmental context, then, defines whether a de-nested chattel is up for grabs according to whether the space is public or private, with nests attaching only in private spaces. But not everything found in public is up for grabs. Even though nests cannot attach to public spaces outright, nests *can* attach to the *things* in public spaces. The focus of this discussion therefore turns to the problem of discerning *ex ante* rights in relation to objects found in public spaces.

b. *Cash, Part 2: Value (The Million-Dollar Question)*

We have established that an FDB in a public space is up for grabs. What about a million-dollar bill ("MDB") in a public space? If, walking down Chicago's Magnificent Mile, I come across an MDB, may I take it? The MDB, like the FDB, communicates no information as to its owner. And in a world where numerous MDBs are in circulation, and there is more than one millionaire,¹²⁵ the millionaire himself could not positively identify that this was his MDB. All the reasons why the FDB are up for grabs apply with equal force to the MDB. It is likewise up for grabs.

Perhaps moral intuition causes the reader, thinking of the misfortune of the previous owner, to cringe at the mention of swiping an MDB from the ground.¹²⁶ Five dollars this way or that way, we think, is not likely to throw

¹²⁵ Below, I will address the situation in which there is only one millionaire in town. See *infra* subsection II.B.1.f.

¹²⁶ For a discussion of the relationship between moral intuition and the law, see Lee Anne Fennell, *Efficient Trespass: The Case for "Bad Faith" Adverse Possession*, 100 NW. U. L. REV. 1037, 1048 (2006) (cataloguing the tendency of property scholars to "sp[ea]k out against bad faith

the unfortunate prior owner into dire straits. But one million dollars! Surely it is not up for grabs!

There are three responses. The first I have given above: all the reasons why the FDB is up for grabs apply with equal force to the MDB. Second, perhaps one so careless with an MDB should not have been its guardian in the first place.¹²⁷ Finally, to “soothe a mind disconcerted by the notion,”¹²⁸ one may always fall back on the corrective role of social norms.¹²⁹ If it is the socially normative thing to seek out the owner of this nameless fortune, then the acquirer should feel free to try.

Value, therefore, has no place in the nesting theory. Expensive objects may be expensive precisely because of the signals they emit or because of their inherent nesting abilities.¹³⁰ But whether the bill is an FDB or an MDB does not affect the fungible and nonidentifying qualities of the de-nested bill, so both are up for grabs.

c. *Mass-Produced Chattels: Scarves and Bottles*

This section addresses how nesting applies to fungibles that, at creation, were as interchangeable as the FDB, but that subsequently acquired some distinguishing features.

This paper began with an introduction to Dorothy, a woman who—one way or another—de-nests her scarf by removing it from her person and depositing it in the street. The scarf, like cash, is a fungible good. The department store sells hundreds of them.¹³¹ Like the cash in the road, the scarf on the sidewalk is up for grabs.

But the scarf is not quite as far to the “fungible” extreme on the fungible–unique spectrum as cash. We tend to know our garments by the signs of experience they bear. In this way, some fungibles—like the scarf—start out

claimants” and side “with the angels”) and *id.* at 1058 (“A legal system that permits knowing trespassers to gain title through adverse possession gains no moral traction by viewing intentional resort to the law’s own process as ‘bad faith.’”).

¹²⁷ Cf. Michael Sandel, TED Talk, *The Lost Art of Democratic Debate*, TED, at 2:05–4:03 (June 2010), http://www.ted.com/talks/michael_sandel_the_lost_art_of_democratic_debate.html (explaining that Aristotle thought the best flute should go to the best flute player; Sandel also explains that Aristotle held this view not because he believed such a distribution would accrue to the benefit of all, but because “that’s what flutes are for—to be played well”).

¹²⁸ The Winkfield, [1902] P. 42 at 60 (Eng.).

¹²⁹ See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 141 (1991) (stating, in a celebrated study of behavior among neighbors, that norms frequently supplant laws).

¹³⁰ See *infra* subsections II.B.1.d (laptops) & II.B.2.b (uniques).

¹³¹ If Dorothy bedazzled or otherwise customized her scarf, it would not fall under fungibles, but rather under uniques. See *infra* subsection II.B.2.b.

similar to cash, but have more potential for customization. As these goods become more customized, they slide away from the purely fungible and inch toward the unique end of the spectrum. Yet the chattel does not move along the parallel spectrum from nonidentifying to identifying. It does not identify its owner, for it gives no indications as to who the owner might be, and there remains as little likelihood of locating the true owner of the scarf in the street as of locating the true owner of the FDB in the street. Accordingly, the scarf in the street is still up for grabs: although it has become more unique, it still fails to identify its owner.

Nevertheless, there is one difference between the scarf and the cash: the owner could recognize the scarf if presented with it. This ability permits us to require proof of ownership where we could not before. The “describe it and it’s yours” technique will work with the scarf, which can be described by color, design, texture, or other markings. For such chattels, a lost and found may prove a useful tool for reuniting the chattel and its most recent owner.¹³² However, the nesting theory does not require us to return these uncustomized yet identifiable (though not identifying) fungible chattels. Again, the scarf is de-nested and is up for grabs. Although the owner may recognize his chattel, the chattel still does not recognize its owner. In other words, the chattel communicates no objectively discernible information to a stranger that would make the stranger believe the once-true owner continues to lay claim to it.

For the reader who finds this outcome amoral, I note that there are safety valves. First, strong-signaling chattels and nested chattels will not be up for grabs and, therefore, would benefit from the lost and found. Moreover, it is very easy to move a fungible to the identifying side of the spectrum, thus strengthening its signal. For example, the owner might sew her name into the scarf.¹³³ Finally, as with the MDB, there remains the possibility of falling back on social norms. The nesting theory proposes only that one who takes a scarf has not committed the same *legal* wrong as one who takes a purse—even if the scarf is more valuable—because the scarf was presumptively up for grabs and the purse, as we shall see, was not.

Consider another mass-produced chattel: a bottle. I purchase a bottle of water from a vendor and leave it, completely unattended, in an open space, such as a library. There is no book near the bottle, no backpack, no laptop:

¹³² Of course, truly public spaces, like the street, do not have a lost and found. *But see* WEST, *supra* note 67, at 36-41 (describing the roles and frequency of Japanese *kōban*, or police posts, one of the primary functions of which is to administrate the disposition of lost property). Some intermediate public spaces, like the department store and the casino, do.

¹³³ *See infra* subsection II.B.1.f.

the water bottle is completely on its own. It is surely a very weak-signaling and de-nested chattel and, as a result, up for grabs. This is why it is permissible for a cleaning crew, even without an explicit policy in place, to dispose of such objects.¹³⁴

But chattels like water bottles are easily changed. Customization comes as easily as taking a drink from the bottle. By altering the chattel from the condition it was in when I bought it, I have inched it away from the fungible extreme, but just barely. A bottle of water a little consumed is only marginally less up for grabs (though significantly less desirable) than one unopened. The more I customize it, the farther it moves from the pole. Perhaps I tear the label, or color the top. Now we begin to encounter a fundamental problem.

Chattels can exist at all increments along the two spectrums I have described. The bottle is moving more and more into the middle territory, but a finder's options are necessarily binary: to take the chattel, or not to take it.¹³⁵ With a de-nested, weak-signaling chattel, the modifications give the chattel a stronger signal (though it remains de-nested until some other object or its environment nests it). As the signal gets stronger, it moves away from the cash end towards the driver's license end. At what point does the presumption flip from the fungible to the unique, that is, from the abandoned to the found? I propose it is the moment the customizations rise to the level of either: (1) art or craft,¹³⁶ or (2) explicit identification.¹³⁷ This is the case with all mass-produced, weak-signaling chattels, including scarves, bottles, chairs, books, and so on.

d. Collections: Handbags and Laptops

In my view, the beauty of the nesting theory is that it explains why it is permissible to take a one hundred-dollar bill from the street, but not a handbag full of items, even if the handbag and its contents are worth very little. Let us explore why that is so.

Unless the handbag is a craft, it is a mass-produced good. In its unaltered state, then, it is a weak-signaling fungible, much like the scarf. If lost in a public space, it is up for grabs. But the handbag is made to be a nest,

¹³⁴ As an exercise, consider that if the bottle were sitting next to my driver's license, the custodial staff ought not to throw it away, but ought to treat it as they would the license. The license nests the bottle, and the fates of the two become intertwined for as long as they are together.

¹³⁵ See *supra* note 106.

¹³⁶ See *infra* subsection II.B.2.b.

¹³⁷ See *infra* subsection II.B.1.f.

both physically and metaphorically within this framework. As personal items are added to the handbag, it becomes a unique collection, shooting across the spectrum from the fungible to the unique. The more items that are in the handbag, the more unique the collection will become. In most cases, there will also be some identifying information, or other strong-signaling chattel, that likewise shoots the handbag across the spectrum from nonidentifying to identifying. Therefore, it is easy to prevent a handbag from being up for grabs.

Laptops are nothing more than electronic handbags. Each time we use a laptop, it becomes increasingly unique, increasingly identifiable, and increasingly identifying. This is why a laptop left completely alone in the library—or for that matter, in the street—is not up for grabs. But note that under the nesting theory a brand new laptop, still in its box and fresh from the store, is up for grabs until it is made into a collection through use. Therefore, it is not theft to take a discernibly brand new laptop (still in its box) discovered in a public place and unattended by a person or other nest. As a function of its value, an untouched, unaltered, and unattended laptop will be a rare find in a public place. But whether or not it is up for grabs is a question completely independent of its value.

Two questions arise. First, though the handbag includes many items and is surely a unique collection of chattels, the handbag might contain nothing that sends an independently strong signal. For example, consider—instead of a handbag—a toolbox, with a hammer, screwdrivers, pliers, a level, and the like. It is a collection of exclusively *weak*-signaling items. Is the toolbox therefore weak-signaling as a whole, and up for grabs? Compare one stick alone and many sticks together. One stick alone is easily broken, but many together are strong. So it is with collections. It matters not at all that there is no particularly strong-signaling chattel in the collection. The weak force of each item's signal is made collectively strong by the coincidence of their collection. In other words, little signals amplify each other. Even if there is no strong-signaling chattel among them, a collection is therefore not up for grabs. The shrewd reader will note that the uniqueness of the nest strengthens the signals of the chattels it contains without rendering them any more identifying. In this way, collections demonstrate that the uniqueness spectrum does independent work in rendering a chattel presumptively owned.¹³⁸

The second question is this: Must the contents be physically contained within each other, as in a handbag? No. For items loosely grouped together,

¹³⁸ I will return to the complementary question of whether the spectrum from nonidentifying to identifying also does independent work. See *infra* subsection II.B.1.f.

or as I call it, the deconstructed handbag, the question is not one of physical encapsulation, but one of order. By this I do not mean a mathematical or geometric order, but a discernable effort to impose order, or to group things with things. A bottle on top of a book indicates that the two have been subject to someone's ordering. Ditto the bottle next to a backpack. The bottle six feet from the backpack is surely less clear, and as confusion goes up, and as the connection weakens between the nest and the thing straying from it, so too does the true owner's claim on the object weaken. When the bottle is near enough to the nest (i.e., to the other thing), the two (or more) things become a collection. Order is fundamental to the inter-nesting that causes collections of weak-signaling things to radiate a strong collective signal. Jewish law, which prescribes that loose and scattered coins may be taken while a stack of coins may not, exemplifies this idea.¹³⁹

Returning to the question of one million dollars in the street: What if instead of an MDB there is a collection of one million one-dollar bills? If the bills are in a flurry, falling from the sky like confetti, then take all you can, for they are clearly up for grabs. But if the bills are in a stack, or near enough to each other, then they suggest order, and may not be taken.¹⁴⁰ Some may object that this is a loophole,¹⁴¹ one by which one million dollars in the street may, effectively, be protected from potential abandonees when it is broken into small bills and stacked, but not when it is only one bill. Perhaps it is a loophole, but disaggregation is nevertheless an effective means of communicating that a chattel is not up for grabs.

e. *Sentimental Fungibles: A Favorite Sweater*

Although some chattels carry special meaning for the owner, this subjective special meaning regrettably has no impact on the signals these chattels objectively convey. Recall that Dorothy's scarf was a gift from her mother. Notwithstanding their argument, Dorothy cherishes her mother, and likewise cherishes the scarf above all other possessions. When Dorothy loses her scarf (or her sweater, or her pen, or her beloved copy of *Moby Dick*—weak-signaling fungibles, all), she is distraught. But the scarf, removed from the nest of Dorothy's person to the nestless public street, communicates

¹³⁹ See QUINT, *supra* note 17, at 17 nn.44 & 46 (observing that, under Jewish law, three coins deliberately stacked must be restored to the owner, while scattered coins may be kept by the finder [abandonee]).

¹⁴⁰ They are a treasure trove. See BLACKSTONE, *supra* note 68, at *295-96 (distinguishing treasure troves from abandoned property).

¹⁴¹ See generally LEO KATZ, WHY THE LAW IS SO PERVERSE 71-86 (2011) (providing examples of loopholes in the law and at least one explanation as to why they exist).

none of Dorothy's personal attachment.¹⁴² Though the owner might recognize her chattel (if given the chance), the de-nested chattel no longer recognizes its prior owner. Unless it is independently strong-signaling, or made strong-signaling through a nest, the chattel is up for grabs. As relief from this perhaps distressing outcome, which the nesting theory demands, I can only propose that, if the scarf truly were so dear to Dorothy, she might have put a label on it.

f. Fungibles that Identify Owners: Labels; Vehicles and Other Registered Chattels; One Million Dollars in the Shtetl

Early in life, we all learned a simple method for signaling that an object is not up for grabs: labeling.¹⁴³ Labeling an object with one's name or with other identifying information propels the nonidentifying fungible to the high ends of both spectrums, to unique and identifying status. Maxing out these spectrums gives the clearest and most explicit notice to the world that a chattel is owned. Of course, we do not write our names on everything we own. But most of these unlabeled things never leave the secure nest of our homes or other real estate where the environment does significant nesting work. Or, if they are brought out of the real estate nest, they do not leave our person—the strongest nesting tool an individual has. Objects that matter to us, that leave our homes, and that might be separated from either our bodies or the safety of our collections (handbags, etc.), actually do tend to have our names written on them, or at least, the notion of labeling them is not unrealistic. A book, for example, might have a person's name inside the cover.

It is now clear why umbrellas are lost so frequently. First, they are fungibles, and therefore weak-signaling. Second, they are frequently removed from our strong-signaling real estate nests, but on arrival at our destinations, they are not kept on our persons, nor do they fit in our handbags. When we then leave an umbrella behind, for example, at a restaurant, the umbrella is completely de-nested and up for grabs. A social practice of affixing a label to the umbrella's handle would solve the problem, but for better or worse (and frequently worse), it is not our common practice to do that.

¹⁴² This is where the subjective relationship of Radin's personhood theory of property fails the would-be acquirer ex ante. See *supra* text accompanying and following note 98.

¹⁴³ See Lynda Altman, *Kids Going to Summer Camp: Planning Tips for Parents*, YAHOO! VOICES (Jan. 16, 2009), <http://voices.yahoo.com/kids-going-summer-camp-planning-tips-parents-2495431.html> (advising parents to "[m]ark all items that your kids will wear with their full names").

What of automobiles and other vehicles? These are certainly fungibles and—when tidiest—are not collections. Neither do we spray paint our names across them. Yet my automobile is not up for grabs. Even if I leave it unlocked with the keys in the ignition, inviting the dishonest to steal it, the thief *does* do wrong when he takes the car. This is because the automobile gives explicit notice as to the identity of its owner through mandatory registration,¹⁴⁴ and fungibles that identify their owners are not up for grabs.

In normal practice, this is a boon to car owners. But what if a person wants to abandon his car, or other registered vehicle?¹⁴⁵ To de-nest the fungible good, all one has to do is remove the identifying information and return it to pure fungible status. To begin with, one can remove a car's license plates or, in another example, paint over a boat's name. The use of VIN numbers may require an owner to remove himself from a registry to completely effect abandonment. And of course, there remains the possibility of abandonment through explicit notice ("Take this car!").

Returning to the complementary question posed in the collections context, does the nonidentifying–identifying spectrum do independent work? In collections, we saw that the fungible–unique spectrum does its own work, for collections are not up for grabs, even when they do not identify the owner. Conversely, can identifying an owner make up for a chattel's fungibility? In other words, when I affix a label with my name on it to a water bottle, does that remove the water bottle from the "up for grabs" realm simply because the water bottle now identifies me, or is it also important that, by identifying me, the chattel is rendered unique?

The answer must be that the identifying feature does independent work *because it is identifying*. Imagine that I have one thousand identical labels made, the kind of labels often stitched to garments. On each label is my name and address, and I sew these labels onto one thousand identical (fungible) scarves and then leave one scarf in the street. The explicit notice of the scarf's owner renders the item identifying, but it is certainly not unique. Nevertheless, it is not up for grabs once labeled.¹⁴⁶

¹⁴⁴ See, e.g., N.Y. VEH. & TRAF. LAW § 401(1)(a) (McKinney 2011) ("No motor vehicle shall be operated or driven upon the public highways of this state without first being registered . . .").

¹⁴⁵ See, e.g., David Streitfeld, *Too Costly to Keep, Boats Become Castaways*, N.Y. TIMES, Apr. 1, 2009, at A1 ("Boat owners are abandoning ship. They often sandpaper over the names and file off the registry numbers, doing their best to render the boats, and themselves, untraceable."); see also Strahilevitz, *supra* note 32, at 357 (citing the Streitfeld article to demonstrate the prevalence—and social cost—of abandonment).

¹⁴⁶ Custodial staff at the library may still choose to discard the scarf at the end of the day, but that is not because the object is, of right, abandoned. Rather, it is pursuant to a library policy that all objects found at the end of the day are presumed abandoned. The custodian ignores the chattel's signals pursuant to this overriding policy.

The nonidentifying–identifying spectrum must do independent work in a world where individuals cannot be expected to know what is one-of-a-kind and what is one-of-many. Consider the \$10,000, one-of-a-kind designer scarf, and the \$10 mass-produced knockoff. The finder does not know which he has found, or even if both kinds (an original and a knockoff) exist in the world. If he can take one, he must be permitted to take the other. It would be unfair to allow the finder to take only the knockoff, but not the original, when he has no way of ascertaining *ex ante* which scarf he has found. Many chattels, such as clothing, neither communicate their value nor indicate how many identical brethren they have. In these cases, where a label or other identifying feature attaches, the strength of the signal cannot depend on the fungibility of the chattel alone. The fact that the chattel identifies its owner must be permitted to do much of the heavy lifting.

Finally, there are circumstances in which a fungible chattel identifies its owner by context. Consider a *shtetl*, one of many small Jewish Eastern European towns where everyone knows everyone and everyone else’s circumstances. In our *shtetl*, called Belz, there is only one very wealthy man in town: Abe. So, when villager Shlomo finds the MDB in the road, there is no doubt as to whom it belongs. The MDB is still a fungible good—after all, there are (let us imagine) other MDBs in circulation throughout the Polish-Ukrainian region—but as everyone in Belz knows, no strangers have passed through, and so this MDB could *only* belong to Abe.

May Shlomo take and keep the MDB? No, for the MDB is merely lost, not abandoned. The circumstances are such that the MDB itself provides explicit notice as to the identity of its owner, and Shlomo can no more pocket the MDB now than if it said “Property of Abe” across the billface. In this scenario, the MDB is a strong-signaling, de-nested chattel. As I will discuss later,¹⁴⁷ taking such a chattel as one’s own is a wrongful repossession.

But what if Abe actually wanted to abandon the MDB? Can he? People abandon positive-value chattels all the time for many reasons, charitable and otherwise.¹⁴⁸ Again, notice conquers all. The simplest way to abandon the chattel would be to give explicit notice of its abandonment, as by affixing a note to the bill (“For whoever finds this first”) or crying out in the town square, “I have abandoned an MDB somewhere in town, and the finder may keep it!” There is also another way Abe might abandon the MDB: we have already seen the loophole providing that Abe could disaggregate the MDB and scatter it in units so small as to be nonidentifying, and in a nonordered

¹⁴⁷ See *infra* subsection II.B.2.a.

¹⁴⁸ See Strahilevitz, *supra* note 32, at 370 (identifying altruism as one explanation for the abandonment of positive–market value property).

way. But what if Abe does not wish to break it down, so as to ensure the finder receives the whole million? Perhaps Abe can lure fellow millionaires to town, so that the MDB begins to lose its identifying quality. But as long as the MDB identifies Abe, his options for severing ties with it stay limited to abandonment by one of the means described above, destruction, or bilateral transfer.

Fungible goods, then, fit well within the nesting theory. The nesting theory uses the signals fungible chattels convey, the effect of nesting such chattels together, and the possibility of overriding notice to explain when and why these goods are up for grabs or merely found.

2. Unique Chattels

In the discussion above, I mentioned briefly that people cannot generally be expected to know whether or not a chattel such as a scarf is unique.¹⁴⁹ Nonetheless, some chattels are known to be one-of-a-kind, or are presumed to be so, and these I discuss below.

a. *Uniques that Identify Owners: Sensitive Documents (Credit Cards, IDs, and Letters); Applications*

If I find a credit card in the street, does it communicate to me that it is abandoned? No. By now, we are familiar enough with the nesting theory to explain why. It does not matter that the thing is of great value (the owner's credit limit), just as it does not matter that it might be worthless (realizing his loss, the owner may have already canceled his account). It matters that the chattel is *unique* and *identifying* (although either alone would be sufficient), and the potential acquirer is therefore squarely in Cell 3, the finder's box.

What if the credit card is found in a trash can at a public intersection?¹⁵⁰ First we must recall the function of trash receptacles in the nesting theory.

¹⁴⁹ See *supra* paragraph following note 146.

¹⁵⁰ Jurisdictions are divided on whether it is permissible to remove objects from the trash. See, e.g., cases cited *supra* note 12. For simplicity, I use a public trash can in my example. But the nesting logic regarding which items can be taken from the trash and which should be left alone should extend to trash cans placed at the perimeters of property. See Strahilevitz, *supra* note 32, at 414-15 (discussing, in response to Peñalver's objection, the abandonment of chattels on real property, but giving examples that require pushing the abandoned chattel to the edge of the property or depositing it in a public space). Courts have felt a need to extend either blanket permission or blanket prohibition to rummaging through trash, but this, as discussed *supra* note 61, conflates the two kinds of chattels intermingled in a trash can: those that may be recovered (because abandoned) and those that may not (because destroyed or irreversibly identifying). The nesting theory keeps these types of chattels distinct, so rummaging through a trash can is not per se wrongful.

Under the nesting theory, placing a chattel in the trash gives explicit notice to the world that the chattel has been abandoned.¹⁵¹ But we have also seen that an abandoned chattel is not necessarily up for grabs. Strong-signaling objects that irreversibly identify prior owners ought not to be repossessed, even when they are abandoned (as in the trash), because repossession interferes with the prior owner's autonomy.¹⁵² In such cases, the notice override function of the trash fails.

Here I add a clarification. Although the notice override fails when *identifying* features render a chattel irreversibly strong-signaling, the notice override succeeds when a chattel is irreversibly strong-signaling merely because it is *unique*. This is because uniqueness poses none of the same infringement of autonomy concerns that identification does. Consequently, if a collection is found in the trash, its *uniqueness* is not a barrier to its acquisition.

Therefore, an abandonee may remove a single irreversibly strong-signaling chattel from the trash *if the strong signal is a function of the chattel's uniqueness*. A homemade, bedazzled sweater (without a label) is an example of such a unique but nonidentifying object. (Good news for us all: the bedazzled sweater in the trash is up for grabs.) Similarly, a nonidentifying, irreversibly unique collection in the trash—a mix tape, for example—is up for grabs.

Returning to the credit card in a public trash can, the credit card is not only unique, it is also identifying. Here, even though the owner abandoned the card by disposing of it in the trash, the card ought not to be repossessed. Of course, the prohibition against recovering irreversibly identifying chattels from the trash is not limited to credit cards. Whenever an individual acquires a sensitive document that has someone else's personal, identifying information on it—even, for example, a piece of mail—the taker is merely a finder or, if the chattel has been abandoned, a wrongful repossessor.

Applications, of the kind one sends to schools or potential employers, pose a particularly interesting case. These documents bear all the marks of a thing that ought not to be possessed by anyone except the person whose information is encoded on the chattel, but they are prepared explicitly to be in someone else's possession. Tax returns, registrations, and the like are similar.

The answer, of course, is that an application does not land in the possessor's hands by way of a unilateral acquisition. It is sent to the recipient, and although there is no case law on point, presumably the laws of license and

¹⁵¹ See *supra* note 117 and accompanying text.

¹⁵² See *supra* text accompanying note 119.

grant apply: the sender grants the recipient certain rights with respect to using the information provided on the form, and waives other rights, such as the right to read a letter of recommendation.¹⁵³ But should one, for some reason, come across an application lying in the street, there is no doubt that the identifying information thereon renders the thing not up for grabs.

A résumé found on the floor after a major recruiting event is a similar case. It is certainly not unique. The individual represented on the résumé has probably made many copies, and would probably be glad to give a copy to anyone who would take it. But due to the identifying information on it, the résumé is not up for grabs. It must be given bilaterally. And like the credit card, it ought not to be removed from the trash. The trash cannot strip the résumé of its identifying information, and if the owner has chosen not to destroy it, it nevertheless cannot be recovered without a wrongful repossession. For the same reason, I cannot pull a manuscript—such as a draft of this paper—from the trash, even if the owner has declined to shred it.

b. *Uniques that Do Not Identify Owners:
Art, Crafts, and Jewels; Photographs*

Finally, we come to uniques that do not identify their owners. These are things like works of art,¹⁵⁴ handmade crafts, and photographs. There is only one of whatever it is, or at most very few, and it communicates no information about the identity of its prior owner. I also include jewels in this category, by which I do not mean fungible costume jewelry, but genuine jewels: stones that are each unique, as no diamond is like any other. (Silver and gold are also in this category, but under the arts and crafts rubric.) These objects are highly and recognizably unique, but communicate no information about prior owners.

First, the easy cases: a person discovers a handicraft, a work of art, or a diamond in the street. Each is a unique but nonidentifying item. In the street, the strength of the signal, fueled by the object's uniqueness, is strong. As a result, barring any overriding notice, the object is not up for grabs.

Now a person finds the same object while rummaging through the trash. The trash provides explicit notice of abandonment, and as long as the object

¹⁵³ See, e.g., *LSAC Applicant References: Letters of Recommendation and Evaluation Services*, LSAC, <http://www.lsac.org/jd/apply/cas-lor-evaluations.asp> (last visited Jan. 11, 2013) (“Letters and evaluations sent to LSAC remain the property of LSAC and will remain active for the life of your file. Letters and evaluations will be neither returned to nor copied for the candidate.”).

¹⁵⁴ This assumes the art is not registered. Were it registered, it would be akin to an automobile. Whereas the automobile is a fungible chattel that identifies via registration, the artwork would be a unique chattel that identifies via registration.

is not irreversibly identifying, taking it poses no affront to another's autonomy. Under the nesting theory, the object may now be taken.

Unique photographs, particularly photographs depicting persons, pose a difficult question: Are photographs identifying or not? The answer must be that they are not. Consider first a photograph of a celebrity—say, Barack Obama—found de-nested in a public place. The photograph depicts President Obama at an event of some kind, and appears to have been taken by a member of the attending throng. (Notwithstanding the celebrity of its subject, assume that it is not a mass-produced image, but rather an amateur's personal snapshot. Please indulge the conceit that someone would still actually *print* a photograph.) Although the image on the photograph depicts a recognizable person, that does not help a would-be acquirer identify the owner of the photograph. In fact, the only person the would-be acquirer can be fairly certain is *not* the photograph's owner is its subject, Barack Obama!

What about candid snapshots of non-celebrities? It is tempting to assume that noncelebrities typically own the photographs that depict them. But a moment's reflection reveals that, in today's world, such an assumption simply is not accurate. Notwithstanding a healthy fondness for my own image, many—indeed, most—of the photographs in my iPhoto library are of people other than me. Similarly, it is a safe bet that many people own photos of me and, were I presented with any one of these photos, it would be difficult or impossible to guess its source. Candid snapshots, it must be admitted, are unique but do not, as a rule, identify their owners.

Lastly, what of photos that are almost always owned by their subjects? For example, cannot a finder assume that a wedding photo of Ben and Janine belongs to none other than Ben and Janine? The assumption in this context is reasonable. But even if the finder correctly assumes that the couple in the wedding photograph owns the photograph, it is extremely unlikely that the finder will be able to *identify* the happy couple. Now, if the finder happens to know either Ben or Janine, then the photo is certainly identifying. But in most cases, an individual lacks the resources to identify a person based on nothing more than his or her image. The police undertake that task every day, but to do so the police employ resources unavailable to the average finder.¹⁵⁵

Therefore, unique photographs are, as a rule, nonidentifying. Nevertheless, uniqueness does independent work, and so when a photo is found in a

¹⁵⁵ See, e.g., *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (providing an example of law enforcement's use of technology "not in general public use").

public place, it is not up for grabs.¹⁵⁶ However, the fact that the photograph communicates no information as to the identity of its owner also means that the same photograph, if found in the trash, is up for grabs.

One exception comes to mind: the actor's headshot photo. The headshot (which always includes the subject's name) is, in effect, an application or a résumé. It represents the owner and no one else. If there is no message written on the headshot, we can be reasonably certain that it is either part of an application (for an audition) or that its previous owner was the person depicted in the photo. Because it is identifying, the headshot may not be removed from the trash. However, if there is a message written on it, such as, "To Judy, All the Best, Signed, Famous Actor," then it is again simply a unique that does not identify its owner. "Judy" is not specific enough to identify a particular individual. But if the message reads, "To Judy Palfrey, All the Best, Signed, Famous Actor," then, like a piece of mail, the photograph identifies its owner. Despite Judy Palfrey's failure to destroy the thing when she abandoned it in the trash (perhaps the Famous Actor snubbed her after a play and she is no longer a fan), it is nevertheless wrongful to repossess it.

C. Case Law Revisited

In this final Section, I address two real cases and explain how the nesting theory would have changed or affirmed the courts' rulings.¹⁵⁷

*In re Funds in Possession of Conemaugh Township Supervisors*¹⁵⁸ presents an excellent test case. There, a police officer stopped to investigate a truck parked along the side of the road and found two things of note: a man relieving himself next to the truck and a trash bag containing \$20,000 cash sitting six feet back from the truck and four feet off the road.¹⁵⁹ The officer asked the man if he had jettisoned anything from his truck, and the man said no.¹⁶⁰ The man was permitted to leave, and the officer returned to the

¹⁵⁶ A quite harrowing example of lost (not abandoned) photographs followed Hurricane Sandy, when family pictures were found along a Staten Island beach. See Slideshow, *Storm-Tossed Memories*, N.Y. TIMES, <http://www.nytimes.com/interactive/2012/11/18/nyregion/storm-tossed-memories.html> (last visited Jan. 11, 2013) (displaying these discovered photographs and providing an email address for viewers who might recognize themselves or a loved one in one of the pictures).

¹⁵⁷ A recent case pending in Arkansas, involving a winning lottery ticket that was thrown away, is also worth noting. See Scott Stump, *Woman Awarded \$1 Million in Lottery Dispute: 'It's My Money'*, NBC NEWS (May 11, 2012, 9:11 AM), http://today.msnbc.msn.com/id/47385518/ns/today-today_news/#.UE6Wa46ySnS.

¹⁵⁸ 724 A.2d 990 (Pa. Commw. Ct. 1999).

¹⁵⁹ *Id.* at 991.

¹⁶⁰ *Id.*

station with the cash.¹⁶¹ The police made conscientious efforts to determine whether the cash was lost, missing, or stolen, and the police publicized their find in the local papers.¹⁶²

Ultimately, the only person to come forward was the driver of the truck.¹⁶³ He claimed to have been drinking, and that when the officer stopped near his truck, he thought it would be wise to dispose of the empty beer cans by throwing them out his window.¹⁶⁴ He further claimed that he must have mistakenly thrown the bag of cash—which his brother-in-law had given to him for the purpose of speculating on Florida properties—out the window as well.¹⁶⁵ He allegedly returned to the scene the morning after the incident, but made no further efforts to recover the bag of cash until he learned seven months later that the police possessed it.¹⁶⁶

The trial court disbelieved the man's story and awarded the cash to the officer.¹⁶⁷ The appeals court agreed that the man from the truck did not have a valid claim but, on public policy grounds, overruled precedent that permitted an officer to keep things he found in the course of his duties.¹⁶⁸ Instead, the court awarded the \$20,000 to the State Treasurer.¹⁶⁹ As to whether the cash was lost or abandoned, the appellate court relied on the trial court's findings. "The trial court concluded that the cash in this case was lost rather than mislaid The court found it unnecessary to determine if the funds were abandoned but stated that if they were the result would be the same."¹⁷⁰

How would the nesting theory have addressed these issues? First, recall that the nesting theory does not address the remedial side of the litigation. In other words, it does not tell us who keeps the money. Nor does the nesting theory dictate the substantive rights and duties of the finder, the abandonee, the wrongful repossessor, or the converter. It tells us only which of the four realms of law just listed applies to the officer who unilaterally

¹⁶¹ *Id.* at 992.

¹⁶² *Id.*

¹⁶³ *See id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *See id.*

¹⁶⁷ *Id.* at 993.

¹⁶⁸ *See id.* at 993-95.

¹⁶⁹ *Id.* at 995.

¹⁷⁰ *Id.* at 993. Under Pennsylvania law, lost property is defined as property separated from its owner "through carelessness, negligence or inadvertence;" mislaid property is defined as property "deliberately placed somewhere and then forgotten;" and abandoned property is defined as property to which "the owner voluntarily and intentionally relinquishes all rights." *Id.* (citation omitted).

acquired the bag of cash. We embark on the three-part inquiry: the spectrums, the nest, and the notice.

How strong a signal did the bag of cash communicate to the officer? The bag of cash comprised many small bills, each fungible and nonidentifying. But nested together, the bills constituted a powerful collection. As a result, the bag of cash was not up for grabs.¹⁷¹ Had the cash not been in a bag, but merely tied together with rubber bands, it still would have been a collection (analogous to the MDB disaggregated into smaller bills, yet stacked). But if the \$20,000 were simply scattered, blowing in the breeze (or in the less probable form of a single \$20,000 bill), then the money would have been up for grabs. Here, however, the officer was a finder, not an abandonee. When and whether a found object, sufficiently publicized and subsequently unclaimed, may become the property of the finder is a matter of the local jurisdiction's finders' law, not of nesting. The nesting theory only informs the officer in this case that he must follow finders' procedures, and not abandonees' procedures. In this regard, the nesting theory affirms the court's finding that the officer was a finder.

There was a potential nest on the premises that we have not yet considered: the driver's truck. What consequence would flow if the bag had been within the nest of the driver's truck? Ultimately, given the nature of the bag of cash, the conclusion would not be altered. The added nest only affirms that the bag of cash is not up for grabs. Of course, that the bag may be nested within the truck's signal—a function of mere proximity—does not necessarily mean the truck's owner is the bag's owner. The nesting theory is not about accurately determining who is the owner of any given chattel, but rather about determining whether the chattel is up for grabs.

If the bag of cash had been a single five-dollar bill, then whether it was in the truck's nest would take on greater significance. The five-dollar bill alone would be weak-signaling. One would have to ask whether the location of the lone bill—six feet back from the truck and four feet off the road—was sufficiently close to encompass the bill in the truck's stronger-signaling nest. The officer might reasonably have concluded the distance was too great or reached the opposite conclusion. The standard for how close is close enough—whether, for example, the bill needed to be “reasonably” close to the truck or within the truck's “certain control”—is a jurisdictional question.¹⁷² If the hypothetical bill had been outside the truck's nest, then the

¹⁷¹ See *supra* text accompanying note 140.

¹⁷² It is similar to the question with which the court struggled in *Pierson v. Post*, 3 Cai. 175, 177-79 (N.Y. Sup. Ct. 1805). Perhaps Justice Tompkins, who did not recognize possession of a hunted fox without “certain control,” *id.* at 178, would rule that the bag was not within the ambit

bill would have been up for grabs; if it had been within the nest, it would not have been up for grabs (though it may or may not have belonged to the driver).

The final point to consider is notice. When the police officer asked the driver whether he had thrown anything from his truck, the driver replied that he had not. What effect does this have on whether the bag of cash was up for grabs? In fact, none. By suggesting that the bag was not his, the truck driver gave notice that his truck did not nest the bag. But this is not the same thing as saying the bag is up for grabs. When the truck's nest is removed from the picture, the bag is still not up for grabs because it is a powerful collection. If Bea finds a wallet at Estelle's feet, and Estelle says it is not hers, Bea cannot suddenly empty the wallet of its cash, believing it abandoned. The wallet is not up for grabs as a result of its own signal, quite apart from whether it also falls within Estelle's nest.

Now imagine that the bag of cash in *Conemaugh* had been a lone FDB and the truck driver again disclaimed ownership. Now the lone bill would be up for grabs because the only possible nest would have relinquished its apparent hold over the bill. Similarly, if Bea found an FDB at Estelle's feet in the street, and Estelle said to Bea, "It's not mine!" then Bea could take it, fair and square, because it was completely de-nested and weak-signaling. Notice, then, does not necessarily determine the identity of the prior owner of a chattel. Notice only clarifies which nests to consider in determining whether or not a chattel is up for grabs.

*Long v. Dilling Mechanical Contractors*¹⁷³ serves as another useful test case. Long, a union employee, was attempting to organize Dilling's employees for union membership.¹⁷⁴ He would routinely remove trash bags from a dumpster behind Dilling's building, rummaging through the trash to find records with the names and numbers of employees Long might rally.¹⁷⁵ Dilling sued,¹⁷⁶ but the court held for Long:

[I]f a generator of trash wishes to retain ownership or control of that trash, then it must take affirmative steps to do so. Although Dilling claimed that the trash bags taken by Long contained Dilling's sensitive and confidential company documents, it took no steps to protect those documents from abandonment. Those documents were neither shredded, nor placed in

of the truck's nest; perhaps Justice Livingston, who argued for a less strict "reasonable prospect" standard, *id.* at 182, would have viewed the bag as within the truck's nest.

¹⁷³ 705 N.E.2d 1022 (Ind. Ct. App. 1999).

¹⁷⁴ *Id.* at 1023.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

locked containers nor in an area which was not readily accessible to others. When trash, whether it be documents or other discarded material, is placed in trash bags, and those trash bags are placed in an unlocked dumpster on the curtilage and readily accessible to others, that trash has been abandoned. In that context trash is trash. . . . As a result of Dilling's abandonment of its trash, its property rights were not abrogated by Long's taking of the bags.¹⁷⁷

The court conferred blanket permission to take from the trash that which was not destroyed, and insofar as the court recognized that destroyed chattels ought not to be recovered, the court's holding was consistent with the nesting theory.

However, the court's broad permission to essentially take from the trash whatever was not nailed down conflicted with the nesting theory. Trash bags in a dumpster are collections, and collections in the trash are up for grabs.¹⁷⁸ Therefore, Long committed no wrong in removing trash bags from the dumpster (there, too, the court and the nesting theory agreed). But it was at the moment that Long found precisely what he was looking for—sensitive documents—that he was not permitted to acquire them. Documents like those that Long found are identifying and thus belong unequivocally to the organization that generated them; just as a credit card cannot be recovered from the trash, neither were Dilling's records up for grabs. Long was free to take many things from the trash as his trophies: apple cores, pens, dirty tissues, and even, should he have found them, diamonds or a priceless work of art. But the identifying documents' signal was too strongly identifying. Had the court utilized the nesting theory, it could have preserved free access to trash, while still protecting the sensitive materials therein.

CONCLUSION

Courts grapple with which objects may be taken in what circumstances and according to what law of acquisition. Working with several bodies of law that provide insufficient guidance about when each applies, judges make sweeping assertions, suggesting that the outcome of an abandonment

¹⁷⁷ *Id.* at 1026.

¹⁷⁸ See *supra* text following note 150.

dispute is identical to that of a finders' dispute,¹⁷⁹ or that taking sensitive documents is, in some contexts, permissible.¹⁸⁰

The nesting theory provides an attractive and refined alternative to the current approach. Relying on the signals that property communicates to would-be acquirers, the nesting theory explains why five dollars in the street is up for grabs, but five dollars in my apartment, or my wallet, is not, just as a handbag or a credit card in the street is not. The nesting theory also operates without requiring the individuals who acquire chattels to bear extraordinary talents: people need not be good at determining the value of something, or—unless the information is forthcoming and obvious—whether the thing is one-of-a-kind.

The nesting theory measures signals along two spectrums, the fungible–unique spectrum and the nonidentifying–identifying spectrum, and recognizes signal strength in chattels accordingly. Signal strength determines whether one who takes a chattel operates in Cell 1 of the unilateral sequential acquisition matrix (as an abandonee) or Cell 3 (as a finder).

Weak-signaling chattels may adopt, or nest with, the stronger signal of a nearby person, real estate, or chattel. Alternatively, chattels may band together and strengthen their signals as a collection.

Finally, in the nesting theory, notice generally conquers all. For example, a chattel's presence in a trash receptacle gives notice to the world that the prior owner intended to abandon his chattel. Still, irreversibly identifying chattels may not be repossessed even if they have been abandoned. Such chattels ought to be destroyed, but are protected from wrongful repossession even if the owner does not destroy them.

When applied *ex post*, the nesting theory ought to align with our *ex ante* intuitions. In tricky cases, it should even provide *ex ante* guidance to the unilateral acquirer. Application of the nesting theory may rescue a finder from becoming an accidental converter, thereby correcting an unfair glitch in the law. Finally, the rules of the nesting theory justify taking those things that are up for grabs and leaving be those that are not. It is a system for mediating and imposing order upon the relationship that exists between human beings and the myriad independent objects that populate our world.

¹⁷⁹ See, e.g., *In re Funds in Possession of Conemaugh Twp. Supervisors*, 724 A.2d 990, 993–94 (Pa. Commw. Ct. 1999) (conferring ownership of found property to the finder despite acknowledging that the property was not abandoned).

¹⁸⁰ See, e.g., *Long*, 705 N.E.2d at 1026 (holding broadly that acquisition of trash, whatever its contents, is permissible).