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KEEPING IT PRIVATE: THE IMPOSSIBILITY OF ABANDONING OWNERSHIP AND THE *HORROR VACUI* OF THE COMMON LAW OF PROPERTY

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In the common law of property, it is generally impossible to abandon one's ownership. In this article, I explore this impossibility. I show that owners cannot abandon land and chattels, let alone have a legal right to do so. I then put forth an account of the common law's restrictive attitude toward abandonment. I demonstrate how this attitude can only be fully understood in light of the common law's conception of ownership. This is because the fear that motivates the restrictions on abandonment, the common law of property's *horror vacui*, is a fear of the absence of common law ownership in its specific normative significance. Crucial features that characterize common law ownership and that shape the legal rules on abandonment are: 1) its monism, 2) its grounding in a private ownership paradigm, and 3) its assignment of proprietary responsibility exclusively to private owners. Owing to these features, recourse to a model of "public ownership of last resort" to appease the *horror*—as in France and Quebec's civil law—is barred. The only way for the common law to appease the *horror* is to ensure that ownable things are kept in private hands for as long as possible. The common law must "keep it private." An account that identifies the legal rules on abandonment as catering to the common law's urge to "keep it private" comprehensively captures the entirety of the legal rules concerning the abandonment of ownership. It shows why obliging owners to continue to assume the responsibility associated with being an owner is warranted.

En common law, il est généralement impossible d'abandonner sa position de propriétaire, son « *ownership* ». Cet article se penche sur cette impossibilité. Il souligne que des propriétaires ne peuvent pas se départir unilatéralement de leurs biens, meubles comme immeubles; il n'y a pas de droit à l'abandon. Ensuite, l'article propose un nouveau cadre théorique pour mieux rendre compte de l'attitude restrictive de la common law envers l'abandon. Il démontre que cette attitude restrictive ne peut être comprise qu'à la lumière de l'« *ownership* » et qu'elle répond à la crainte de son éventuelle absence, l'*horror vacui* de la common law. Les éléments cruciaux qui caractérisent l'« *ownership* » en common law et qui façonnent les règles juridiques sur l'abandon, sont: 1) son monisme, 2) l'enracinement de l'« *ownership* » dans un paradigme de la propriété privée, ainsi que 3) l'attribution d'une responsabilité spécifique qui incombe exclusivement aux propriétaires. Ces caractéristiques font en sorte que la voie vers la « propriété publique de dernier recours », telle qu'elle existe en France et au Québec, n'est pas disponible pour répondre à l'*horror vacui* de la common law. La common law cherche plutôt à garder les choses entre les mains des propriétaires privés le plus longtemps possible, et donc de « garder cela privé ». En relevant l'importance que la common law accorde au fait de « garder cela privé », le cadre théorique proposé ici permet de rendre compte de l'ensemble des règles de doctrine gouvernant l'abandon. Il met en avant les raisons sous-jacentes justifiant l'obligation qu'ont les propriétaires de continuer d'assumer leur responsabilité à l'égard de leurs biens.

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Introduction

Owners can occasionally make "treasure hunters" happy when they leave behind things for which they no longer have any use,[1] but sidewalks lined with household clutter raise eyebrows. When owners walk away from what is theirs, it may not just be annoying, but can also generate substantial harm and elicit public outrage. Instances of the latter kind include, for example, industrial sites that become orphaned following the bankruptcy of the corporations that operated them, or uninhabited, derelict houses in downtown areas. Orphaned industrial sites can release toxic substances into groundwater and soil which requires complicated (and costly) cleanup.[2] Derelict houses in downtown areas can be dangerous for neighbours and passersby, they withdraw urgently needed space, and they can negatively impact the perception of their immediate surroundings.[3] Allowing owners to vanish into thin air would seemingly permit them to eschew liability for these kinds of negative impacts. It clearly does not sit comfortably to let them just walk away and, in so doing, shed all responsibility for the consequences of their previous dealings with a

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1 See e.g. the blog of a Montreal garbage hunter: "Things I Find in the Garbage" (16 December 2021), online (blog): *Things I Find in the Garbage* <www.garbagefinds.com> [perma.cc/CH8J-MBYN]; Sharon Montgomery, "Heavy Garbage Treasure-Hunting Already Underway in the Cape Breton Regional Municipality", *Cape Breton Post* (24 April 2019), online: <www.capebretonpost.com> [perma.cc/LR9D-3NAW].

2 See e.g. the debates surrounding the Giant Mine in Yellowknife, an orphaned gold mine, in which massive amounts of arsenic trioxide were left behind: "Giant Headache; Canada's Giant Mine", *The Economist* 412:8906 (27 September 2014) 38. Orphaned gas and oil wells present similar difficulties (Kyle Bakx, "Old, Unproductive Oil and Gas Wells Could Cost Up to $70B to Clean Up, Says New Report", *CBC News* (8 April 2019), online: <www.cbc.ca/news> [perma.cc/BM6W-ZWXL]; Alec Jacobson, "These Zombies Threaten the Whole Planet", *New York Times* (30 October 2020), online: <www.nytimes.com> [perma.cc/7JT9-NL24]; Chris Ensing, "Wheatley Explosion Could Be 'Tip of the Iceberg' in Ontario Given Number of Abandoned Wells: Expert", *CBC News* (2 September 2021), online: <www.cbc.ca/news> [perma.cc/Q6HK-D8XJ]). The situation of sites of natural resource extraction often differs from the situation of other industrial sites, as those who hold the extraction rights are generally not the owners of the land. Operators of these sites hold, for instance, *profits à prendre*, and can abandon these rights (see note 11). This is so even if the detrimental effects are similar to an abandoned site they owned (see *below* at 738 (on harmful dealings by non-owners) and note 89). I leave for another occasion a more detailed analysis of the apparent disconnect between the possibility of, on the one hand, abandoning extraction rights with, on the other, the impossibility of abandoning ownership—especially in situations in which the factual (harmful) consequences look alike.

3 See Elissa Carpenter, "Surplus of Abandoned Homes Frustrates Bankview Residents", *CBC News* (25 November 2019), online: <www.cbc.ca/news> [perma.cc/6MR5-PEEL]; Michael Smee, "Are Old Downtown Buildings Arson Magnets or the Answer to the City's Housing Crisis?", *CBC News* (20 February 2020), online: <www.cbc.ca/news> [perma.cc/G8QY-S9TL]. See also Thomas W Merrill & Henry E Smith, *Property: Principles and Policies* (New York: Foundation Press, 2007) at 522.

thing. This is especially so because, as owners, they were exclusively entitled to these dealings. It is highly doubtful if owners should be allowed to exploit all the benefits of a resource and, at the same time, be able to leave the consequences to be dealt with by others.

Conversely, preventing owners from ever parting ways with their things seems unduly harsh. Owners are entitled to exclusive control over what is theirs. But to keep them tied to their things forever would, figuratively speaking, put them under their things' exclusive control. While many would agree that it is problematic for owners to simply throw away their empty cans and plastic wrappers on the street, there is also a sense that there should nevertheless be a way for them to permanently get rid of their household garbage.

What is more, it can be just as problematic when owners are able to use up and destroy their things without being able to abandon them when they are no longer wanted.[4] Property rights in a thing end when it is physically destroyed.[5] So, tying owners to their (unwanted) things could incentivize them to destroy these things instead of encouraging them to leave intact but unwanted things behind for others to take and use.[6] It may suffice to think about items placed on the sidewalk around garbage collection day or the "Little Free Libraries" mushrooming successfully across North America to illustrate that it can at times be preferable to enable owners to part ways with their things.[7]

In the law of property, owners' capacity to walk away from their things is governed by the rules on abandonment. Abandonment is "the voluntary relinquishment of all rights, title, or [proprietary] claim ... to property that rightfully belongs to the owner of [a thing]."[8] In the legal context, this refers only to the situation in which a legal position, such as ownership, is terminated. This more technical understanding of aban-

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4 This is, of course, notwithstanding restrictions to the destruction of some things, notably of sites and objects of cultural heritage.

5 See Robert Samuel Wright, "Possession and Trespass in Relation to the Law of Theft" in Frederick Pollock & Robert Samuel Wright, eds, *An Essay on Possession in the Common Law* (Oxford, UK: Clarendon Press, 1888) 118 at 123 (absolute destruction of possession occurs only by destruction of the thing); JE Penner, *The Idea of Property in Law* (Oxford, UK: Oxford University Press, 1997) ("once in *qua* proper object of property norms ... [a thing] remains in until it no longer exists" at 98).

6 See Lior Jacob Strahilevitz, "The Right to Abandon" (2010) 158:2 U Pa L Rev 355 at 406.

7 See "Little Free Library World Map", online: *Little Free Library* <littlefreelibrary.org> [perma.cc/7B34-J5DC]; Strahilevitz, *supra* note 6 at 415 (for shared "dumping" locations in condominium buildings).

8 "Abandonment", online: *The Law Dictionary* <thelawdictionary.org > [perma.cc/8YZQ-GSLG].

donment must be distinguished from the one that identifies all that is *de facto* left behind as "abandoned." Indeed, and as this article will show, any thing left behind, be it a parcel of land or a piece of chattel, is not necessarily unowned.[9]

Legal systems attempting to deal with abandonment are uneasy both with owners eschewing responsibility and with binding owners too tightly to their things. Over the course of the last three to four decades, the question of how the common law balances these two discomforts has received a sustained level of scholarly attention.[10] While prior accounts have provided many insightful perspectives on the common law's rules on abandonment, they have tended to only focus on selected case law dealing with it. This issue has also sometimes been compounded by an adherence to theoretical pre-commitments that are at best incompletely realized in the doctrine on abandonment. No account has so far succeeded in explaining the entirety of these legal rules.

My aim in this article is to offer a conclusive and comprehensive theoretical account of the entirety of the common law's rules on the abandonment of ownership.[11] I suggest that examining the common law's rules on abandonment requires us to reflect on fundamental questions pertaining to the role of ownership in the legal system, and on what we allow and expect owners to do with the resources assigned to them. I show that the way in which the common law conceives of ownership and distributes the

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9 For a view similarly stressing the distinction between the legal and the "practical" sense of abandonment, see Sally Brown Richardson, "Abandonment and Adverse Possession" (2015) 52:5 Hous L Rev 1385 at 1391.

10 See e.g. AH Hudson, "Is Divesting Abandonment Possible at Common Law?" (1984) 100 Law Q Rev 110; Lee Aitken, "The Abandonment and Recaption of Chattels" (1994) 68 Austl LJ 263; Janine Griffiths-Baker, "Divesting Abandonment: An Unnecessary Concept?" (2007) 36:1 Comm L World Rev 16; Eduardo M Peñalver, "The Illusory Right to Abandon" (2010) 109:2 Mich L Rev 191; Strahilevitz, *supra* note 6; Brown Richardson, *supra* note 9; Robin Hickey, "The Problem of Divesting Abandonment" (2016) 1 Conveyancer & Property Lawyer 28.

11 I will be focusing on the abandonment of ownership, understood as the greatest proprietary interest a person can have in a thing. This is notably meant to include a fee simple absolute (in possession) as the greatest possible proprietary interest in land. The abandonment of lesser proprietary interests in owned things, such as easements, does not give rise to "unowned" things; the common law's *horror vacui* as I present it here does not extend to these situations. Considerations of the salience of the fear of the absence of (private) owners in the context of intellectual property rights must be left for other occasions. For reflections on the significance of abandonment of trademarks and copyright, see Strahilevitz, *supra* note 6 at 390–92; Emily Hudson & Robert Burrell, "Abandonment, Copyright and Orphaned Works: What Does It Mean to Take the Proprietary Nature of Intellectual Property Rights Seriously?" (2011) 35:3 Melbourne UL Rev 971; Dave Fagundes & Aaron Perzanowski, "Abandoning Copyright" (2020) 62:2 Wm & Mary L Rev 487.

roles between private owners and the state commits the common law to "keep it private" (i.e., to ensure that ownable things remain in private hands for as long as possible). I will show that both the general rules on abandonment as well as the exceptions to them are intimately tied to this underlying view of ownership and the strict delimitation of private owners from public entities that it implements.[12]

The article proceeds as follows: In Part I, I begin with a description of the legal rules on the abandonment of ownership in the common law and show that the restriction on abandonment is almost all-encompassing, notwithstanding two exceptions worth attending to. I refute interpretations of the law that attempt to show that there are either different types of restrictions on abandonment, or none at all. In Part II, I turn to the motivation underlying the restriction on abandonment and introduce the notion of *horror vacui*. I canvass several unsuccessful explanations for the common law's *horror* and highlight that the investigation should concentrate on how the common law allocates responsibility for things to private owners. Part III then examines the "public ownership of last resort" model adopted in French and Quebec property law to demonstrate the importance of linking a legal system's treatment of abandonment with its conception of ownership. In Part IV, I proceed to lay out how the common law's conception of ownership shapes its *horror* as a fear of the absence of private ownership and consequently its approach to abandonment. A final section concludes and points out implications of a view of ownership that strives to "keep it private."

I. Abandoning Ownership in the Common Law

This section provides an overview of the common law's rules on abandonment. I will demonstrate that it is generally impossible to abandon ownership of both land and chattels. In weighing the concerns of holding owners responsible for their things on the one hand and acknowledging their desire to get rid of unwanted things on the other, the balance tilts heavily toward responsibility. I introduce the exceptions for the abandonment of wild animals and on the high seas, and highlight that these exceptions do not unsettle the general conclusion that abandonment is

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[12] Whether the common law has a definite understanding of the realm of "public" entities or the state is, of course, debatable (see Martin Loughlin, "The State, the Crown and the Law" in Maurice Sunkin & Sebastian Payne, eds, *The Nature of the Crown: A Legal and Political Analysis* (Oxford, UK: Oxford University Press, 1999) 33; Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (New York: Cambridge University Press, 2012)). For my purposes here, it is not necessary to enter into this difficult debate. In what follows, I will use the terms "state" and "public entities" to refer to all entities with the mandate to govern or administer public life, and in contrast with "private" persons.

impossible. I also discuss two unsuccessful attempts at reaching a different conclusion. These accounts either argue that the restrictions on the abandonment of land and chattels are different in kind, or that abandonment should generally be viewed as a conditional transfer. I show that neither suggestion fully captures the legal rules on the abandonment of ownership. Both accounts are ultimately unconvincing.

A. General Principle: No Abandonment

Canadian common law courts have understood abandonment as "'a giving up, a total desertion, and absolute relinquishment' of private goods by the former owner" and as "aris[ing] when the owner with the specific intent of desertion and relinquishment casts away or leaves behind his property."[13] Put differently, owners abandon when they decide to put an end to the proprietary ties that have existed between them and a thing they own(ed), and then do something that communicates this intention to the outside world. Abandonment extinguishes someone's ownership position in direct response to the decision to part ways with a thing that person owns.[14]

This formulation suggests that abandonment is possible (i.e., that the question of whether abandonment took place is open-ended and can lead to different answers depending on the interpretation of an owner's behaviour in a specific case). However, a closer analysis of the case law reveals that it is not at all easy to part ways with a thing that one owns. As Yaëll Emerich points out, it is "very difficult in ... common law to actually abandon one's property rights."[15] Ben McFarlane observes that "the concept of abandonment is very problematic" and that, "[i]n general, a party with a property right does *not* have the power simply to give up that right."[16] Already in the sixteenth century, English jurist St. Germain let his student of the common law explain that it is permitted to waive possession, but not ownership.[17]

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[13] Ray Andrews Brown, *The Law of Personal Property*, 2nd ed (Chicago: Callaghan & Company, 1955) at 9 (cited in *Simpson v Gowers* (1981), 121 DLR (3d) 709 at 711, 32 OR (2d) 385; *Stewart v Gustafson* (1998), 171 Sask R 27 at para 13, 4 WWR 695 (QB)).

[14] The process thus described mirrors—not surprisingly—what is required to acquire through first possession (for a formulation of the requirements of this type of acquisition, see *Popov v Hayashi*, WL 31833731 (Cal Sup Ct 2002) [*Popov v Hayashi*]).

[15] Yaëll Emerich, *Conceptualising Property Law: Integrating Common Law and Civil Law Traditions* (Cheltenham, UK: Edward Elgar, 2018) at 118.

[16] Ben McFarlane, *The Structure of Property Law* (Oxford, UK: Hart, 2008) at 873.

[17] See Christopher St Germain, *The Doctor and Student*, 16th ed (London, UK: S Richardson and C Lintot, Law-Printer to the King's Most Excellent Majesty, 1531) ("There is no such law in this realm of goods forsaken: for though a man wave the possession of

The impossibility of abandoning land is indeed firmly established across common law jurisdictions.[18] When I wish to divest myself of my (hypothetical) acreage as I get too consumed with perfecting my chess skills, I simply cannot do so in a way that the law recognizes as abandonment. Since land might be rendered worthless or unusable but cannot be destroyed, there are—adverse possession aside—only two ways in which my ownership can end. I either succeed in transferring the parcel to someone else, or my life—and with it the capacity to own anything at all—comes to an end.[19] Aside from these situations, under common law rules, my ownership of Blackacre does not come to an end when I merely leave it behind with the intent of desertion and relinquishment.

The situation is less straightforward for the abandonment of chattels. Court decisions occasionally contain general statements affirming the impossibility of abandoning items of personal property.[20] At the same time, case law abounds with discussions of "abandoned" chattels of all kinds, which some take to indicate that it is possible to abandon personal property.[21] On closer examination, however, the "abandoned" chattels mentioned in these cases still fall within the scope of the restriction on abandonment, as none of these chattels are actually *de jure* abandoned. This is so since the cases dealing with "abandoned" chattels are concerned with solving what I will call "competitive scenarios." In competitive scenarios, a court is confronted with a surplus of ownership claims, rather than with a shortage or an absence of owners. Abandonment's "principal function is to determine after the fact who owns [the thing] when [it] is wanted."[22] Reference to abandonment serves to establish who among multiple contenders can claim ownership of the thing in question. In all these scenari-

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his goods, and saith he forsaketh them, yet by the law of the realm the property remaineth still in him, and he may seise them after when he will" at 269).

18 See e.g. *Pocono Springs Civic Ass'n, Inc v MacKenzie*, 446 Pa Super 445, 667 A (2d) 223 (1995) [*Pocono Springs*]; William Swadling, "Property: General Principles" in Andrew Burrows, ed, *English Private Law*, 3rd ed (Oxford, UK: Oxford University Press, 2013) 173 at 299; Merrill & Smith, *supra* note 3 at 521; Jesse Dukeminier et al, *Property*, 8th ed (New York: Wolters Kluwer Law & Business, 2014) at 116; Bruce Ziff, *Principles of Property* Law, 7th ed (Toronto: Thomson Reuters, 2018) at 161.

19 I discuss the implications of an owner's death in the absence of heirs at 751–52, *below*. Using a corporation's "death" by bankruptcy as an escape route is a persistent problem, but arguably not one for property law to solve.

20 For a comprehensive overview of previous treatment of this question, see *Johnstone & Wilmot Pty Ltd v Kaine* (1928), 23 Tas LR 43 at 56–58, Clark J [*Johnstone & Wilmot*] ("the intentional abandonment of a chattel by the owner of it does not divest him of his ownership" at 58).

21 See e.g. Merrill & Smith, *supra* note 3; Hudson & Burrell, *supra* note 11 at 975; Dukeminier et al, *supra* note 18 with further references.

22 Peñalver, *supra* note 10 at 208.

os, "abandonment" is raised as a defence to an alleged conversion.[23] Defendants will put forward that the former owner has abandoned whatever is now in their possession, rendering any claim for conversion unsuccessful. Competitive scenarios do not, however, establish that owners of chattels can simply end their ownership by leaving them behind. In these settings, the question of whether it is possible to abandon ownership of chattels does not even arise.

In the Canadian authority on the matter, *Stewart v. Gustafson*, a dispute arose concerning the ownership of farming equipment left behind on leased premises after the end of the lease.[24] The landlord took and disposed of the equipment. Had those items been abandoned so that the landlord could rightfully do so,[25] or did the landlord commit the tort of conversion? The court thoroughly weighed all the evidence speaking in favour of and against "abandonment" to conclude that some items were in fact "abandoned" (so that the landlord could deal with them as they wished), whereas others were not (so that a claim for conversion could succeed). What was undoubtedly the case for all these items was that there would be an owner either way. Both the landlord and the former tenant laid claim to the ownership position.[26] The issue for the court to decide was who could legitimately do so. There was never a concern with abandonment that would only terminate ownership.[27]

In addition to disputes following the termination of leases, courts are at times concerned with allocating ownership for found items. Bruce Ziff highlights that "[a found] item may have been abandoned by a previous

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23 See e.g. *Dean v Kotsopoulos*, 2012 ONCA 143 at para 17; *Wicks Estate v Harnett*, 157 ACWS (3d) 1047, 48 CCLT (3d) 155 (Ont Sup Ct).

24 *Stewart v Gustafson*, *supra* note 13.

25 In this case, the former tenants might have trespassed by leaving these items behind.

26 Importantly, these competing ownership claims result from the complaints that each party raised. Accordingly, they arise irrespective of the desirability of the chattels in question for the competitors as something they wanted to have and hold on to. Claiming to be the owner was also the necessary condition for the landlord to discard broken and useless items.

27 For cases arising out of similar situations, see *Robot Arenas Ltd v Waterfield*, [2010] EWHC 115 (QB) (an English case where a landlord had disposed of commercially valuable movie equipment left behind by the tenant); *Re Jigrose Pty Ltd* (1993), [1994] 1 QR 382 (an Australian case which examined the admissibility of a clause in a contract according to which any item left behind on sold land could be deemed to be abandoned). Another competitive scenario gave rise to Wrangham J's statement in *Moffatt v Kazana* (1967), [1969] 2 QB 152, [1968] 3 All ER 271 (the owner remains the owner unless he divests himself of the ownership by "one of the recognised methods, abandonment, gift or sale" at 156). I have not found a single common law case that seemed to permit abandoning chattels outside of a competitive scenario.

owner."[28] Yet, here again a decision has to be made about the competing claims of different contenders for the ownership position.[29] Robin Hickey therefore rightly concludes that it does not make a difference for the law of finding if abandonment in the absence of ownership contenders is (theoretically) possible or not.[30] Given that there is someone willing to take up the ownership position, the issue of the absence of owners does not arise.[31] The occasional mention of successfully "abandoned" chattels in the case law does not indicate that it is possible for owners to unilaterally divest themselves of their ownership positions. To conclude otherwise omits to take due account of the fact that all these mentions of "abandoned" chattels concern competitive scenarios.[32] The common law of property's case law on the "abandonment" of chattels consequently does not lend support to claims that it is possible to abandon ownership. Judges merely establish guidelines on how to solve competitive scenarios. The general rule for the abandonment of chattels in the common law still corresponds to the holding in *Haynes's Case*: "A person cannot relinquish the property he has to his goods."[33] In the common law of property, owners can destroy their things, but not their proprietary title to them.[34] I can eat, burn, or pulverize my crops, but I cannot sever the ties of ownership.[35]

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28 Ziff, *supra* note 18 at 176.

29 See e.g. *Wicks Estate v Harnett*, *supra* note 23.

30 See Robin Hickey, *Property and the Law of Finders* (Oxford, UK: Hart, 2010) at 70.

31 That the development of common law doctrine fundamentally relies on actual disputes being brought to court might provide an explanation for why we only encounter competitive scenarios in the case law. Situations in which courts are called upon to declare the effects of a unilateral, divesting abandonment are and will be rare.

32 Taking the competitive nature of these scenarios seriously makes plain why judges concerned with "abandoned" chattels engage in depth with evidentiary questions. See e.g. the frequently cited authority in *Simpson v Gowers*, *supra* note 13 (establishing the burden of proof for abandonment as lying with the party raising it as a defense). See also the test for inference of the intention to abandon established in *Stewart v Gustafson*, *supra* note 13. The classification of the relations between the value of an object and abandonment offered by Strahilevitz is helpful to approach these evidentiary questions, but is only salient in competitive scenarios (see Strahilevitz, *supra* note 6 at 362).

33 *Haynes's Case* (1613), 12 Co Rep 113, 77 ER 1389, as summarized in Sjef van Erp & Bram Akkermans, eds, *Cases, Materials and Text on National, Supranational and International Property Law* (Portland, Or: Hart, 2012) at 1006. While *Haynes's Case* is frequently considered to have established the "no property" principle according to which human corpses cannot be owned, I take this decision dealing with theft of shrouds to first and foremost establish that the shrouds could not have been unilaterally abandoned. For an account of the "misinterpretation and mistranslation" of the case, see also James Edelman, "Property Rights to Our Bodies and Their Products" (2015) 39:2 UWA L Rev 47 at 63–64.

34 See Penner, *supra* note 5 at 79, 148.

35 See *ibid* at 79.

The impossibility of abandoning ownership hence also applies to my plastic wrappers, cans, and other household garbage.[36] Only at the moment when the garbage is collected does my ownership of it end. Importantly, my ownership is not terminated when I simply leave my bin and its content out on the street with the intent of desertion and relinquishment. Instead, it comes to an end because I transfer it to the collector and, in most places, the collector's acceptance is subject to a set of conditions.[37] If these conditions are unmet, my garbage still belongs to me.[38]

B. Exceptions

Any description of the common law's rules on the abandonment of ownership would be incomplete if it did not pay close attention to the two situations in which it is permitted for owners to voluntarily relinquish their ownership position. The common law permits the abandonment of one's ownership of wild animals and of shipwrecks on the high seas.

A person's ownership of a "wild animal"[39] can end, either involuntarily by the animal escaping or when the owner intentionally releases it.[40] The existence of this first exception indicates that a difficulty with the abandonment of ownership arises only for things that are viewed as inanimate.[41]

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36 See Cheng Lim Saw, "The Law of Abandonment and the Passing of Property in Trash" (2011) 23 Sing Ac LJ 145 at 159–62 (for an overview of the ownership situation of garbage in English law with a focus on privacy violations and celebrity trash).

37 See e.g. City of Toronto, by-law c 844, *Waste Collection, Residential Properties* (30 June 2020), art 3. The by-law provides specific days and times for collection (arts 1, 4–8), rules on waste separation (art 18), etc.

38 I show at 730–33, *below*, that a successful transfer does not indicate successful abandonment.

39 The very idea that non-human animals can be objects of ownership is not unproblematic. I will abstain from discussing these issues for the present purpose, however, as my focus is on describing the current legal rules and their underlying rationales.

40 See e.g. Oliver Wendell Holmes, *The Common Law* (Cambridge, Mass: Harvard University Press, 2009) at 214: "We have adopted the Roman law as to animals *feræ naturæ*", meaning that the latter can be released. See also *Kearry v Pattinson* (1938), [1939] 1 KB 471, [1939] 1 All ER 65 (for loss of ownership of swarming bees).

41 Despite being viewed as ownable, animals' agency is thus partially reflected in property law. See William Blackstone, *Commentaries on the Laws of England, Book II: Of the Rights of Things*, ed by Simon Stern (Oxford, UK: Oxford University Press, 2016) ("*animals*, which have in themselves a principle and power of motion, and ... can convey themselves from one part of the world to another" at 263). This of course does not mean that whatever a released animal does or does not do will have to be tolerated.

The second exception allows for shipwrecks to be abandoned on the high seas.[42] In these cases, it is the location of the abandonment that makes the difference. The shipwrecks are abandoned on the high seas and thus on international territory over which there are neither private property rights, nor sovereignty exercised by particular states.[43]

By way of exception, in these two settings, abandonment is recognized when it concerns ownable things viewed as capable of making their own decisions, or when proprietary ties are cut on an extraterritorial location. Neither setting requires the presence of a "designated private successor" for the present owner's ownership to end. Yet, these settings are truly exceptional, and the general rule against the abandonment of inanimate things on domestic territory is left untouched. At the same time, the two exceptions clearly indicate what to look for as we try to understand the motivation behind the general rule.

C. De Facto *Versus* de Jure *Restrictions on Abandonment*

Eduardo Peñalver has suggested that the common law only restricts the abandonment of land, and that the restriction on the abandonment of chattels is not *de jure* but merely *de facto*.[44] He argues that the common law does give owners a right to abandon their chattels, but that it is practically impossible to carry out what one is legally entitled to do. On Peñalver's account, this is because "all land is owned[, which] means that

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42 This is arguably also the case for chattels other than shipwrecks and their cargo, even if case law is almost exclusively concerned with these. See William Blackstone, *Commentaries on the Laws of England, Book I: Of the Rights of Persons*, ed by David Lemmings (Oxford, UK: Oxford University Press, 2016) ("a man that scatters his treasure into the sea ... is construed to have absolutely abandoned ... and returned it to the common stock" at 190). Today, the exception does not extend to territorial waters, despite the holdings as in *Arrow Shipping Company v Tyne Improvement Commissioners, (The Crystal)*, [1894] AC 508, 10 TLR 551 [*Arrow Shipping Company*]. The decision frequently refers to the territorial waters (the harbour of the River Tyne) on which a collision leading to wreckage occurred as "the high seas." It dates from before the organization of territorial sovereignty over international waters that is in place today, though. See also and for similar treatment of "abandonment" on territorial waters *Eads v Brazelton*, 22 Ark 499, 79 Am Dec 88 (Sup Ct 1861) (possibility to acquire lead on a ship sunk in the Mississippi River through first possession in a "competitive scenario").

43 See *United Nations Convention on the Law of the Sea*, 10 December 1982, 1836 UNTS 397 (entered into force 16 November 1994) [*UNCLOS*] ("No State may validly purport to subject any part of the high seas to its sovereignty", art 89); *Convention on the High Seas*, 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962) ("The term 'high seas' means all parts of the sea that are not included in the territorial sea or in the internal waters of a State", art 1). For a further discussion of the exception, see 753, *below*.

44 See Peñalver, *supra* note 10 at 203–04.

the owner of an item of personal property who wishes legally to abandon it must intentionally deposit the item on some piece of *owned* land with an intention to renounce future claims to the chattel."[45] The *de facto* circumstances of landholding, so the argument goes, would erode the right to the abandonment of chattels and ultimately render it merely "illusory."[46] Land belongs either to the putative abandoner or to someone else. In the first case (abandoning on one's own land), Peñalver explains, the abandoner would always remain in possession of everything that is located on her land, including the chattel she wishes to abandon. Her abandonment could never be completed as she cannot walk away from a thing and at the same time possess it.[47] In the second case (abandoning a chattel on someone else's land), the putative abandoner will—unless the owner of that piece of land either licenses the action or appropriates the abandoned thing herself—commit a trespass. The rightful abandonment therefore always risks being a wrongful trespass. Even on land that is accessible to everyone, an owner wishing to abandon chattels runs the risk of violating prohibitions against littering and dumping.[48]

Peñalver's arguments are informed by a conception of ownership which inherently encompasses a "social-obligation norm" that puts owners under specific duties toward other persons and society at large.[49] The common law's *de facto* restriction on the abandonment of chattels, he suggests, takes account of the intricate net of social obligations into which owners find themselves to be embedded. Were it possible for owners to liberally abandon chattels, this web of social obligations would be continuously endangered.[50]

There is undoubtedly a strong normative appeal to the view that the restriction on abandonment is the emanation of a special obligation that owners have for others' wellbeing, particularly when explaining the restriction on the abandonment of hazardous substances or dangerous objects. At the same time, Peñalver's observations neither fully capture the doctrine nor provide a consistent explanation, even on the terms of his own account. As I have outlined above, the claim that the common law gives owners *de jure* permission to abandon chattels is highly questionable. Moreover, reference to a *de facto* impossibility does not capture the

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45 *Ibid* at 203.

46 *Ibid*.

47 See *ibid* at 203–04.

48 See *ibid* at 204.

49 See Gregory S Alexander et al, "A Statement of Progressive Property" (2009) 94:4 Cornell L Rev 743 at 743–44.

50 *Cf* Peñalver, *supra* note 10 at 212–13.

treatment of wild animals and of things abandoned on the high seas. And even if I undoubtedly trespass by leaving chattels on others' land as well as by entering onto it without authorization, it is less intuitive why the owner of a piece of land always possesses everything located on it, regardless of her actual intention to control.[51] In addition, while Peñalver's argument concerning abandonment on one's own land would point to an impossibility grounded in legal rules,[52] the argument based on trespass merely describes an unfavourable incentive structure. In this second case, abandonment would be possible in a legal sense but undesirable due to an internal cost-benefit analysis on which owners willing to part ways with their things will ask "does the inconvenience of potential liability outweigh my desire to get rid of this chattel?" It remains unclear how a legal impossibility and a potential "losing bargain" render an existing right to abandon chattels "illusory" in the same way.

More importantly, Peñalver's account fails to address why the *de jure* impossible abandonment of land should only indirectly impact the possibility to abandon chattels. Why is the abandonment of land problematic in a way that only reflects onto the treatment of chattels? And why does the normative commitment to the social-obligation norm not also require a *de jure* restriction on the abandonment of chattels? Peñalver answers these questions only in part and somewhat vaguely with reference to the common law's "discomfort with abandonment through and through."[53] But, as I have described above, this pervasive discomfort actually finds its expression in the *de jure* restriction on the abandonment of the ownership of both land and chattels that we see in the current doctrine.

D. Abandonment as Transfer?

Some authors have sought to bridge the apparent disconnect between the definition of abandonment in the reasoning of common law courts on the one hand, and the acknowledgement of its legal impossibility on the other. They draw attention to the role that the possibility of a transfer can play for a successful "abandonment" and suggest broadening the scope of what falls under the term "abandonment" so as to reconceive of abandonment as a specific way to transfer ownership. More specifically, this view presents abandonment as a form of delayed or conditional trans-

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51 There is, of course, a strong presumption that everything that is located on a given parcel of land is covered by the landowner's *animus possidendi*, but Peñalver does not deal with the question of the necessary subjective component of possession.

52 For Peñalver, I simply cannot claim to have abandoned something that I still possess.

53 Peñalver, *supra* note 10 at 215.

fer,[54] or simply as a "unilateral transfer of ownership."[55] On this modified understanding of abandonment, an owner's divestment of her ownership position through abandonment would be possible. The abandonment would, however, only be accomplished if someone else takes possession and, in turn, restarts the "cycle of ownership."[56] Put differently, the owner's intentional and absolute relinquishment does not immediately terminate her ownership, but instead confers (only) a revocable licence to appropriate.[57] Once, but also only when, someone else has appropriated the abandoned thing, the former owner's proprietary ties are cut for good and the "abandonment" is complete. Although unilateral relinquishment of ownership is thus impossible, there could nevertheless be "abandonment," namely in the form of a conditional transfer to another person.

On the understanding of "abandonment as transfer," the common law of property would consequently permit the abandonment of ownership.[58] It would, however, always need the participation of other persons who appropriate the thing to complete the divestment of ownership. Abandonment and conditional transfer would become synonymous. Conversely, unilateral abandonment without another's active participation would remain impossible.

The "abandonment as transfer" conception challenges the traditional understanding, according to which it is the very essence of abandonment that I quit "possession without any specific intention of putting another person in [my] place."[59] On this traditional understanding, owners do not

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54 Proponents of this view describe abandonment in the common law as inherently "directional" and thus capable of operating as a functional equivalent for, or even as a mode of, transfer. For the latter view, see Penner, *supra* note 5 at 84–85; James Penner, "On the Very Idea of Transmissible Rights" in James Penner & Henry E Smith, eds, *Philosophical Foundations of Property Law* (Oxford, UK: Oxford University Press, 2013) 244 at 246; JE Penner, *Property Rights: A Re-Examination* (Oxford, UK: Oxford University Press, 2020) at 132–35.

55 Strahilevitz, *supra* note 6 at 360.

56 See Hudson, *supra* note 10 at 110.

57 See Frederick Pollock, "Notes", Case Comment on *Arrow Shipping Company v Tyne Improvement Commissioners*, (1894) 10 Law Q Rev 289 ("express abandonment is ... merely a licence to the first man who will take the goods for his own; which taking ... will finally change the property" at 293). See also Aitken, *supra* note 10 at 266–67 (retracing this approach to *derelictio* in Roman law as favoured by the Proculeans while also highlighting that Justinian's *Institutes* followed the opposite view of the Sabinians).

58 Some of these views accept the impossibility of abandoning land and restrict the proposal for a modified understanding of "abandonment" as transfer to chattels.

59 Frederick Pollock, "Of Possession Generally" in Pollock & Wright, *supra* note 5, 43 at 44. See also "Abandoned Property", online: *The Law Dictionary* <thelawdictionary.org> [perma.cc/CP9Q-34NK] (lack of designation of a new owner or at least posses-

abandon *to another*, they abandon *tout court*, for there is "no principle of English law under which real estate can pass from one to another by 'abandonment'. One man cannot abandon his property to another."[60] In some common law jurisdictions, abandonment is even explicitly referred to as relinquishment "without vesting it in any other person."[61]

A modified understanding of "abandonment as transfer" might bridge the disconnect between the legal definition and what the law actually permits. Yet, it is questionable whether the disconnect between the existence of a legal concept and its viability can justify as radical a shift as the "abandonment as transfer" conception would occasion. After all, diverging answers to the questions of how a legal concept is to be understood, and about such a concept's viability, are not infrequent in other areas of the common law (think of fraud or unconscionability). There can very well be definitions for things we cannot do. In addition, very different sets of more detailed rules apply to abandonment and transfer.[62] Lastly, the "abandonment as transfer" conception does not capture why it is possible to abandon wild animals and chattels on the high seas. When abandonment always requires a successful transfer, who are animals and shipwrecks abandoned to?

To justify the "abandonment as transfer" conception, Lior Strahilevitz raises concerns with abuse. He highlights the risk of owners (ab)using a possibility for unilateral abandonment with immediate divesting effect as a way of ridding themselves of any lesser and limited property rights such as security rights or easements. An owner's unilateral, unconditional abandonment would withdraw the basis of these rights and leave their holders empty handed. Even worse, the very owner who just abandoned a thing could immediately reacquire it, and do so free from any of the prior burdens.[63] This argument is unconvincing. To begin with, it is highly questionable whether the owner's behaviour in these hypothetical cases could fulfill the requirements of abandonment in the first place (i.e., if an

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sor as the second essential feature of abandonment, next to the relinquishment of rights).

60 *Jones v McClean*, [1931] 2 DLR 244 at 252, [1931] 1 WWR 315 (Man CA).

61 *Pocono Springs*, *supra* note 18 at 448, referring to *Pennsylvania v Wetmore*, 301 Pa Super 370, 447 A (2d) 1012 (1982).

62 I am thinking here particularly of formal requirements for successfully transferring title. None of the proponents of the "transfer" conceptions of abandonment have so far suggested modifying these requirements as well.

63 See Strahilevitz, *supra* note 6 at 361.

intention to abandon could really be assumed).[64] In addition, in the common law, lesser and limited property rights attach to the ownership position, not to its holder. These limited property rights would not disappear.[65] Upon reacquisition, an abandoning owner would also remain bound by restrictive covenants.[66] In a nutshell, the legal system already has mechanisms to prevent abuse.[67] Reframing abandonment as a transfer is not necessary to do so.

In another attempt to justify the "abandonment as transfer" proposal, Lee Aitken advances "moral reasons." Reconceiving "abandonment as transfer" would address concerns about the lack of participation of a second person before ending ownership.[68] Rather than solving the puzzle though, the "transfer" account begs the question why a second person would be needed to complete the abandonment of another's ownership in the first place.

The prior sections have demonstrated that the common law generally restricts the abandonment of both chattels and land in a similar way. I have also argued that instead of modifying the definition of what counts as abandonment, it seems more promising to further investigate the reasons for preventing it. The following parts of the article will do so.

II. Why Is There No Abandonment in the Common Law?

After establishing that it is indeed impossible to abandon ownership, the following parts of the article will turn to the underlying rationale for the common law's restriction on abandonment in more detail. In this section, I introduce the common law's *horror vacui*, that is, the common law's fear of unowned things. I then canvass prior accounts that have sought to explain the *horror*'s significance in the context of abandonment. I show that these accounts do not comprehensively capture the legal rules on abandonment. The better explanation for the impossibility to abandon

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64 See e.g. the definition of abandonment endorsed in *Pocono Springs*, *supra* note 18 at 448: abandonment is relinquishment "with the intention of not reclaiming further possession or resuming ownership, possession or enjoyment."

65 For instance, a right of way for a landlocked parcel would remain as untouched by a unilateral abandonment and immediate repossession as it would be by a transfer to someone else.

66 She is not a *bona fide* purchaser for value without notice upon reacquisition. In fact, requiring that someone other than the former owner appropriate to complete the abandonment increases the risk that such an equitable interest becomes unenforceable.

67 To close all the remaining loopholes, one could furthermore think of equitable remedies, comparable to estoppel, that would "resurrect" a lesser proprietary interest fraudulently brought to an end.

68 See Aitken, *supra* note 10 at 266.

ownership looks neither to the common law's feudal heritage, nor to preventing liability evasion, but instead to the way it conceives of owners as bearers of "proprietary responsibility."

A. The Horror Vacui *and Impossible Abandonment*

In trying to make sense of the restrictive treatment of abandonment, Eduardo Peñalver has pointed to a "discomfort with abandonment through and through."[69] Oliver Wendell Holmes explicates this discomfort further. In his lecture on "Possession," Holmes describes that the common law "abhors the absence of proprietary or possessory rights as a kind of vacuum"[70] and expresses this in "the general tendency ... to favour appropriation,"[71] a tendency he identifies as unique to the common law.[72] For Holmes, the horror of unpossessed or unowned things urges that everything that *can* be owned or possessed also *must* be owned or possessed. Conversely, things neither owned nor possessed are to be avoided at all costs.[73]

In the context of fine arts and design, the term *horror vacui* is often used to describe a similar kind of fear of the void. An artist suffering from a *horror vacui* feels uneasy with empty spaces, which results in a desire to fill every part of a canvas, producing the overfull paintings we know, for instance, from the Baroque period.[74] The underlying idea here, again, is that it is the natural course of things that whichever space *can* be occupied *must* be occupied. By contrast, the existence of a vacuum, that is, of a

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69 Peñalver, *supra* note 10 at 215.

70 Holmes, *supra* note 40 at 214.

71 *Ibid*.

72 Holmes contrasts the common law's "attitude" particularly with what he views as overly strict requirements for possession in the German Historical School's writings (see *ibid* at 197–200, 213).

73 It has been highlighted that the reason why Holmes believed that the *horror* extends to both proprietary and possessory rights stems from the focus of his analysis on remedies, for the purpose of which, Holmes argues, possession and ownership are largely treated alike. Holmes remarks, "But what are the rights of ownership? They are substantially the same as those incident to possession" (*ibid* at 222). For a more detailed analysis, see Rashmi Dyal-Chand, "Sharing the Cathedral" (2013) 46:2 Conn L Rev 647 at 673, 700–01. The distinction between possessory and proprietary rights, or the lack thereof, shall not be of further interest for my present inquiry into the abandonment of ownership.

74 See "horror vacui", online: *Oxford English Dictionary* <www.oed.com> [perma.cc/ZTH5-G5UH].

space entirely devoid of its usual matter, is unnatural, highly undesirable, and generates *horror*.[75]

Applied to property law, the *horror vacui*, understood as the abhorrence of a proprietary vacuum, captures the fear of what is viewed as the unnatural situation in which things that could and should be owned are not. On my account of abandonment, the common law's *horror vacui* consequently explains not only the relatively easy process of acquisition that responds to the urge to favour appropriation.[76] It also explains the restriction on abandonment. Hence, the common law's *horror vacui* motivates not only a preference for appropriation, but also the prevention of the creation of unowned things through abandonment. In restricting abandonment, the common law's *horror* is so powerful that its effect is to "saddle [an owner] with a relationship to a thing that one does not want"[77] for it "condemn[s] the owner to having to deal with it."[78] But what exactly is the problem with unowned things? Why does the common law's *horror vacui* aspire to bind owners to their things? And why does it sometimes allow for exceptions?

B. Feudal Heritage

According to some authors, the *horror* and the resulting impossibility to unilaterally abandon land must be viewed as expressions of the common law's feudal heritage.[79] After the Norman Conquest of England in 1066, all land was held by the new king. Title to land was only granted in return for different types of services, later primarily monetary dues.[80] Under the feudal system of landholding, all land had to be held by someone. There was to be no "abeyance of seisin" to ensure the provision of services that, for example, secured the military power and spiritual well-

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75 See "vacuum", online: *Oxford English Dictionary* <www.oed.com> [perma.cc/N9LS-AURB]. See also Aristotle, *Aristotle's Physics: Books III and IV*, ed by Edward Hussey (Oxford, UK: Oxford University Press, 1983) at ch 6–9 (a void, understood as a "place deprived of body," is simply impossible in nature).

76 See *Popov v Hayashi*, *supra* note 14.

77 Penner, *supra* note 5 at 79. While James Penner, in whose view abandonment should be possible, describes these consequences as a hypothetical "funny turn of events" (*ibid*), this turn is precisely the one the common law takes.

78 *Ibid*.

79 See John Henry Merryman, "Ownership and Estate (Variations on a Theme by Lawson)" (1974) 48:4 Tul L Rev 916 at 922; James C Roberton, "Abandonment of Mineral Rights" (1969) 21 Stan L Rev 1227 at 1228, n 13 (with further references to case law).

80 See Sir John Baker, *An Introduction to English Legal History*, 5th ed (Oxford, UK: Oxford University Press, 2019) at 245–47.

being of the king, and that later generated a steady stream of income for the Crown.

Building on this historical background, it has been argued that property taxes paid by owners today are simply the continuation of feudal dues. Where there was once to be no abeyance of seisin to secure income and manpower, today's restriction on abandoning land secures an uninterrupted flow of property taxes to the state.[81] The *horror vacui* would thus be informed by a fear of the absence of income in the form of property taxes.

Insofar as this explanation points to the historical background of common law concepts of landholding, it assists in getting a grasp on why the common law's treatment of abandonment might be peculiar.[82] This background resonates in much of today's land law (e.g., with the organization of landholding in a system of estates).[83] At the same time, there is general agreement that the continuity is conceptual at best. The contemporary relations between citizens and state differ substantially from the ones between medieval kings and the feudal lords who held title to land.[84] The generation of a continuous influx of property taxes certainly is a welcome result of the restriction on unilateral abandonment of land. It is nevertheless implausible that the aim of generating tax income drives the sweeping restriction in place today. It is, in other words, unconvincing to rely solely on fiscal advantages to explain why owners are prevented from abandoning. Property tax yields vary considerably among common law jurisdictions, with some levying no property taxes at all, which—tellingly—does not have any impact on the restriction on abandonment.[85] Some state-operated services that landowners use (e.g., connection to the sewage system) certainly benefit from greater financial resources. Still, the

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81 See Ziff, *supra* note 18 at 161.

82 *Cf* Holmes *supra* note 40 at 214 (highlighting the *horror vacui* as peculiar to the common law, albeit for different reasons). For a different approach, see Part III, Abandonment in the Civil Law and "Public Ownership of Last Resort", *below*.

83 See Kevin Gray & Susan Francis Gray, *Elements of Land Law*, 5th ed (Oxford, UK: Oxford University Press, 2009) at para 1.3.2.

84 For the idea of an only nominal continuity, see JW Harris, "Ownership of Land in English Law" in Neil MacCormick & Peter Birks, eds, *The Legal Mind: Essays for Tony Honoré* (Oxford, UK: Clarendon Press, 1986) 143; Peñalver, *supra* note 10 at 231 (remaining similarities between obligations of contemporary owners and land ownership under feudal systems are at most of a structural nature). Penner suggests an even more marked conceptual discontinuity (see Penner, *supra* note 5 at 151–52).

85 Strahilevitz rightly flags also that the market value of real property that owners wish to abandon will frequently be so low that the amount of taxes—usually calculated on the basis of market value—will be negligible (see Strahilevitz, *supra* note 6 at 400).

abandonment of an unserviced piece of land is as impossible as the abandonment of a fully serviced plot.

Finally, and most importantly, the explanation of the *horror vacui* that is based on feudal remnants is necessarily an incomplete explanation of the legal rules on abandonment. An understanding of the "updated" *horror vacui* as the fear of the absence of property taxes could only ever capture the restriction on the abandonment of land. This explanation does not shed any light on the general restriction on the abandonment of chattels.

C. Preventing Liability Evasion

Another attempt to explain the common law's fear of proprietary voids identifies the *horror* as directed at the absence of owners who can potentially be held liable for the harms and dangers caused by their things. On this account of the *horror vacui*, owners are prevented from abandoning ownership in order to avoid a situation in which there are no defendants against whom claims for compensation or remediation could be directed. The concern with abandoned and subsequently unowned things formulated here is with the potential detrimental effects they may have on others, caused either directly by inflicting harm, or indirectly, for instance through the negative communicative effect that abandoned things can have.[86] Put differently, on this account, the restriction on abandonment prevents owners from evading liability for negative externalities.[87] The *horror* would thus be directed at the absence of owners as bearers of liability.

This approach responds to the worry that "while the interest underpinning property incorporates the interest in getting rid of things one no longer wants, people also have an interest in not being harmed by the way that [other] people deal with their things."[88] Such an account of the *horror* responds most closely to the attention-grabbing cases of toxic substances oozing onto neighbouring land, or of loose building debris hitting passersby.

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[86] Arguments based on a negative communicative effect are concerned with protecting neighbouring owners from depreciation of their parcels when they are surrounded by abandoned parcels (Brown Richardson, *supra* note 9 at 1388 and implicit reference to the "Broken Windows" theory (published for the first time in James Q Wilson & George L Kelling, "Broken Windows: The Police and Neighborhood Safety" *Atlantic Monthly* 249:3 (March 1982) 29). See also Peñalver, *supra* note 10 at 211–12; Strahilevitz, *supra* note 6 at 413–14).

[87] See Merrill & Smith, *supra* note 3 at 522.

[88] Penner, *supra* note 5 at 79.

At the same time, this account relies too strongly on structures of tort law to explain the sweeping restriction on abandonment. The focus on looming liability renders it difficult to explain why the common law must prevent owners from abandoning almost all things, including non-dangerous and harmless ones. This also raises the question why the risk of the absence of defendants would be met with a sweeping restriction when it is not only owners', but also non-owners' dealings with things that can give rise to claims for compensation, as in the case of nuisances committed by tenants.[89] And while it might be easier to identify who the owner is to assign liability, it is conceivable that someone else declares, contracts, or otherwise provides insurance to pre-empt the absence of a defendant. Yet, the presence of such an insurance scheme—even if it is as easily determinable as who owns—leaves the restriction on abandonment untouched. Finally, an explanation that centres around tortious liability can hardly make sense of the possibility of abandonment on the high seas, where salvaging and cleanup costs can be tremendous, as can other harms that might be caused by abandoned things.

Attempting to explain the *horror vacui* as based on concerns with liability also overstresses the impact suffered by particular and clearly identifiable persons (or groups of persons). The worry with, for example, orphaned industrial sites and derelict houses stems from the fact that a community at large will ultimately have to step in to deal with the abandoned thing or land, at least to prevent the worst harm. However, it is often very difficult to define the impacted communities in these scenarios precisely because they may not yet have experienced harm, and harm may not even be imminent.[90]

In sum, liability is not the suitable lens through which to examine the legal rules on abandonment either. These rules are as little concerned with individual plaintiffs as they are with the absence of defendants. Solutions that respond to the *horror vacui* do not primarily take aim at nascent or existing tortious relationships between specific parties.

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89 See *Earl v Reid*, [1911] OJ No 145, 23 OLR 453 (Ont CA) at para 27 (liability of tenant for nuisance caused by collapsing building). The "polluter pays" principle is one of the guiding principles of the *Canadian Environmental Protection Act, 1999*, SC 1999, c 33 and targets not only owners, but all polluters. See also Jeremy Waldron, *The Right to Private Property* (Oxford, UK: Oxford University Press, 1990) at 32–33; Griffiths-Baker, *supra* note 10 at 19–20 (for English rules ensuring liability outside of ownership).

90 Most frequently, public entities with rather clearly territorially delimited mandates will be tasked with organizing how an acutely dangerous orphaned or derelict thing is dealt with. That still does not change the difficulty to determine who is (potentially) harmed.

D. From Liability to Proprietary Responsibility

A tort-focused account does not furnish an explanation that appropriately reflects the scope of the rules on abandonment. The focus on liability essentially overstresses the importance of actual or imminent harm for the *horror vacui*. Nevertheless, this account's primary concern—preventing abandonment insofar as it unduly burdens others—points in the right direction. The burdens for others that unilateral abandonment could give rise to do not, however, primarily consist in actual harm or danger. I argue that in order to understand the *horror vacui*, we have to shift the focus from liability to an idea that I will refer to as "proprietary responsibility." This idea captures that the *horror vacui* is better viewed as a fear of unowned things because this signifies the absence of owners who alone are capable of bearing responsibility for their things *qua* owners, not as a fear of absent defendants.

In her work, Larissa Katz has developed an account of ownership as a special kind of office. On this account, the common law's *horror vacui* is identified as a concern about the vacancy of the office of ownership that must be filled.[91] For Katz, the primary role of owners is to set the agenda for the things they own, thereby exclusively determinining the normative position of others with respect to these things.[92] The idea of ownership as an office is concerned with allocating decision-making authority so as to prevent "conflict[s] that arise in the absence of an *authoritative* agenda for the thing."[93] Any mechanism to fill vacancies of ownership—when understood as an office in this way—therefore aims at effectively allocating authority to achieve finality and closure in decisions about the use of things. Katz shows how different doctrines in property law are responsive to the worry of filling vacant ownership positions in this way, notably through the law of adverse possession and the law of finders.[94] She hints at the rules on abandonment as serving a similar purpose.[95]

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91 See e.g. Larissa Katz, "Exclusion and Exclusivity in Property Law" (2008) 58:3 UTLJ 275 at 306 [Katz, "Exclusion and Exclusivity"]; Larissa Katz, "The Moral Paradox of Adverse Possession: Sovereignty and Revolution in Property Law" (2010) 55:1 McGill LJ 47 at 71, 77–78 [Katz, "Moral Paradox"]; Larissa Katz, "Ownership and Offices: The Building Blocks of the Legal Order" (2020) 70:Supp 2 UTLJ 287 at 269 [Katz, "Ownership and Offices"].

92 See e.g. Katz, "Exclusion and Exclusivity", *supra* note 91 at 289–95; Katz, "Ownership and Offices", *supra* note 91 at 274–78.

93 Katz, "Ownership and Offices", *supra* note 91 at 275 [emphasis added]. See also Larissa Katz, "Property and Sovereignty" in James Charles Smith, ed, *Property and Sovereignty: Legal and Cultural Perspectives* (London, UK: Routledge, 2013) 243 at 262 [Katz, "Property and Sovereignty"].

94 Katz, "Exclusion and Exclusivity", *supra* note 91 at 306 (rule against perpetuities); Katz, "Moral Paradox", *supra* note 91 (adverse possession); Katz, "Property and Sover-

It is important to note however that many of the doctrines Katz primarily focuses on provide procedures to fill vacancies that arise from what I refer to above as "competitive scenarios."[96] Vacancies in the context of adverse possession, the law of finders, or the rule against perpetuities are not created by a lack of someone who wants to be an owner, but by the lack of an *authoritative* determination for a thing.[97] In situations of adverse possession, for example, there may well be an owner, it is just not the right kind of owner. In turn, the restriction on abandonment does not attempt to remedy the lack of an authoritative decision in the presence of multiple potential decision-makers. Instead, the restriction prevents the creation of a (normative) vacuum which results from the absence of any potential decision-maker.

This difference matters as it opens up a new way to think about the common law's *horror vacui* and owners' "proprietary responsibility" in the way I propose it here. The restriction on abandonment of ownership is not fully captured when described as just one of the many ways in which the legal system responds to the aspiration to fill voids. The generalized restriction is first and foremost the sum of concrete duties of each and every owner to remain in place until someone can take up their ownership position. The common law's *horror vacui* gives rise to an individualized duty of every office-holder to remain in office as long as possible. In other words, not only the legal system as such but also each and every owner is in charge of avoiding the creation of vacancies.

By "proprietary responsibility," I therefore mean to refer to owners' larger and more general role to take care of their things, before these things can cause harm, even if they never do, and—crucially—to continue to do so as long as nobody else is ready to assume ownership in their stead. Only such a wider focus is capable of explaining the wide-ranging restriction on abandonment that applies regardless of any (potential)

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eignty", *supra* note 93 (adverse possession); Larissa Katz, "Relativity of Title and *Causa Possessionis*" in James Penner & Henry Smith, eds, *Philosophical Foundations of Property Law* (Oxford, UK: Oxford University Press, 2013) 202 (law of finders).

95 Katz, "Moral Paradox", *supra* note 91 at nn 11, 124; Katz, "Ownership and Offices", *supra* note 91 at 280–81 (with reference to a prior version of this article).

96 See Part I-A, General Principle: No Abandonment, *above*.

97 Katz briefly refers to the law of escheat and *bona vacantia*, both of which are of course concerned with the absence of an owner (Katz, "Ownership and Offices", *supra* note 91 at 281). Other than in the "competitive scenarios" Katz mainly discusses, these two doctrines only see public owners fill the vacant ownership position under very limited circumstances (see my discussion *below* at 751–52). Yet, public owners' limited capacity to fill in vacancies in the common law is crucial to understanding the role of owners in the common law of property, as I explain in this article. By concentrating on "competitive scenarios" that oppose different private actors, this dimension remains underexplored.

harm, as well as the fact that this restriction only targets owners. Due to their exclusive position, only owners do and can deal with ownable things. The idea of proprietary responsibility follows from this and asserts that owners also must remain capable of doing what they are entitled to. Along with their exclusive entitlement to deal with their things, owners have a duty to continue to deal with them (and not merely face their dealings' consequences, which may or may not include harm or danger to others). This undeniably encompasses owners' duties to prevent or compensate for harm, but it reaches far beyond the level of liability. It is responsibility writ large.

Before elaborating on how owners' responsibility writ large and the fear of its absence shape the common law's rules on abandonment, the very concept of ownership that underlies these rules deserves closer attention. This is because the way in which civilian jurisdictions respond to abandonment highlights the need to further refine an account centred on owners as bearers of proprietary responsibility in the common law of property. Civilian jurisdictions' rules on abandonment seemingly let owners evade their responsibility. These jurisdictions appear to expose themselves to the moral hazard created by a possibility for owners to leave their things behind whenever they become too burdensome. They nevertheless permit owners to abandon. Key to understanding this difference is that the concern with abandonment is one with the looming absence of a suitable bearer of proprietary responsibility. In the common law, not every actor in the legal system is able to bear this responsibility in the way required to address its *horror vacui*.

III. Abandonment in the Civil Law and "Public Ownership of Last Resort"

In civilian jurisdictions, ownership of both chattels ("movables") and land ("immovables") can be abandoned.[98] These jurisdictions allow owners to voluntarily relinquish their ownership and just walk away from what they no longer wish to own. In the majority of cases, however, the termination of all proprietary ties between former owners and their things does

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[98] *Cf* Emerich, *supra* note 15 at 118–19. Here, I use the term "civilian jurisdictions" mainly to contrast it with the unique stance of the "common law" tradition on abandonment. In the area of the law of property, a distinction between civil and common law best reflects the structure of the respective systems of legal rules (Sjef van Erp, "Comparative Property Law" in Mathias Reimann & Reinhard Zimmermann, eds, *The Oxford Handbook of Comparative Law*, 2nd ed (Oxford, UK: Oxford University Press, 2019) 1032). When it comes to unilateral abandonment, I did not come across a "civilian" jurisdiction that would treat abandonment as restrictively as the common law of property. For other jurisdictions, see e.g. van Erp & Akkermans, *supra* note 33 at 955 on Dutch law; overview in Peñalver, *supra* note 10 at 209, n 69; overview in Strahilevitz, *supra* note 6 at 394–95.

not create ownerless things. In a large number of civilian jurisdictions, the state steps in as the "owner of last resort."[99] Among these jurisdictions are France and Quebec. They will be used in this section to illustrate the mechanism of "public ownership of last resort."

French law permits owners to unilaterally abandon the ownership of all ownable objects. It does this almost as a matter of course when it provides merely for the legal consequence of successful abandonment. According to article 713 of the French *Civil Code*, "*[l]es biens qui n'ont pas de maître appartiennent à la commune sur le territoire de laquelle ils sont situés*."[100] A thing that is abandoned by its owner automatically comes to be owned by a public entity.[101] The state always steps into former owners' shoes.

The civil law of Quebec provides for a similar mechanism. Unilateral abandonment is not only possible, but is considered to have formed part of the civil law since time immemorial,[102] and to flow from the rights inhering in ownership.[103] According to article 934 of the *Civil Code of Quebec*, "[t]hings without an owner are things that belong to no one or that have

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99 Exceptions worth mentioning include German and Swiss law. German property law permits the creation of unowned, masterless (*herrenlos*) movables and immovables through unilateral abandonment (in the latter case, with a pre-emptive right to acquire for the federal country where the parcel is situated): arts 928 (immovables), 959 (movables) Civil Code (Germany). In explaining this approach, the legislative materials and treatises point to the importance of submitting the now "masterless" thing to general and open access: see Benno Mugdan, ed, *Die Gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich, III. Band: Sachenrecht* (Berlin, DE: R v Deckers Verlag, 1899) at 206. Swiss property law provides for comparable rules: arts 666 (immovables), 718 (movables) Civil Code (Switzerland), in each case with exceptions in some cantons. Polish law provides for similar rules for the abandonment of movables: see arts 180, 181 Civil Code (Poland) (I thank Przemysław Pałka for this reference). This article focuses on abandonment in the common law tradition. I will leave further detailed analysis of the differences regarding abandonment among civilian systems of property law for another occasion.

100 "Unowned property belongs to the municipality on the territory of which it is located." [translated by author].

101 Art 713 C civ. The way in which the abandoned thing can travel through the hands of different levels of government is grounded in the specifics of the organization of administrative entities under French (public) law. The municipality on the territory of which the abandoned thing is situated has a "pre-emption right" of acquisition that it can renounce in favour of certain types of associations of municipalities, and finally, in the event that both of these entities renounce their right of ownership, the abandoned thing falls to the state.

102 See *Banque Laurentienne du Canada c 200 Lansdowne Condominium Association*, [1996] RJQ 148 at para 6, 1995 CanLII 3733 (Qc Sup Ct).

103 See Sylvio Normand, *Introduction au droit des biens*, 2nd ed (Montreal: Wilson & Lafleur, 2014) at 37; Pierre-Claude Lafond, *Précis du droit des biens*, 2nd ed (Montreal: Thémis, 2007) at 175.

been abandoned." Unless an abandoned movable is appropriated by someone else, it automatically falls to public entities; article 935 of the *Civil Code of Quebec* stipulates that "[a]n abandoned movable, if no one appropriates it for himself, belongs to the municipality that collects it in its territory, or to the State." Abandoned immovables directly pass to the state.[104] It is thus true that Quebec's property law regime does not recognize the concept of ownerless land.[105] However, this is not the case because owners cannot abandon it. Instead, it is due to the mechanism of "public ownership of last resort." Rather than creating unowned things, the abandonment of movables and immovables leads to the state assuming the role of the owner.[106]

In describing the rules in French law, Sjef van Erp has summed up the mechanism as "lead[ing] to a derivative acquisition by the French state."[107] This does not turn abandonment in systems with "public ownership of last resort" into a conditional transfer, however. The "public ownership of last resort" mechanism makes it possible to abandon, but it does not collapse abandonment into transfer, as suggested by the "abandonment as transfer" view I discussed above.[108] In civilian systems with "public ownership of last resort," owners can—thanks to a blanket acceptance by public entities—always abandon. Their abandonment never fails for lack of a designated successor.

Jurisdictions that follow the "public ownership of last resort" model would, for example, allow owners to walk away from an old car left on the side of the road and thereby terminate their ownership.[109] If no other per-

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104 Although with the option for private parties to subsequently acquire some of them by accession or adverse possession ("An immovable without an owner belongs to the State. Any person may nevertheless acquire it by natural accession or prescription unless the State has possession of it or is declared the owner of it by a notice of the Minister of Revenue registered in the land register", art 936 CCQ).

105 See Emerich, *supra* note 15 at 118 with further references.

106 It is of course noteworthy that something automatically falling to a public entity is nevertheless referred to as "sans maître" ("without master") in French law. The structure of public ownership in French law, as I explain here, can illuminate this terminology.

107 van Erp & Akkermans, *supra* note 33 at 952. See also Cass civ 3e, 18 June 2003, [2003] Bull civ III 129 at 115, No 01-01.758. Some authors claim that this transfer still requires consent of the French state in the same way that a donation would (Phillippe Malaurie & Laurent Aynès, *Les Biens* (Paris, France: Defrénois, 2003) at 51–52). This, however, does not seem to reflect the current state of French law.

108 The second part of art 713 C civ explicitly mentions a transfer only as between municipalities and state, and thus at a moment when the abandonment is already completed.

109 These are the facts in *Johnstone & Wilmot*, *supra* note 20. In the common law of property, the car's prior owner could only successfully terminate her ownership ties in a

son came forward, the car would inevitably fall into public hands.[110] Strikingly, the response even to the abandonment of potentially dangerous industrial sites is "public ownership of last resort."[111]

The "public ownership of last resort" mechanism that makes abandonment possible is in turn enabled by the capacity of public entities to own in two different ways. Under French property law's *dualité domaniale*, public entities' dealings with some things are "public," whereas toward other things, they stand just like any private owner.[112] Despite some overlap, both modalities represent genuinely distinct ways of owning. It is not settled whether Quebec's property law regime has adopted the doctrine of *dualité domaniale*. Even if it had, Quebec would have only partially adopted the doctrine and enabled only municipalities to opt for either the private or public ownership modality.[113] Nevertheless, the implications of the dualist ownership model for public entities on the possibility of abandonment are well-illustrated by the property laws of France and Quebec.[114]

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competitive scenario (see Part II, Why Is There No Abandonment in the Common Law, *above*).

110 It is for this reason that Strahilevitz's likening of civil law models of abandonment as gifts to the state is not entirely accurate (see Strahilevitz, *supra* note 6 at 394). The "public ownership of last resort" model is even stricter than a gift, as it does not allow the state to refuse acceptance.

111 Albeit with possibilities to hold prior owners accountable other than by property law, as I will discuss shortly.

112 See e.g. Giorgio Resta, "Systems of Public Ownership" in Michele Graziadei & Lionel Smith, eds, *Comparative Property Law: Global Perspectives* (Cheltenham, UK: Edward Elgar, 2017) 216 at 225–36 (pointing also to other civilian jurisdictions that have adopted this model).

113 For the adoption of the doctrine in Quebec, see e.g. Jules Brière, "La dualité domaniale au Québec" in Raoul-P Barbe, ed, *Droit Administratif canadien et québécois* (Ottawa: University of Ottawa Press, 1969) 313 at 318 (showing the "inoperability" of the concept of domanial duality of the state and its existence in the case of municipalities). See also René Dussault & Normand Chouinard, "Le domaine public canadien et québécois" (1971) 12:1 C de D 8 at 9–10 (pointing to the inexpediency of the state's dual domain); *Richard Lasalle Construction Ltée c Concepts Ltd*, [1973] CA 944, AZ-73011191 at 949 (declaring the doctrine to be inoperative and sterile in Quebec). But see Denys-Claude Lamontagne, *Biens et Propriété*, 8th ed (Cowansville: Yvon Blais, 2018) at 161 (pointing to the "possible" existence of things in the private domain as the premise of art 916 CCQ: "Nor may anyone acquire for himself property of legal persons established in the public interest that is appropriated to public utility"). See also Peter Hutchins & Patrick Kenniff, "La dualité domaniale en matière municipale" (1971) 12:3 C de D 477 at 478–84 (demonstrating the existence of domanial duality of municipalities); Resta, *supra* note 112 at 235–36 for further references.

114 The situation in Quebec's property law results from the intersection between a civilian private law regime with a common law constitutional order that, among other things, influences how public entities can or cannot own. Here, a civilian conception of absolute

The domanial duality allows public entities to choose between two sets of property rules and to submit a thing to the set that best responds to the specific challenges that the ownership of this thing presents. The public and private ownership modalities contain, for example, differing rules on management and alienation.[115] In French law, rules on public ownership are laid down in the *Code général de la propriété des personnes publiques*[116] and various accompanying pieces of legislation for specific objects (e.g., cultural artifacts). These rules contain considerable modifications to the private ownership modality. They notably bind all decisions about dealings with the thing thus owned to the public interest in a way that private ownership would not require. The public ownership modality can occasionally even exclude the applicability of legal rules that would run counter to the dedication to the public interest.[117]

The blanket acceptance of abandoned things into ownership by public entities does not, however, leave a former owner "off the hook." The "public ownership of last resort" model is not granting owners permission to throw away garbage with impunity. Still, it generally does not restrict owners' capacity to undo their proprietary ties to a thing. Public regulation against dumping as well as extracontractual liability establish a first limit, comparable to public regulation and tortious liability in the common law.[118] Under the "public ownership of last resort" model, these restrictions and liability mechanisms directed at past owners take effect even if public entities ultimately assume ownership. In addition, a public ownership regime is reconcilable with the imposition of further obligations for *ex post* contributions or (financial) compensation when someone's dealing with an ownable resource has generated, or could at some point in

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ownership operates against the backdrop of the Crown as the supreme proprietor of all land. As my goal here is to contrast the civilian approach to abandonment with the common law approach, a more detailed elaboration of the implications of these intersecting rationales will be left for another occasion. For an overview of the comparable debate around abandonment in (mixed) Scottish law, see Malcolm M Combe & Malcolm I Rudd, "Abandonment of Land and the *Scottish Coal* Case: Was it Unprecedented?" (2018) 22:2 Ed L Rev 301.

115 In addition, disputes concerning publicly owned things are generally to be brought before administrative tribunals.

116 See especially the Code général de la propriété des personnes publiques [C génPPP]'s second part on management (*gestion*): arts L 2111-1 to L 2341-2 C gén PPP.

117 With respect to the creation of new rights over the thing in question, see e.g. art L 2121-1 C génPPP: "Les biens du domaine public sont utilisés conformément à leur affectation à l'utilité publique. Aucun droit d'aucune nature ne peut être consenti s'il fait obstacle au respect de cette affectation."

118 The latter are untouched by the proprietary fate of the thing. See art 1457 CCQ (for the general principle to prevent harm on others incumbent on everyone, owners and non-owners alike).

the future generate, harm or undue burdens.[119] What is more, any use of publicly owned things can be made subject to a fee owed by those who wish to use it, rather than relying only on the community at large to finance upkeep, etc.[120] And in situations where it is not warranted for the public interest to prevail in dealings with the thing, the doctrine of domanial duality lets public entities assume ownership of an abandoned thing under the private ownership modality.

What this brief overview shows is that the availability of two distinct modalities of ownership by public entities under the model of domanial duality provides a way to respond to problematic abandonment without imposing a wholesale restriction on it.[121] The possibility of a more flexible approach to how public entities can own seems to motivate the blanket acceptance of abandonment. It provides the basis of "public ownership of last resort," which makes abandonment legally possible. The availability of a specific governance regime for publicly owned things also offers a way to reconcile the obligations and responsibilities of public entities with the obligations and responsibilities they have as owners. This renders it possible to align ownership with the constraints on the exercise of public power.

The *horror vacui*, as we have seen, expresses the fear of the absence of what should be present. I have argued above that in the common law of property, what should be present are owners who are exclusively entitled to and capable of bearing proprietary responsibility. Under legal systems that adhere to the doctrine of domanial duality, public entities are viewed as similarly capable of fulfilling this task without letting owners freeride by taking advantage of the possibility to abandon. In these systems, ownership by public entities can suitably appease the *horror vacui*.

IV. The Common Law: Monist Ownership and the Need to "Keep It Private"

This Part links observations about the common law's conception of ownership with the legal rules governing its abandonment. I will identify that, in contrast with the civilian jurisdictions discussed in the preceding Part, common law ownership is monist. The only modality it knows is the private one. I will show that the common law of property's *horror vacui*, its fear of the absence of what should be present, is therefore necessarily a fear of the absence of private ownership. This fear can consequently on-

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119 Cleanup costs can be imposed on former owners by means of administrative law.

120 See e.g. arts L 2125-1 to L 2125-6 C génPPP.

121 Further, public entities are sometimes better placed to prevent harm (for example, because they have superior expertise or technology).

ly be remedied by "keeping it private." Abandonment is to be prevented unless a designated private successor comes forward. I end by demonstrating that this account succeeds at conclusively and comprehensively explaining the common law's rules concerning the abandonment of ownership.

A. The Common Law's Monist Conception of Ownership

In the common law of property, "ownership" unequivocally refers to the same legal position, irrespective of who the owner is. The same set of rules applies to both private and public owners. There is notably no specific public ownership regime for public entities.[122] In the Canadian context, Justice La Forest noted that "[a]s a general proposition, the Crown's proprietary rights are the same as those of a private owner."[123] A more recent decision reiterates that public "roads, bridges and parks do not get their legal status from who owns the land."[124]

This monist conception of ownership in the common law is grounded in a paradigm of private ownership.[125] Every owner is positioned toward other owners and third parties as just another private party. This includes public entities who, as owners, never stand as a public entity would toward those over whom they wield power *qua* public entity.[126] Under the private ownership paradigm, ideal-typical owners pursue self-interested motives. While owners may consider the interests of others or the public, they cannot be required to do so.[127] Crucially, this is—at least conceptually—also the case when the owner is a public entity.

This explains why references to "public property rights," and sometimes also to "public ownership," in common law writing do not point to a

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[122] See Christine Willmore, "Constructing 'Public Land': The Role of 'Publicly' Owned Land in the Delivery of Public Policy Objectives" (2005) 16:3 Stellenbosch L Rev 378; Resta, *supra* note 112 at 218, 233; Antonia Layard "Public Space: Property, Lines, Interruptions" (2016) 2:1 JL Property & Society 1 at 16. For an analysis of the impact that the absence of a genuine public way of owning has on an understanding of "common" property in Canada, see Sarah E Hamill, "Private Rights to Public Property: The Evolution of Common Property in Canada" (2012) 58:2 McGill LJ 365.

[123] *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139 at 165, 77 DLR (4th) 385 [*Commonwealth of Canada*].

[124] *R v SA*, 2014 ABCA 191 at para 94.

[125] See Willmore, *supra* note 122 at 381.

[126] For an analysis of the opposite conceptions of authority that underlie public sovereignty on the one hand, and ownership on the other, see Arthur Ripstein, "Property and Sovereignty: How to Tell the Difference" (2017) 18:2 Theor Inq L 243.

[127] While the expropriation of an owner may respond to the public interest, the decision to expropriate neither is nor has to be made by the owner.

different modality of owning. Instead, these terms most often refer to a governance regime that allows for the access of an unlimited number of people, one under which "each resource is in principle available for the use of every member alike."[128] A "public" thing, in the common law of property, is first and foremost one to which access is not exclusive, not necessarily one that is dedicated to the pursuit of the public interest.[129]

Common law ownership's exclusive grounding in the private paradigm creates tensions with the role and status of public entities when these public entities become owners. This is because ownership and the exercise of public powers can pull in opposite directions.[130] Particularly with respect to land, the "quasi-fiduciary" position of the government generates a setting in which "[t]he very nature of the relationship existing between citizens and the elected government provides that the latter will own places for the citizens' benefit and use, unlike a private owner who benefits personally from the places he owns."[131] The tensions are exacerbated when multiple public entities own different things. A problematic fragmentation results when these entities are "acting as private landowners with conflicting agendas and no duty to the collective whole."[132] A similar tension, albeit of more limited scope, exists with respect to chattels.[133]

Courts and legislatures have addressed parts of the tension with "special rules" for the public interest-based use of some things owned by public entities.[134] These rules create overriding rights of access to land owned by public entities for the exercise of constitutionally protected rights.[135] As Justice La Forest points out, "in exercising [its proprietary rights] the Crown is subject to the overriding requirements of the *Canadian Charter*

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128 Waldron, *supra* note 89 at 41.

129 See e.g. Lee Anne Fennell, *Slices and Lumps: Division and Aggregation in Law and Life* (Chicago: University of Chicago Press, 2019) at 45. See also Resta, *supra* note 112 at 218 (for further references to the ambiguous terminology).

130 See *R v Somerset County Council, ex parte Fewings*, [1995] 3 All ER 20, [1995] 1 WLR 1037 (for a setting in which the ownership position of a public authority was to be reconciled with its statutory purpose); see also JW Harris, *Property and Justice* (Oxford, UK: Oxford University Press, 1996) at 105 (observing that the non-self seeking nature of public institutions is irreconcilable with the idea of ownership).

131 *Commonwealth of Canada*, *supra* note 123 at 154.

132 Willmore, *supra* note 122 at 382 (writing in the English context).

133 The tensions is more limited for chattels particularly because of the comparatively limited availability of land.

134 *R v SA*, *supra* note 124 at para 94. See also the opinions of McLachlin J (as she then was) and L'Heureux-Dubé J in *Commonwealth of Canada*, *supra* note 123 (discussing the need to differentiate public access for publicly owned places; McLachlin J calls for the exemption of, for example, a judge's private chambers at 241).

135 See *Commonwealth of Canada*, *supra* note 123; *R v SA*, *supra* note 124 at para 94.

of Rights and Freedoms."[136] Still, and even though tangential adaptations can be made, any accommodation of the public interest meets its limitation in the core of this very ownership conception.[137] And while public owners may at times have to exercise their rights differently, they do not outright own differently.

The foregoing shows that, bluntly put, the common law's "one size fits all" conception of ownership is frequently a bad fit for the way in which public entities are supposed to relate to and manage things. To avoid tensions, the common law will be reluctant to increase the number of things owned by public entities when there is no imperative to do so. Owners' interests in getting rid of their things is no such imperative.

In addition, from property law's vantage point, all legal actors—including present owners and potential successors to an ownership position—interact with one another as equally private owners. This aligns with the common law's private ownership paradigm. Significantly, this entails that nobody can be made an owner against their will. Nobody is under a duty to take over another's ownership position unless they choose to do so. Under the private ownership paradigm, parties must actively come forward to acquire a thing. They must volunteer to take over an ownership position and cannot be conscripted into taking it up.

In sum, under the common law's monist, paradigmatically private ownership conception, it is highly undesirable to vest ownership in public entities. Furthermore, it is conceptually impossible to conscript anyone into owning. If nobody actively came forward, an "abandoned" thing may never have a new owner, which is precisely what triggers the common law's *horror*.

B. The Horror Vacui*, Abandonment, and the Need to "Keep It Private"*

This section demonstrates how the common law's conception of ownership affects the understanding of its *horror vacui* and its rules on abandonment.

Ownership under the private paradigm does not permit an ownership position to be uncoupled from the wholesale assumption of responsibility, as in the civilian public ownership modality. Common law ownership entails that only owners can assume complete proprietary responsibility for

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[136] *Commonwealth of Canada*, *supra* note 123 at 165.

[137] References to specific features of Crown property must therefore be understood as referring to these tangential adaptations (see e.g. Halsbury's Laws of Canada (online), *Crown* (2017 Reissue), "Wrongful Use or Occupation of Crown Property" at HCW-165 (Crown property never has the same scope as private property)).

an ownable thing. This includes liability, but goes far beyond it.[138] The current owner cannot outsource her responsibility to current non-owners of any kind, including to prior owners. When a public entity owns, it would similarly have to bear the full load of ownership responsibilities. A public entity's options to have prior owners and others contribute are much more limited than under the domanial duality's public ownership modality. In addition, ownership by public entities leads to significant conceptual tensions because it is difficult to reconcile ownership with the duty to attend to the public interest.[139]

In the common law, public entities cannot flexibly switch between different modalities if they assume ownership. For the reasons outlined above, the only available (private) modality creates a lot of friction with their status as public entities. In light of all this, it is undesirable for public entities to liberally assume ownership of abandoned things, for example, by declaring a blanket acceptance of all things that some private owner might want to get rid of. Public owners cannot step into private owners' shoes as smoothly as in the civilian traditions with the "public ownership of last resort" model. As a result, the common law's conception of ownership is at odds with a "public ownership of last resort" model that would permit private owners to abandon.[140]

Instead, the common law's conception of ownership implements a strict separation between private owners and public entities. The difficult status of publicly owned things translates into a necessity for safeguards that prevent ownable things from passing from private to public owners. Intent upon upholding the strict separation between private owners and public entities, once ownership has been vested in private hands, the common law seeks to maintain it as private. Public entities are to be kept out of the picture of ownership as much and for as long as possible. This gives effect to the common law's idea that once in *qua* proper object of property norms, a thing "remains in" as a privately owned thing.[141]

This approach may appear to simply curtail the position of private owners in individual cases. Yet, it is actually strengthening the role of private ownership at a more general level. In the absence of a "public ownership of last resort" model, the common law runs no risk of

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138 See Part II-D, From Liability to Proprietary Responsibility, *above*.

139 See Part IV-A, The Common Law's Monist Conception of Ownership, *above*.

140 It is also worth stressing that the collection of garbage by municipal authorities is by no means close to a blanket acceptance. As highlighted at 726–27, *above*, it comes with many restrictions and is better characterized as a transfer.

141 This is a modification of Penner's statement on a thing falling within the realm of property law (see Penner, *supra* note 5 at 98).

(re)investing the state with control over ownable things that were once privately owned. The delimitation of private and public owners shields private ownership to a significant extent from the exercise of public powers. The common law's restrictive treatment of abandonment recognizes the specific role that private ownership plays in its normative ordering, even if this signifies that individual private owners are prevented from taking the decision to abandon.[142] In this sense, the separation may restrict private owners' options, but at the same time makes private ownership truly private.

The treatment of abandonment is, as we have seen, a response to the *horror vacui* that renders the common law wary of unowned things.[143] The foregoing makes clear that a remedy to the *horror* can only come from private owners. The fear of unowned things arises as a problem concerning the absence of private owners specifically, since only private owners can fulfill the responsibilities associated with being an owner. The fear of the absence of what should be present is a fear of the absence of private ownership in its specific normative significance. It forms part of this normative significance that only private—as opposed to public—owners are fully capable of bearing proprietary responsibility, understood to include an ongoing duty to deal with ownable things.[144] The common law's urge that everything that is ownable must be owned must consequently be understood as the urge that everything that is ownable must be privately owned.[145] Its *horror vacui* translates into an urge to "keep it private." I have also pointed to the impossibility of conscripting private parties into ownership.[146] As a result, to appease the fear of the absence of private

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142 For an argument in a similar vein, see Jonathan Griffiths, "*Star Industrial Co Ltd v Yap Kwee Kor* [1976]: The End of Goodwill in the Tort of Passing Off" in Simon Douglas, Robin Hickey & Emma Waring, eds, *Landmark Cases in Property Law* (Oxford, UK: Hart, 2015) 277 at 286. The impossibility to adversely possess publicly owned lands prevents public land from becoming privately owned. This shows that the strict separation between private and public can also work the other way around. This is the case in many common law jurisdictions in the United States (Merrill & Smith, *supra* note 3 at 169). For the situation in Canada and the effect of provincial statutes of limitation, see *Hamilton v The King*, [1917] 54 SCR 331, 35 DLR 226.

143 See Part II-A, The *Horror Vacui* and Impossible Abandonment, *above*.

144 See Part II-D, From Liability to Proprietary Responsibility, *above*.

145 See e.g. Holmes, *supra* note 40 at 214. Henry Sumner Maine refers to the presumption that everything must be owned (Henry Sumner Maine, *Ancient Law*, 3rd ed (New York: Henry Holt, 1864) at 249), a result of the aspiration described by Holmes, as a characteristic of modern property systems. See *Yanner v Eaton*, [1999] HCA 53 at para 29, citing Roscoe Pound, *An Introduction to the Philosophy of Law*, revised ed (New Haven: Yale University Press, 1954) (on the "nineteenth-century dogma that everything must be owned" at 111).

146 See 749, *above*.

ownership, the current owner must remain in her position until a successor comes forward. If owners were allowed to abandon (i.e., to intentionally cast away or leave their things behind), they could ultimately undermine the allocation of proprietary responsibility that forms the very basis for granting them the strong, exclusive position that they have *qua* owners.[147] Owners have this position because it enables them to engage in normatively desirable activities. In turn, they are expected to engage in these activities and not to "desert their posts" by unilaterally abandoning.

On very limited occasions, however, when there is no possibility of keeping an ownable thing privately owned, the strict separation between private owners and public entities can exceptionally be lifted. One such limited exception arises upon the intestate death of an owner. In these situations, there is neither a current owner who could be under a duty to remain in her position nor a private successor who could be designated. As we have seen, it would be irreconcilable with the idea of ownership under the private paradigm to make private parties owners against their will.[148] Despite the absence of a private successor, the thing must nevertheless be owned to appease the *horror*. The doctrines of *bona vacantia* and escheat address this problem, and exceptionally vest ownership of land and chattels in the Crown when former owners die without heirs.[149] Here, the common law exceptionally recognizes a sort of ownership of last resort, but not in response to a private owner's decision to abandon. The state might step in to remedy the involuntary creation of ownerless things, but the common law refuses to deploy the same tools to assist owners in intentionally getting rid of their things.[150]

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147 See Part II-D, From Liability to Proprietary Responsibility, *above*.

148 Even designated heirs can disclaim their inheritance.

149 See Ziff, *supra* note 18 at 198 (escheat), 244 (*bona vacantia*); Anne Warner LaForest, *Anger & Honsberger Law of Real Property*, 3rd ed (Toronto: Thomson Reuters, 2006) (loose-leaf updated 2019, release 23), ch 27 at §27:40.30(a). See Halsbury's Laws of Canada (online), *Crown* (2017 Reissue), "Revesting of Abandoned Lands in the Crown" at HCW-167 (for an overview of legislation governing escheat at federal and provincial levels in Canada). The terminology varies slightly among common law jurisdictions; for example, English law differentiates between escheat and *bona vacantia* in a different manner following the *Administration of Estates Act 1925* (UK), 15 & 16 Geo V, c 23. The situation is different with respect to those unclaimed incorporeal objects of ownership covered by several Canadian provinces' legislation (see e.g. *Unclaimed Property Act*, SBC 1999, c 48). These acts provide for passing of title of certain unclaimed objects of property to public entities in the interest of reuniting former owners with what is theirs, and thus do not operate with a view to abandonment.

150 I am grateful to Lionel Smith for the suggestion to express the contrast in this way. In fact, both French and Quebec civil law provide for very similar rules for owners dying without heirs (see art 539 C civ; art 696 CCQ).

The understanding of the *horror vacui* presented above helps to clarify the legal rules on abandonment laid out in prior parts of this article. It underscores why the restriction on abandonment must be sweeping. Common law ownership's normative significance and focus on assigning proprietary responsibility make it necessary for all ownable things to remain privately owned for as long as possible.

While it would be beyond the scope of this article to discuss the role attributed to private owners in more detail, its broad outlines can be drawn from the foregoing remarks and preliminary conclusions. The common law's exceptional permission for the abandonment of wild animals (i.e., ownable animate things viewed as able to take their own decisions) suggests that the capacity to exercise control is a decisive factor.[151] We have also seen that neither tort liability, nor the collection of dues and taxes sufficiently explain why the common law needs private owners to appease its *horror vacui*. These observations stress the common law's need for owners in their active capacity as decision-makers, not merely as passive bearers of consequences or defendants.

Finally, the exceptional recognition of abandonment on the high seas makes clear that the private owner-focused version of the *horror vacui*—and consequently, also the *horror*'s cure—are peculiar to the common law of property. What crucially distinguishes abandonment on the high seas from abandonment on domestic territory is that no state can make claims for sovereignty over the high seas; it is international territory. Only an abandonment that takes place in a "jurisdictional vacuum" (i.e., in the absence of both private and public authority) can be recognized as immediately terminating ownership. On the high seas, the meaning and the normative significance of ownership are simply not settled. No state can claim the applicability of its rules over those of another.[152] This crucially includes a state's conception of ownership, and this conception's distribution of roles between private owners and the state with respect to ownable things.[153] In recognizing abandonment on the high seas, the common law of property defers to the fact that domestic conceptions of ownership cannot demand recognition on a space over which there is no domestic juris-

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[151] An approach shared by the civilian jurisdictions discussed earlier. Both similarly follow the Roman law approach when it comes to wild animals (see Holmes, *supra* note 40 at 214 for a description of the Roman Law). For Quebec civil law, see Lamontagne, *supra* note 113 at 10.

[152] The law of the flag state applies to the ship, but it is surrounded by a jurisdictional vacuum. For the "flag state" principle, see *UNCLOS*, *supra* note 43, art 92.

[153] It is therefore not surprising that the common law shares its approach to abandonment on the high seas with civilian jurisdictions. For Quebec, see Lamontagne, *supra* note 113 at 16.

diction.[154] In turn, we are forcefully called to look to the role of owners and the normative significance of ownership in the common law in order to comprehend the rules on abandonment when it occurs on domestic territory.

Conclusion

The common law restricts owners from unilaterally terminating their ownership position. Only ownable things with an innate capacity for control (wild animals) can be abandoned, as can things on territory where no domestic allocation of the roles of private and public actors can be recognized (high seas). A specific version of the *horror vacui*, the fear of the absence of what should be present, lies behind these rules. The common law's version of the *horror* results from a conception of ownership that is not only monist and paradigmatically private, but also intimately tied to the strict separation between public and private when it comes to allocating proprietary responsibility. The common law's *horror vacui* therefore pushes it to "keep it private."

In the absence of a self-standing conception of public ownership, and in light of the difficulties associated with ownership by public entities, there is no room for increased openness toward a possibility of abandoning ownership by way of adopting a "public ownership of last resort" model.[155]

The common law's current conception of ownership views private owners as essentially tasked with exercising proprietary responsibility

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[154] This explains why, and without difficulty, abandonment on territorial waters can be restricted by a national legislator. In Canada, see e.g. *Wrecked, Abandoned or Hazardous Vessels Act*, SC 2019 c 1, s 4. International law increasingly narrows the scope for permitted abandonment on the high seas with a view to the prevention of harm (see e.g. *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, 29 December 1972, 1046 UNTS 120 (entered into force 30 August 1975) which imposes significant limitations on what, among others, owners of vessels can leave behind). See also *UNCLOS*, *supra* note 43, arts 210–11 (obliging signatories to legislate against pollution from dumping and vessels). While there is a broader discussion about the global environmental commons and protection of the seabed as "common heritage of mankind" (*ibid*, art 136), the threshold for a violation is high and not likely to be met by most things that are abandoned on the high seas. In any case, these restrictions do not impact the general conceptual possibility of abandonment on the high seas. I am indebted to Christopher Campbell-Duruflé for a discussion of these issues.

[155] For suggestions to further develop a self-standing category of public ownership in the common law, see e.g. Christopher Rodgers, "Towards a Taxonomy for Public and Common Property" (2019) 78:1 Cambridge LJ 124. The development of the public trust doctrine is described as an attempt to alleviate the tension by organizing public ownership outside of the private law paradigm of ownership. For such an interpretation of the public trust doctrine, see Resta, *supra* 112 at 240–43.

writ large for ownable things. Only private owners can fully assume the proprietary responsibility that comes with ownership. This can in turn provide the justificatory basis for compelling owners to fully assume and maintain their position as owners. As long as private owners are the only ones who can exercise proprietary responsibility, holding them to this task does not necessarily contradict the concept of ownership. It enforces precisely what ownership entails. Holding owners of derelict houses and of orphaned industrial sites to their responsibility *qua* owners cannot be easily dismissed as intruding into, or as weakening the boundaries of, the exclusive ownership position. It results from upholding this very position and the common law's commitment to "keep it private."