THE DUTY TO MAINTAIN

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ABSTRACT

Property is closely associated with freedom. Following the demise of the feudal property system, property ownership in Anglo-American law came to imply an individual's freedom to act as she pleases on her land. For their part, modern property theories—whether right-based, utilitarian, or relational—employ the normative value of freedom to justify ownership. Courts and scholars have always acknowledged the fact that this freedom of the owner cannot be absolute: an owner's freedom to do as she pleases on her land is often limited to protect other owners. However, the consensual assumption remains that an owner is not subject to affirmative duties. She is free, according to conventional wisdom, to choose to do nothing with her property. This Article argues that this assumption is simply wrong. Owners are not free to ignore their land. Property law has always subjected them to an obligation to maintain their land up to a specific standard. This obligation, dubbed here "the duty to maintain," is enforced through an array of legal rules and practices. This Article chronicles these rules and practices for the first time, classifying them in accordance with the enforcement mechanism they employ. It then justifies these diverse rules and practices—and the general duty to maintain—in light of the different theories of property. In this fashion, this Article illustrates that ownership, both as a legal institution and as a normative concept, inherently and inevitably incorporates a duty to maintain.

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INTRODUCTION

Property is freedom. Property ownership conveys on the owner independence, autonomy, and privacy; it cordons off a slice of the world and designates the owner as its master. Philosophers and economists, judges and laypeople, legal scholars and political scientists, varied as their ideological and methodological predilections may be, all ground property—even if to shifting degrees and for different reasons—in freedom.[1] The rules of Anglo-American property law seemingly vindicate their position: once Jane becomes Blackacre's owner, Jane is free to set the blueprint for Blackacre's use and development.[2] True, Jane's freedom as an owner can never be absolute.[3] There are activities that the law prohibits her from freely undertaking on Blackacre. She may be found liable if, for example, she constructs an artificial reservoir.[4] She may be barred from

1. *See infra* Part I.A–C.

2. *See infra* Part I.A; *see also* SIMON GARDNER & EMILY MACKENZIE, AN INTRODUCTION TO LAND LAW 181 (3d ed. 2012) ("[The] paradigm idea of ownership" is "*dominium*," which "supposes that an owner has rights to do anything he likes with the 'owned' asset.").

3. GARDNER & MACKENZIE, *supra* note 2, at 190–92.

4. Rylands v. Fletcher, [1868] L.R. 3 (H.L.) 339 (appeal taken from Eng.).

establishing a factory.[5] Moreover, the law may force Jane to allow others to enter, or stay in, Blackacre. She may, for example, be enjoined to permit patrons of all races to frequent the restaurant she operates on Blackacre.[6] She may be ordered to share Blackacre with her former spouse.[7] But in one very important respect Jane is still completely free as Blackacre's owner. Jane may be banned from establishing a factory on Blackacre, but she cannot be forced to install one.[8] Her desire to exclude diners of a specific racial group from her Blackacre restaurant may be thwarted, but she cannot be required to launch a restaurant.[9] Legal writers view these freedoms as instances of a general freedom accorded to Jane: as Blackacre's owner, she can simply decide to do nothing on, or with, Blackacre.[10] In the eloquent terms employed by legal scholars, ownership incorporates a right to "let [the property] lie fallow,"[11] or "gather dust."[12]

But does property ownership indeed encompass this right?

At the time of this Article's publication, properties are offered for sale in Detroit, Michigan, for one dollar.[13] Assets languish on the

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5. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388–90 (1926).

6. Civil Rights Act of 1964, 42 U.S.C. § 2000a(a) (2012).

7. *E.g.*, N.J. STAT. ANN. § 2A:34–23 (West 2010 & Supp. 2014).

8. *Cf.* Vernon Park Realty Inc. v. Mt. Vernon, 121 N.E.2d 517, 519 (N.Y. 1954) (holding unconstitutional an ordinance that prohibited an owner from using one specific property for any purpose but parking).

9. *Cf.* Palmer v. Thompson, 403 U.S. 217, 220–21 (1971) (approving decision to close pools rather than desegregate them).

10. J.E. PENNER, THE IDEA OF PROPERTY IN LAW 5 (1997) ("[P]roperty is the right to determine how particular things will be used."); Lee Anne Fennell, *Efficient Trespass: The Case for "Bad Faith" Adverse Possession*, 100 NW. U. L. REV. 1037, 1064 (2006) ("[O]wnership importantly encompasses the prerogative to use or not use the land as one pleases."); A.M. Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 107, 118 (A.G. Guest ed., 1961) (arguing that the liberty to waste the thing owned is one of the incidents of "ownership"); Larissa Katz, *Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right*, 122 YALE L.J. 1444, 1449–50 (2013) ("[O]wnership . . . is an office dedicated to a specific task—setting the agenda for [the use of] a thing."); Thomas W. Merrill, *The Property Strategy*, 160 U. PA. L. REV. 2061, 2067 (2012) ("The first [prerogative of ownership] is the recognition . . . that the owner exercises residual managerial authority over the owned object." (emphasis omitted)); Roscoe Pound, *The Law of Property and Recent Juristic Thought*, 25 A.B.A. J. 993, 997 (1939) (listing six rights as constituting ownership, among them four that incorporate the freedom to not use the property: the right to use, the right to enjoy its fruit, the right to destroy, and the right to injure the property).

11. RICHARD EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 62 (1995).

12. Lior Jacob Strahilevitz, *The Right to Abandon*, 158 U. PA. L. REV. 355, 389 (2010).

13. For current listings, see *Detroit Real Estate*, REALTOR.COM, http://www.realtor.com/realestateandhomes-search/Detroit_MI/type-single-family-home,condo-townhome-row-home-co-op,multi-family-home/price-na-101/sby-1?pgsz=50 (last visited Nov. 1, 2014).

market only if they are over-priced, implying that the fair market value of these specific properties is negative.[14] If ownership includes the right to let property lie fallow or gather dust, this fact is baffling. To be valued at less than zero, the property must not only be valueless. It must do worse than offer no conceivable economic benefit.[15] Negative-value property must carry actual duties for its owner. Yet the only involuntary affirmative duty acknowledged as affixed to ownership—the administrative duty to pay property taxes—cannot burden a valueless property: taxes are calculated as a percentage of the property's value.[16] The anomaly of the negative valuation of these Detroit properties can only be explained if nonadministrative duties inherent to ownership itself burden all property owners. That is, if ownership does not incorporate a right to "let [the property] lie fallow" or "gather dust."

This Article shows that ownership indeed does not include such a right. Rebutting scholars' proclamations, this Article concludes that property law *does not*—and never did—afford the owner the freedom to do nothing with her land, and that furthermore, it *should not* afford that freedom to her. Rather, for weighty normative reasons, ownership contains an affirmative duty to keep land in good repair, a duty that forces owners to engage in certain activities on their land regardless of their own desires. This Article dubs this duty "the duty to maintain." This duty to maintain is enforced through disparate legal means, ranging in the intensity of their impact. Sometimes, when the most extreme of these means are applied, the duty gives rise to a state of affairs in which property not only fails to equate with the owner's freedom, but becomes freedom's antithesis: ownership amounts to coercion. A property owner is less free than a nonowner. Jane may find herself subject to a legal duty she cannot shed as long

14. For an early report indicating the lengthy period such properties spend on the market, see *Detroit Homes Still Selling for $1*, THE DAILY CALLER, Nov. 1, 2012, http://dailycaller.com/2012/11/01/detroit-homes-still-selling-for-1.

15. Certain properties in the distressed city of Detroit may indeed offer no conceivable economic benefit. Detroit filed for bankruptcy protection in July 2013. *In re* City of Detroit, Mich., No. 13-53846, 2013 WL 4761053, at *1 (Bankr. E.D. Mich. 2013).

16. MICH. CONST. art. IX § 3. The provision also mandates that property be re-assessed at the time of its transfer, thereby assuring the purchaser that she will not be charged property taxes based on an older, and outdated, appraisal of the land's value. This result is highly unlikely regardless, as statutes provide for an annual reassessment of all properties. MICH. COMP. LAWS ANN. § 211.10(1) (West 2005). Other government charges are assessed based on consumption. Though Detroit imposes a fixed fee for water and sewer services, an owner who is not leasing a residential unit can discontinue service. DETROIT, MICH., ORDINANCE § 56-4-2 (2013).

as she owns Blackacre, while at the same time, she cannot rid herself of the legal status of owner.[17] This is precisely the predicament trapping the owners of the Detroit one-dollar assets.

How does law impose this liability on owners in Detroit and elsewhere? How does it render erroneous the prevalent academic perception that owners enjoy the freedom to let their property lie fallow or gather dust? What elements of law have academic writers been missing? Law imposes inescapable liabilities on owners through a myriad of rules. For example, an owner might be liable in tort law to trespassers injured on her land.[18] An owner might be liable in nuisance law to neighbors if strangers use her property for illegal activities.[19] An owner might be subject to a common-law duty to support adjoining lands.[20] An owner might be bound to keep the property livable as long as a tenant occupies it, with limited rights to ever terminate that tenancy.[21] An owner might be forced to buy unauthorized improvements to her land made by a stranger.[22] Although most of these rules are well established in law—indeed, many have existed in Anglo-American property law for centuries—scholars have overlooked them in this context as they formally address disparate social ills that are unrelated to an owner's right to let her land lie fallow or gather dust. These rules' declared purposes are distinct and evince little intention to disturb an owner's freedom of inaction: they are concerned, for example, with privileging possessors of land over landowners,[23] remedying physical injuries,[24] combatting illegal activities,[25] or shielding adjacent lands from

17. In American law land cannot be abandoned. *E.g.*, Walker v. Polk, 44 So. 2d 477, 485 (Miss. 1950) (en banc) ("[T]he common-law rule prevails that save as to easements, or licenses or mere equities, abandonment is not effective to divest the title to real estate . . . ." (quoting Meyerkort v. Warrington, 19 So. 2d 433, 435 (Miss. 1944))).

18. *See infra* Part II.A.

19. *See infra* Part II.A.

20. *See infra* Part II.A.

21. *See infra* Part II.A.

22. *See infra* Part II.B.

23. Protections for improving trespassers against owners formally protect bona-fide unauthorized possessors. Gideon Parchomovsky & Alex Stein, *Reconceptualizing Trespass*, 103 NW. U. L. REV. 1823, 1857–58 (2009).

24. Tort liability toward trespassers and others is meant to deter against, and compensate for, physical injuries. MARK A. GEISTFELD, TORT LAW: ESSENTIALS 42–43 (2008).

25. Owners' liability for illegal activities on their lands serves to lower crime rates. Kellner v. Cappellini, 516 N.Y.S.2d 827, 830–31 (Civ. Ct. 1986) (noting that "[t]he use of real property for illegal purposes such as the sale and use of illegal drugs if left unchecked will . . . increas[e] the crime rate in the area").

collapse.[26] Therefore, never before have these rules been considered as forming part of one legal concept. Yet they all forcefully direct an owner toward one action: to maintain her property up to a specific, legally defined, standard.

As this Article shows, there is an abundance of such rules.[27] Separately and in tandem, they create an affirmative duty inherent to property law; they establish this Article's duty to maintain.[28] By introducing this new unitary concept, this Article facilitates an informed and consistent assessment of the normative worth of each individual rule instituting a duty to maintain. Furthermore, through this exercise this Article promotes a new, and improved, understanding of the legal notion and social function of ownership. In influential works authored during and since the closing decade of the twentieth century, legal scholars have provided a richer and more accurate understanding of the rules and roles of property law.[29] As Professor Joseph Singer clarified, property is not only about rights, but also about obligations.[30] Much attention has accordingly been paid to obligations, such as those mentioned in the opening paragraph of this Introduction, that force an owner to refrain from certain activities

26. Owners must provide support to adjacent lands as every landowner holds the "right to have the soil in its natural condition supported." 8 THOMPSON ON REAL PROPERTY, SECOND THOMAS EDITION § 69.01 (David A. Thomas ed., 1998).

27. In an upcoming Article, I will show that the duty extends beyond land ownership to water and mineral rights, personal property, and intellectual property.

28. Recent and influential articles deal with the owner's right to destroy her property, Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781 (2005), and to abandon it, Strahilevitz, *supra* note 12; Eduardo M. Peñalver, *The Illusory Right to Abandon*, 109 MICH. L. REV. 191 (2010). They do not deal, however, with an owner's freedom, or lack thereof, to neglect, which is this Article's contribution. The duty to maintain is distinct from rights to destroy or abandon, because law treats the duty separately and it raises different (though sometimes related) normative concerns. *See infra* Part II.C.

29. Examples of this scholarship include GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: THE COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT (1997); LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER (2003); Hanoch Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517 (2003); Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597 (2008); Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403 (2009); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001); Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889 (2005); Carol M. Rose, *The Moral Subject of Property*, 48 WM. & MARY L. REV. 1897 (2007); Joseph William Singer, *Democratic Estates*, 94 CORNELL L. REV. 1009 (2009); Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (2012).

30. JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 16–18 (2000).

on her land, or from excluding particular persons from entering it.[31] Yet to the very limited extent that property law's *affirmative* obligations have been explored, scholars have either claimed that these obligations attach to the ownership of assets of exceptional social importance, such as heritage buildings[32] or inns,[33] or that they amount to mere aspiration in an era of environmental degradation.[34]

This Article argues instead that property contains a general, persistent, ancient, and expanding affirmative duty to maintain an owned asset. The presence of such an intrusive obligation, in an institution supposedly dedicated to freedom, challenges our understanding of that institution. Ever since the dawn of the liberal age, thinkers have celebrated ownership as providing owners with freedom from the dictates of others. Accordingly they have condemned the attachment of affirmative obligations to ownership as smacking of feudal landholding notions, which conflated economic relations with personal obligations.[35] The duty to maintain, as uncovered in this Article, unsettles this tenet of faith, for as this Article contends, property law's duty to maintain is not the result of a series of historical mishaps or of defunct, feudal, legal reasoning. Rather, the duty flows directly from the different justifications for ownership that have animated property law's concern with the institution since the inception of the modern age.

The duty to maintain is normatively warranted, as it always represents an arrangement among property-interest holders. This arrangement can take one of three forms. First, some legal rules instituting the duty to maintain reflect an actual or implied arrangement between current or antecedent neighbors that was freely reached at some point, even though that point might only be found in the distant past.[36] Second, a larger group of legal rules imposes the duty on neighbors as a legally constructed arrangement whereby they

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31. *See infra* Part I.B.

32. *E.g.*, David Lametti, *The Concept of Property*, 53 U. TORONTO L. J. 325, 354 (2003).

33. *E.g.*, Joseph William Singer, *No Right to Exclude*, 90 NW. U. L. REV. 1283, 1290–93 (1996) (chronicling the special duties placed on innkeepers and common carriers, including heightened duties to protect their premises due to the premises' public importance).

34. John Edward Cribbet, *Concepts in Transition*, 1986 U. ILL. L. REV. 1, 24–26 (1986); Kevin Gray & Susan Francis Gray, *The Idea of Property in Land*, *in* LAND LAW: THEMES AND PERSPECTIVES 15, 39–44 (Susan Bright & John Dewar eds., 1998).

35. *See infra* Part I.C.

36. These rules include, for example, the laws respecting affirmative covenants and those respecting the maintenance of easements (such as rights of way). For a full discussion of these examples and all the other similar rules, see *infra* Part III.A.

all agree to maintain their lands, because collective-action problems block the neighbors themselves from attaining this mutually and socially beneficial arrangement.[37] Third, a few legal rules insert the duty into existing arrangements whose terms create a relationship of dependence between property-interest holders whereby one unfairly exploits the other by not maintaining the land.[38] Enforcement of each of these three incarnations of the maintenance obligation is inherent to the normative notion of ownership according to at least one of the three major property theories—right-based, utilitarian, or relational. Hence, the same normative theories that endorse property and celebrate the institution's capacity to ensure freedom actually justify—nay, necessitate—the placement on owners of affirmative duties to maintain.

The failure to coherently acknowledge this normative and doctrinal reality has carried tangible and troubling costs for American law. For example, in the aftermath of the housing market's collapse in 2008, states and localities moved to enforce vacant property maintenance codes against lenders who own mortgage interests in abandoned houses.[39] When banks challenge such practices, courts often accept their arguments, believing that these new laws contradict traditional notions regarding a property-interest holder's freedom to let her asset lie fallow or gather dust.[40] In fact, however, these measures, geared toward remedying the devastating neighborhood and social costs of neglect and foreclosure, merely reincarnate entrenched principles of property law embodied in the duty to maintain. Moreover, they are wholly justifiable based on the duty's normative standing. Judges ignore this fact due to a scholarly unawareness of the duty to maintain. This Article, demonstrating that the duty to maintain *is* and *should* be a component of property holding, ought to cure this oversight.

This Article proceeds as follows. Part I reviews the concern of diverse property theories—grouped into three archetypes: right-based, utilitarian, and relational—with freedom. It illustrates the key role attributed to freedom, that is, the owner's liberty to act as she

37. These rules include, for example, an owner's duties in negligence and nuisance, as well as the laws of adverse possession. For a full discussion of these examples and all the other similar rules, see *infra* Part III.B.

38. These rules are mostly those applicable in the landlord–tenant relationship. For a full discussion, see *infra* Part III.C.

39. *See infra* note 360.

40. *See infra* note 362.

pleases on her land, in justifying property. It then explores the nature of the limits the disparate property theories presently acknowledge as placed on such freedom. Part I finds that although theorists realize that an owner's freedom to act as she pleases is never absolute, they mostly assume that in the postfeudal Anglo-American world, the owner enjoys a complete freedom to *refrain* from engaging in an activity on her land, unless she is subject to a specific contractual duty demanding otherwise. Part I concludes by demonstrating how this assumption has, over the past few years, affected the judicial approach to the imposition of duties on mortgage lenders.

Part II then reveals that the assumption that the owner enjoys a freedom to refrain from action is misleading—that such a freedom does not exist even in current, postfeudal, property law. It presents the disparate legal rules that place on an owner a duty to maintain her land even if she herself never entered a contract to that effect. Part II offers a taxonomy of these rules based on the enforcement mechanism they employ, either financial liability or loss of land. It concludes by summarizing the standing in property law of the duty to maintain and its relationship to the owner's right (or lack thereof) to abandon or destroy her property.

Part III constructs explanations for the various rules exposed in Part II as forming property law's duty to maintain. Three rationales for the duty to maintain are developed, drawing on each of the three property theories reviewed in Part I. Finally, to illustrate the practical implications of its theoretical findings, Part III concludes by revisiting the debate over lenders' duties in foreclosure, introduced earlier in Part I.

I. CURRENT PROPERTY THEORY: OWNERSHIP AS FREEDOM FROM DUTIES TO ACT

A. The Key Role of an Owner's Freedom in Property Theories

This Article's main contribution is highlighting and explaining the freedom-depriving function of property. To grasp the challenge to common scholarly thinking this contribution portends, it is necessary to first appreciate the central role legal and philosophical theories attach to freedom in constructing the notion of property. Thus, this opening Part surveys the different ways in which all major property theories celebrate the owner's freedom on her land, and more prominently, the owner's immunity from others' commands to act on her land. The major property theories are grouped into three

archetypes: right-based, utilitarian, and relational. This Part briefly surveys each archetype and the manner in which it grounds property in the owner's freedom.

1. *The Key Role of an Owner's Freedom in Right-Based Property Theories*. Right-based arguments constitute the first archetype of property theories. A right-based property theory takes an individual's interest as sufficient moral justification for holding others under a duty to respect private property.[41] The particular individual interest that can justify property differs across right-based justifications for property. But the owner's freedom is central to all—whether they are Kantian, libertarian, Lockean, or Hegelian. Kantian and libertarian accounts are the most extreme in this regard. According to Kant, the establishment of the legal institution of property is rooted in the innate right to freedom.[42] Kant defines freedom as "independence from being constrained by another's choice."[43] Freedom is the requirement that no other person be able to tell an individual what purposes to pursue.[44] To effectuate this innate capacity for choice immune from the interference of others, external objects of choice must be accessible to the individual.[45] Therefore, each person must have an entitlement to external objects: a right rendering an object available for the exclusive exercise of her capacity for choice.[46] In other words, holding an asset, whose manner of use cannot be dictated to the individual by others, is a prerequisite for the individual's freedom.

Libertarian theories rely heavily on this argument, eventually equating property with freedom. In libertarianism the private-property regime is justified as the only regime that both sustains and is sustained by the owner's free actions.[47] Property presents the most effective constraint on the ability of outsiders—most notably, the government—to interfere with individual freedom.[48] By dispersing the

41. JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 87 (1988).

42. Ernest Weinrib, *Poverty and Property in Kant's System of Rights*, 78 NOTRE DAME L. REV. 795, 801 (2003).

43. IMMANUEL KANT, *The Metaphysics of Morals*, *in* IMMANUEL KANT: PRACTICAL PHILOSOPHY 353, 393 (Cambridge ed. 1996).

44. *See* ARTHUR RIPSTEIN, FORCE AND FREEDOM 14, 34 (2009).

45. KANT, *supra* note 43, at 419.

46. Weinrib, *supra* note 42, at 806.

47. *See generally* RICHARD PIPES, PROPERTY AND FREEDOM xiii (1999) (arguing that liberty is "inconceivable" without property).

48. EPSTEIN, *supra* note 11, at 59.

ability to freely act on resources among many owners, the private-property regime prevents one decisionmaker from monopolizing power.[49] Conversely, an interference with the individual owner's freedom—forcing her to use her property in a certain manner—amounts to exacting forced labor from her.[50] This leads libertarians to demand full respect of the owner's autonomy to do, or not do, as she pleases with her property.

Though other right-based property theories do not ground property primarily in freedom, and are often able to steer clear of libertarian conclusions, they too hold that ownership serves values of autonomy and self-determination. Locke's highly influential right-based theory locates ownership's source in labor.[51] Subject to certain provisos, it awards ownership to the person who labored on the resource.[52] After property is acquired in this fashion, Locke's theory stresses the owner's freedom to act on the land that is now hers. Through labor, the individual gains absolute control over the asset "that another can no longer have any right to,"[53] and from which "the common right of other Men" is excluded.[54] Mixing one's labor with an external object results in the freedom to decide whether to act, or not act, on the object.

Similar to the Lockean labor theory, Hegelian property theories do not ground property in freedom per se.[55] Rather, they associate property with the individual's personality or personhood.[56] Yet, like all other right-based property theories, they too eventually insist on the owner's isolation from the decrees of others. For Hegelians, the person can become a real self only through relationships with external objects.[57] Individuals "need to be able to 'embody' the freedom of

49. RANDY BARNETT, THE STRUCTURE OF LIBERTY 139 (1998).

50. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 167–72 (1974).

51. On Locke's impact in America, see generally LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA (1955).

52. 2 JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 27 (Peter Laslett ed., Cambridge University Press 1988) (1690).

53. *Id*. § 26.

54. *Id*. § 27.

55. On Hegelian theories and their contemporary relevance, see generally Margaret Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

56. Hegel's ideas thus differ from Kant's. *See* Alan Brudner, *Private Law and Kantian Right*, 61 U. TORONTO L. J. 279, 310–11 (2011) (observing that the Hegelian system is distinct from the Kantian system, as Kant theorized that "private rights to external things are provisional and displaceable by public right—that all conclusive right is public right").

57. G. W. F. HEGEL, HEGEL'S PHILOSOPHY OF RIGHT § 44, at 155 (S.W. Dyde trans. 1896).

their personalities in external objects so that their conceptions of themselves as persons . . . become concrete and recognizable . . . in a public and external world."[58] Because the external object embodies the individual's personality or free will, the individual should have the right to control that external object. Interferences with the owner's relationship with, or decisions respecting, her external objects are a denial of the owner's personhood. For personhood theories, as for the freedom-based Kantian property theories, property crystalizes into the "first embodiment of freedom."[59]

2. *The Key Role of an Owner's Freedom in Utilitarian Property Theories*. For different reasons, all right-based property theories highlight property's function in enabling individual freedom and in barring outsiders from dictating a course of action to the individual owner. Utilitarian justifications for property, which represent the second archetype of property theories, likewise celebrate property's capacity to promote freedom.

Utilitarian theories are not interested in freedom as a right. Indeed, the distinction between right-based and utilitarian theories is the latter's refusal to recognize a single individual aim—say, freedom—as a basis for moral constraints.[60] Rather, in the utilitarian worldview, the foundation for an institution must be its capacity to serve a social aim. In the most prevalent of current utilitarian theories, that aim is overall social wealth or general welfare.[61] This aim is promoted, according to utilitarian commentators, when law grants owners the freedom to act.[62] As a result, although not invested in freedom *qua* freedom, that is, in freedom's inherent moral value, utilitarian accounts of property still embrace property specifically due to its freedom-promoting function.

Owners' freedom to make independent decisions regarding the use and transfer of assets is vital for general welfare because it assures that assets are used in a socially efficient manner. The private-property regime promises an owner that she will reap the fruits of any

58. WALDRON, *supra* note 41, at 353.

59. *Id.* § 45 note; *see* GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 58 (2012) ("Hegel's theory shares with libertarian accounts of property a fundamental concern with promoting individual freedom.").

60. WALDRON, *supra* note 41, at 79.

61. *E.g.*, RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 11–12 (3d ed. 1986).

62. *See* ALEXANDER & PEÑALVER, *supra* note 59, at 11–34 (providing an overview of these commentators' positions).

positive developments of her land and bear the burdens of negative developments; thereby the regime affords her a strong incentive to choose for her land only uses whose benefits outweigh their costs.[63] Thus, as Professor Harold Demsetz argues in a seminal article, the point of private property is that it aligns the owner's incentives in the utilization of her land with the social interests regarding its use. Private property is the optimal solution for the societal challenge of making efficient use of society's limited resources.[64]

A regime relying on the owner's freedom is socially advantageous not only because the owner holds the strongest incentive to reach the most efficient decisions regarding the asset, but also because no one else has better knowledge respecting an asset's best use.[65] The owner, as the person closest to the asset, is the person most familiar with it; additionally, and inevitably, she knows best which uses will promote her own welfare as an individual.[66] Utilitarians, accordingly, argue that an asset's true social value can only be discerned through market transactions whereby independent owners freely express their preferences respecting the asset.[67] The free market is capable of rectifying the situation when the current owner does not place the highest subjective value on, or is not the best user of, the asset. Such an owner will be furnished with pecuniary incentives to identify and contract with another individual who places a higher value on the asset.[68] Thus, through a utilitarian analysis, the owner's freedom to independently adopt decisions governing the use and transfer of land renders private property the optimal regime for resource regulation.

3. *The Key Role of an Owner's Freedom in Relational Property Theories*. The legal academic accounts forming the third archetype of

63. *See generally* Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968) (describing this regime).

64. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348 (1967).

65. Henry Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1754–55 (2004).

66. Most current utilitarian theories define social welfare as the maximum satisfaction of individual subjective preferences. *See* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare: Notes on the Pareto Principle, Preferences, and Distributive Justice*, 114 HARV. L. REV. 961, 982 (2001).

67. Ludwig von Mises, *Economic Calculation in the Socialist Commonwealth*, *in* COLLECTIVIST ECONOMIC PLANNING: CRITICAL STUDIES ON THE POSSIBILITIES OF SOCIALISM 87, 97 (F. Hayek ed. 1935) (1920).

68. STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 11–20 (2004).

property theories combine elements from the right-based and utilitarian theories to synthesize a description of the function of property that differs from that drawn by those two groups of theories. Nonetheless, like right-based and utilitarian theories, this last group of theories celebrates ownership's role as provider of freedom. The theories considered in this Section under the collective heading "relational" have gained in popularity over the past two decades. Amongst them, I count theories titled civic-republican,[69] Aristotelian,[70] objective-wellbeing,[71] human-flourishing,[72] pluralist,[73] social-relations,[74] social-obligation,[75] and progressive-property.[76] Like right-based theories, these theories all cherish specific values. Yet, unlike right-based theories whose focus is on individual rights, relational theories share with utilitarianism the belief that property is justified because it promotes social goals. Unlike utilitarianism, however, these theories have a preset view of what those social goals, or values, are. They do not define social goals in terms of overall welfare (that is, satisfying subjective preferences),[77] but rather ground them in a specific objective view of the common good and of desirable social interactions.

More often than not, freedom is one of the defining elements of these desirable interactions, and property is heralded as its paramount purveyor.[78] This attitude is associated with the most influential relational-property theory in American thinking—civic republicanism. Civic republicanism locates property's justification in

69. William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335, 1335–36 (1991).

70. Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 863–65 (2009).

71. Daphna Lewinsohn-Zamir, *The Objectivity of Well-Being and the Objectives of Property Law*, 78 N.Y.U. L. REV. 1669, 1669 (2003).

72. Colin Crawford, *The Social Function of Property and the Human Capacity to Flourish*, 80 FORDHAM L. REV. 1089, 1089 (2011).

73. Davidson, *supra* note 29, at 1600; Jedediah Purdy, *The American Transformation of Waste Law*, 91 CORNELL L. REV. 653, 654–58 (2006).

74. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 742 (1986).

75. Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 745 (2009).

76. Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 743 (2009).

77. For utilitarians, welfare includes everything that an individual might value. LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 18 (2006).

78. *E.g.*, Jedediah Purdy, *A Freedom-Promoting Approach to Property*, 72 U. CHI. L. REV. 1237, 1237 (2005).

its democratic role. A tradition hearkening back to canonical thinkers such as Aristotle and Thomas Jefferson, it posits that property-holding is a prerequisite for meaningful citizen participation in government.[79] To be an active citizen, freely participating in the political realm, the individual must not depend on others.[80] As long as others control her economic wellbeing, an individual cannot be expected to be free from their will when politically participating. Jefferson, therefore, extolled the independent yeoman living on his own land. In Jefferson's mind, and in that of his disciples, the persistence of republican governance hinges on widespread property-ownership because ownership assures the freedom to independently make decisions regarding one's life, interests, land, and politics.[81]

Similar support for wide ownership-distribution is proclaimed by the other theories listed above as relational, although their focus is not limited to ownership's political function.[82] These other relational theories suggest that society entertains a substantive conception of the good life. As a society, we believe that certain things are good for people and that having such things makes for better lives.[83] Prominently, and in clear departure from the Jeffersonian fixation on the detached yeoman, non-civic republican relational theories count relationships with others among those things individuals must have in order to flourish.[84]

The ensuing reverence for property law's power to foster relationships—rather than isolation—renders relational theories hospitable to limitations on the powers of owners. Nonetheless, relational theorists contend that the relationships humans must maintain if they are to flourish have to be based on a great degree of freedom. The objective values necessary for a good life include deep social relations, but also autonomy and liberty, which imply an ability to choose one's life course. Such choices are possible only through

79. On Aristotle's political theory, see RICHARD KRAUT, ARISTOTLE 359–64 (2002); on Jefferson's view of property, see ALEXANDER, *supra* note 29, at 26–42. For a modern theory of property based on republicanism, see Frank Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1325 (1987).

80. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, Query XIX (1785).

81. DANIEL HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA 1815-1848, at 489 (2007).

82. *E.g.*, SINGER, *supra* note 30, at 144; Alexander, *supra* note 75, at 768.

83. *E.g.*, Lewinsohn-Zamir, *supra* note 71, at 1701–14; Peñalver, *supra* note 70, at 864.

84. *E.g.*, Alexander, *supra* note 75, at 765–73.

independent control of some material goods.[85] Individuals cannot pursue the lives they desire or freely enter relationships that enable them to flourish if they lack unilateral control over some assets.[86] Property law must afford them such control. For law to promote wellbeing and sustain vital relationships, it must assure an ample measure of freedom and autonomy to a widespread population of property holders.

B. Limitations on an Owner's Freedom in Current Property Theories

As the preceding exposition concluded, all property theories attribute to ownership the salutary function of furthering freedom. Accordingly, property law's doctrines have been structured toward the promotion of the owner's autonomy.[87] Yet, in a world of limited resources, in which owners are surrounded by other owners, there is no possible way to secure for all owners the capacity to freely do as they wish with their property. If one owner is free, for example, to construct a reservoir that floods underground shafts connecting her land with another's, the second owner is not free to operate a mine on her land.[88] If red cedar trees communicate a disease to apple trees, owners are not free to plant apple trees if their neighbor is free to plant red cedars.[89] If all local owners are free to enforce an agreement—a "covenant"—barring themselves and their successors from conveying their properties to "people of the Negro or Mongolian race," African Americans can never freely become owners.[90] Property rights conflict; one owner's freedom of action inevitably interferes with another's. As a result it is clear that all three property theories admit and even require limits on the owner's freedom; uncertainty solely surrounds the location of those limits.[91] Each theory places the limits in accordance with its own particular normative standards for defining and designing property rights.

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85. Mozaffar Qizilbash, *The Concept of Well-Being*, 14 ECON. & PHIL. 51, 65, 67 (1998).

86. SINGER, *supra* note 30, at 15.

87. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1728–31 (1976).

88. *See* Rylands v. Fletcher, [1868] L.R. 3 (H.L.) 339 (appeal taken from Eng.).

89. *See* Miller v. Schoene, 276 U.S. 272, 279–80 (1928) (holding that the state was within its power to choose the destruction of one class of property to save another).

90. *See* Shelley v. Kraemer, 334 U.S. 1, 4–5 (1948) (addressing a covenant restricting property ownership based on race).

91. SINGER, *supra* note 30, at 16.

Right-based property theories ground property in individual rights, such as freedom. Yet they only recognize a right as long as its exercise does not harm the rights of others.[92] Thus, right-based arguments must discern what counts as harm—or, more precisely, illegitimate harm—and then limit the owner's right when her freedom of action engenders such harm. Utilitarian arguments embrace the owner's freedom because, thanks to the owner's right to the asset, her private interests align with social interests concerning its use. But when those interests do not correspond—when the owner's freedom of action produces effects felt only by others—the owner's freedom of action does not promote social welfare. The task for utilitarians is to identify such externalities that cannot be internalized by the owner through bargaining with others and limit her freedom of action to avert them.[93] Relational explanations hold that individual freedom assured through ownership is necessary for human flourishing. But they realize that beyond a certain point, a commitment to an owner's individual freedom either defeats shared relationships that are also necessary for flourishing or interferes with the ability of others to acquire minimal resources for flourishing.[94] Ascertaining the correct mixture between these interests needed for flourishing, and limiting an owner's freedom in accordance, is the challenge for relational theorists.

The diverse balancing acts required by the different theories—right-based, utilitarian, and relational—are executed through property law's specific doctrines. Relying on right-based, utilitarian, or relational theories, a court might employ nuisance law to conclude that the owner's freedom to construct the reservoir should be curtailed to protect her neighboring owner's freedom.[95] Relying on right-based, utilitarian, or relational theories, a legislature might avail itself of the police power to conclude that owners' freedom to grow red cedars should be curtailed to protect other owners' freedom.[96]

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92. *E.g.*, The Declaration of the Rights of Man and the Citizen art. 4 (1789) ("Liberty consists in the freedom to do everything which injures no one else."), *reprinted in* HUMAN RIGHTS SOURCEBOOK 744, 744 (Albert P. Blaustein et al. eds., 1987); JOHN STUART MILL, ON LIBERTY 93 (Elizabeth Rapaport ed., 1978) ("The individual is not accountable to society for his actions, in so far as these concern the interests of no person but himself.").

93. Lee Fennell, *The Problem of Resource Access*, 126 HARV. L. REV. 1471, 1503 (2013). For a detailed discussion on the role of externalities in utilitarian property theories, see *infra* Part III.B.

94. SINGER, *supra* note 30, at 12.

95. *See* Rylands v. Fletcher, [1868] L.R. 3 (H.L.) 339. (appeal taken from Eng.).

96. Miller v. Schoene, 276 U.S. 272, 277 (1927) (quoting VA. CODE §§ 885–893 (1924)).

Relying on right-based, utilitarian, or relational theories, a court or legislature may reform the law of covenants to curtail owners' freedom to enforce racially restrictive covenants, in order to protect others' freedom.[97] As these examples illustrate, to serve all or any of the goals theorists ascribe to property, law limits owners' freedom in many ways. The checks scholars usually recognize as placed on owners' freedom fall into one of the following categories:[98] limits on what the owner can do with her property, limits on the owner's freedom to exclude, limits on the owner's ability to determine who will own the property in the future, lack of immunity against having the property taken by the government, and regulations of relationships among the owner and the owners of other interests in the property.

Most—perhaps all—of these checks on ownership heretofore appreciated by legal academic writers are negative in nature. They limit what the owner can do with her land, but they do not force her to actually do something with it.[99] As Anthony Honoré explains in his famed exploration of the institution of ownership, the acknowledged "social aspect" of ownership is not truly affirmative. "Positive control by the state shades into prohibition. The positive duty to exploit one's property in a socially beneficial way, as opposed to the prohibition of a harmful exploitation, has not been generally imposed or its implications fully worked out."[100] This accepted legal wisdom engenders claims that ownership includes the right to let land lie fallow or gather dust.[101] In light of the disparate property theories this Part reviewed, this state of affairs is wholly justified. Property is promulgated to advance freedom, solely or among other values. Although absolute freedom is unattainable in a society in which every owner is located in proximity to other owners and is able to control others' access to ownership, the complete negation of owners' freedom—the coercion of owners into action—appears inappropriate.

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97. *See* Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (holding that court enforcement of restrictive covenants is an exercise of police power); 42 U.S.C. § 2000a(a) (2012).

98. Joseph Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 641–43 (1988).

99. An exception might be found in an article by Larissa Katz in which she describes ownership as an "office" through which the state presses owners into its service, assigning them burdens. *See* Larissa Katz, *Governing Through Owners: How and Why Formal Property Rights Enhance State Power*, 160 U. PA. L. REV. 2029, 2035 (2012). Still, the only affirmative burden discussed in Katz's work is the owner's statutory obligation in many cities to shovel snow from the adjoining sidewalk.

100. Honoré, *supra* note 10, at 146.

101. *See supra* text accompanying notes 11–12.

C. Owners' Affirmative Duties in Anglo-American Law: From Status to Contract

In view of these current understandings of ownership, rules were supposedly adopted in Anglo-American property law to free owners from the specter of affirmative obligations.[102] Professor James Harris's important work on the concept of property in law concludes that "property-duty . . . rules . . . play an insignificant role in modern . . . institutions."[103] Property-duty rules "constitute an eccentric anachronism in the modern world."[104] The reason, Harris explains, is that such duties are characteristic of feudal property institutions.[105] Much of the attachment professed by modern thinkers of all three property theories to the owner's freedom, as depicted in this Part, stems from their reaction to feudalism.[106] The feudal social system contradicts modern ideas of individual rights, efficient free markets, and human flourishing. Feudalism was a system in which the King allocated land to lords in exchange for services, such as loyalty and raising armies and goods. In turn, lords allocated rights in the land to those below them on the hierarchical ladder, again in exchange for services, including labor on lands held by the lord, or coming to his aid when called.[107] In such a legal order, in which property relations embodied personal relations taking place in a society defined by inequality, obligation, and static positions, a duty placed on the landholder to actively engage in specific behaviors on his land—to employ it for certain purposes, to put it to productive use, to maintain it—was completely coherent with the system's principles. After all, the whole estates system was founded on this idea of affirmative obligations owed by a land's holder.[108]

But with the dawn of the liberal age, the feudal social order was condemned and eventually overthrown. The feudal conception of property fell out of fashion: law came to prohibit feudal landholding,

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102. JOSEPH SINGER, PROPERTY 635–36 (3d ed. 2010). An example is the rule against perpetuities, which frees certain interest holders from affirmative (as well as negative) obligations attached to their interest by a predecessor. The rule against restraints on alienation often performs a similar function.

103. J. W. HARRIS, PROPERTY AND JUSTICE 37 (2002).

104. *Id.* at 34.

105. *Id.*

106. Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 292–93 (1998).

107. For more on the feudal system, see generally A.W.B. SIMPSON, A HISTORY OF THE LAND LAW (2d ed. 1986).

108. Cribbet, *supra* note 34, at 39.

mandating instead that all land titles be "allodial."[109] Allodial property was defined as "free; not holden of any lord or superior; owned without obligation or vassalage or fealty; the opposite of feudal."[110] As the great legal historian Henry Maine famously put it, law progressed "from [s]tatus to [c]ontract."[111] Feudal property holding was a status ineluctably and immutably carrying duties of loyalty, obligation, and service toward others; modern, allodial, property holding is supposed to entail no similar duties.

If duties to act are to be recognized and enforced against an owner, the owner must freely elect and design them. In other words, affirmative duties can be placed on ownership only through contract—not through the mere status of ownership. For example, Jane, Blackacre's owner, can promise another person that she will produce something on Blackacre or preserve its appearance. She can enter a contract with the Department of Agriculture whereby she promises to take actions to conserve the soil.[112] If Jane leases, rather than owns, Blackacre, her lease might require her to not let it lie fallow and to "cultivate the premises . . . in a farmerlike manner and according to the usual course of farming practiced in the neighborhood."[113] In contrast, as the eminent jurist William Blackstone explained, if she "be the [holder of the] absolute . . . fee-simple . . . [s]he may commit whatever waste [her] own indiscretion may prompt [her] to, without being impeachable or accountable for it to anyone."[114] As a result, "though the waste is undoubtedly *damnum*, it is *damnum abseque injuria* [a moral wrong without legal redress]."[115]

This "waste" will only become a wrong with legal redress if, as in the examples of the contract with the Department of Agriculture or the lease, Jane herself consented to refrain from committing it. The obligation in these cases arises from Jane's agreement, rather than from her status as the land's holder. It is personal to her. Jane *the*

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109. ARK. CONST. art. II, § 28; MINN. CONST. art. I, § 15; WIS. CONST. art. I, § 14; Wallace v. Harmstad, 44 Pa. 492, 501 (1863) (holding that all property in Pennsylvania is allodial "purged of all the rubbish of the dark ages, excepting only the feudal names of things not any longer feudal").

110. BLACK'S LAW DICTIONARY 76 (6th ed. 1990).

111. HENRY MAINE, ANCIENT LAW 179 (3d ed., Transaction Publishers 2002) (1866) (emphasis omitted).

112. 30 U.S.C. § 1236(a) (2012) (authorizing the Secretary of Agriculture to enter such agreements).

113. Coats v. Stephens, 67 Cal. App. 753, 754 (Ct. App. 1924).

114. 3 WILLIAM BLACKSTONE, COMMENTARIES, 223–24.

115. *Id.* at 224 (emphasis omitted).

person, not Jane *Blackacre's owner*, may, by her own choosing, become obliged to produce something on Blackacre or to conserve its appearance.[116]

Duties to act on the land that are embedded in ownership, independent of any contract, are supposedly alien to modern, postfeudal property law. Even writers that lament this development acknowledge it. "The disappearance of any long established social system must involve some losses. And so, in the case of feudalism it is regrettable that there could not have been preserved the idea that all property was held subject to the performance of duties . . . ."[117] Or "nothing in American law resembles a sustained account of a . . . norm predicated on the idea that private ownership entails obligations to act."[118]

D. The Policy Effect of Current Property Theory's Attitude Toward Affirmative Duties: The Debate over Lenders' Responsibilities

These prevalent accounts, observing that modern American property law has repudiated all affirmative duties not created by the owner herself, exert influence on the development of current laws. The trope that in the modern legal system the owner can let her property lie fallow or gather dust echoes, as just seen, historical concerns and normative values associated with property. It therefore easily impacts judicial attitudes toward property law. The trope's resulting impact has been to decrease the law's ability to confront new challenges.[119]

A striking example is the legal backlash against the response of states and local governments to the housing-market crash of 2008.[120]

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116. Thus, for example, the statute limits soil conservation agreements to ten years, and the Secretary of the Department of Agriculture must determine that the party will control the land for the duration. 30 U.S.C. § 1236(a) (2012).

117. Francis Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 710 (1938).

118. Alexander, *supra* note 75, at 757.

119. I am grateful to Laura Underkuffler for encouraging me to think of the problem in these terms.

120. In the late 2000s, a major recession hit the American and then the global markets. According to the U.S. National Bureau of Economic Research, the recession in the United States began in December 2007 and ended in June 2009. NAT'L BUREAU OF ECON. RESEARCH, US BUSINESS CYCLES AND CONTRACTIONS (2012), *available at* http://www.nber.org/cycles/US_Business_Cycle_Expansions_and_Contractions_20120423.pdf. Most of the American public associates the starting point of the recession with the fall of Lehman Brothers investment bank in September 2008, especially because a major cause of the recession was the subprime

In the aftermath of the market's collapse, many urban and suburban neighborhoods were dotted with neglected properties, whose owners were, more often than not, long gone.[121] As both policy-makers and researchers believe that such properties are extremely detrimental to their surroundings,[122] cities and states throughout the nation have been devising means to tackle the problem presented by properties whose owners defaulted on their mortgages. A particularly appealing strategy has been to target mortgagees—the banks who hold liens over these neglected or vacant properties. New or revised state and local laws render lending institutions liable for the upkeep of vacant houses and lots after the owner defaults on the mortgage.[123]

Laws and ordinances differ with respect to the specific obligations they institute.[124] The exact moment at which the lien holder becomes responsible for these obligations also varies across jurisdictions. For example, some impose liability on the lender immediately upon the owner's default on the loan.[125] Others tie liability to the initiation of the foreclosure proceedings,[126] and still others to the assumption of possession of the property by the lender during those proceedings.[127] Elsewhere, the obligation applies

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mortgage market. *See, e.g.*, James B. Stewart, *Eight Days*, NEW YORKER, Sept. 21, 2009, at 59 (describing the Lehman Brothers' bankruptcy as the beginning of the recession).

121. *See, e.g.*, DETROIT BLIGHT REMOVAL TASK TEAM, EVERY NEIGHBORHOOD HAS A FUTURE . . . AND IT DOESN'T INCLUDE BLIGHT (May 2014) (report of the task force appointed by the President regarding the extent and effect of neglected houses in Detroit).

122. *Id.*; IND. CODE ANN. § 36-7-9-4.5 (West 2009) ("Vacant, deteriorated structures contribute to blight, cause a decrease in property values, and discourage neighbors from making improvements to properties. . . . Structures that remain boarded up for an extended period of time also exert a blighting influence and contribute to the decline of the neighborhood by decreasing property values, discouraging persons from moving into the neighborhood, and encouraging persons to move out of the neighborhood."). *See infra* notes 353–60 and accompanying text.

123. The consumer credit industry's national trade association reports that as of April 17, 2014, 684 cities had enacted such ordinances. Such cities can be found in all but a handful of states (Alabama, Alaska, Arkansas, Hawai'i, Montana, North Dakota). AM. FIN. SERV. ASS'N, VACANT, ABANDONED, AND FORECLOSED PROPERTY: MUNICIPAL ORDINANCES (2014).

124. For examples of such local maintenance code obligations, see *infra* notes 272–79 and accompanying text.

125. *E.g.*, CHULA VISTA, CAL., MUN. CODE § 15.60.040 (2014); CHI., ILL., MUN. CODE § 13-12-126 (holding a mortgagee liable within the later of thirty days after the building becomes vacant or sixty days after a default).

126. *E.g.*, BOS., MA., ORDINANCE § 16-52.3 (applying an obligation seven days after "initiation of the foreclosure"); MADISON, WIS. GEN. ORDINANCE § 27.10 (applying obligations thirty days following the initiation of foreclosure proceedings).

127. COLO. REV. STAT. § 30-15-401 (2014).

following the issuance of a foreclosure judgment.[128] Another jurisdiction introduces it upon conclusion of the bidding process at the foreclosure sale.[129] Finally, the duty may come into effect later still, once the foreclosure sale is completed.[130] Though they thereby differ in their details, these laws all subject lenders to upkeep requirements. Minnesota adopted a measure that is even more innovative. The pertinent state statute empowers local governments to expedite the foreclosure process by demanding that the court shorten the mortgagor's redemption period and thereby force lenders or buyers at a foreclosure sale to assume ownership of abandoned residential properties.[131]

These efforts to expand lenders' liability for the upkeep of properties met with stern resistance from lenders,[132] and courts were often persuaded by these lenders' arguments.[133] Successful legal

128. *E.g.*, N.Y. REAL PROP. ACTS. LAW § 1307 (McKinney Supp. 2014) (applying maintenance obligations to lenders after judgments of foreclosure).

129. MINN. STAT. ANN. § 582.031 (West 2010) Minnesota applies the obligation to the holder of a sheriff's certificate—issued to the highest bidder at the foreclosure sale, normally, the lending bank—but only if she knows that there is prima facie evidence of abandonment of the property. *Id.* Note that under foreclosure laws, the holder of the sheriff's certificate is not the owner of the land. *Id.* The borrower remains the owner as she still holds the right of redemption. *Id.*

130. CAL. CIV. CODE § 2929.3 (West 2012 & Supp. 2014) (creating a duty to maintain "vacant residential property purchased by that owner at a foreclosure sale, or acquired by that owner through foreclosure under a mortgage or deed of trust").

131. MINN. STAT. ANN. § 582.032 (West 2010 & Supp. 2014). Other states have also allowed for the shortening of the foreclosure proceeding in the case of vacant properties, but their statutes do not include a provision enabling the local government to force this option on the mortgagee. *E.g.*, MICH. COMP. LAWS ANN. §§ 600.3240(9)-(10), 600.3241, 600.3241a (West 2010 & Supp. 2014); 735 ILL. COMP. STAT. ANN. 5/15-1505.8 (West Supp. 2014) (following a pilot program adopted by the Cook County Court); MD. CODE ANN., REAL PROP. § 7-105.11 (LexisNexis Supp. 2014) (responding to the report of the MD. FORECLOSURE TASK FORCE REPORT (Jan. 11, 2012), which recommended following the example set by the Cook County Court in Illinois).

132. MORTG. BANKERS ASS'N, VACANT PROPERTY REGISTRATION, http://www.mortgagebankers.org/VacantPropertyRegistration.htm (last visited Nov. 1, 2014); Robert Klein, *An Outbreak of Ordinances*, MORTGAGE BANKING, Aug. 1, 2008, at 46.

133. Courts have been even more resistant to lawsuits by local governments challenging directly the lending practices of banks (rather than banks' alleged disregard of mortgaged properties' level of upkeep), and claiming that they were responsible for the market's collapse and the ensuing deterioration of urban neighborhoods. *See, e.g.*, City of Cleveland v. Ameriquest Mortg. Sec., Inc., 621 F. Supp. 2d 513 (N.D. Ohio 2009), *aff'd*, 615 F.3d 496 (6th Cir. 2010); City of Cleveland v. JP Morgan Chase Bank, N.A., No. 2013-Ohio-1035, 2013 WL 1183332 (8th Dist. Ohio Mar. 21, 2013). Localities' efforts to argue that these lending practices represented discrimination prohibited by the Federal Housing Act have similarly failed. *See* Dekalb Cnty. v. HSBC N. Am. Holdings, Inc., No. 1:12-CV-03640-SCJ, 2013 WL 7874104 (N.D.

challenges to new lender obligations were based on varied claims. Upkeep ordinances were deemed a regulation of the credit market and therefore preempted by state laws governing the lending industry's business practices[134] or by the federal laws under which certain industry participants operate.[135] Ordinances were also found to represent a form of taxation and were thus potentially subject to state constitutional restrictions on taxes.[136] A city's attempt to ground an ordinance in the obligation the city owes other residents was denied when the court refused to acknowledge any such municipal obligation.[137] Finally, some courts simply determined that mortgagees could not be held liable to the city for the condition of properties.[138]

All these varied doctrinal grounds for denying the imposition of an obligation on lenders rely on one key assumption: the courts conceive maintenance obligations as impinging on the banks' traditional freedom as holders of either the property (postforeclosure) or a lien over it (preforeclosure).[139] These obligations are viewed as new regulations imposed on private interest holders. They are treated as regulations that interfere with property rights and extend beyond the allowable contours of land-use controls.[140] As a new form of regulating property rights, these obligations are, according to the lending industry[141] and the federal

Ga. Sept. 25, 2013); City of Memphis v. Wells Fargo Bank, N.A., No. 09-2857-STA, 2011 WL 1706756 (W.D. Tenn. May 4, 2011).

134. City of Cincinnati v. Deutsche Bank Nat. Trust Co., 897 F. Supp. 2d 633, 640 (S.D. Ohio 2012).

135. Fed. Hous. Fin. Agency v. City of Chi., 962 F. Supp. 2d 1044 (N.D. Ill. 2013) (refusing to apply Chicago's maintenance ordinance against Fannie Mae and Freddie Mac).

136. Easthampton Sav. Bank v. Springfield, 736 F.3d 46, 53 (1st Cir. 2013).

137. *City of Cincinnati*, 897 F. Supp. 2d at 644 (S.D. Ohio 2012).

138. Hausman v. Dayton, 653 N.E. 2d 1190, 1196 (Ohio 1995) (dismissing the city's code-enforcement claims against mortgagee, and explaining that the mortgagee can only become liable when the mortgagor's interest terminates).

139. *E.g.*, *Fed. Hous. Fin. Agency*, 962 F. Supp. 2d at 1060 (concluding that maintenance duties are not traditional regulation of property, but rather, are a form of financial regulation); *City of Cincinnati*, 897 F. Supp. 2d at 640 (denying the city's claim that the banks' practices unreasonably interfere with a common public right given that "[m]ost of the 'practices' the City targets are not inherently dangerous nor are they unlawful, such as foreclosing on mortgage loans, taking title to dilapidated or abandoned buildings, or selling properties at firesale prices").

140. Keith H. Hirokawa & Ira Gonzalez, *Regulating Vacant Property*, 42 URB. LAW. 627, 633–37 (2010) (criticizing vacant-property ordinances as regulations of property rights).

141. MORTG. BANKERS ASS'N, VACANT PROPERTY REGISTRATION, http://www.mortgagebankers.org/VacantPropertyRegistration.htm (last visited Nov. 1, 2014).

housing finance agency's legal position, "onerous," "vague," and "subjective."[142]

In other words, upkeep duties are perceived in the current legal struggle over lenders' responsibilities as *external* to property holding: they are administrative regulations of private property, or taxes levied on private property. Given that there are many legal limits on the government's ability to interfere with property—to regulate or tax private property—this perception facilitates the striking down of new ordinances imposing duties on lenders. The persistent perception of maintenance duties and other affirmative duties as external to property is an outgrowth of the attachment of American law to the trope of the owner's right to let her land lie fallow or gather dust. Elsewhere, civil-law scholars have arguably been able to sometimes disassociate themselves from this trope.[143] Still its grip on Anglo-American legal thinking has been unwavering, mainly due to the philosophical and historical reasons described in this Part. The

142. Verified Complaint, at 2, 5, Fed. Hous. Fin. Agency v. City of Chi., No. 11CV08795 (N.D. Ill. Dec. 12, 2011). The district court later accepted the position of the federal agency and ruled against Chicago. *Fed. Hous. Fin. Agency*, 962 F. Supp. 2d 1044 at 1061. In the spring of 2014, the parties settled and Chicago waived its right to appeal. The federal agency agreed to voluntarily register all vacant properties in which it held an interest, but not to pay any fees as required by the local ordinance governing such interests. Mary Ellen Podmolik, *Chicago, Federal Housing Finance Agency, End Vacant Property Dispute,* CHI. TRIB., Apr. 8, 2014, http://articles.chicagotribune.com/2014-04-08/business/ct-chicago-vacant-buildings-0408-biz-20140408_1_vacant-building-ordinance-vacant-properties-fannie-mae.

143. The French jurist Léon Duguit famously argued in the early twentieth century that "property is not a right; it is a social function." According to Duguit, an owner is obliged to put her property to productive use, and the state is entitled to sanction her if she does not do so. LÉON DUGUIT, LES TRANSFORMATIONS GÉNÉRALES DU DROIT PRIVÉ DEPUIS LE CODE NAPOLÉON 21 (2d ed. 1920). Duguit was not describing the contemporary state of French law or the thinking of legal scholars, but rather, was criticizing legal scholars for not recognizing property's social function. The extent of Duguit's ideas' impact on the laws of European countries is debatable. The German Basic Law, for example, announces: "Property entails obligations. Its use shall also serve the public good." GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ][GG][BASIC LAW] art. 14, § 2 (Ger.). The Civil Code of the Netherlands contains a title "Rights and *Obligations* of Owners." BW Book 5, Title 4 (Neth.). However, most of the obligations it lists are negative. The sole affirmative obligations are the duty to keep shrubs and trees within a distance from the boundary of adjacent land (art. 42), and the duty to maintain visible marks of the boundary (art. 46), or, in a built-up area, to erect a dividing wall (art. 49). Duguit's thinking has perhaps played a greater role in South American legal systems. *See, e.g.*, CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 58. For more on Duguit and his influence, see, for example, Nestor M. Davidson, *Sketches for a Hamiltonian Vernacular as a Social Function of Property*, 80 FORDHAM L. REV. 1053, 1070 (2011); M.C. Mirow, *The Social-Obligation Norm of Property: Duguit, Hayem, and Others*, 22 FLA. J. INT'L L. 191, 226 (2010).

resultant hostile approach toward lenders' responsibilities is unfortunate, for as will now be clarified, this trope is simply wrong.

II. CURRENT PROPERTY LAW: A DUTY TO MAINTAIN EMBEDDED IN OWNERSHIP

This Part detects a duty to maintain *internal* to property law—a concept that flies in the face of conventional wisdom, and contradicts the normative justifications for the modern institution of property reviewed in the preceding Part. Later, Part III shows that this last contradiction is illusory as the normative justifications for property in fact demand the duty to maintain. But first, it is necessary to understand the positive manner in which the duty, until now ignored, operates. Current law imposes the duty to maintain on the owner through multiple doctrines. The effect of these varied doctrines can best be grasped when they are categorized in accordance with the sanction they employ: potential monetary liability or potential loss of land. This Part is divided accordingly: it first uncovers doctrines that establish the duty through monetary sanctions, and second, it reveals doctrines that do so via forfeiture. The duty that crystallizes from these different rules will then be summarized and tied to other elements recognized as inherent to ownership.

A. Rules Imposing the Duty To Maintain Through Financial Liability

One way for property law to establish a duty to maintain is to render an owner who neglects her land vulnerable to financial liability—in the form of damages or an injunction mandating repairs. Property law contains a wealth of rules exposing owners to such liability. Counting mostly common-law doctrines, but concluding with statutory expansions, they include waste law, negligence law as applied to harms to outsiders generated by the land's conditions, negligence law as applied to harms to outsiders generated by unauthorized entrants to the land, negligence law as applied to harms to trespassers, private nuisance law, public nuisance law, support-rights law, affirmative-covenants law, easements law, landlord–tenant law, building codes, and farming law.

1. *Waste Law*. Waste is a property-law doctrine that explicitly targets those who fail to maintain their land, and therefore, it is a natural starting point for this Part's exploration of doctrines imposing a duty to maintain. At the same time, waste applies only to confined

settings. The doctrine solely regulates the uses of lands in which several parties hold interests not equal in status and effect. It empowers the person to whom possession of the land will inevitably shift at the conclusion of a lease or a specific person's lifetime to bring suit to halt the present possessor from committing waste therein.[144] In current American law, it similarly limits the freedom of those holding land subject to a mortgage, to protect the mortgagee's security.[145]

Waste law thus applies to tenants, life tenants, and mortgagors. The waste these interest-holders are prohibited from committing encompasses two kinds of behavior. One is "affirmative waste": injurious acts the holder perpetrates on the land, such as razing a building.[146] Another form is "permissive waste": harms done to the property through the holder's failure to act.[147] This form of forbidden waste imposes on the present holder an affirmative duty to maintain the property in good repair.[148] Thus, a holder of a lease, life estate, or mortgaged land is liable for waste if she, for example, fails to pay property taxes,[149] allows a house to deteriorate,[150] permits farmland to lie untilled,[151] stands idle as weeds infest the land,[152] stops watering a lawn,[153] or ceases to prune and fumigate an orchard.[154]

As these examples illustrate, waste law creates a conspicuous duty to maintain, which applies to holders of certain present estates. Unlike waste, the various doctrines to next be inspected in this Part are not quite as patent in their concern with a duty to maintain land, and thus have never been recognized as serving such a duty. But in actuality, these doctrines set a duty to maintain. Furthermore, because the rules presented in the subsequent Sections cover a markedly more diverse—sometimes all encompassing—group of holders of interests in land, they are much more consequential than waste law.

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144. *E.g.*, N.Y. REAL PROP. ACTS. LAW § 801 (McKinney 2009); Pasulka v. Koob, 524 N.E.2d 1227, 1239 (Ill. App. Ct. 1988).

145. RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES § 4.6 (1997).

146. JESSE DUKEMINIER, JAMES KRIER, GREGORY S. ALEXANDER, & MICHAEL SCHILL, PROPERTY 218 (7th ed. 2010).

147. 1 DAN B. DOBBS, LAW OF REMEDIES § 5.2(8), at 737 (2d ed. 1993).

148. 51 AM. JUR. 2D *Life Tenants and Remaindermen* § 30.

149. McIntyre v. Scarbrough, 471 S.E.2d 199, 201 (Ga. 1996).

150. Moore v. Phillips, 627 P.2d 831, 834 (Kan. Ct. App. 1981).

151. Jeffreys v. Hocutt, 142 S.E.2d 226, 228 (N.C. 1928).

152. Lytle v. Payette-Oregon Slope Irrigation Dist., 154 P.2d 934, 939 (Or. 1944).

153. Kimbrough v. Reed, 943 P.2d 1232, 1234 (Idaho 1997).

154. Anderson v. Hammon, 24 P. 228, 229 (Or. 1890).

2. *Negligence Law.* All owners—not just those subject to waste law (tenants, life tenants, and mortgagors)—are subject to a duty to maintain premised on negligence law. Negligence law presents a neglectful landowner with the specter of liability for injuries off the land caused by the condition of her land, for injuries to outsiders inflicted by unauthorized entrants to the landowner's land, and for injuries to trespassers.

a. Liability for Conditions Causing Injuries Off the Land. Owners of land are constantly under threat of liability for physical harms that their land's condition may inflict on outsiders. Liability in negligence for such damages often results from acts the owner committed—such as improper construction of an awning, the subsequent accumulation of water on the sidewalk due to this improper construction, and the injury to a passerby who slipped on the frozen water.[155] But liability can also be imposed when the owner did not act. Liability can be imposed in cases in which the owner's neglect of her land caused injuries to others. Such negligence liability arising from neglect creates a duty for owners to maintain their land. A cursory review of cases illustrates this point.

In several cases, owners were found liable when vegetation on their land blocked sightlines of motorists on adjacent roads,[156] or interfered with sidewalks.[157] Owners were charged with damages when trees collapsed on neighbors' properties,[158] and when tree trunks or roots damaged adjoining properties.[159] In other cases, the owners lost in court when a tree's swinging dead limbs prevented the use of a neighbor's driveway,[160] and when structures damaged by fire later collapsed on adjacent lands.[161] Lawsuits against owners were also successful when pieces of structure fell on roads,[162] and when weeds facilitated fire.[163] An owner was even found liable for the explosion of a faulty gas-line located on her land although she was legally

155. McKinley v. Fanning, 595 P.2d 1084, 1087 (Idaho 1979).

156. Whitt v. Silverman, 788 So. 2d 210, 222 (Fla. 2001).

157. Rosengren v. Seattle, 205 P.3d 909, 914 (Wash. 2009).

158. Gibson v. Denton, 38 N.Y.S. 554, 556 (N.Y. App. Div. 1896).

159. Scheckel v. NLI, Inc., 953 N.E.2d 133, 138 (Ind. Ct. App. 2011).

160. Pesaturo v. Kinne, 20 A.3d 284, 291 (N.H. 2011).

161. Fitzpatrick v. Penfield, 109 A. 653, 658 (Pa. 1920).

162. Brown v. Consol. Rail Corp., 717 A.2d 309, 317 (D.C. 1998).

163. Irelan-Yuba Gold Quartz Mining Co. v. Pac. Gas & Elec., 116 P.2d 611, 620 (Cal. 1941).

proscribed from attending to that gas-line. The court ruled in that case that the owner was under a duty to demand that the city, which had installed the gas-line and held exclusive rights to handle it, fix any leak therein.[164] In perhaps the most extreme of the cases imposing liability, one owner was found negligent when she took no measures to protect a downhill neighbor from natural landsides.[165]

The general rule applied in all such cases is that an owner must exercise reasonable care to prevent conditions on her property that foreseeably lead to an unreasonable risk of harm to others beyond its borders.[166] This duty burdens all owners with the responsibility to inspect their property and to secure any object located therein.[167] Originally, the duty only covered artificial conditions the owner created (such as structures),[168] but, as the cases indicate, the duty has expanded to "natural" conditions as well.[169] The recently adopted *Restatement (Third) of Torts* reflects this trend and imposes liability for natural conditions, as long as the owner "knows of the risk or if the risk is obvious."[170] A few jurisdictions go further by jettisoning knowledge requirements,[171] imposing strict liability when a diseased tree falls,[172] or suggesting that dilapidated conditions alone suffice for an inference that the owner's property ignited fire in adjoining properties.[173] Even without such easing of the prerequisites for liability, negligence law as currently applied to harms endured outside the land places on an owner of land a duty to maintain her land up to a reasonable standard.

b. Liability for Acts of Unauthorized Third Parties. A defendant's liability in negligence for risks generated by her land's

164. Black v. City of Cordele, 293 S.E.2d 557, 560 (Ga. Ct. App. 1982).

165. Sprecher v. Adamson, 636 P.2d 1121, 1130 (Cal. 1981).

166. Custom Craft Tile, Inc. v. Engineered Lubricants Co., 664 S.W.2d 556, 558 (Mo. Ct. App. 1983); Rosengren v. City of Seattle, 205 P.3d 909, 912 (Wash. Ct. App. 2009).

167. *E.g.*, Marshall v. Erie Ins. Exch., 923 N.E.2d 18, 23, 24 (Ind. App. 2010).

168. *See* FRANCIS BOHLEN, STUDIES IN TORTS 47 (1926).

169. The precursor of the trend was *Gibson v. Denton*, 38 N.Y.S. 554 (N.Y. App. Div. 1896). For an early, and positive, report on this trend, see PROSSER, TORTS § 76 (1941).

170. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 54(b)(2) (2012). When the property is commercial knowledge is not required. *Id.* § 54(b)(1).

171. Whitt v. Silverman, 788 So. 2d 210, 222 (Fla. 2001).

172. Loescher v. Parr, 324 So. 2d 441, 445 (La. 1975).

173. *See* Ford v. Jeffries, 379 A.2d 111, 113–14 (Pa. 1977) (holding that the failure to adequately maintain property where a fire had previously occurred could represent a breach of the general duty to take care that one's use of property does not harm the person or property of another).

condition stands out in tort law. Its basis is not the defendant's actual control of specific hazardous activities harming the plaintiff, as is normally the case in tort law, but rather, the defendant's inherent control of the land she owns.[174] Through the same rationale, an owner's liability in negligence extends to the harms inflicted by others, whom she does not control, when they acted on her land, which she does control. For example, an owner was liable when trespassers used her land as dumping grounds and the debris they jettisoned spread fire to neighboring properties;[175] when a fire erupted after trespassers smoked on her property;[176] when her house fell into visible disrepair attracting fire-setting vandals;[177] when trespassing motorcyclists used her land as a track, causing water damages to neighbors;[178] and when an unknown trespasser raped a neighbor's child in the owner's vacant apartment.[179]

In such cases, the owner is deemed responsible for the conduct of entrants whose acts she does not control because as the owner, she could have controlled their entry.[180] When the owner neglected her land she created conditions enabling trespassers to enter, and when she later failed to police the trespassers' behavior, she facilitated their dangerous acts. Negligence law holds her liable for consequent harms

174. Another example of tortious liability detached from control over dangerous conditions is defective products liability. The seller or distributer of a defective product is liable for harms caused by the product after the sale or distribution. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 (1998).

175. *See* Dealers Serv. & Supply Co. v. St. Louis Nat'l Stockyards, 508 N.E.2d 1241, 1244–45 (Ill. App. Ct. 1987) (holding that a duty to maintain that property so as to reduce the foreseeable risk of fire was created because the landowner had knowledge of the dumping of flammable materials on her property).

176. *See* Hesse v. Century Home Components, Inc., 514 P.2d 871, 873–74 (Or. 1973) (finding that even if a third party had actually started the fire, the landowner was still on notice regarding the risk of a fire, and had a duty to take reasonable care to alleviate that risk).

177. *See* Ford, 379 A.2d at 114–15 (finding that even if trespassers actually caused the fire, liability could still be appropriately assessed to the defendant-landowner because the trespassers' actions would have remained within the foreseeable scope of the risk created by the dilapidated state of the defendant's property).

178. *See* Schropp v. Solzman, 314 N.W.2d 413, 415 (Iowa 1982) (holding that because the landowner was aware of the damage caused to her property by the motorcyclists, she had a duty to take reasonable steps to reduce the risk the damage could pose to others).

179. *See* Nixon v. Mr. Prop. Mgmt., 690 S.W.2d 546, 550–51 (Tex. 1985) (holding that a court could find the incident in question foreseeable, given the condition of the landowner's property, and therefore, the landowner had a duty to take reasonable steps to prevent damage to the property of others).

180. *See* RESTATEMENT (SECOND) OF TORTS § 364(c) (1965) ("A possessor of land is subject to liability to others outside of the land . . . which the possessor realizes or should realize will involve a reasonable risk of such harm.").

to outsiders, and thus, it generates a duty to maintain land so as to render it inhospitable to risky entrants and hazardous activities.

c. Liability for Injuries to Trespassers. Negligence law also presses owners to maintain their land through the threat of liability for harms incurred by individuals on the land. The common law holds an owner responsible for injuries sustained by others while on her land. Had such liability extended only to injuries suffered by individuals to whose entry the owner consented, it would not have amounted to a duty to maintain: an owner desiring to let her land grow wild could have simply refrained from inviting entrants. But liability cannot so readily be preempted. Law empowers a broader group—not solely invited entrants—to seek remedy when injured on another's land. Because owners can be liable for injuries suffered by unpermitted entrants—trespassers—the duty toward entrants enforces on all owners a duty to maintain.

In the common law, owners owe an entrant a sliding scale of duties of care linked to the legal status of the specific entrant.[181] Trespassers occupy the bottom rung of this hierarchy. Accordingly, a landowner owes the trespasser "the lowest standard of care . . . . The landowner is bound only to refrain from reckless, willful, or wanton conduct toward the trespasser."[182] Standing alone, this rule places on the owner no duty to maintain the land. It only imposes a duty to avoid certain acts on the land. However, most jurisdictions assign a higher status to some trespassers—*known* trespassers—and the correlating higher duty of care they merit does entail a duty to maintain. This category of trespassers consists not solely of trespassers whose presence the owner discovered prior to their injury.[183] It also counts trespassers whom the owner did not discover, but of whose presence she should have been aware: foreseeable trespassers.[184] An owner is deemed to have such constructive notice of

181. Traditionally, the three major statuses recognized were invitee, licensee, and trespasser. *See*, *e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 329–32 (1965). The system was criticized and abandoned in many states. *E.g.*, Mounsey v. Ellard, 297 N.E.2d 43, 51–52 (Mass. 1973); Webb v. City & Borough of Sitka, 561 P.2d 731, 732–33 (Alaska 1977). The recently adopted RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 51 (2012) rejects status-based duty rules and replaces them with a unitary duty.

182. Ryals v. U.S. Steel Corp., 562 So. 2d 192, 193–94 (Ala. 1990).

183. *E.g.*, Moore v. Kurn, 108 F.2d 906, 909 (10th Cir. 1939) (holding that the railroad may be liable to a trespasser hit by a train when said train's engineer had observed the trespasser).

184. *E.g.*, Frederick v. Phila. Rapid Transit Co., 10 A.2d 576, 578 (Pa. 1940) (holding that being on notice as to the presence of a trespasser is sufficient for a landowner to owe the

a trespasser when, for example, her land is habitually and manifestly trespassed,[185] or if it houses a dangerous condition naturally attractive to children (the "attractive nuisance" doctrine),[186] such as a timber stack[187] or pool.[188]

When the trespasser is known or foreseeable, the "standard of duty is the protection of others against an unreasonable risk of harm."[189] This duty is not a light one; indeed, it is similar to the duty owed to invitees. In fact, the *Restatement* abolishes the distinction between the duty owed to most trespassers and that owed to permitted entrants.[190] Courts thus found owners liable in cases involving injuries to trespassers resulting from uninsulated electric wires,[191] furrows,[192] waste-induced fires,[193] a collapsing dump,[194] an unmarked barbed wire fence,[195] a pond,[196] and a river-crossing.[197]

Naturally, the duty to protect trespassers has its limits. Some courts note that liability is restricted to conditions presenting risk of serious bodily injury.[198] Liability is also sometimes confined to injuries

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trespasser a duty of care); Lee v. Chi. Transit Auth., 605 N.E.2d 493, 499 (Ill. 1992) (adopting the rule that if a landowner should reasonably know that a trespasser would be exposed to danger on her land, then a duty of care toward that trespasser would arise).

185. *See* Imre v. Riegel Paper Co., 132 A.2d 505, 509–10 (N.J. 1957) (holding that indications that trespassers frequently entered a potentially dangerous area should have been sufficient to put the landowner on notice of a duty of care owed to those trespassers).

186. The doctrine is traced to *Sioux City v. Stout*, 84 U.S. 657, 657 (1873).

187. *See generally* Bransom v. Labrot, 81 Ky. 638 (1884) (finding that a landowner owed a duty to a trespassing child who could not have known of the danger posed by a negligently stacked pile of timber).

188. *See generally* King v. Lennen, 348 P.2d 98, 100–01 (Cal. 1959) (holding that due to the plaintiff's young age, the danger of drowning posed by a swimming pool would not have been apparent, and the doctrine of attractive nuisance should therefore apply). *But see* Mozier v. Parsons, 887 P.2d 692, 698 (Kan. 1995) (stating generally that pools are not attractive nuisances).

189. *See Imre*, 132 A.2d at 508.

190. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 51 (2012). The only entrants to whom this duty does not apply are "flagrant trespassers." *Id.* § 52. Although they are not defined, the section notes that a significant factor must be their intent to commit an illegal act. *Id.*

191. Wytupeck v. Camden, 136 A.2d 887, 896 (N.J. 1957).

192. Harris v. Mentes-Williams Co., 95 A.2d 388, 390 (N.J. 1953).

193. Strang v. S. Jersey Broad. Co., 86 A.2d 777, 780 (N.J. 1952).

194. *Imre*, 132 A.2d at 511.

195. Webster v. Culbertson, 761 P.2d 1063, 1067 (Ariz. 1988).

196. Pocholec v. Giustina, 355 P.2d 1104, 1113 (Or. 1960).

197. City of Hous. v. Cavazos, 811 S.W.2d 231, 237 (Tex. App. 1991).

198. *E.g.*, Armenta v. City of Casa Grande, 71 P.3d 359, 365 (Ariz. Ct. App. 2003). *But see* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 51 cmt. g

sustained due to conditions the entrant should not have noticed herself,[199] or to those arising from artificial conditions.[200] Furthermore, whereas in extreme cases the duty toward trespassers imposes a duty to reconfigure the land,[201] often the owner can dispense with her duty by giving trespassers adequate warning of dangerous conditions.[202] Still, through negligence liability toward trespassers, the law imposes on an owner a duty to maintain her land so as to limit the development of, or the risk posed to others by, dangerous conditions on the land.[203]

3. *Nuisance Law*. Negligence law renders an owner liable when others or their properties are injured due to the unreasonable condition of the owner's land. It thus incentivizes an owner to maintain her land to prevent accidents. This incentive to maintain is reinforced through nuisance law, which exposes an owner who fails to maintain her land to financial liability even when its neglected state does not precipitate an accident. A nuisance claim does not require the plaintiff to sustain an injury, as it protects individuals not from interferences with their bodily integrity or the wholeness of their property, but rather from interferences with their use or enjoyment of the property.[204] Such interferences need not result in physical injury, and they may affect one private owner's ability to use or enjoy her land or the whole public's ability to do so.

a. Private Nuisance Law. In the typical nuisance case, an activity one owner engages in on her land detrimentally affects another owner's enjoyment of her land without physically harming it. For example, there may be liability for nuisance when one owner's

(2012) ("A land possessor owes a duty of reasonable care to entrants on the land with regard to all risks that exist on the land.").

199. *E.g.*, State v. Shumake, 199 S.W.3d 279, 290 (Tex. 2006). *But see* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 51 cmt. k (2012) ("[T]he fact that a dangerous condition is open and obvious bears on the assessment of whether reasonable care was employed, but it does not pretermit the land possessor's liability.").

200. *E.g.*, Loney v. McPhillips, 521 P.2d 340, 345 (Or. 1974). *But see* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 51, cmt. f (2012) ("The duty of reasonable care imposed on a land possessor includes risks arising from natural conditions.").

201. Sirek v. State, 496 N.W.2d 807, 809 (Minn. 1993).

202. Green-Glo Turf Farms v. State, 347 N.W.2d 491, 494 (Minn. 1984).

203. "Generally, a landowner owes a duty of care to maintain his or her property in a reasonably safe condition." Gronski v. Cnty. of Monroe, 963 N.E.2d 1219, 1222 (N.Y. 2011).

204. San Diego Gas & Elec. v. Superior Ct., 920 P.2d 669, 696 (Cal. 1996).

business, operated on her land, exposes another owner's land to loud noises or foul odors.[205]

Similar detrimental effects sometimes result not from the owner's activities on her land, but from her failure to act and regulate her land's conditions. An individual's ability to enjoy her property is decreased when a dilapidated property is located in the vicinity, and hence that dilapidated property can qualify as a nuisance. For example, courts found neglectful owners whose lands became hubs for illegal activity, such as drug dealing, liable for nuisance due to their neighbors' lost sense of safety and the resultant decrease in the value of their properties. Such suits were upheld despite the fact that the owner-defendants neither participated in, nor authorized, the illegal activity taking place on their property.[206] As one court explained, "[a] property owner cannot knowingly allow his property to become a haven for criminals to the detriment of his neighbors and deny that his property has become a nuisance because the resulting criminal activities are those of third parties."[207] Owners, another court declared, must "take all reasonable measures available to them to control their property."[208]

To further broaden owners' nuisance liability for failing to maintain their properties, some states have turned to legislative reform. California's Street Terrorism Enforcement and Prevention Act[209] renders a space used by gang members a private nuisance for which its owner may be found liable.[210] Even more prominently, some state statutes now explicitly define as nuisances all decrepit and untended properties that adversely affect the value of surrounding properties or represent a hazard to the wellbeing of their dwellers. In

205. *E.g.*, Kriener v. Turkey, 212 N.W.2d 526, 539 (Iowa 1973) (odor as nuisance); Stevens v. Rockport Granite, 104 N.E. 371, 376 (Mass. 1914) (noise as nuisance).

206. Lew v. Superior Court, 25 Cal. Rptr. 2d 42, 47 (Ct. App. 1993); Kelly v. Boys' Club of St. Louis, 588 S.W.2d 254, 258 (Mo. Ct. App. 1979). *But see* City of Seattle v. McCoy, 4 P.3d 159, 169 (Wash. App. 2000) (an owner may be liable only when she had notice, or should have had notice, of illegal activity); FLA. STAT. ANN. § 893.138 (West 2013) (establishing administrative boards to resolve nuisance complaints brought by neighbors against owners in whose property illegal activity was taking place); TEX. CIV. PRAC. & REM. CODE ANN. § 125.042 (West 2011) (empowering neighbors to demand a meeting to present evidence of illegal activity to the district attorney who can pursue a nuisance claim on their behalf).

207. *Kelly*, 588 S.W.2d at 257.

208. *Lew*, 25 Cal. Rptr. 2d at 47.

209. CAL. PENAL CODE § 186.22a (West 2014).

210. *Id.* Claimants are always eligible for an injunction. Damages can also be awarded if the owner knew, or should have known, of the illegal activities.

accordance, nearby owners are empowered to bring private nuisance suits.[211] These recent expansive interpretations of the term "nuisance," in conjunction with the rulings extending liability for illegal activities by third parties, transform private nuisance law into a tool that imposes on owners a duty to maintain.

b. Public Nuisance Law. An owner's neglect of her land does not solely interfere with one neighbor's, or a handful of neighbors', enjoyment of their properties. Rather, it often impacts a broader community—sometimes an entire neighborhood. Property law has a separate category of rules to regulate such interferences with the wellbeing of whole swaths of the public—the aptly titled public nuisance law. With case law burgeoning since the 1990s,[212] public nuisance law is now an even more profuse source of a duty to maintain than private nuisance law.

In general, "[a] public nuisance is an unreasonable interference with a right common to the general public."[213] This broad definition can easily be used to impose obligations on owners to act on their land, because, as one court explained, an unreasonable interference might be inaction that "works some substantial annoyance, inconvenience, or injury to the public."[214] The requirement is not that some individual be actually annoyed or injured by the owner's failure to act; it suffices that such failure tends to inconvenience the public.[215] Thus, under public nuisance law, owners were found liable for not treating still water on their land that may have contributed to the spread of malaria;[216] for retaining abandoned bridge piers;[217] for permitting corn to obstruct a public road;[218] for not removing a dead

211. MO. ANN. STAT. § 82.1025 (West 1998 & Supp. 2014) (granting right of suit to "[a]ny property owner who owns property within a reasonable distance"); OHIO REV. CODE ANN. § 3767.41 (West 2006 & Supp. 2014) (granting right of suit and expanding the range of remedies available to "neighbors" owning property within five-hundred feet of a dilapidated building).

212. SINGER, *supra* note 30, at 123.

213. RESTATEMENT (SECOND) OF TORTS § 821B (1979). Some definitions are more precise. CAL. CIV. CODE § 3480 (West 2012) ("A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons . . . .").

214. Commonwealth v. S. Covington & C. St. Ry. Co., 181 Ky. 459, 583 (1918).

215. Chicago v. Gunning Sys., 214 Ill. 628, 636 (1905).

216. *See* Mills v. Hall & Richards, 9 Wend. 315 (N.Y. Sup. Ct. 1832) (holding that the dam erected by defendant and rendering the surrounding area unhealthy was a public nuisance).

217. United States v. Ill. Terminal R.R. Co., 501 F. Supp. 18 (E.D. Mo. 1980).

218. Guy v. State, 438 A.2d 1250, 1255 (Del. Super. 1981).

tree;[219] for allowing runoff water to freeze on an adjacent sidewalk;[220] and for not securing abandoned buildings.[221] As these examples illustrate, public nuisance law creates an obligation toward the community to reasonably maintain one's property.[222]

4. *Servitudes Law*. When established through negligence or nuisance, the maintenance standard the duty to maintain imposes is grounded in reasonableness. A harsher maintenance requirement extending beyond a reasonableness standard is instituted through servitudes law—including support rights, affirmative covenants, and easements.

a. Support Rights. All landowners have an absolute right to lateral support: "to have the soil in its natural condition supported by the soil of adjoining land in its natural conditions."[223] In light of this "original right incident to [every man's] property,"[224] which "stands on natural justice, and is not dependent upon grant,"[225] law imposes on all owners a duty not to interfere with the lateral support their land provides to neighboring lands.[226] The neighbor's right for such support of her land is a servitude—it is a nonpossessory interest burdening another owner's land.[227] A breach of this right of the neighbor exposes the owner to liability, even if she behaved reasonably.[228]

The duty to respect the neighbor's right to support is first and foremost a negative obligation.[229] The typical interference with lateral support occurs when excavation works disturb a neighboring land's

219. Brown v. Milwaukee Terminal Ry., 227 N.W. 385, 386 (Wis. 1929).

220. Leahan v. Cochran, 60 N.E. 382, 382 (Mass. 1901).

221. Sanford v. Detroit, 371 N.W.2d 904, 907 (Mich. Ct. App. 1985).

222. Historically, public nuisance claims were pursued by public officials, rather than private individuals. PROSSER & KEETON ON THE LAW OF TORTS § 90 (5th ed. 1984). But today, all individuals can seek injunctions against public nuisances. RESTATEMENT (SECOND) OF TORTS § 821C(2)(c) (1979). To seek damages, they must endure "special injury"—a harm distinct from that the public suffered. *E.g.*, Phila. Elec. v. Hercules, 762 F.2d 303, 315–16. (3d Cir. 1985).

223. 8 THOMPSON ON REAL PROPERTY, THOMAS EDITIONS § 69.01.

224. Hunt v. Peake, [1860] 70 Eng. Rep. 605.

225. Tunstall v. Christian, 80 Va. 1, 3 (1885).

226. *E.g.*, Prete v. Cray, 141 A. 609, 611 (R.I. 1928).

227. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.1(1) (2000).

228. *E.g.*, *Tunstall*, 80 Va. at 3.

229. Gilmore v. Driscoll, 122 Mass. 199, 201 (1877) ("[E]ach owner has the absolute right to have his land remain in its natural condition, unaffected by any act of his neighbor . . . .").

support.[230] The duty is, however, transformed into an affirmative obligation—a duty to maintain—in cases involving retaining walls. When a wall on one owner's land supports the soil of another's, courts hold that the owner has "the obligation to maintain the wall to support the [neighbor's] land."[231] The owner is liable if, even while behaving reasonably, she fails to maintain the retaining wall whose conditions deteriorate, thereby causing the neighboring land to subside.[232] An owner might even be forced to construct a wall to prevent her land from eroding onto another's land.[233]

The duty to maintain retaining walls is a duty attached to the ownership of the property on which the wall is situated, that is, it runs with the land. Not only is the owner who built the wall responsible for its maintenance, but so too are her successors.[234] In this important respect, the affirmative duty to maintain retaining walls goes beyond the typical negative duty not to interfere with lateral support. Most courts hold that subsequent owners are not liable for their predecessors' withdrawal of lateral support.[235] Even if the effects of the withdrawal are felt during the current owner's tenure (that is, only then does the neighboring land subside), she is not responsible for excavations performed earlier. Liability attaches to the excavating owner, not to the land.[236] Thus, in most states, if an owner excavated and removed support for neighboring land, her successor is freed from any duty. If, however, that owner replaced said support with a retaining wall, the successor carries a duty to maintain the wall.[237] This result is best explained when support duties are conceived as duties to maintain. An owner is subject to a duty to maintain the support

230. *E.g.*, Kelley v. Falangus, 388 P.2d 223, 224 (Wash. 1964); Dyer v. St. Paul, 8 N.W. 272, 272 (Minn. 1881).

231. Noone v. Price, 298 S.E.2d 218, 223 (W. Va. 1982).

232. *E.g.*, Gorton v. Schofield, 41 N.E.2d 12, 15 (Mass. 1942); Urosevic v Hayes, 590 S.W.2d 77, 79 (Ark. Ct. App. 1979).

233. Fabbri v. Regis Forcier, 330 A.2d 807, 809–10 (R.I. 1975).

234. *Gorton*, 41 N.E.2d at 15.

235. Keck v. Longoria, 771 S.W.2d 808, 811 (Ark. Ct. App. 1989); Spoo v. Garvin, 32 S.W.2d 715, 716 (Ky. Ct. App. 1930). *But see* Gladin v. Von Engeln, 575 P.2d 418, 421–22 (Colo. 1978).

236. *See* RESTATEMENT (SECOND) OF TORTS § 817 cmt. j (emphasis added) ("The person liable under the rule . . . is the actor who withdraws the naturally necessary support.").

237. *See* Frederick v. Burg, 148 F. Supp. 673, 675 (W.D. Pa. 1957) (explicitly drawing the distinction between the subsequent owner's lack of liability for excavation work done by her predecessor and her liability for maintaining a retaining wall constructed by that predecessor).

provided by her land to neighboring soil as that support existed at the time she assumed ownership.[238]

b. Affirmative Covenants. Servitudes for support are "natural." Other kinds of servitudes must be created by private parties. Yet these other servitudes may also institute a property-law duty to maintain. For, although non-natural servitudes are always traceable to an agreement between owners, they are rights and duties in property, rather than in contract, meaning that they run with the land.[239] In other words, an owner must abide by the servitude even if she herself was not a party to the agreement creating it. Servitudes that oblige all future owners to perform an act on the land—for example, maintain it—are called affirmative covenants.[240]

Examples of affirmative covenants are obligations to provide heat to a building,[241] to conserve a historic structure,[242] to care for a fence,[243] to keep a sewer in good condition,[244] to maintain a bridge and replace it if destroyed,[245] to landscape,[246] and to preserve land in a manner preventing declines in the value of surrounding properties.[247] The most popular affirmative covenant nowadays is an obligation to pay homeowners association fees to fund the maintenance of common premises.[248]

The onus on an owner of land subject to an affirmative covenant to maintain can be weighty. She will be obliged to carry the costs of abiding by the covenant, regardless of her choice to refrain from using the land, and even when the land cannot be used. The case of *Pocono v. MacKenzie*[249] represents this extreme result. The MacKenzies held

238. Note, however, that the dilapidated state of the wall at the time the land was purchased by the defendant does not immunize her from liability. Noone v. Price, 298 S.E.2d 218, 225 (W. Va. 1982).

239. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.3(1) (2000).

240. *Id.* § 1.3(2).

241. Nicholson v. 300 Broadway Realty, 164 N.E.2d 832, 835 (N.Y. 1959).

242. Historic Green Springs v. Bergland, 497 F. Supp. 839, 842 (E.D. Va. 1980).

243. *E.g.*, Concklin v. N.Y. Cent. & H.R.R. Co., 134 N.Y.S. 191, 192 (N.Y. App. Div. 1912).

244. Friends of the Sakonnet v. Dutra, 749 F. Supp. 381, 384 (D.R.I. 1990).

245. *E.g.*, Old Dominion Iron & Steel Corp. v. Va. Elec. & Power Co., 212 S.E.2d 715, 718 (Va. 1975).

246. *E.g.*, Skyline Woods Homeowners Ass'n v. Broekemeier, 758 N.W.2d 376, 390 (2008).

247. *See id.*

248. *E.g.*, Neponsit Prop. Owners Ass'n v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793, 798 (N.Y. 1938).

249. Pocono Springs Civic Ass'n v. MacKenzie, 667 A.2d 233 (Pa. Super. Ct. 1995).

vacant land subject to an affirmative covenant to pay association fees. After purchasing the land, they discovered that it could not meet municipal sewage requirements, and therefore could not be developed. Consequently, they were not only unable to use the land, but they also could not dispose of it. When the land was put on the market, no buyers materialized; when offered to the homeowners association as a gift, the association declined; and, when property taxes were withheld, the locality refused to take possession.[250] Still, the court decided that the MacKenzies must abide by the affirmative covenant and pay the association fees. As a result, the property became a negative-value asset.

Affirmative covenants lead to a similar eventuality in other, less extreme, scenarios. For example, in several cases owners were forced to maintain golf courses in accordance with an affirmative covenant even when the courses became unprofitable.[251] In these and similar cases involving affirmative covenants, courts have held that as long as the covenant—that mandates the maintenance of a golf course, payment of fees for maintenance of common premises, or any other obligation—meaningfully benefits others, it must be enforced against the owner.[252]

c. Easements. As seen, the law of servitudes benefits the holder of a servitude—for example, of a support right or of an affirmative covenant—by empowering her to force the owner of the subjected land, known as the "servient estate," to maintain that land. With respect to another category of servitudes, easements, the law of servitudes performs the reverse. Easements are servitudes whose holders have the right to enter another's land and do something on it.[253] Examples of easements are a right of way or a right to install pipes. An easement thereby benefits its holder. But it also places a duty on her. The holder of an easement may not exercise her easement in a way that places an undue burden upon the servient estate.[254] This restriction engenders a duty to repair and maintain an easement to prevent injury to the servient estate. For example, the owner of a right of way may not stand idle as the cattle guards along

250. *Id*. at 235.

251. *E.g.*, Heatherwood Holdings LLC v. First Commercial Bank, 61 So.3d 1012, 1024 (Ala. 2010); Shalimar Ass'n v. D.O.C. Enters. Ltd., 688 P.2d 682, 683 (Ariz. Ct. App. 1984).

252. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.10 cmt. c (2000).

253. *Id*. § 1.2(1).

254. Cox v. Glenbrook Co., 371 P.2d 647, 656–57 (Nev. 1962).

the road deteriorate and fail to protect livestock on the servient estate.[255] The owner of an irrigation easement may not allow it to overgrow with vegetation, become obstructed by debris, and gush with polluted water.[256] Thus, easements law, albeit mostly concerned with privileging a holder of an easement to use another's land, also places on the holder of an easement the duty to maintain the portions of land that her easement covers.

5. *Landlord–Tenant Law*. Servitudes mandating maintenance play a key role in one specialized area of property law: landlord–tenant law. The lease creating the tenancy is a series of covenants—obligations between the landlord and the tenant.[257] In addition to these explicit and voluntary promises, there are implicit covenants that courts or legislatures insert into all leases, regardless of the parties' desires. Many such legally created obligations impose on landlords assorted duties to maintain. These include a duty to maintain the building's common spaces in a safe condition[258] and to protect tenants' premises from third parties' illegal activities.[259] Most prominently, the obligations to which a landlord is subjected by law encompass a warranty of habitability: the unwaivable obligation to maintain leased premises in livable conditions.[260] The warranty, often drawing on detailed municipal codes, consists of specific and rigorous requirements, such as the provision of heat and water, garbage removal, and the insulation of windows.[261]

Given that the warranty is inherent to landlord–tenant law, the potent duty to maintain it institutes endures for as long as the landlord–tenant relationship lasts. Thus, owners who seek to evade the duty—because they cannot afford, or do not wish, to maintain their properties—can simply opt to avoid or abandon the rental

255. Walsh v. United States, 672 F.2d 746, 748 (9th Cir. 1982).

256. City of Turlock v. Bristow, 284 P. 962, 965 (Cal. Dist. Ct. App. 1930); *see also* Powers v. Grenier Constr. Inc., 524 A.2d 667, 669 (Conn. App. Ct. 1987) (concluding the drainage-easement holder was liable for flooding the servient estate due to his failure to repair the drainage system).

257. WILLIAM STOEBUCK & DALE WHITMAN, THE LAW OF PROPERTY § 6.1, at 244 (3d ed. 2000) (defining tenancy).

258. *E.g.*, King v. G & M Realty Corp., 370 N.E.2d 413, 415 (Mass. 1977).

259. *E.g.*, Braitman v. Overlook Terrace Corp., 346 A.2d 76, 77 (N.J. 1975).

260. The warranty was first recognized in *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1072–73 (D.C. Cir. 1970). It has since been adopted by most states. ROBERT SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 3:16, n.30 (1980).

261. *See* UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 2.104, 7B U.L.A. 326 (1972).

market. In some jurisdictions, however, this course of action is unavailable because owners' ability to control their statuses as landlords is restricted. Anti-eviction laws (enumerating allowable causes for removing tenants),[262] rent-control laws (setting maximum rates for rent increases),[263] or condominium-conversion laws (regulating the transformation of rental units into individually owned units),[264] limit a landlord's ability to terminate a landlord–tenant relationship, even after the lease expires.[265] Such laws might even ban the owner from removing the unit from the market and moving into it herself.[266] In tandem with obligations to maintain leased properties, any such restriction on the owner's ability to terminate leases generates a duty to maintain units that is costly, and in radical cases, even impossible, to escape.

6. *State and Local Statutory Maintenance Obligations*. The duties a landlord owes to her tenant draw on both common-law and statutory origins. There are also rules imposing a detailed duty to maintain that are fully based on statute. These rules supplement the common-law doctrines reviewed earlier in this Section. Building laws and ordinances, which most states and cities now boast, present a prime example. They enforce maintenance standards on all owners regardless of the use to which they put their property (that is, even if the property is not leased) through fines and repair orders.

Although the specific maintenance standards vary by jurisdiction, their characteristics can be gauged through Chicago's

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262. *E.g.*, N.H. REV. STAT. ANN. § 540:2 (LexisNexis 2014).

263. *E.g.*, N.Y. COMP. CODES R. & REGS. tit. 9, § 2101.

264. Condominium-conversion statutes can, for example, place a moratorium on conversions, assure tenants a right to buy their units for a set price, or forbid eviction of certain tenants. *See, e.g.*, 1983 Mass. Acts 1926; N.J. STAT. ANN. §§ 2A:18-61.22–65 (West 2000 & Supp. 2014).

265. When challenged by landlords as takings, these laws were mostly deemed constitutional. *See* Block v. Hirsh, 256 U.S. 135, 153–54, 157–58 (1921) (upholding rent control); Yee v. Escondido, 503 U.S. 519, 524–25, 549 (1992) (upholding rent-control law prohibiting eviction of mobile-home dwellers); San Remo Hotel v. City and Cnty. of S.F., 41 P.3d 87 (Cal. 2002) (upholding an ordinance mandating payments by the owners of single-occupancy hotel units before converting them to tourist use).

266. *See, e.g.*, Flynn v. Cambridge, 418 N.E.2d 335, 337, 339–40 (Mass. 1981) (upholding a statute that prohibited a condominium owner from reoccupying one of his own units); Puttrich v. Smith, 407 A.2d 842, 843–44 (App. Div. 1979) (upholding a similar statute in New Jersey). *But see* Cwynar v. City & Cnty. of San Francisco, 109 Cal. Rptr. 2d. 233, 238–40, 245–46 (2001) (holding that a similar ordinance could constitute a taking).

building ordinance.[267] Chicago requires owners to keep their buildings or units in "a clean, sanitary and safe condition"[268] and "exterminate any insects, rodents or other pests therein."[269] Every lot must "be graded and drained so as to prevent the accumulation of stagnant water."[270] The foundations must fully support the building, and all exterior walls and roofs must be whole.[271] In addition, like many of its peers,[272] Chicago singles out vacant properties for particularly invasive treatment. The owners of such properties must, among other obligations, register their properties with the city and pay fees;[273] retain an occupied local address;[274] carry liability insurance;[275] keep all grass below ten inches high;[276] preserve windows, doors, porches, decks, and stoops in sound condition;[277] light exit areas;[278] prevent trash accumulation;[279] and secure the building.[280] Importantly, these

267. Comparable codes have been adopted in other cities. *See* PHILA. CODE §§ PM-304–305 (2007); HOUS. TEX., ORDINANCE §§ 10-361, 363, 364 (2011), *available at* http://www.houstontx.gov/codes. Similar statewide codes have also been adopted. *See* N.Y. COMP. CODES R. & REGS. tit. 19, § 1226.1 (adopted 2010).

268. CHI., ILL. MUN. CODE § 13-196-620 (a) (2013).

269. *Id.* § 13-196-620(c).

270. *Id.* § 13-196-600.

271. *Id.* § 13-196-530.

272. *E.g.*, PHILA. CODE § PM-306; L.A., CAL., MUN. CODE § 91.8904. In addition, in a law applicable to Los Angeles and San Diego, the California legislature shortened the notice period required before the enforcement agency may act against a vacant, substandard, single-family dwelling. CAL. HEALTH & SAFETY CODE § 17980.9 (West 2006). Indiana adopted a different approach. Under its Unsafe Building Law, vacant and unmaintained properties are defined as unsafe buildings, and are thus susceptible to the plethora of administrative sanctions available for governments dealing with unsafe buildings. IND. CODE ANN. § 36-7-9-4(a)(6) (LexisNexis 2009 & Supp. 2014). Further, the Indiana law specifically encourages local governments to adopt, with respect to such structures, "maintenance and repair standards appropriate for the community." IND. CODE ANN. § 36-7-9-4.5 (LexisNexis 2009). Michigan established special administrative-hearing bureaus to adjudicate and impose sanctions on the violations of local codes designated as "blight" violations. MICH. COMP. LAWS ANN. § 117.4q (West 2006 & Supp. 2014). Congress has considered providing federal funding to municipalities for expanded and improved code enforcement, as well as other local mechanisms for dealing with vacant properties. The Community Regeneration, Sustainability, and Innovation Act of 2009. (S. 453 H.R. 932 (111th)), reintroduced as The Community Regeneration, Sustainability, and Innovation Act of 2011 (H.R. 790).

273. CHI., ILL. MUN. CODE § 13-12-125(a)(1).

274. *Id.* § 13-12-125(a)(2).

275. *Id.* § 13-12-125(c).

276. *Id.* § 13-12-135(a)(1).

277. *Id.* § 13-12-135(b)(3); § 13-12-135(b)(6).

278. *Id.* § 13-12-135(b)(7).

279. *Id.* § 13-12-135(c)(1).

280. *Id.* § 13-12-140.

and other building code obligations may be enforced against an owner whether or not the neglect presents a danger to outsiders.[281] These extensive maintenance obligations under state and local laws illustrate that the characterization of property rights as encompassing a freedom to let property lie fallow or gather dust is simply inaccurate—at least in urban or suburban settings.

7. *Farming Law*. Although the owners of rural lands are mostly not subject to building codes, they too cannot let their lands lie fallow or gather dust. Like all other owners, they are subject to negligence and nuisance liability for damages arising from the state of their lands.[282] There is solely one category of rural cases in which courts remain loath to impose liability in negligence or nuisance: cases in which damages result from the spread of noxious fauna or flora from neglected farmland.[283] However, even in such instances, owners are not shielded from the specter of legal responsibility. Since the early twentieth century, statutes impose a duty to maintain in many of these situations, sometimes going as far as to criminalize a farmholder's failure to combat wild plants.[284] Thus, owners' liberty to neglect, or let their rural land lie fallow, is very limited.

Indeed, the particular practice of letting rural land lie fallow has become the subject of legal challenges. When agricultural land is farmed ineffectively or not at all, sand, soil, and weeds can blow onto neighbors' lands. Nevertheless, at an earlier time, courts were unwilling to entertain negligence or other claims against farmers who let their land lie fallow—cleared, unirrigated, and unplowed.[285] Over the years, however, courts began to condition their approval of such practices on proof that leaving land fallow for a certain time is "in

281. Vill. of Ringwood v. Foster, 932 N.E.2d 461, 471 (Ill. App. Ct. 2010).

282. *See supra* Part II.A.2–3.

283. A late nineteenth-century English judge dismissed such a case with two sentences: "I never heard of such an action as this. There can be no duty as between adjoining occupiers to cut the thistles, which are the natural growth of the soil." Giles v. Walker [1890] 24 L.R. 656, 657 (Q.B. Div.); *see also* Boarts v. Imperial Irr. Dist., 182 P.2d 246, 248 (1947) (holding "no duty rested on the defendant to cut or destroy weeds"); Belhumeur v. Zilm, 157 N.H. 233, 236 (2008) (holding the owner not liable for the "independent acts of wild animals"—in this case, the actions of the bees nesting in a tree on her property).

284. *See, e.g.*, IND. CODE ANN. §§ 15-16-7-1–15 (LexisNexis 2008) (noxious weed eradication); *id.* §§ 15-16-8-1–14 (LexisNexis 2008) (destruction of certain detrimental plants); Vance v. S. Kan. Ry. of Tex., 152 S.W. 743, 743 (Tex. Civ. App. 1912) (interpreting a statute making it illegal to permit Russian thistles to go to seed).

285. *E.g.*, Stewart v. Birchfield, 114 P. 999 (Cal. Dist. Ct. App. 1911).

accordance with good farming methods" in the specific area and for the particular crop.[286] This requirement renders precarious the legal status of neglectful owners who let their rural land lie fallow for no persuasive reason.[287] This line of decisions amplifies the duty to maintain that already burdens rural owners, and specifically undermines the supposed general right to let one's property lie fallow.

B. Rules Imposing the Duty To Maintain Through Loss of Property

The law subjects owners to a duty to maintain their lands because, as seen in the preceding Section, neglectful owners are vulnerable to monetary judgments or injunctions. The law also, as this Section illustrates, threatens such inattentive owners with the potential loss of their land. This sanction is often harsher than financial liability. For, when imposed, it leaves the owner without her property and, at least in most cases, without its worth. Yet there are circumstances in which financial liability is the more severe sanction, even though it leaves the owner with her property. When an owner's land can be put to no productive use—that is, when it is valueless—its loss causes the owner no harm, whereas imposing any financial liability on the land transforms it into a negative-value asset. Because in American law owners cannot relinquish their land,[288] negative-value land drains the owner's other resources. The predicament of the holders of Detroit properties offered for one dollar serves as an example.[289] These owners would, in all likelihood, welcome a rule divesting them of their lands (and, as explained below, Michigan may indeed formulate such a rule).[290] Theirs is an exceptional case however. Most lands are not valueless, and, accordingly, most owners are apprehensive about losing their land. Hence rules imposing the duty to maintain through potential loss of land are effective tools promoting the duty. These rules include eminent domain, improving trespasser, adverse possession, and nuisance abatement and property rehabilitation statutes.

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286. Preston v. Schrenk, 295 P.2d 272, 273 (Idaho 1956); Hoover v. Horton, 209 S.W.2d 646, 649 (Tex. Civ. App. 1948); Robinson v. Whitelaw, 364 P.2d 1085, 1085 (Utah 1961).

287. *See* 1 AM. JUR. 2D *Adjoining Landowners* § 32 (cautioning that such practices are unlikely to be upheld).

288. Peñalver, *supra* note 28.

289. *See supra* notes 13–16 and accompanying text.

290. *See infra* note 323.

1. *Eminent Domain*. Eminent domain is the government's power to take private property for public uses.[291] The government can take whichever properties are necessary for the planned public use, irrespective of the properties' level of upkeep.[292] However, undermaintained properties are, and always were, particularly attractive candidates for exercises of the eminent-domain power.[293] Indeed, the federal Constitution incentivizes governments to target these properties because of the two restrictions it places on eminent domain.[294] First, under the federal Constitution, a government condemning property must pay just compensation, equaling the market value of the property.[295] The value of the property is higher when the property is well-maintained, and therefore, the law encourages a government to take a neglected property, rather than one that is well-maintained, when either can serve a public project.

An even stronger incentive for the government to select neglected properties is created by the second requirement for a constitutional exercise of the eminent-domain power: that the land be taken for a "public use."[296] Justifiably or not, government officials routinely and successfully claim that taking neglected properties is inherently a public use, regardless of the nature of the government's eventual use of the land.[297] Moreover, during the first decade and a half of the twenty-first century, as criticism grew of the taking of properties and their transfer to private developers, states amended their laws to limit the reach of takings for such economic

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291. Kohl v. United States, 91 U.S. 367, 373–74 (1875).

292. Nat'l Docks Ry. v. Cent. R.R., 32 N.J. Eq. 755, 763 (1880) ("[The power of eminent domain] is primarily an absolute one . . . . In the constituted government of this state, the right of exercising it has been confided to the legislature, restricted by only two conditions: one, that compensation shall be made to the owner of the property taken; the other, that the use for which property may be taken shall be a public use. In other respects it is without limit.").

293. *E.g.*, N.J. CONST. art. VIII, § 3, ¶ 1 ("The clearance, replanning, development or redevelopment of blighted areas shall be a public purpose and public use, for which private property may be taken . . . .").

294. U.S. CONST. amend. V.

295. *See id.* ("[N]or shall private property be taken for public use, without just compensation.")

296. *Id.*

297. For an overview and critique of this position, see generally Steven Eagle, *Does Blight Really Justify Condemnation*?, 39 URB. LAW. 833 (2007); *see also* New Orleans Redevelopment Auth. v. Burgess, 16 So. 3d 569, 583–85 (La. Ct. App. 2009) (holding that the expropriation of blighted property served a public purpose, and thus did not violate the Louisiana Constitution, even though ownership was to be transferred to a private third party).

development to "blighted properties" alone.[298] Elsewhere, state courts interpreted their constitutions similarly,[299] and four dissenting Supreme Court Justices read the federal Constitution in a corresponding vein.[300]

Statutory definitions of the "blighted" conditions that legitimize takings for economic development under these new restrictions encompass most failures to maintain land. In Alabama, for example, a property is blighted if it is dilapidated, unsanitary, overcrowded, a fire hazard, disconnected from utilities or sewage, overgrown with noxious weeds, a haven for rodents, or a dumping ground.[301] Definitions of blight can be broader and vaguer still,[302] and consequently, owners who fail to meet a not-trifling maintenance standard are vulnerable to takings for economic development—takings against which owners maintaining their land are now immune. Thus, current rules expand eminent domain's role as a tool enforcing a duty to maintain. Neglectful owners are subject to a heightened risk of land loss for traditional public projects, and in many states, they are the sole owners subject to the risk of land loss for economic development.

2. *Improving Trespasser*. When a private owner fails to maintain her land, the risk that title will be removed and vested in the government increases. So does the likelihood that title will be lost in favor of another private individual. One doctrine producing this result is the law of the improving trespasser. When an unauthorized individual makes improvements—say, builds structures—on another's land, she is committing trespass, regardless of the land's prior condition.[303] Still, in most states[304] the owner cannot remove the

298. *E.g.*, Act of Aug. 25, 2006, 2006 Ala. Acts 584 (codified as ALA. CODE § 24-2-2(c) (LexisNexis Supp. 2014)); Act of June 14, 2006, 2006 Iowa Legis. Serv. 1st Ex. Sess. Ch. 1001, § 3 (West) (codified as amended at IOWA CODE ANN. § 6A.22 (West 2008 & Supp. 2014)); Act of Sept. 1, 2005, 2005 Tex. Gen. Laws 1 (codified as TEX. GOV'T CODE ANN. § 2206.001(b)(3) (West 2008 & Supp. 2014)).

299. *E.g.*, Wayne Cnty. v. Hathcock, 684 N.W.2d 765 (Mich. 2004); Karesh v. City Council of Charleston, 247 S.E.2d 342 (S.C. 1978).

300. Kelo v. City of New London, 545 U.S. 469, 498–502 (2005) (O'Connor, J., dissenting).

301. ALA. CODE § 24-2-2(c).

302. *E.g.*, Norwood v. Horney, 853 N.E.2d 1115, 1143 (Ohio 2006) (striking down an ordinance that applied too vague a definition of the phrase "deteriorating area").

303. Trespass is "a physical intrusion upon the land of another without the proper permission." Hoery v. United States, 64 P.3d 214, 217 (Colo. 2003) (citation omitted). An object can physically intrude, and hence, unauthorized construction of a building on another's land constitutes trespass. *See id.*

trespasser and keep those improvements.[305] As the recently adopted *Restatement (Third) of Restitution and Unjust Enrichment* explains, the trespasser who mistakenly improved another's land "has a claim in restitution as necessary to prevent unjust enrichment."[306]

To prevent unjust enrichment, a court may order the owner to pay the trespasser for the improvements she made to the land. Alternatively, the court may force the owner to sell the land to the trespasser in exchange for the land's market value.[307] A court will award one of these remedies if it concludes that when balanced against the interests of the owner, the trespasser's interests prevail. The different balancing tests vary in name and origin—some are statutory, others judicial—but under all of them the owner is more likely to lose her land (that is, be forced to convey it to the trespasser) if the land is unimproved or undermaintained.[308]

A major factor a court considers before ruling that the balancing favors the trespasser is the extent of loss the owner will sustain if her land is awarded to the trespasser. Such loss is small in cases of unimproved land,[309] especially when the owner cannot show a plan to maintain the land.[310] In addition, courts place much weight on the timing of the owner's complaint against the trespasser. If the owner delays, courts are hostile to her request to preserve title.[311] An owner

304. In the past, the rule was different. *E.g.*, Geragosian v. Union Realty, 193 N.E. 726, 728 (Mass. 1935) ("The facts [sic] that the aggrieved owner suffers little or no damage from the trespass . . . [or] that the wrongdoer acted in good faith and would be put to disproportionate expense by removal of the trespassing structures . . . are ordinarily no reasons for denying an injunction. Rights in real property cannot ordinarily be taken from the owner at a valuation . . . . The general rule is that the owner of land is entitled to an injunction for the removal of trespassing structures." (citations omitted)).

305. HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION 82–85 (2004).

306. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 10 (2011).

307. *See* Rzeppa v. Seymour, 203 N.W. 62, 63 (Mich. 1925).

308. For different balancing tests, see generally Culbreath v. Parker, 717 So. 2d 430 (Ala. Civ. App. 1998) ("balancing the equities"); Golden Press v. Rylands, 235 P.2d 592 (Colo. 1951) ("relative hardship" test); CAL. CIV. PROC. CODE § 871.3 (West 1980 & Supp. 2014) (requiring courts to award relief that "is consistent with substantial justice to the parties under the circumstances").

309. *E.g.*, *Golden Press*, 235 P.2d at 596; RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 10 cmt. a (2011) ("The . . . showing of unjust enrichment . . . may be very strong, particularly where the value of the improvements greatly exceeds the value of the unimproved property.").

310. CAL. CIV. PROC. CODE § 871.4 (West 1980) ("[T]he court shall take into consideration any plans the owner of the land may have for the use or development of the land . . . .").

311. *E.g.*, Myers v. Yingling, 279 S.W.3d 83 (Ark. 2008); Stewart Sterk, *Strict Liability and Negligence in Property Theory*, 160 U. PA. L. REV. 2129, 2156–57 (2012).

is thus required to maintain, or at least police, her land often enough to promptly spot the improving trespasser. Moreover, by actually maintaining her land, the owner might prevent trespassing improvements altogether, because it is much harder, and sometimes physically impossible, to improve land already improved. For example, a trespasser cannot build a structure where one has already been built or clear a field that has already been cleared.

As originally conceived by courts and legislatures, the balancing test applied in improving trespasser cases is meant not to impose a duty to maintain, but to prevent unjust enrichment. Nonetheless, because of the factors used to justify forcing the owner to sell the land to the trespasser, the test's actual effect is the promotion of a duty to maintain.

3. *Adverse Possession*. Another doctrine carrying the same effect is adverse possession. The impact of adverse possession on an owner is more unsettling than that of the improving trespasser rules or the eminent-domain power. When losing her land through the latter doctrines, the owner is paid its market value, by the trespasser or the government, respectively. In contrast, when losing her land through adverse possession, the owner receives no compensation.

For this dire fate to befall an owner, the requirements of adverse possession must be met. A person must prove unauthorized, actual, exclusive, continuous, and open possession of the owner's land for a statutorily set period of time.[312] Unlike improving trespasser rules, adverse possession's focus is not on the value of improvements the trespasser made, but rather, on the passage of time.[313] However, like the improving trespasser doctrine, adverse possession incentivizes an owner to maintain her land, as an intruder is likelier to meet the requirements of adverse possession, and win the owner's land, when that land is neglected.

Inevitably, it is easier to actually possess another's land for a lengthy period of time, as required for adverse possession, when that land is neglected. In such circumstances, entry barriers to the land and detection risks while on the land are lower. The actual-possession requirement thus often serves as a proxy singling out neglectful

312. *See, e.g.*, Snook v. Bowers, 12 P.3d 771, 781–82 (Alaska 2000).

313. *See* Nome 2000 v. Fagerstrom, 799 P.2d 304, 309 (Alaska 1990) ("Whether a claimant's physical acts upon the land are sufficiently continuous, notorious and exclusive does not necessarily depend on the existence of significant improvements . . . .").

owners. An owner who could not be bothered to keep intruders off her land for the statutory adverse-possession period is unlikely to have been actively maintaining it in other respects.[314] Adverse possession's further requirement that the intruder's possession be open is particularly geared toward protecting an owner who maintains her land: an intruder openly possessing the land is apparent to an owner attending to it.[315] Moreover, if the owner maintains the land, it will often be impossible for the possessor to satisfy the adverse-possession requirement of exclusive possession. When the owner maintains the land, the intruder cannot argue that she excluded the owner. Thus, the intruder's possession is viewed as shared with the owner, rather than exclusive, and the adverse possession claim falters.[316] In sum, because it requires actual, open, and exclusive possession by an intruder, adverse possession encourages an owner to maintain her land, or at least periodically inspect it, to impede possession by unauthorized individuals.

4. *Nuisance Abatement and Abandoned Properties Rehabilitation Statutes*. As with common-law rules inflicting financial liability on neglectful owners, the traditional common-law rules exposing these owners to potential loss of land are amplified by legislative initiatives. The most straightforward of such initiatives are the nuisance-abatement statutes. As explained in Part II.A, an undermaintained property may constitute a public nuisance.[317] In common law, the sanction accompanying this tort was damages or an injunction. Nowadays, plaintiffs may seek yet another remedy set by statute: abatement of the nuisance through the taking of the neglected property. Courts may order the property sealed and ban the owner from using it for one to several years.[318] Once that time elapses, the

314. Peñalver, *supra* note 28, at 210.

315. *E.g.*, *Nome*, 799 P.2d at 309 ("Use consistent with ownership which gives visible evidence of the claimant's possession, such that the reasonably diligent owner 'could see that a hostile flag was being flown over his property' is sufficient [to prove notoriety]." (quoting Shilts v. Young, 567 P.2d 769, 776 (Alaska 1977))).

316. Smith v. Tippett, 569 A.2d 1186, 1190 (D.C. 1990) ("[T]he adverse claimant's possession cannot be shared with the true owner." (quoting J.P. HAND & J.C. SMITH, NEIGHBORING PROPERTY OWNERS § 6.06, at 135 (1988))).

317. See *supra* Part II.A.

318. *E.g.*, KAN. STAT. ANN. § 22-3901–3904 (2007 & Supp. 2013); MICH. COMP. LAWS ANN. § 600.3825 (West 2013). Individuals seeking nuisance abatement must petition the court and rely on a statute. *See* Countrywide Home Loans, Inc. v. Holland, 993 N.E.2d 184, 193 (Ind. Ct. App. 2013) (denying claimant's contention that he enjoys a citizen's right to abate a nuisance, a right which empowered him to take over a vacant house in foreclosure).

owner regains title provided she pays all expenses related to the abatement of the nuisance. Often, she is also obliged to post a bond assuring the nuisance shall not resume.[319] Many states limit these remedies to cases in which the neglected property is a hub for illegal uses, such as gambling, drugs, or prostitution.[320]

In a still more recent trend dating to the past decade, some states adopted legislation subjecting all neglected properties, not just those accommodating illegal activities, to such treatment. For example, the Ohio nuisance-abatement statute defines public nuisances as including deteriorated buildings, and empowers any interested party to petition the court for the appointment of a receiver to abate the nuisance.[321] The receiver is tasked with maintaining the property, and may sell it to fund her efforts.[322] Indiana introduced an expedited process for the forced tax sale of abandoned properties, which limits the right an owner otherwise has to redeem her property.[323] Iowa represents an even more extreme example. A recent amendment to its statutes empowers a city in which an abandoned building is located to petition the court to enter judgment awarding the city clean title to the property.[324]

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319. *E.g.*, KAN. STAT. ANN. § 22-3904 (2007); MICH. COMP. LAWS ANN. § 600.3840 (West 2013).

320. MICH. COMP. LAWS ANN. § 600.3801 (West 2013); HAW. REV. STAT. ANN. § 712-1270 (LexisNexis 2007 & Supp. 2013).

321. OHIO REV. CODE ANN. § 3767.41 (West 2006 & Supp. 2014).

322. *Id.*

323. IND. CODE ANN. § 6-1.1-25-4 (LexisNexis 2013); IND. CODE ANN. § 6-1.1-24-1(a)(2) (LexisNexis 2013). Indiana also bans certain entities, which are unlikely to develop the abandoned lands, from purchasing properties in the tax sale. *See* IND. CODE ANN. § 36-1-11-16 (LexisNexis 2013) ("A person who owes delinquent taxes, special assessments, penalties, interest, or costs directly attributable to a prior tax sale on a trace of real property . . . may not purchase, receive, or lease a tract that is offered in a sale, exchange, or lease under this chapter.").

324. IOWA CODE ANN. § 657A.10A (West Supp. 2014). The special task force appointed by the President to explore blight in Detroit recommended that Michigan adopt a similar measure to reinforce the city's power to use nuisance proceedings to demolish blighted properties or take title from their owners. *See* DETROIT BLIGHT REMOVAL TASK TEAM, *supra* note 121. Detroit was actually the site of the first such measure in 2005: the Wayne County Nuisance Abatement Program (NAP) was empowered to pursue neglectful owners and take title of their property through court action. Wayne Cnty. Exec. v. Acorn Inv. Co., Nos. 248925, 248926, 248927, 248928, 2005 WL 17764, at *4 (Mich. Ct. App. Jan. 4, 2005). Though the program was hailed as a success, the county discontinued it due to budgetary constraints in 2010. Dustin Walsh, *Wayne County Wins 11 Awards from National Association of Counties*, CRAIN'S DETROIT BUS. (July 20, 2010), http://www.crainsdetroit.com/article/20100720/free/100729992/wayne-county-wins-11-awards-from-national-association-of-counties. In April 2014, the newly elected mayor of Detroit launched a neighborhood-rebuilding program that seeks to force property owners to

Illinois, which similarly enables local governments to gain title for abandoned properties,[325] has further adopted a supplementary, and different, approach to reintegrating undermaintained properties. In Illinois, governments are not the only entities now entitled to take possession of such properties. The Illinois Abandoned Housing Rehabilitation Act empowers nonprofit organizations to petition courts for permission to take possession of abandoned properties and rehabilitate them for low- or moderate-income housing.[326] An owner may seek to restore her interest in the property, but she must first reimburse the organization for its expenditures and for any increase in the property's value.[327] If the owner delays for more than two years, she loses the property irreparably.[328]

These different statutes enable local governments and nonprofit organizations to take over neglected land and maintain it. The owner loses, permanently or temporarily, her land or the right to use it. Even though she is thereby deprived of her property, none of these statutes offer compensation. Although the Constitution mandates compensation for the denial of all economically beneficial use of private land,[329] courts have upheld these arrangements because they target nuisances.[330] In other words, precisely because the

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rehabilitate vacant homes on their properties through the threat of otherwise losing those properties to the Detroit Land Bank under nuisance-abatement laws. *Detroit's Neighborhood Rebuilding Program Kicks Off in Marygrove Community*, CITY OF DETROIT (Apr. 9, 2014), http://www.detroitmi.gov/News/tabid/3196/ctl/ReadDefault/mid/4561/ArticleId/445/Default.aspx.

325. 65 ILL. COMP. STAT. ANN. 5/11-31-1(d) (West 2005 & Supp. 2014).

326. 310 ILL. COMP. STAT. ANN. 50/3 (West 2008).

327. *Id.* § 50/7.

328. This is so provided that the nonprofit uses the property for low- or moderate-income housing for at least ten years. 310 ILL. COMP. STAT. ANN. 50/9 (West 2008). In another new law, adopted in 2010, Illinois empowers localities to initiate a forced sale of distressed condominiums, defined as parcels "containing condominium units which are operated in a manner or have conditions which may constitute a danger, blight, or nuisance to the surrounding community or to the general public." 765 ILL. COMP. STAT. ANN. 605/14.5 (West Supp. 2014). Detroit has experimented with another tactic to promote the rehabilitation of vacant properties. In May 2014, the city began auctioning vacant houses it owns at the starting price of $1000. Buyers must inhabit the house and commit to repairing it within six months. If the house is not up to code within six months, the buyer loses the house (and the money she paid for it). *See Building Detroit*, DETROIT LAND BANK AUTH., http://www.buildingdetroit.org (last visited Nov. 1, 2014).

329. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 (1992).

330. *E.g.*, Empire State Ins. Co. v. Chafetz, 278 F.2d 41, 42 (5th Cir.1960) ("The exercise of the police power by the destruction of property which is itself a public nuisance . . . is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property

arrangements penalize neglectful owners and enforce a duty to maintain, they count as legitimate exercises of the state's police power.

C. *Summary: Property Law's Duty To Maintain and Its Relationship to Rights to Destroy and Abandon*

Each of the doctrines reviewed in this Part imposes on an owner a duty to maintain her property up to a minimum standard. When a statutory duty (for example, an implied warranty of habitability or a building code) applies, an owner is subject to a detailed list of obligations regarding her property's condition. In the absence of a specific statutory duty, an owner remains subject to the duty to maintain as formulated in different common-law rules, which urge her to periodically inspect her property, prevent blight, and exercise at least a reasonable standard of care to avoid the emergence of dangerous conditions or interferences with neighbors' enjoyment of their lands. Each doctrine creates an incentive: maintaining her property is an effective (and sometimes the only) way for an owner to avoid the imposition of financial liability, or loss of land, by the specific doctrine. The intensity and details of the incentive vary across doctrines. So does the identity of the party who can seek a remedy against the owner under each doctrine. Sometimes it is a harmed individual, other times it is any individual or an individual who meets certain conditions, and elsewhere it is the relevant local government. But the end effect is the same. Cumulatively, these doctrines construct a legal reality in which the duty to maintain is pervasive. An owner is simply not free to let her land lie fallow or gather dust. Any such decision may entail legal costs.

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is taken away from an innocent owner." (quoting Pasternack v. Bennett, 190 So. 56, 59 (Fla. 1939))); Johnson v. City of Prichard, 771 F. Supp. 2d 1310, 1319–20 (S.D. Ala. 2011) (finding no unconstitutional taking or trespass by the government when a city demolished a structure to abate a nuisance); Embassy Realty Invs., Inc. v. City of Cleveland, 976 F. Supp. 2d 931, 940–43 (N.D. Ohio 2013) (same); Keshbro v. City of Miami, 801 So. 2d 864, 875–77 (Fla. 2001) (holding that an order of closure issued to a business where illegal activity was taking place pursuant to a nuisance-abatement statute, was not a taking); LJD Props., Inc. v. Greenville, 753 S.W.2d 204, 207 (Tex. App. 1988) (finding no unconstitutional taking or trespass by the government when a city demolished a structure to abate a nuisance under the Texas Constitution). These rulings rely, or can rely, on statements made by the Supreme Court in cases such as Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 n. 20 (1987) ("[S]ince no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity.").

This unacknowledged limit on ownership's reach is different from seemingly similar rights an owner may lack to abandon or destroy her property. These latter rights have recently attracted belated and sophisticated scholarly attention, and it is important to understand the differences between the duty to maintain and these other elements of property law.[331] The difference centers on two special characteristics of property law. First, property law employs the term "abandonment" in a manner diverging from the word's colloquial understanding. Second, property law does not fold the moderate right to neglect an asset into the radical right to destroy it.

In common parlance respecting assets, the verbs "to abandon" and "to neglect" are used interchangeably. In property law, conversely, the term "abandonment" has a very precise and constricted meaning. An owner does not legally abandon her property by neglecting or failing to maintain it. An owner who has not occupied her land for a lengthy period of time, or who has allowed it to fall into disrepair, has not necessarily abandoned it as a legal matter. Legal abandonment requires an actual decision by the owner to let go of the property. An owner abandons her property when she chooses to no longer be its owner and acts on that decision.[332] Abandonment thus signifies a mental state of actively seeking to renounce one's status as owner—not a mere disregard of the owned asset.

The law of water rights neatly illustrates this distinction. It allocates to individuals rights to use water that can later be lost in two distinct ways: abandonment or forfeiture. Water rights are *abandoned* when their owner exhibits intent to relinquish them; water rights are *forfeited* when their owner fails to use them. Ergo, an owner who has expressed no intent to relinquish her water rights cannot lose them through abandonment, but she might still lose them through forfeiture if she fails to maintain them.[333]

An owner may fail to maintain her property without abandoning it and thus the duty to maintain is not synonymous with the owner's inability to legally abandon land.[334] Similarly, the duty to maintain

331. On the right to abandon, see generally Peñalver, s*upra* note 28; Strahilevitz, *supra* note 12. On the right to destroy, see generally Strahilevitz, *supra* note 28.

332. *E.g.*, Preseault v. United States, 100 F.3d 1525, 1545 (Fed. Cir. 1996) (abandoning easements); Corliss v. Wenner, 34 P.3d 1100, 1104 (Idaho App. 2001) (abandoning goods).

333. *See* Hawley v. Kansas, 132 P.3d 870, 880 (Kan. 2006) (relying on the abandonment–forfeiture distinction).

334. In American law, land cannot be abandoned. *See supra* note 17.

suggested here is not the equivalent of the lack of a right to destroy. Professor Lior Strahilevitz defines destruction as the "eliminat[ion] . . . of all otherwise valuable future interests in a . . . thing."[335] Naturally, as a practical matter, an owner may fail to maintain her property without eliminating all its value. More importantly, as a legal matter, an owner may have a right to destroy her asset, yet still be obliged to maintain it until its destruction. To illustrate this point, consider animal law. Under current law, animals are treated as property and may be destroyed (that is, put to death) by their owners at any point.[336] However, an owner is not free to treat her animal cruelly, and therefore, is not allowed to starve or neglect it.[337] Thus, although the owner possesses the freedom to destroy her animal, she does not hold the lesser freedom to refrain from maintaining it.[338]

The duty to maintain identified in this Article is thus not the Hohfeldian opposite,[339] or the reverse image, of the privilege to destroy. Neither is the failure to abide by this duty to maintain comparable to the abandonment of property. The powerful duty to maintain emerging from the disparate legal rules reviewed in this Part is an independent element of American property law and as such, it must be separately appreciated and explained.

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335. Strahilevitz, *supra* note 28, at 793.

336. GARY FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 24, 44, 128–29 (1995) (animals are regarded as property and hence may be killed by owners; protective legislation has never been interpreted to interfere with the unnecessary killing by owners).

337. *See* The Animal Welfare Act of 1970, 7 U.S.C. § 2143(a)(1)–(2) (2012). The Animal Welfare Act does not prohibit exterminating animals, but bans certain forms of abuse and neglect. *Id.* (mandating that the Secretary of Agriculture promulgate rules establishing minimum standards for animal welfare including feeding and exercise); *see also* State v. Hill, 996 S.W.2d 544, 547 (Mo. Ct. App. 1999) (holding that although Missouri law does not preclude owners from intentionally killing their animals in a humane way, it prohibits them from intentionally causing them suffering).

338. Doctrines reviewed earlier in this Article also illustrate this special feature of property law that extends to the owner the right to destroy her property while subjecting her to a duty to maintain it during its existence. Unless it is protected as a historic landmark, a current owner can destroy a building she owns. *See, e.g.*, J.C. & Assocs. v. D.C. Bd. of Appeals & Review, 778 A.2d 296, 298 (D.C. 2001) (holding that the petitioner was barred from destroying its building, as it was a historical landmark). However, as long as the building stands, the owner is subject to the duty to maintain it in accordance with building codes. *See supra* notes 266–80 and accompanying text.

339. *See* Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913).

III. THE NORMATIVE STANDING OF THE DUTY TO MAINTAIN

Part II showed that American property law currently encompasses a duty to maintain. Scholarly claims to the contrary notwithstanding, owners have no right to let land lie fallow or gather dust. But should they? Is American law's imposition of a duty to maintain justified? What normative values, if any, does the duty serve, and how should these values affect our attitude toward the specific rules enforcing the duty that were surveyed in the preceding Part?

This Part seeks to answer these questions and demonstrate that statements about owners' freedom to let land lie fallow or gather dust are not solely factually inaccurate, as already seen, but also normatively unacceptable. This claim appears to challenge Part I's analysis, which highlighted the vital role assigned by the different normative justifications for property to the owner's immunity from edicts. But the ensuing examination demonstrates that in actuality, the different property justifications presented in Part I not only tolerate the duty to maintain, but necessitate it. The discussion in this Part concludes by employing this realization to revisit and criticize the hostile judicial attitude toward new maintenance ordinances enforced against lenders originally presented in Part I.

But first this Part analyzes each of the normative theories discussed in Part I—right-based, utilitarian, and relational—in turn, constructing through each a normative account of the duty to maintain. The conclusion is that, when correctly understood, each theory requires a duty to maintain. Nonetheless, some theories require a broader duty than others. Right-based arguments embrace a limited duty and hence only some of the legal doctrines surveyed in Part II are justifiable in the right-based worldview. Utilitarian theories adopt a much broader vision and accordingly justify almost all current rules. Relational theories support the widest notion of the duty and can justify all the legal practices enforcing it. The theories thus have a cumulative ability to explain the doctrines: each theory can incorporate the doctrines and explanations provided by the theory or theories previously surveyed.

This relationship between the theories implies that, as is inevitable given the natural discrepancy between distinct normative theories, not all readers should endorse all the duty's manifestations revealed in Part II. Specifically, right-based theories profess a strong individualistic bent, and therefore, approach all property restrictions

with a generally dim view.[340] Thus, a reader who adheres to a right-based theory might reject current rules extending the duty to maintain beyond the minimalist contours that right-based theories outline. Alternatively, that reader might contemplate justifications for property drawing on non-right-based arguments: utilitarian or relational theories.

A. Elements of the Duty To Maintain Explained by Right-Based Property Theories

1. *The Duty To Maintain as Embodying Actual Contracts.* The first group of property theories grounded property in its ability to promote owners' individual rights, which, as seen in Part I.A.1, are all connected to freedom. In accordance, under these theories, a duty to maintain—or any other affirmative duty placed on an owner—is justified and must be enforced when the owner freely assumed it of her own volition. The move from complete freedom (and isolation)—the state right-based theories idealize—to a state of obligation, must be the result of actual free choice.[341] In other words, the duty to maintain has to relate to a contract the owner voluntarily entered. When it does, property law must aid in implementing this exercise of the owner's freedom of choice—for, under right-based theories, this is the law's function.

The original contract creating the duty to maintain need not be explicit or detailed for the duty's enforcement to be justifiable in this manner under right-based theories. The duty need not be specifically written into a formal agreement. The test to determine whether the duty expresses the free agreement of the owner is substantive, not formal.[342] For theories focusing on an individual's right to freely

340. For example, right-based arguments would limit nuisance liability to cases in which the defendant is perceived as physically invading the plaintiff's land. Richard Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 57–65 (1979). This attitude does not reflect the common law, and it is representative of the inevitable, awkward solutions right-based explanations deliver, given the fact that right-holders are surrounded by other right-holders. SINGER, *supra* note 30, at 94, 171–74.

341. 2 JOHN LOCKE, TWO TREATISES OF GOVERNMENT §§ 123–31 (Peter Laslett ed., 1988) (1690); Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES L. 127, 132 (2009).

342. A similar attitude justifies a fiduciary's duty not to let funds in her possession lie fallow. This duty is implied into the instrument creating the fiduciary relationship. *In re* D'Espinay-Durtal's Will, 4 A.D.2d 141, 143 (N.Y. App. Div. 1957). Accordingly, one court suggested that a mortgage service company, as the trustee of the investors holding the mortgage, owes the investors a fiduciary duty to maintain the underlying property. Dep't of Hous. Pres. & Dev. of

choose, the defining question is whether the owner is fairly viewed as choosing a liability—explicitly or implicitly.

A few of the legal doctrines introduced in Part II as instituting the duty to maintain reflect this normative stance. They impose the duty on an owner who, in one way or another, is legally conceived as choosing to assume it. These are the doctrines of waste, easements, affirmative covenants, and support rights. Whereas the first three draw on explicit agreements, the final one is grounded in an implicit agreement.

2. *Legal Rules Imposing the Duty To Maintain that Draw on Explicit Contracts*. In the easiest cases for right-based justifications, the duty to maintain can be connected to an actual, explicit contract. Several of the rules reviewed in Part II fall into this category. The duty to maintain enforced through the doctrines of waste and easements is traceable to a voluntary agreement by owners, as both doctrines are fully contractual. The duty of the present interest holder not to commit waste is suppletive in that law imposes the duty, even when not included in the original contract creating the estate, as mere default. The individuals drafting that contract are free to renounce the doctrine: the creator of the present interest can empower its holder to commit waste.[343] Similarly, after the creation of the interest, the holders of the future interests are free at any time to allow the holder of the present interest to commit waste.[344] The law with respect to the maintenance of easements is identical: those establishing an easement can agree that the easement's holder will not be subject to a duty to keep it in good repair.[345] If the parties to the easement fail to

N.Y. v. Deutsche Bank Nat'l Trust Co., No. HP#115/13, 2013 WL 5336761, at *9 (N.Y. City Civ. Ct. Sept. 12, 2013). Similarly, a condominium board owes the owners of the individual units a fiduciary duty, statutorily or otherwise, read into the declaration establishing the condominium, to provide for the operation, care, upkeep, maintenance, replacement, and improvement of the common elements. *E.g.*, Duffy v. Orlan Brook Condo. Owners' Ass'n, 981 N.E.2d 1069, 1075–76 (Ill. App. 1 Dist. 2012) (holding the condominium board liable for breach of its fiduciary duty when it failed to make repairs to the common elements that were causing damage to an individual unit).

343. 8 POWELL ON REAL PROPERTY ¶ 637, at 682 (Richard R. Powell & Patrick J. Rohan eds., 1968). An exception exists in California, where a statute bars a mortgagor from committing waste, regardless of the agreement. CAL. CIV. CODE § 2929 (West 2012).

344. *See* Thomas Merrill, Melms v. Pabst Brewing Co. *and the Doctrine of Waste in American Property Law*, 94 MARQ. L. REV. 1055, 1086 (2011) ("[C]ontractual modifications of duties toward specific property can be and often are modified [after the creation of the interest].").

345. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.13 (2000).

renounce the duty at that point or later, the law simply assumes they agreed to impose it.[346]

Affirmative covenants are also contractual in nature. A duty to maintain embodied in a covenant is a duty that two private parties—in most cases, adjacent owners—established in an agreement between them. That agreement then runs with the land—hence it is not a mere contract right, but a property right.[347] The agreement can be enforced against, and by, future owners of the lands—who were not parties to the original agreement. However, such future owners are legally viewed as if they did voluntarily consent to the duty contained in the original agreement. After all, they chose to buy the land knowing that it was subject to the covenant.[348] The law of covenants verifies that the current owner tacitly agreed to the previously created covenant by mandating that she have notice of it.[349] Hence, as with the rules respecting waste and the maintenance of easements, affirmative covenants are grounded in a contract an owner actually and freely entered, and accordingly, they must be enforced under a right-based theory of property.

3. *Legal Rules Imposing the Duty To Maintain that Draw on Implicit Contracts*. The duty to maintain embodied in the law of support rights, albeit not rooted in any explicit agreement—unlike duties in waste, easements, and affirmative covenants—is based on an implicit agreement. Thus it too imposes a duty to maintain that is grounded in an owner's free choice. An owner has a duty to maintain a retaining wall supporting neighboring land because in most cases she or her predecessor built that wall as a replacement for the natural support furnished to the neighbor's land.[350] The owner who constructed the wall made a choice and an exchange: she chose to

346. *See* Walsh v. United States, 672 F.2d 746, 749–50 (9th Cir. 1982); 2 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 428, at 666 (1980 Replacement).

347. SINGER, *supra* note 102, at 848.

348. For a libertarian writer celebrating restrictions imposed on owners through covenants in a planned community, see RANDY BARNETT, RESTORING THE LOST CONSTITUTION 43, 69–75 (2004).

349. Although historically notice was required for covenants' enforcement in equity but not in law, courts now tend to require it in all cases. *E.g.*, Inwood N. Homeowners' Ass'n v. Harris, 736 S.W.2d 632, 635 (Tex. 1987). In addition, recording statutes protect buyers from servitudes of which they had no notice. *E.g.*, 21 PA. CONS. STAT. ANN. § 351 (West 2001).

350. RESTATEMENT (SECOND) OF TORTS § 817, cmt. k (1979) ("The [excavating] actor may avoid liability by furnishing artificial support, such as a retaining wall, sufficient to replace the natural lateral support withdrawn.").

remove the natural support provided to her neighbor's soil, and tacitly agreed that instead of being liable for that act, she would provide her neighbor with a wall performing the function formerly provided by the unexcavated land. Later, if a subsequent buyer of the land on which the wall stands saw the wall, that buyer would be put on notice of that exchange. If the buyer did not actually see the retaining wall, but could have seen it, she was still on constructive notice of the exchange. Either way, the subsequent buyer implicitly agreed to the conditions of the exchange when buying the land.[351] According to right-based arguments for property, this and all other agreed-upon duties to maintain—found in waste, easements, and the law of covenants—must be enforced as they evince the owner's freedom and right to choose.

B. Elements of the Duty To Maintain Explained by Utilitarian Property Theories

1. *The Duty To Maintain as Embodying a Hypothetical Contract*. Right-based theories explain a few doctrines applying the duty to maintain by tying those doctrines to an actual contract an owner freely entered. The other doctrines identified in Part II that impose a duty to maintain cannot be justified in contractual terms, and thus cannot easily pass muster with right-based theories.[352] Most of these other doctrines, however, are outgrowths of utilitarian theories, which view these doctrines as reflecting a hypothetical contract that is necessary for the promotion of utility. The reason is that an owner's decision to not maintain her land generates effects on others, effects that she does not consider through contractual agreements with those others due to transaction costs. The doctrines imposing the duty to maintain embody a hypothetical agreement replacing this

351. This rationale was explicitly stated in the Canadian case, *Foster v. Brown*, 48 O.L.R. 1, 6 (Can. Ont. App. Div. 1920), which set the rule respecting the duty to maintain retaining walls that was later adopted by American courts in *Gorton v. Schofield*, 41 N.E.2d 12, 15 (Mass. 1942). The Canadian court reasoned that the current owner is liable for failing to maintain a retaining wall built by her predecessor, but she was not liable for excavations performed by that predecessor. *Id.* at 6–7. As in the former case, the court reasoned that she was aware, when she bought the land, of the duty toward the neighbor. *Id.* at 3–4.

352. Right-based arguments might justify all other manifestations of the duty to maintain based on an idea of "harm." *See supra* note 92 and accompanying text. Because a neglectful owner exercises her right in a manner that imposes harms on others, she is interfering with their rights. But, because this account requires a definition of rights and harm that does *not* draw on freedom, but rather relies on utilitarian or relational descriptions of property, it caricatures right-based explanations and renders them meaningless as an independent category.

unreachable actual agreement and are thus the only way to assure that the owner's decision respecting land maintenance is socially beneficial—as required by the utilitarian justification for property. The analysis in this Section unpacks the different elements of this claim.

As seen in Part I.A.2, utilitarian theories enshrine the owner's free decisions regarding the use and maintenance of her land as the owner experiences the decisions' costs and benefits, and therefore is the most likely to make socially efficient decisions. Naturally this prediction only holds if the owner's decision does not generate costs or benefits not experienced by the owner—effects on surrounding lands.[353] Unfortunately, an owner's decision to neglect her land almost inevitably carries such external costs. The costs outsiders feel may be quite extreme. As the task force appointed by the President to aid the city of Detroit explained in the spring of 2014 when detailing the rationale behind its arduous endeavor to map each and every neglected property in the city, "[b]light is a cancer. Blight sucks the soul out of anyone who gets near it, let alone those who are unfortunate enough to live with it all around them. Blight is radioactive."[354]

A blighted, or even simply ill-maintained, property impacts its neighbors in many ways.[355] It causes aesthetic damages,[356] as it is likely to be an eyesore. It may cause physical damages as, for example, trees can fall onto neighboring land, fires can spread more easily, and dangerous entrants are attracted to the area.[357] It also causes financial

353. DUKEMINIER ET AL., *supra* note 146, at 49.

354. DETROIT BLIGHT REMOVAL TASK TEAM, *supra* note 121, at preface.

355. One study found that the presence of an abandoned house on a block reduces the value of all the other property by an average of $6720. RESEARCH FOR DEMOCRACY, BLIGHT FREE PHILADELPHIA: A PUBLIC-PRIVATE STRATEGY TO CREATE AND ENHANCE NEIGHBORHOOD VALUE 21 (2001).

356. NAT'L VACANT PROPS. CAMPAIGN, VACANT PROPERTIES: THE TRUE COSTS TO COMMUNITIES 11 (2005), *available at* http://www.smartgrowthamerica.org/documents/true-costs.pdf (noting the various costs of vacant properties to communities including increased city services, decreased property values, low quality of life for homeowners, and blight).

357. *See supra* notes 155–65 and accompanying text; *see also* Alan Mallach, *Abandoned Property: Effective Strategies to Reclaim Community Assets*, HOUSING FACTS & FINDINGS: SHARING KNOWLEDGE ABOUT HOUSING AND COMMUNITY DEVELOPMENT ISSUES, Vol. 6, No. 2 at 6 (Fannie Mae Foundation 2004) ("The National Fire Protection Agency reports that in 1999, an estimated 11,400 structure fires in vacant properties caused 24 civilian deaths, 66 civilian injuries, and $131.5 million in direct property damage."); William Spelman, *Abandoned Buildings: Magnets for Crime?*, 21 J. CRIM. JUST. 485 (1993) ("Blocks [in Austin, Texas] with

effects as the value of surrounding properties is depressed,[358] local revenue from property tax decreases,[359] and extended public services, such as policing and fire prevention, become required.[360] The owner of the property does not experience these costs herself, and hence, will often not take them into account in her decision to neglect.[361]

Yet even when externalities are present, as they are here, the utilitarian prediction that the owner's decision respecting the use of her land will produce socially efficient outcomes can persist. According to traditional utilitarian analysis, the owner will still act efficiently if the outsiders experiencing the externalities bargain with the owner and force her to internalize the externalities into her decision.[362] An owner will, for instance, consider her decision's effects on others if they pay her to do so. Property law established a tool for effectuating such contracts by which outsiders make sure that the owner internalizes the effects her decisions have on them. That tool is the covenant. A covenant, such as the affirmative covenants reviewed earlier, is a promise outsiders procure through bargaining whereby an owner pledges that she and her successors will refrain from activities those outsiders find detrimental. Covenants further enable founding collective neighborhood bodies—homeowners associations and

unsecured buildings had 3.2 times as many drug calls [to police], 1.8 times as many theft calls [to police], and twice the number of violent calls [to police]" as other blocks).

358. Anne Shlay & Gordon Whitman, *Research for Democracy: Linking Community Organizing and Research to Leverage Blight Policy*, 5 CITY & CMTY. J. 153, 162 (2006) (finding that Philadelphia homes within 450 feet of an abandoned property suffered a net decrease in sales price of between $3542 and $7627).

359. Edward G. Goetz, Kristin Cooper, Bret Thiele & Hin Kin Lam, *Pay Now or Pay More Later: St. Paul's Experience in Rehabilitating Vacant Housing*, CURA REP. 19 (Apr. 1998) (calculating the decrease in St. Paul, Minnesota's tax revenue attributable to declining values of properties surrounding undermaintained lots).

360. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-34, VACANT PROPERTIES: GROWING NUMBER INCREASES COMMUNITIES' COSTS AND CHALLENGES 42–43 (2011). For example, it is estimated that foreclosed and undermaintained properties cost Chicago $36 million in maintenance, security, and administrative costs annually. Dory Rand, Op-Ed., *Chicago's Housing Recovery Just Got Slower*, CRAIN'S CHICAGO BUS., Sep. 4, 2013, http://www.chicagobusiness.com/article/20130904/OPINION/130909977/chicagos-housing-recovery-just-got-slower (reporting the finding of a study conducted by the Woodstock Institute).

361. To the extent these harms do not always materialize, it is perhaps more accurate to say that neglect is a risk-producing activity, or omission, operating at a scale that does not match the size or shape of individually owned pieces of property. *See* Lee Ann Fennell, *Property and Half-Torts*, 116 YALE L.J. 1400, 1448 (2007).

362. The argument was famously laid out in Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

condominiums[363]—to enforce these promises and to verify that owners do not engage in behaviors negatively affecting others.[364] Indeed, the extraordinary spread of homeowners associations and condominiums during the second half of the twentieth century[365] is attributable to the need of American owners, living in an increasingly crowded environment, for assurances that the surrounding properties would remain well maintained.[366]

This development is hardly surprising. Due to the major externalities generated whenever a property is neglected, all owners stand to gain if each takes these effects into account before settling on a level of maintenance for her property. We should therefore expect all owners to enter neighborhood agreements in which each assures her peers that she will maintain her property. Yet despite the promise of social-welfare gains afforded by homeowners associations and condominiums, most properties are not subject to them or to covenants requiring maintenance. The culprit is the major transaction costs involved in instituting covenants in existing neighborhoods. Bargaining, as already noted, generally leads to the internalization of externalities; however, and as is established in economic literature, in any given case such bargaining may fail to materialize due to transaction costs.[367] Among other things, the individuals affected by a property owner's decision may be too dispersed to come together to negotiate with her, the decision's effects on any one individual may be too limited to impel her to alone expend the resources for negotiations, a forum for negotiations may be lacking, and antagonism may separate the parties.

A multitude of such transaction costs impede contracts—or, more accurately, covenants—from forcing the owner to internalize the effects of neglect. To subject owners to covenants and to an

363. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.8 (2000) (defining common-interest communities and their role).

364. *See, e.g.*, Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 929 A.2d 1060, 1073 (N.J. 2007) (explaining that homeowners association rules are premised on the notion that their reciprocal nature benefits the entire community).

365. As of 2012, 323,600 association-governed communities existed in the United States, housing 63.4 million Americans in 25.9 million units. In 1970, only 10,000 such communities were in existence, with 2.1 million residents in 701,000 units. *See* FOUNDATION FOR COMMUNITY ASSOCIATION RESEARCH, STATISTICAL REVIEW 2012, *available at* http://www.cairf.org/foundationstatsbrochure.pdf (last visited Nov. 1, 2014).

366. For a similar explanation of such communities' appeal, see Robert Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75, 82–83 (1998).

367. *See generally* Coase, *supra* note 362 (describing this effect).

attendant homeowners association or condominium, the assent of all owners must normally be obtained. In addition to the major administrative costs associated with this endeavor, it is plagued by inescapable collective-action problems.[368] Any owner who knows she is likely to cease maintaining her property will hold out. Moreover, all owners have an incentive to not enter the covenant, which places a burden of maintenance on them, and stand back as their neighbors enter the covenant. Given that those neighbors will now maintain their lands, the recalcitrant adjacent owner who did not enter the agreement will benefit from the agreement just as much as those who did, without sharing in the costs. In other words, on the one hand, all surrounding owners benefit from the enforcement of a promise to maintain a neighbor's land and none can be excluded from enjoying this benefit. On the other hand, enforcement is costly for an owner. The result is that all owners have an incentive to hold out while others agree, and thus, no covenant will be created.[369] Their appeal notwithstanding, reciprocal neighborhood contracts imposing a duty to maintain are almost exclusively therefore a phenomenon reserved to new developments in which one owner, the developer, owns all lands, and thus no administrative costs or collective-action problems impede the drafting of covenants.[370]

According to a utilitarian analysis, when transaction costs block market mechanisms from leading the owner to internalize externalities into her free decision, as they do in the case of neglectful owners, legal intervention forcing internalization is warranted.[371] The legal duty to maintain performs that function. It serves the utility-promoting role of property when it fixes the market failure: creating for owners in all neighborhoods, including existing neighborhoods, the neighborhood contract that those owners desire but cannot reach due to transaction costs. The duty to maintain is thus justifiable as a hypothetical contract that promotes utility.

Most doctrines reviewed in Part II and not justified in reference to an actual agreement in Part III.A replace an agreement for internalizing externalities that parties would have thrashed out had

368. *See* Robert Nelson, *Privatizing the Neighborhood*, 7 GEO. MASON L. REV. 827, 828 (1999) (lamenting the inevitability of collective-action problems).

369. For a similar argument, see Frank Michelman, *Political Markets and Community Self-Determination*, 53 IND. L.J. 145, 156 (1978).

370. Nelson, *supra* note 368, at 828.

371. Peñalver, *supra* note 70, at 871; *see* EPSTEIN, *supra* note 11, at 63 (describing how this rationale affected the evolution of property laws governing the hunting of wild animals).

transaction costs not been present.[372] Accordingly they are endogenous to property in its utilitarian reading. Whether directly or indirectly, these doctrines set in place a reciprocally advantageous regime between neighbors, assuring that each internalizes all costs of her decision not to maintain. Negligence duties toward outsiders, and the laws of private and public nuisance achieve this goal directly. The doctrines of eminent domain, building codes, negligence liability toward trespassers, improving trespasser, and adverse possession do so indirectly.

2. *Legal Rules Imposing the Duty To Maintain that Directly Institute the Hypothetical Contract.* Some doctrines enforcing the duty to maintain are formally set to protect neighbors against the external effects of an owner's act, and thus, they are easily perceived and justified as imposing the hypothetical, mutually beneficial, neighborhood-maintenance agreement. Negligence duties toward outsiders explicitly protect neighbors from physical harms that are neglect's externalities. As one court stated, "the governing principle" over the duties of an owner in negligence (as opposed to nuisance), "is that one must so use his own property as not to injure that of his neighbor."[373] For example, the duty to prevent conditions aiding in the spread of fire directly safeguards neighboring properties,[374] and the liability imposed on an owner for the acts of third parties forces an owner to exercise her control over entrants to her land to protect her neighbors.[375]

For its part, nuisance is specifically defined as an interference with neighbors' enjoyment and use of their land.[376] It is a tort regime forcing owners to internalize the neighborhood costs of their land-use decisions, thereby assuring efficient uses. It is thus directly set to replace the contractual neighborhood-land-use regime that

372. This underlying justification is sometimes explicit. Thus, for example, Madison, Wisconsin's lawn ordinance, requiring all landowners to not allow their lawns to exceed eight inches in height, enables an owner to have a "natural lawn": a lawn for which this restriction does not apply. However, to have a natural lawn, the landowner must obtain a special permit, which is granted only if a majority of neighborhood owners do not object. MADISON, WIS., ORDINANCE § 27.05(2)(f)(5).

373. Fitzpatrick v. Penfield, 109 A. 653, 656 (Pa. 1920).

374. *See* Hesse v. Century Home Components, 514 P.2d 871, 873 (Or. 1973).

375. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 57, at 356 (4th ed. 1971).

376. *See supra* note 204.

transaction costs forestall.[377] The tort is sometimes explicitly viewed in these terms. Michigan Community Resources and the Michigan Municipal League, for example, developed in 2011 a nuisance-based legal program to help communities in Detroit hold their members responsible for the harms they inflict on local morale and property values through neglect. Neighborhood groups can gather information on neglectful owners in their midst and report them to a nonprofit legal organization that then files nuisance claims against the owners.[378] This role of the nuisance tort, as preserver of common neighborhood interests, is even more pronounced in the law of public nuisances. As one court explained, the doctrine of public nuisance "aim[s] at the protection and redress of *community* interests and, at least in theory, embodies a kind of collective ideal of civil life."[379]

3. *Legal Rules Imposing the Duty To Maintain that Indirectly Institute the Hypothetical Contract.* The negligence and nuisance rules just reviewed directly institute a legally constructed, mutually beneficial, neighborhood agreement replacing the actual agreement for internalizing costs that neighbors cannot negotiate themselves. The doctrines of eminent domain, building codes, negligence liability toward trespassers, improving trespasser, and adverse possession achieve the same socially desirable goal indirectly. Unlike the negligence and nuisance doctrines already reviewed, these doctrines formally balance the interests of the owner and actors other than her neighbors—namely, the government or entrants to her land. Still, their actual focus is mostly on protecting neighbors by incentivizing the owner to maintain. Thereby, these doctrines are also mechanisms for instituting the hypothetical, mutually beneficial, neighborhood maintenance agreement.

This is easiest to see in eminent domain and building codes. The governmental exercise of the eminent-domain power is often tailored to protect surrounding properties from blight's effects.[380] Building

377. Robert Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 762 (1973).

378. For more information, see MICH. MUN. LEAGUE, *Community Driven Nuisance Abatement*, *available at* http://placemaking.mml.org/community-driven-nuisance-abatement/ (last visited Nov. 1, 2014).

379. People *ex rel*. Gallo v. Acuna, 929 P.2d 596, 603 (Cal. 1997).

380. Thomas Merrill & Henry Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1883 (2007) ("Why might condemning blighted property . . . be acceptable, whereas condemning non-blighted property is not? . . . [B]ecause the owner of blighted property is

codes serve a similar purpose, as legislators admitted in the post-2008 recession years.[381] Indeed, neighboring property owners are often those responsible for the city's eventual action against properties that are in violation of the code,[382] and a few statutes explicitly allow neighbors to independently pursue legal action against a code violator.[383]

The indirect way in which liability toward trespassers, adverse possession, and improving trespasser doctrines indirectly replace a mutually beneficial, reciprocal promise to maintain made between neighbors, is less conspicuous and requires some elucidation. Liability toward trespassers is technically geared toward forcing an owner to internalize costs experienced by entrants to her land. But it mostly benefits neighbors of the land by incentivizing an owner to eradicate dangerous conditions or make her land inaccessible, thereby eliminating externalities neighbors would otherwise experience. It also benefits neighbors slightly more directly. Trespassers are most likely to be neighbors—especially neighboring children attracted to the "attractive nuisance."[384] Furthermore, liability frequently hinges on others' vicinity in that no other factor more easily renders the trespasser foreseeable, and thus eligible for protection. For example, trespassers were foreseeable when a furrow was in a lot abutting a school,[385] when land served as recreational grounds for neighbors,[386] and when a railroad was situated amid a populated area and residents routinely walked along it.[387] The practical result of such holdings is that negligence liability toward trespassers is likelier when neighbors are prone to be affected by the owner's neglect—that is, when neglect

imposing harm on neighboring properties. The taking of blighted property, therefore, can serve as an appropriate collective response to harm-causing or immoral behavior . . . .").

381. *E.g.*, CAL. CIV. CODE § 2929.3(b) (West 2012); MADISON, WIS., ORDINANCE § 27.05(2)(f) (requiring owners to maintain their property in a way that will enhance "the appearance and value of the neighborhood").

382. For example, consider the facts in DMK Acquisitions & Props. v. New Orleans, 124 So. 3d 1157, 1162 (La. Ct. App. 2013). Here, community members complained to the city about the undermaintained house, and later provided testimony in court regarding multiple code violations. *Id.*

383. 65 ILL. COMP. STAT. ANN. 5/11-31-1(b) (West 2005 & Supp. 2014) (awarding the right to institute an action to those residing within 1200 feet of the building).

384. *E.g.*, Bransom's Adm'r v. Labrot, 81 Ky. 638, 643 (1884).

385. Harris v. Mentes-Williams Co., 95 A.2d 388, 390 (N.J. 1953).

386. Webster v. Culbertson, 761 P.2d 1063, 1066 (Ariz. 1988); Wytupeck v. City of Camden, 136 A.2d 887, 894–95 (N.J. 1957).

387. First Nat'l Bank v. Kan. City S. Ry. Co., 865 S.W.2d 719, 731 (Mo. Ct. App. 1993).

produces externalities they feel—and thus it is in these situations that an owner is incentivized to maintain her land.

Improving trespasser and adverse possession rules, which formally serve the interests of possessors, not neighbors, similarly incentivize the owner who seeks immunity from such possessors to exercise her title by maintaining the property, thereby sparing neighbors from costs. Indeed, throughout their history, these doctrines often targeted neglected lands and absentee owners for particularly harsh treatment.[388] If the incentive these doctrines provide to owners to maintain their land, and thereby safeguard the interests of neighbors, proves ineffective, the doctrines can force transfer of title to the possessor who maintains the land. This is often a neighbor who actually maintained the land or constructed something on it.[389] But even if title shifts to a stranger who maintained the previously neglected land, neighbors stand to benefit from improved upkeep by the new owner.

Adverse possession in particular is a radical legal doctrine "specifying procedures for a productive user to take title from an unproductive user."[390] Perhaps the best way to explain in utilitarian terms the need for these procedures is to acknowledge their benefits to neighbors. Otherwise, it is hard to legitimize the necessity to bypass market tools through which the productive (or maintaining) user should have entered a purchase agreement with the unproductive user-owner.[391] This Article's reconceptualization of adverse possession as part of the duty to maintain may help in solving this puzzle. The reason an actual agreement between the formal owner and the possessor is not reached, despite its social benefits, is that the benefit of maintaining the land is not fully experienced by the

388. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 10 (2011) (explaining that the rationale for protecting improving trespassers has historically been the promotion of the active use of neglected lands); Eduardo M. Peñalver & Sonia Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1110–13 (2007) (reporting jurisdictions that directly penalized absentee owners, making it easier for squatters to adversely possess undeveloped lands).

389. SINGER, *supra* note 102, at 163 ("[M]ost disputes covered by the law of adverse possession are border disputes . . . .").

390. ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 154 (5th ed. 2007).

391. *See* Fennell, *supra* note 10, at 1073–76 (noting the problem, and suggesting that the only way for adverse possession law to promote efficiency is by requiring that the user have acted in bad faith); Stewart Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55, 81–82 (1987) (theorizing that an improver's failure to negotiate the purchase of the land from an owner provides evidence that the owner has a higher valuation of the land than the improver).

adverse possessor—it is felt by the entire neighborhood.[392] Consequently the adverse possessor does not offer the owner a price representing the full benefit of transferring the land to her.[393] To overcome these transaction costs and compel the internalization of maintenance's benefits, adverse possession forces the land's transfer to the maintaining possessor.

Adverse possession thus finds a strong justification as a mechanism replacing the unattainable, mutually beneficial, neighborhood contract to maintain all lands. Along with eminent domain, building codes, liability toward trespassers, and improving trespasser, this doctrine, although formally pursuing other purposes, imposes a duty to maintain that indirectly leads owners to internalize the neighborhood costs of their land-use decisions. As with the other doctrines instituting the hypothetical neighborhood contract to maintain, adverse possession is thus an element of an efficient property law system.

4. *The Scope of the Hypothetical Contract.* The utilitarian property theory, animating the doctrines just reviewed, demands that decisions regarding the use of resources engender efficient results. For that purpose, the costs of neglect experienced by others must be imposed on the owner who otherwise, due to the inadequacy of contractual tools, ignores them. This utilitarian rationale, as seen so far, accounts for the reach of the duty to maintain in property law. It also explains the duty's outer limit.

Given that the legal imposition of costs through the duty to maintain is justified in utilitarian terms as a hypothetical contract replacing the actual contract parties would have entered, the duty only encompasses costs parties inarguably experience, and undeniably

392. Of course the incentive of a possessor, who knows she does not own the land, to maintain it for her benefit and for that of the neighborhood, is to some extent always blunted by the owner's ability to bring an ejection suit before the limitation period runs out. Such a suit will be accepted unless the possessor prevails under the flexible, and hence unpredictable, doctrine of improving trespasser.

393. The transaction costs cited as blocking a deal between the possessor and the true owner are associated with the inability of the possessor to identify and locate a true owner who is passive, and presumably absent. *E.g.* Thomas Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1130–31 (1984). Minimum maintenance of the land or other acts on it serves as a signal aiding potential market players in identifying the owner. Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 79–81 (1985). This argument is not as compelling as the one suggested in this Article because the true owner is, by definition, the record owner, who can be located through a simple title search, and hence, identification costs are unlikely to form the main cause for the market failure.

would like to see controlled. The doctrines imposing the duty are therefore minimal. They limit their range to actual neglect or disregard, which, as explained, inevitably generates objective externalities that neighbors feel. These doctrines create a duty to maintain property, not to beautify property. The law forbids the owner from neglecting her land, but does not prevent her from turning it ugly. "It is generally recognized that unsightliness, without more, does not create an actionable [claim]."[394] Even when the aesthetic impact of unsightliness decreases the value of neighboring properties, a claim in law does not materialize.[395] An added element—such as objective neglect—must be present.

Neglect is inherently different from unsightliness. Preferences respecting aesthetics are subjective, and thus, as courts explain, the regulation of aesthetic harms and benefits should be left to actual, not hypothetical, contracts between neighbors. In other words, it should be left to covenants. When neighbors challenge an owner's design choice that did not breach a contract between them, the court is asked to act as an arbiter of taste, a role generating great confusion.[396] Conversely, when an owner's choice to neglect her property is challenged, and the neglect results in odors, noise, dangerous conditions, et cetera, the court is not asked to arbitrate subjective tastes. As harms are uncontestable, the court can establish a rather predictable and consensual standard by which all owners must abide. In these cases, courts can more easily substitute their own judgment for the judgment of the parties that would have been expressed in an agreement had transaction costs been absent.[397]

In utilitarian analysis, property law should do exactly that. It should intervene to rectify market failures when private decisions do not take full account of social costs and benefits. It should replace actual agreements interest-holders desire but cannot attain due to hurdles that block bargaining. The duty to maintain performs this

394. Ness v. Albert, 665 S.W.2d 1, 1–2 (Mo. Ct. App. 1983); *see also* Haehlen v. Wilson, 54 P.2d 62, 64 (Cal. Dist. Ct. App. 1936); Allison v. Smith, 695 P.2d 791, 794 (Colo. 1984); Jillson v. Barton, 229 S.E.2d 476, 477–78 (1975).

395. Rankin v. FPL Energy, 266 S.W.3d 506, 510–12 (Tex. App. 2008).

396. Green v. Castle Concrete Co., 509 P.2d 588, 591 (Colo. 1973); Wernke v. Halas, 600 N.E.2d 117, 122 (Ind. Ct. App. 1992).

397. *See* Parkersburg Builders Material v. Barrack, 191 S.E. 368, 371 (1937) ("[E]quity should not be aroused to action merely on the basis of the fastidiousness of taste of complainants. Equity should act only where there is presented a situation which is offensive to the view of the average persons of the community.").

function in many of its disparate manifestations reviewed in Part II and analyzed here, namely, negligence duties toward outsiders, private and public nuisance, eminent domain, building codes, negligence liability toward trespassers, improving trespasser, and adverse possession. The duty to maintain materializes as the only legal mechanism capable of instituting the desired mutual assurance between neighbors that they will all maintain their lands so as not to suffer the neighborhood effects of an owner's decision to neglect.

C. Elements of the Duty To Maintain Explained by Relational Property Theories

By replacing actual contracts with hypothetical ones as justification for a duty to maintain, utilitarian explanations account for most of the doctrines reviewed in Part II, whose logic eluded right-based explanations. However, one doctrine reviewed in Part II explicitly supersedes contracts parties create, and thus cannot be viewed as emanating from an agreement they would have freely reached had transaction costs been absent. Rules applying the duty in landlord–tenant law unequivocally announce their goal to circumvent owners' desires and to promote the interests of one group of individuals (tenants) at the expense of another (landlords). These rules are not based on the reciprocity-of-advantages idea that animates rules protecting neighbors. There, as seen, the duty to maintain was based on the assumption that if assured their neighbors will do the same, all owners will prefer to maintain their lands. Here the assumption is the opposite: in all conditions, all owners who are landlords will prefer to be free to neglect.

Current law still enforces on owners who are landlords a duty to maintain, which can only be explained through the third group of property theories: relational theories. Although these theories place a premium on the owner's freedom and self-determination achieved through ownership, they do so as part of their celebration of desirable social relationships. Consequently, like the utilitarian theories, they embrace duties to maintain that subject an owner to reciprocal obligations toward other owners that sustain the healthy, neighborly relations that permit all owners to enjoy their property and flourish, free of neglect's threat.

But relational justifications go beyond utilitarian justifications. Due to the belief that property must sustain desirable relationships, as reviewed in Part I.A.3, relational theories value the expansion of opportunities for self-determination, even at the expense of existing

owners' liberty or of overall social welfare. Therefore, relational theories sometimes require owners to surrender portions of their freedom not to mutually benefit other owners with whom they entertain a relationship based on equality and reciprocity (such as neighbors), but to enable *non-owners* to enjoy the freedom property affords. A particularly compelling reason under relational theories to force an owner to part ways with some of her freedom in favor of another's emerges when two conditions are met: the owner is in a relationship with another interest-holder who is dependent on her,[398] and the owner voluntarily entered this relationship.[399]

Because relational theories focus on desirable and fair relationships, they require property law to protect the limited freedom of those who, through property relationships, are economically dependent on other owners.[400] If the latter choose to use the property system to establish a position from which they derive a benefit from the weakness and dependence of others, property law may—and should—limit their freedom to abuse the relationship.[401] The quintessential example for such a relationship of dependence is the landlord–tenant relationship.[402] The landlord is the property-holder and thus the stronger actor, whereas the tenant depends on her for shelter. Given that the landlord was never forced to become a landlord, but rather opted to enter the housing market in quest of profits, it is just to force her to provide a well-maintained shelter and

398. *See, e.g.*, Alexander, *supra* note 75, at 771.

399. Singer, *supra* note 98, at 666–67 (explaining that "[i]t is morally wrong for the true owner to allow a relationship of dependence to be established and then to cut off the dependent party," and therefore, adverse possession is justifiable). Peñalver & Alexander, *supra* note 341, at 149–54 (employing a similar framework to analyze *State v. Shack*, 277 A.2d 369, 374–75 (N.J. 1971)).

400. *See* ROBERTO UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 80–81 (1983) (explaining that relations of interdependence create duties in private law).

401. *See* Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323, 326–27 (1986) ("[P]rivate law is a relatively seamless area in which the society, speaking primarily through the courts, assigns rights and duties based on relationships among people and firms, in light of many factors, among them the particular community needs, the needs of the parties themselves, their relative power, fairness among them *and* their assent." (footnote omitted)); *see also* Bruce Ackerman, *Regulating Slum Housing Markets On Behalf of the Poor*, 80 YALE L.J. 1093, 1171 (1971) (raising the issue of whether slum landlords must carry special redistributive burdens with respect to their tenants).

402. Ackerman, *supra* note 401, at 1172 (arguing that landlords should be subject to the warranty of habitability because they chose to embark on a continuing relationship with tenants, thereby weaving the maldistribution of income into the fabric of their lives and market activities).

to conserve the relationship with the specific tenant who depends on her. Only in this manner can the tenant's freedom be protected. It is only by imposing a duty to maintain on those who choose to benefit from others' dependence that property can contribute to forming and sustaining the social relations necessary for human flourishing.

D. Summary: Revisiting the Debate over Lenders' Responsibilities

The claim that ownership encompasses the right to let land lie fallow or gather dust is not merely descriptive, but also normative. As seen in Part I, all property theories agree that private property was instituted to promote freedom. How can the owner thus be denied the most basic freedom, that of choosing to do nothing? How can she be forced to act? This Part has shown, however, that in fact all property justifications require, for different reasons and to varying extents, that ownership place on the owner a duty to maintain, which limits her freedom. Right-based theories require the enforcement of a duty when current or antecedent owners have entered an agreement that can be interpreted as imposing it. Utilitarian theories require the duty even in the absence of an agreement if an agreement would have been reached had transaction costs not been present. Relational theories require the duty even in the absence of an actual or hypothetical agreement when the relationship between the parties is grounded in an imbalance of power utilized by the stronger party to derive an economic benefit and further limit the dependent party's freedom. In light of one or more of these justifications, all current doctrines imposing the duty to maintain, reviewed in Part II, are warranted. An owner not only lacks the freedom to let her land lie fallow or gather dust, she should lack it. The adherents of different property theories will dispute the details of the specific limits placed on that freedom, but none should question the desirability of limits.

This conclusion aids in rethinking the prevailing, and generally dismissive, attitude toward affirmative obligations in property law and the embrace of the trope that an owner has a right to let land lie fallow or gather dust, presented in Part I. It should also serve to remedy specific detrimental effects of that trope. The new understanding of the doctrinal place occupied by the duty to maintain in American law, and of the duty's normative function, should inform legislators and judges as they tackle new questions in property law. As an example of the practical implications of the theoretical findings elaborated on in this Part, these concluding pages will revisit the

hostile approach of contemporary courts to new maintenance obligations enforced against lenders.

As surveyed in Part I.D, this attitude owes to a belief that holders of interests in property enjoy the freedom to ignore that property. Yet, as Part II of this Article illustrated by exposing the profusion of property rules enforcing a duty to maintain, the common law contains no such freedom. The disapproving attitude toward new statutory duties imposed on lien holders over neglected properties stands in stark contrast to the realities of American law. These realities are not new, but have been a constant in American law. As seen in Part I.C, affirmative duties in property law are often disfavored, as they are conceived as feudal practices alien to liberal Anglo-American law. In fact, however, as Part II revealed, such duties have always formed a key element in liberal Anglo-American law.

Perhaps even more telling is the fact that throughout American history, legislative initiatives were embraced to reinforce the capacity of the duty to maintain to combat specific ills—similar to those targeted today by measures directed at lenders—as they periodically emerged. As soon as colonization commenced, American law required owners to work and improve their lands, appropriating the land if they did not. These early laws explicitly referred to the social harms that deserted lands could generate.[403] Other laws enacted at the time required owners to fence their lands, and appointed "fence watchers" to enforce compliance through fines and other sanctions against those who failed to thereby secure their lands or allowed fences to fall into disrepair.[404] Later, nineteenth-century American law disfavored absentee owners who left their lands fallow, and often transferred title to those who rescued such lands from neglect.[405] In the twentieth century, the Supreme Court stated: "a legislature generally has the power to . . . condition [property rights'] continued retention on performance of certain affirmative duties."[406]

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403. John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1259–63 (1996).

404. FAREN R. SIMINOFF, CROSSING THE SOUND: THE RISE OF ATLANTIC AMERICAN COMMUNITIES IN SEVENTEENTH-CENTURY EASTERN LONG ISLAND 38 (2004); Bethany R. Berger, *It's Not About the Fox: The Untold History of* Pierson v. Post, 55 DUKE L.J. 1089, 1112–13 (2006).

405. *See* Peñalver & Katyal, *supra* note 388, at 1109–14.

406. United States v. Locke, 471 U.S. 84, 104 (1985).

A strict duty to maintain applied to lenders conforms not only to these past practices of American property law and to the many present ones reviewed in Part II, but also to the duty's justification under two of the three theories of property as developed in this Part of the Article. Both utilitarian and relational theories find no normative cause to distinguish lenders from owners when enforcing duties to maintain vacant lots.

For utilitarians, the duty to maintain neglected properties in foreclosure is a socially desirable mechanism for internalizing neighborhood externalities that bargaining cannot handle. As detailed in Part II.B, neglected properties carry detrimental effects for all nearby property owners.[407] They also, as a result, negatively impact the lenders who rely on these properties as security for credit they issue.[408] In accordance, contracts whereby all those who hold interests in properties in a neighborhood mutually agree to assure minimum maintenance of those properties will benefit all parties. Yet, due to the transaction costs reviewed in Part III.B.1, neighbors and lenders cannot realistically be expected to enter such contracts restricting neglect before it occurs.[409] Later, during foreclosure, such contracts are blocked by added transaction costs as owners of properties in foreclosure are often long-gone, and lenders have no reason to announce their identity, which, in the highly segmented mortgage market,[410] neighbors cannot discern. The unattainable maintenance agreement between all owners and all lenders should be replaced, according to utilitarianism, with a duty to maintain legally imposed on all of them.[411]

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407. *See supra* notes 319–26 and accompanying text.

408. There are thus grounds to question the First Circuit Court of Appeals's conclusion that lenders are not beneficiaries of a maintenance ordinance whose purpose is neighborhood preservation. *See* Easthampton Sav. Bank v. City of Springfield, 736 F.3d 46, 52 (1st Cir. 2013) (holding the "true beneficiaries" of a maintenance ordinance are "mortgagors and the public at large").

409. *See supra* notes 367–70 and accompanying text.

410. *See* Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1, 11 (2011) (explaining how mortgages are generally financed through securitization).

411. Lenders' arguments that maintenance duties will render credit more expensive or harder to price are unpersuasive. First, the duty's reciprocal nature will reduce the risk that lenders' securities will lose value due to neighboring properties' neglect, and the cost of credit should adjust downwards accordingly. Second, because ownership always carried the duty to maintain, lenders could, and probably did, at least partially already price the duty's costs when setting interest rates. Third, lenders already require owners to carry homeowners insurance, which covers many liabilities the duty imposes.

This duty is also justified through relational theories. For these theories the lender's duty to maintain is the necessary upshot of the special relationship that exists between a lender and the community in whose midst the mortgaged property is located. Lenders are more powerful than other housing-market participants—the owners to whom they lend and their neighbors. Owners and communities depend on lenders, who voluntarily involve themselves in the housing market to derive benefits from their position. Therefore, as seen in Part III.C, and as Congress argued in a similar context, there is a relational justification to subject lenders to an obligation to protect communities that depend on them.[412]

Because of the strong normative justifications for applying the duty to maintain in these cases, as well as the history and present structure of American law which render the duty inherent to property, there is no reason to insist that a maintenance responsibility only apply to an interest holder—in this case, a mortgagee—after it takes formal title to the land. When assessed as part of the law and policy of the duty to maintain exposed in this Article, the expansion of lenders' responsibilities must be judged uncontroversial.

CONCLUSION

Edith Beale, known as "Big Edie," was an early twentieth-century socialite. She owned Grey Gardens, a big old mansion in a tony neighborhood in East Hampton, New York, where she lived with her daughter, "Little Edie." Following the dissolution of her marriage, Big Edie did not invest in the grounds' upkeep. More than thirty years of complete neglect left the house decrepit with raccoons roaming the halls, garbage mounting throughout, ceilings and walls crumbling, and more.[413] Consequently, in 1972, the relevant local government, Suffolk County, issued an eviction order. While Big Edie argued that no one had the right to order her to do anything on her land, the county argued that her inactivity as an owner generated major costs for her neighbors and for the county.

412. Similar reasoning led to the adoption of the Community Reinvestment Act of 1977, 12 U.S.C. §§ 2901–2907 (2006), which requires banks to "meet the credit needs of the local communities in which they are chartered." The legislators who enacted the Act believed that banks were under a duty to reinvest in the communities from which they draw deposits. *See* Jonathan R. Macey & Geoffrey P. Miller, *The Community Reinvestment Act*, 79 VA. L. REV. 291, 298 (1993) (explaining that "redlining" improperly funnels financial resources out of "areas in which the funds are gathered").

413. Gail Sheehy, *The Secret of Grey Gardens*, N.Y. MAG., Jan. 10, 1972.

Luckily, Big Edie was an aunt of Jacqueline Kennedy Onassis, who arranged for the necessary renovations. As a result, the story of Grey Gardens ended up playing out as a documentary on movie screens,[414] as a musical on the Broadway stage,[415] and as a movie on television sets,[416] rather than as a legal dispute in courts. The story's artistic versions celebrated the eccentricities of the two protagonists, Big and Little Edie. The legal story, had it unfolded, would have exemplified the fact that property law, although aimed at forming for individuals a realm of privacy to freely pursue their eccentricities, also curbs this freedom of eccentricity.

An owner is free to pursue her idiosyncratic wishes respecting her land, as long as she minimally maintains that land. Property law does not force an owner to grow any specific crops on her land; it does not force her to use an asset in a specific way. But it also does not permit an owner to leave her land fallow; it does not enable her to sit back as her asset gathers dust. That legal reality, heretofore unacknowledged by scholars, was borne out by the experiences of Big Edie in the 1970s and of the Detroit properties put on sale for one dollar in the 2010s. Ownership encompasses obligations, including affirmative obligations to maintain the land. It always has. It should.

414. GREY GARDENS (Portrait Films 1976).

415. GREY GARDENS: THE COMPLETE BOOK AND LYRICS OF THE BROADWAY MUSICAL (2007).

416. *Grey Gardens* (HBO television broadcast Apr. 18, 2009).