KEEPINGS

DONALD J. KOCHAN*

Individuals usually prefer to keep what they own; property law develops around that assumption. Alternatively stated, we prefer to choose whether and how to part with what we own. Just as we hold affection and attachment for our memories, captured in the lyrics of the George Gershwin classic, so too do most individuals adopt a "they can't take that away from me" approach to property ownership.

We often focus on the means of acquisition or transfer in property law. We look less often at the legal rules that support one's ability to keep what one owns. Yet, it is precisely the ability to keep property that motivates its acquisition. This ability serves as a necessary element in offering any property up for sale. The property's value is directly correlated with the buyer's confidence in the seller's authority to transfer—which can only exist if the owner also has the authority to keep it, i.e. not transfer—and with the buyer's confidence in her own ability to keep the property once she acquires it in the transfer.

This Article catalogs and evaluates a variety of doctrines, assumptions, presumptions, principles, and guidelines that exist for the purpose of aiding owners in keeping their property. I use "keepings" and "keepings rules" as terms that refer collectively to these parts of the substantive law, procedural rules, and legal infrastructure. Included is an analysis of keepings rules within a Hohfeldian framework of immunities. In conclusion, the Article explains why these keepings rules are a necessary and vital component of an effectively operating property system.

* Associate Dean for Research & Faculty Development and Professor of Law, Chapman University Dale E. Fowler School of Law. I want to thank Tom W. Bell, Joseph William Singer, and Jennifer Spinella for helpful comments and suggestions on early drafts of this article.

INTRODUCTION

Property law has developed based on the presumption that, more often than not, individuals want to keep what they own. Hoarders offer an extreme example of the premise.[1] But far short of suffering from such an affliction, most individuals express a healthy, and perhaps even natural, desire to keep things. More precisely, most of us prefer to choose whether and how to part with what we own; we wish to regulate the process. At the very least, individuals are unwilling to part with their property absent a beneficial exchange. As with the affection and attachment we have for our memories, captured in the lyrics of the George Gershwin classic, so too do most individuals adopt a sticky "they can't take that away from me" approach to ownership and the strong bond we have with our physical possessions.[2]

Much of the study of property law is focused on the way the law enables the acquisition or transfer of property. Every major law school property textbook devotes several chapters to these topics. However, a separate, equally important legal theme is rarely mentioned: how the law enables one to keep the property one already owns. Seldom do we stop and consider the many ways in which the law facilitates the keeping of one's property.

Yet, it is precisely the ability to keep property that motivates its acquisition and that serves as a necessary element in offering any property up in a transaction. The property's value is directly correlated with the buyer's confidence in the seller's authority to transfer—which can only exist if the owner also has the authority to keep it, i.e. not transfer—and with the buyer's own confidence in her ability to keep the property once she acquires it. Thus, strong legal rules helping owners keep their property encourage investment in such property, and respect for these property rights "protects private expectations to ensure private investment."[3]

Once we have reduced some personal or real property into ownership, we have a tendency to feel entitled to keep it and are

---

1 *See generally* RANDY FROST & GAIL STEKETEE, STUFF: COMPULSIVE HOARDING AND THE MEANING OF THINGS (2011).

2 FRED ASTAIRE, THEY CAN'T TAKE THAT AWAY FROM ME (ROK Radio Pictures 1937).

3 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring).

hesitant to part with it. The law is often structured around this preference. This Article will catalog and evaluate a variety of doctrines, assumptions, presumptions, principles, and guidelines that exist for the purposes of aiding owners in keeping their property or that, even if not specifically designed for those purposes, at least serve that end—protecting the maintenance of ownership after property is acquired and before it is transferred. In this Article, I use "keepings" and "keepings rules" as terms that will refer collectively to these parts of the substantive law and legal infrastructure that lie ubiquitously in the often unexposed background of real and personal property law.[4]

Part II establishes the basic contours of keepings rules, situating them within what Wesley Newcomb Hohfeld calls immunity rights. Part III explains the relationships between keepings rules, Locke's labor theory, and the security-providing function of government in relation to property ownership. Part IV catalogs some of the substantive legal rules that include keepings components. This Part begins with a general discussion of rules against wrongful private and public takings of property and proceeds to a discussion of the keepings rules prevalent in the law of lost property, abandoned property, gift, adverse possession, and the statute of frauds. Part V transitions from substantive law into institutional mechanisms for the facilitation of keepings, focusing on neutral third party enforcement, the rule of law, and ancillary institutional arrangements like the recording system, all of which aid in the keeping of property when owners are confronted with conflicts.

This Article does not discuss the reasons why people want property or even how they can acquire it. Instead, it will focus on the proposition that once people have acquired and gained recognized ownership in something, the law tends to protect their ability to keep it. It concerns not wanting, getting, transferring, or taking, but keeping.

4 This is in line with other useful recent research that chooses similar terminology to categorize a set of rules around a particular theme – whether it be "givings," "forcings," "usings," or the like. *See, e.g.*, Lee Ann Fennell, *Forcings*, 114 COLUM. L. REV. 1297 (2014); Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547 (2001); Jed Robenfeld, *Usings*, 102 YALE L.J. 1077 (1993).

I. THE BASICS OF THE KEEPINGS CONCEPT AND HOHFELDIAN IMMUNITIES

In many ways, we generate the legal rules of acquisition of property as a means of (1) incentivizing desired action and investment; and (2) rewarding those who engage in certain behaviors and activities with the product of their investment. If we determine that someone owns something, then we generate rules and build legal architecture to protect that ownership in order to allow people to keep what they own as long as they so desire. Keepings is a theme that helps us understand the formulation of these components of the property law system. Keepings rules help guide courts—even when not expressly stated—in deciding between doctrines, resolving ambiguities, and developing presumptions.

In his influential treatise on property law, Joseph William Singer alludes briefly to the general proposition that the law reflects the right to keep property. In a passage introducing adverse possession, he writes that "[o]wners generally have the *power to transfer* their property rights, and the obverse seems to be the right *not* to give up your rights until you wish to do so."[5] Singer's observation here is one of the rare instances in the literature where the idea of a right to keep is expressly discussed. Singer continues, positioning "[t]he right to keep your property until you want to part with it"[6] as something that is "as important, or more important, than the right to exclude or the privilege to use property."[7] Furthermore, Singer explains that the right to keep one's property should be characterized as "an example of what Wesley Hohfeld called an '*immunity*' right," a type of right that entitles its holder to be immune from the demands or claims made by others on or to his property, whether those demands be to control how the property is used or to demand that ownership be given over altogether to the demander.[8] Although Singer does not continue with an explanation of the connection between Hohfeld's

5 JOSEPH WILLIAM SINGER, PROPERTY 140 (3d ed. 2010).

6 *Id.*

7 *Id; see also* Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369, 1395 (2013) ("A corollary of the right to exclude is the right to keep your property. Others cannot take your property away from you without your consent no matter how much they want it.").

8 SINGER, *supra* note 5, §4.1.

immunity rights and keepings, a close examination of Hohfeld's work validates the connection.

In Hohfeld's seminal work on the nature of rights, he sought to refine and distinguish the core elements of rights, privileges, immunities, and liabilities.[9] Hohfeld explained that an immunity is an instance of freedom from the control of another, which can be analogized to the freedom that an owner has from the attempt by others to take her ownership away.[10] Hohfeld sets out the definitions and distinctions as follows:

> [A] power bears the same general contrast to an immunity that a right does to a privilege. A right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another. Similarly, a power is one's affirmative "control" over a given legal relation as against another; whereas an immunity is one's freedom from the legal power or "control" of another as regards some legal relation.[11]

To see the connection between keepings rights and Hohfeld's definition of immunities, it is useful to follow the examples Hohfeld provides. Consider the first example:

> X, a landowner, has, as we have seen, power to alienate to Y or to any other ordinary party. On the other hand, X has also various immunities as against Y, and all other ordinary parties. For Y is under a disability (*i.e.*, has no power) so far as shifting the legal interest either to himself or to a third party is concerned; and what is true of Y applies similarly to every one [sic] else who has not by virtue of special operative facts acquired a power to alienate X's property.[12]

By identifying the owner's control over alienability and all others' lack of power or disability to take away or shift that interest to anyone else, Hohfeld claims that the owner is thereby usually the holder of immunities against all others. These immunities are freedoms from the actions, wants, or demands of others, including others' attempts to take property away from an owner. The consequence of these immunities and owner controls over alienability can be characterized as a generally-held right to keep one's property, even though Hohfeld does not use those terms.

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

10 *See id.* at 55.

11 *Id.* at 55.

12 *Id.*

The dominion an owner has over alienability holds true unless, of course, the other party has in fact obtained some recognized legal power against the owner, or the owner has done something to make herself or her property liable to the other. The next example and exception from Hohfeld demonstrates this:

> If, indeed, a sheriff has been duly empowered by a writ of execution to sell X's interest, that is a very different matter: correlative to such sheriff's power would be the *liability* of X,—the very opposite of immunity (or exemption). It is elementary, too, that as against the sheriff, X might be immune or exempt in relation to certain parcels of property, and be liable as to others. Similarly, if an agent has been duly appointed by X to sell a given piece of property, then, as to the latter, X has, in relation to such agent, a liability rather than an immunity.[13]

This example underscores that the right to keep one's property is not absolute, especially in relation to taxes and other means of legitimate state action where the government affects the keeping of property.[14] There are certainly times when the law determines that an individual will not be allowed to keep what she would otherwise own, usually because she has done something to justify losing it, such as sitting on his rights too long, necessitating foreclosure, or prompting civil or criminal asset forfeiture. As explained in Part IV.E below, another example of such a transformation away from ownership rights can occur where the owner fails to take certain protective actions that the law demands in order to maintain his ownership status.[15]

Nonetheless, so long as someone has not lost their immunity in one of these ways, they have the right to keep their property. The rest of the world is under a disability vis-à-vis that property and can only overcome that disability through voluntary exchange

13 *Id.*

14 *See* Anita Bernstein, *Question Autonomy, with an Asterisk*, 54 EMORY L.J. 239, 245 (2005) ("Under the contemporary rule of law everywhere, the right to keep one's property exists, but is partially defeasible. This liberal consensus deems it not wrong—not unlawful expropriation, not 'theft'—for the state to take money from one citizen and give it to another."). *See also* State v. Shack, 277 A.2d 369, 373 (N.J. 1971) (One's "right in his real property of course is not absolute").

15 For example, in adverse possession when a trespasser can defeat the immunity right and transform the owner into a position of disability when that owner does not take minimum steps to disrupt the would-be adverse possessor's claim. *See infra* Part IV.E.

and consensual trading of rights. It is because keepings rules assign these immunities and disabilities between owners and the "other" that we have a baseline against which bargaining over the property can occur.

Thus, with a basic understanding of what we mean by keepings and how keepings fit into the structure of rights, privileges, immunities, and liabilities, we can embark on identifying specific keepings rules. Anti-theft mechanisms and other things that prevent the taking away of property easily fit under the keepings umbrella. But even beyond those simplest of keepings doctrines, the law is filled with other, more complex ways that we recognize the keepings tendency. The idea of keeping what one owns is a thread that connects a variety of different spheres of property law.

II. THE THEORY OF LABOR AND THE CONNECTION BETWEEN THE INCENTIVE TO LABOR AND THE RIGHT TO KEEP THE FRUITS

Keepings rules are motivational prerequisites to acquiring property. In other words, the level of confidence one has in his ability to keep property once acquired affects his incentives, including his willingness to expend resources to acquire that property in the first place. Generally, individuals will invest in property acquisition and improvements only if they know they can keep the fruits of that labor and other investment.

The process of incentivizing investment is an explication of labor theory most commonly associated with the writings of John Locke. Locke makes plain the direct correlation between the incentive to work and the confidence one has in the ability to keep the fruits or value of one's labor:[16]

> Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something

16 *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 19 (C.B. Macpherson ed., Hackett Pub. Co. 1980) (1690).

> annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer. . . .[17]

Man reduces property into his dominion by mixing his labor with the things that are to become his property. Of course, much of what we labor for today is money, not the transformation of things unowned into things owned by the laborer himself.[18] For example, with most land already owned by one person or another, labor operates in conjunction with the instrumentality of money to pay a laborer the cash equivalent of the improvements that laborer makes on another's property.[19] Thus, when Locke speaks of the right to keep the fruits of one's labor, he anticipates that such fruits need not be limited to the things actually produced or improvements made, but instead includes the money paid in a market economy for the value provided by the labor and conferred upon another who pays the laborer in money for the efforts.[20] If one cannot also keep that property, there will be no lasting benefit from the labor, or even value to the assignment of the right to the property from that labor. There must be a high degree of certainty in ownership that can only come from recognizing keepings rules.

Given this reality of human action and motivation, as a first principle, the liberal legal system sets the rules so that if a person invests in something, they usually get to keep it. Managerially, through the property regime, the system prohibits those that have not labored from taking from those that have. It is the added value of labor that converts its fruits into property, and it is the keepings values in property law that incentivize the labor in the first instance.

Many scholars have toned their own note on labor theory. Within the context of a discourse about respecting the worth of the individual, for example, Abraham Lincoln explained labor theory's utility as follows:

---

17 *Id.* at 19.

18 *See id.* at 28, 29.

19 *See id.* at 28 (discussing the role that "came in the use of money" as a lasting thing that "mutual consent, men would take in exchange" instead of keeping the property itself upon which they labored).

20 *See id.* at 29 (discussing the contribution money makes to specialization and division of labor, especially where "different degrees of industry were apt to give men possessions in different proportions," so that trade was both necessary and efficient through "the invention of money").

> Property is the fruit of labor; property is desirable; is a positive good in the world. That some should be rich shows that others may become rich, and hence is just encouragement to industry and enterprise. Let not him who is houseless pull down the house of another, but let him work diligently and build one for himself, thus by example assuring that his own shall be safe from violence when built.[21]

There is no doubt that labor theory plays a substantial role in the creation, formation, and refinement of property law. This is true whether one approaches labor theory from an economic efficiency and incentive-based lens, or discusses rewarding labor as a fairness doctrine and one involving the "moral case for property rights,"[22] or both.

If labor, or at least the value attached to labor, is the property of the laborer, then the things with which she mixes her labor and makes tangible because of it—or the money she is paid to compensate for the value she adds to another's property by her labor—become the laborer's as well.[23] The transformation of labor into value lies at the heart of Locke's theory.[24] But a critical element seldom expressly mentioned in incentivizing labor is the ability to *keep* the fruits of one's labor, at least until one voluntarily chooses to part with them. The labor theory only makes sense if by 'own' we really mean 'own and keep.' Ownership is meaningless if it is fleeting.

If there is no stability in keepings rules, then there will be less confidence and security in ownership, which will translate into a diminished incentive to labor in the first place. Stability, in part, requires the existence of a neutral system, often relying on impartial courts, to resolve competing claims to property. Individuals must have some confidence that if things they wish to keep are taken from them forcibly, there will be a way to get them back without resorting to self-help. The easier it is to have ownership taken away, the less secure we feel. Behaviors will adapt, disadvantageously, to that insecurity.

---

21 10 ABRAHAM LINCOLN, Reply to a Committee from the Workingmen's Association of New York*,* March 21, 1864, *in* COMPLETE WORKS OF ABRAHAM LINCOLN 50, 54 (John Nicholay & John Hay eds., 1894).

22 JERRY L. ANDERSON & DANIEL B. BOGART, PROPERTY LAW: PRACTICE, PROBLEMS AND PERSPECTIVES 13–14 (2014).

23 *See* LOCKE, *supra* note 16 at 19.

24 *Id.* at 19.

This security and certainty in ownership, resulting from strong keepings rules, works to encourage transactions and the movement of property in commerce. Individuals rely on the existence and enforcement of keepings rules when making decisions to acquire property or invest in property in an efficient manner and on optimal terms. Individuals will not make improvements or other investments in property if they do not have a high degree of certainty that they can keep the property they enhance.[25] Individuals expect to reap the gains of their investments or they will not invest. Keepings rules help the law fulfill these expectations.

The security in ownership facilitated by keepings was not lost on the inspirers and architects of the American liberal legal system.[26] John Locke, for example, focused on the importance of establishing means for property's "preservation." He posited that "[t]he great and chief end . . . of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property. To which in the state of nature there are many things wanting."[27] Keepings play this vital preservation role. The law helps an individual keep what she owns; no such protection exists against a plunderer in a world without such liberal

25 *See* Hernando de Soto, *Law Connects*, Address to the IBA Annual Conference (Oct. 12, 2008), *in* 62 INT'L BAR NEWS 14, 16. ("[G]lobally . . . the problem is that nobody's going to invest unless they know who owns it, or that they own it. Nobody's going to remove the rocks; nobody's going to put in the irrigation systems or the roads, until they feel they own it.").

26 *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 29 (1985) ("It is very clear that the founders shared Locke's and Blackstone's affection for private property, which is why they inserted the eminent domain provision in the Bill of Rights."); James M. Ely Jr., *The Constitution and Economic Liberty*, 35 HARV. J.L. & PUB. POL'Y 27, 29–30 (2012) ("John Locke and the Whig emphasis on the rights of property owners profoundly influenced the founding generation.").

27 LOCKE, *supra* note 16, at 66. Locke describes the importance of liberty underlying this protection of property:

> [F]reedom of men under government is, to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man . . . This freedom from absolute, arbitrary power, is so necessary to, and closely joined with a man's preservation, that he cannot part with it, but by what forfeits his preservation and life together.

Id. at 17.

governance.[28]

There are plunderers in the world against which the law must protect owners and their right to keep what they own. As Frederic Bastiat explains, "Since man is naturally inclined to avoid pain—and since labor is pain in itself—it follows that men will resort to plunder whenever plunder is easier than work."[29] The basic idea is that humans, in their natural condition, are self-interested and will seek to use their strength to obtain what they want and to satisfy their own desires, leaving human interrelations to be organized only by matters of brute power and resort to self-help.[30]

Hume too explains that a stable system of keepings rules is necessary for peace and prosperity: "Where possession has no stability, there must be perpetual war. Where property is not transferr'd by consent, there can be no commerce. Where promises are not observ'd, there can be no leagues or alliances."[31] Hume continues that strict observation of these "three fundamental laws of nature, *that of the stability of possession*, *of its transference by consent*, and *of the performance of promises*" is something upon which "the peace and security of human society entirely depend," and there is no "possibility of establishing a good correspondence among men, where these are neglected."[32]

Ludwig von Mises also helps us understand the importance of establishing a property regime with stable keepings rules that protect ownership. He explains, "Human beings construct society by making their actions a mutually conditioned co-operation. The basis and starting point of social co-operation lie in peace-making, which consists in the mutual recognition of the 'state of property.'"[33] Consistent with the recognition of private property is the need for security in our ability to keep it once acquired, through labor or other legal means. Low levels of security for keepings expectations leaves the incentives to work, improve

---

28 *See* THOMAS HOBBES, LEVIATHAN 186 (C. B. Macpherson ed., Penguin Books 1968) (1651) (discussing self-interest and tendency toward plunder).

29 FREDERIC BASTIAT, THE LAW 6 (Dean Russell trans., Found. for Econ. Educ. 2d ed. 1996) (1850).

30 *See* HOBBES, *supra* note 28, at 186.

31 DAVID HUME, A TREATISE OF HUMAN NATURE 363 (Oxford Univ. Press 2000) (1740).

32 *Id.* at 337.

33 LUDWIG VON MISES, SOCIALISM 466–67 (J. Kahane trans., 1981 Liberty Classics 6th ed. 1981) (1922).

property, or engage in exchange wanting.[34]

This idea of security in property rights and confidence in the state's preservation role is also captured by James Madison's outline for the essential role of the law. In his essay, *Property*, Madison proclaimed, "Government is instituted to protect property of every sort. . . . This being the end of government, that alone is a just government, which impartially *secures to every man, whatever is his own*."[35] This statement underscores the necessity of security in the ability to keep one's property and in having the law and its keepings rules present and enforceable. It speaks to the requisite need for a system of government designed to implement the keepings rules necessary to preserve the corresponding ownership rights. That is why the Supreme Court of the United States has likewise stressed the importance that owners not be deprived of that which is their own—*i.e.*, that they must be protected in their ability to keep what is their own.[36] The Court has explained that "[t]he right to enjoy property *without unlawful deprivation* . . . is in truth a 'personal' right," and "a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other."[37] The protection against being unlawfully deprived of that which one has the right to keep stands as a basic responsibility and duty of our legal system.

Hence, rules are beneficial when they control the fear of losing our rights to keep our property, and the law has responded to supply them. The following section looks at a few of the substantive rules within which keepings principles and justifications are engrained.

III. SELECTED SUBSTANTIVE "KEEPINGS": RELATED DEVICES AND PROPERTY DOCTRINES

The law exists, in part, to allow people to keep what they own

34 *See* DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 140 (1990) ("One gets *efficient* institutions by a polity that has built-in incentives to create and enforce efficient property rights." (emphasis in original)).

35 James Madison, *Property*, NATIONAL GAZETTE (Mar. 27, 1792), *reprinted in* 14 THE PAPERS OF JAMES MADISON 266 (Robert A. Rutland et al. eds., 1983) (emphasis added; emphasis in original omitted).

36 *See, e.g.,* Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).

37 *Id.* (emphasis added).

and to facilitate property's voluntary disposal. Rules are developed to aid persons in the retention of property and to incentivize the acquisition of property by including—in the reward of acquisition—a high level of confidence in the acquirer's similar right to keep that property once reduced into her own dominion. While by no means exhaustive, the theories and rules in this Part are informed by the importance of the right to keep and the immunity from wrongful taking in ways that make these devices appropriately designated as keepings rules.

A. *Selected Core, Obvious Keepings Devices: General Protections Against Takers and Plunderers*

The rules surrounding what we generally consider the 'unlawful taking' or 'plunder of property' qualify as keepings rules. Stealing is depriving one of their right to keep their own property. As Mises has explained, "The law-abiding citizen by his labor serves both himself and his fellow man and thereby integrates himself peacefully into the social order. The robber, on the other hand, is intent, not on honest toil, but on the forcible appropriation of the fruits of others' labor."[38] The law exists in large part to provide the security against private and public takings of property from private individuals and to thereby provide greater certainty in the meaning of 'ownership.'

The government has a role in protecting ownership and transfers of ownership, which, as explained above, cannot be effective without a strong keepings component to the substance and structure of the legal system. From a keepings perspective, the law has a role to play in protecting the potentially affected private property owners, whether those who wish to take from owners are private or public actors. So, the government must protect owners from other members of society. But the government must protect owners from state takers too.

Some of the principal protections from public takings lie in the keepings rules associated with the due process and takings clauses in the United States and the several state constitutions. Consider the eminent domain power, which authorizes the condemnation of private property, but only if for public use and only if just compensation is paid.[39] As one court explained,

38 LUDWIG VON MISES, LIBERALISM 151 (3d ed. 1985).

39 *See, e.g.*, U.S. CONST. amend. V.

juxtaposing the eminent domain power to take private property with the keepings rights held by the private property owners to be dispossessed, "[t]he authority to exercise such power [to condemn private lands], *being against the common right to own and keep property*, must be given expressly or by clear implication; it can never be implied from doubtful language."[40] Owners and purchasers expect that the government will respect their ownership, will not confiscate property once acquired or expropriate investments once made, and will not otherwise disrupt or interfere with the sanctity or enforceability of the exchange.[41] And, to the extent that the government does take private property, owners at least have their keepings rights compensated. With such takings, the government must admit that, but for its actions, the owner would have the right to keep the property and that the owner is therefore entitled to the value of the property as compensation for the taking.[42]

Let us next move to the controls on the private takers of other people's private property. These next few paragraphs intertwine the definitions of some key terms with the text because the definitions themselves make the point. If you read the corresponding definitions of the terms listed below with a fresh eye, seeing them as they fit with one's ability to keep her property or to get it back if the right to keep has been violated, the contributions of these terms, actions, and doctrines to the keepings characteristics of the property regime will become obvious.

Because individuals have a presumptive right to keep their property, theft is wrong and property owners hold a Hohfeldian-type immunity from it, with theft defined as the "wrongful taking and removing of another's personal property with the intent of depriving the true owner of it" and "[b]roadly, any act or instance of stealing, including larceny, burglary, embezzlement, and false pretenses."[43] The law states that it is wrong to steal— "to take

40 Town of Eaton v. Bouslog, 292 P.2d 343, 344 (Colo. 1956) (en banc) (emphasis added).

41 *See* Heather K. Way, *Informal Homeownership in the United States and the Law*, 20 ST. LOUIS U. PUB. L. REV. 113, 121 (2009) ("Security in ownership—the principle that an owner's property rights cannot be taken away, except by the government with just compensation—is a fundamental attribute of American property ownership.").

42 *See, e.g.*, U.S. CONST. amend. V. ("[N]or shall private property be taken for public use, without just compensation.").

43 *Theft,* BLACK'S LAW DICTIONARY (10th ed. 2014) (noting also that "[m]any

(personal property) illegally with the intent to keep it unlawfully"[44]—and the system thereby creates remedies against all types of stealing or theft to enforce one's keepings entitlement. Hence, we recognize wrongs like larceny— "unlawful taking and carrying away of someone else's tangible personal property with the intent to deprive the possessor of it permanently"[45]—and robbery— "illegal taking of property from the person of another, or in the person's presence, by violence or intimidation; aggravated larceny".[46] Oliver Wendell Holmes explains, "We think it desirable to prevent one man's property being misappropriated by another, and so we make larceny a crime."[47] Because an individual has the right to keep her property, the taking of it misappropriates her keepings rights and circumvents the interconnected right she has to choose to voluntarily alienate or transfer the property for whatever she believes to be adequate consideration and according to her own individual preferences.

On the civil side, when an individual has personal property taken away, her right to keep property is enforceable under actions against, *inter alia*, conversion—"wrongful possession or disposition of another's property as if it were one's own; an act or series of acts of willful interference, without lawful justification, with an item of property in a manner inconsistent with another's right, whereby that other person is deprived of the use and possession of the property";[48] replevin—"action for the repossession of personal property wrongfully taken or detained by the defendant";[49] trover—"common-law action for the recovery of damages for the conversion of personal property, the damages generally being measured by the property's value";[50] or detinue—"common-law action to recover personal property wrongfully taken or withheld by another."[51] Each of those rules provides a means for enforcing keepings rights.

modern penal codes have consolidated such property offenses under the name 'theft'").

44 *Steal*, BLACK'S LAW DICTIONARY (10th ed. 2014).

45 *Larceny*, BLACK'S LAW DICTIONARY (10th ed. 2014).

46 *Robbery,* BLACK'S LAW DICTIONARY (10th ed. 2014).

47 Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469–70 (1897).

48 *Conversion,* BLACK'S LAW DICTIONARY (10th ed. 2014).

49 *Replevin*, BLACK'S LAW DICTIONARY (10th ed. 2014).

50 *Trover*, BLACK'S LAW DICTIONARY (10th ed. 2014).

51 *Detinue*, BLACK'S LAW DICTIONARY (10th ed. 2014).

The same holds true for the ability to keep real property and to expel those who attempt to unlawfully take it from the owner. Keepings rules here include the right to bring an action for trespass—"unlawful act committed against the person or property of another; esp., wrongful entry on another's real property";[52] disseisin—"act of wrongfully depriving someone of the freehold possession of property";[53] dispossession—"[d]eprivation of, or eviction from, rightful possession of property; the wrongful taking or withholding of possession of land from the person lawfully entitled to it";[54] and forcible entry and detainer—"act of violently taking and keeping possession of lands and tenements without legal authority," where the owner is afforded a "quick and simple legal proceeding for regaining possession of real property from someone who has wrongfully taken, or refused to surrender, possession."[55] The keepings thread is again interwoven throughout these types of legal rules designed to prevent unlawful possessors from taking what is not their own.

Those wrongfully claiming possession of property can be expelled through the owner's action for ejectment, where the "essential allegations in an action for ejectment are that (1) the plaintiff has title to the land, (2) the plaintiff has been wrongfully dispossessed or ousted, and (3) the plaintiff has suffered damages."[56] Or, in other instances where the person unlawfully takes the property by staying on in possession beyond their legal rights, there is eviction—"act or process of legally dispossessing a person of land or rental property."[57]

Myriad rules exist to prevent the taking of property, and protect the keeping of property, both real and personal. This section has highlighted the ones that are most obvious in light of the definition of keepings rules I advance. The sections that follow elucidate a few more examples of legal doctrines and presumptions developed around and shaped by keepings rules.

52 *Trespass*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* RICHARD A. EPSTEIN, TORTS 22–24 (1999) (summarizing the basic law of trespass to land).

53 *Disseisin*, BLACK'S LAW DICTIONARY (10th ed. 2014).

54 *Dispossession*, BLACK'S LAW DICTIONARY (10th ed. 2014).

55 *Forcible entry and detainer*, BLACK'S LAW DICTIONARY (10th ed. 2014).

56 *Ejectment*, BLACK'S LAW DICTIONARY (10th ed. 2014).

57 *Eviction*, BLACK'S LAW DICTIONARY (10th ed. 2014).

B. *Lost and Found Property, the Relativity and Priority of Rights, and Protections for the "True Owner"*

Individuals lose things, but that does not mean that they should lose their rights to those things. That, at least, is the crux of the legal doctrine when it comes to lost property.[58] Generally, the true owner of lost property retains her rights to that property even if we recognize some lower priority rights for the finder. Most often, 'find' cases in textbooks focus on the rights of the finder vis-à-vis individuals other than the owner. They focus on why we reward the finder. Few talk about how find doctrine operates as a keepings rule. Yet I contend that the rules regarding finding lost property are especially developed to protect an owner's right to keep her property.

In a case well known to almost every law school graduate, *Armory v. Delamirie*, the court was required to determine the status rights between a chimney sweep who found a jewel and a goldsmith to whom the sweep had handed the jewel for appraisal after he found it.[59] The court famously explained the very simple rule that stands today in the common law of lost and found property. The court held that "the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against *all but the rightful owner*, and consequently may maintain trover."[60] The chimney sweep as finder had superior rights to everyone in the world except the true owner who keeps his or her rights.[61] Thus, the chimney sweep could recover the value of the jewel that was wrongfully taken from him by the goldsmith.[62] The suit was not one in replevin because the jewel itself had long since passed in commerce and recovery of value was the only way to make the finder whole for what was taken from him. Theoretically, in a later suit by the actual, true owner against the sweep, the true owner would be entitled to the value of the jewel from the sweep who, as finder with limited rights, had no right to keep the jewel or its

58 For an excellent collection of citations to articles about the find doctrine, see Joseph J. Simeone, *"Finders Keepers, Losers Weepers": The Law of Finding "Lost" Property in Missouri*, 54 ST. LOUIS U.L.J. 167, 167 n.2 (2009).

59 *See* Armory v. Delamirie (1722) 93 Eng. Rep. 664 (K.B.); 1 Strange 505.

60 *Id.* (emphasis added).

61 *See id.* The original owner of the jewel was not present in the *Armory* lawsuit.

62 *See id.*

value if the true owner asserted his right to keep. For our purposes, the *Armory* case tells us the basics of the law of acquisition by find and what we need to know to understand the keepings rules at play.

While we want to reward finders with priority and status rights—after all, we do not want everyone to just leave lost property lying around until the true owner comes along to recover it himself—find doctrine operates as a keepings rule because it ensures that the true owner's claim to the property is the superior claim.[63] It is a matter of relativity of ownership and possessory rights.[64] 'Finders keepers, losers weepers' is simply *not* the law of the land. In fact, it is very much a 'losers keepers' set of rules, at least if 'keep' denotes the idea of maintaining ownership despite some incidence of temporarily losing possession.

Under the doctrines associated with acquisition of lost property by find, the general rule is that the first finder has rights against all but the true owner.[65] It is understandable that people lose things and we cannot punish owners for the faults we all share. As a keepings matter, the true owner's status remains favored because the law understands that non-possession should not, alone, be proof that one does not want to keep the property. When property is lost, the owner maintains the right to get the property back—to assert her superior title even against other present possessors of the property. The first finder's rights to possession are inferior to the true owner's keepings right.

We should ask whether the more important part of the doctrine regarding acquisition of lost property by find is (a) that the finder gets rights against almost the whole world, or (b) that the owner still has superior rights over the finder. Undoubtedly both (a) and (b) are important, but a close reading of most textbooks and case law will show substantial attention to why we give the finder certain rights and much less attention, if any, to the fact that the doctrine is first and foremost protective of the owner's right to keep what she owns even in the face of losing it (even if she loses it because of her own inattention or stupidity). I suggest

63 *See* DUKEMINIER ET AL., PROPERTY 126–27 (8th ed. 2014); *see also* JOHN SPRANKLING & RAYMOND COLLETTA, PROPERTY: A CONTEMPORARY APPROACH 172–73 (2d ed. 2012) (explaining the basic rules regarding lost property and acquisition by find).

64 *See* ANDERSON & BOGART, *supra* note 22, at 88, 90.

65 *See* DUKEMINIER ET AL., *supra* note 63, at 125–34.

the keepings justification is the deeper one, in light of the contours the law has given to its rules on found property and the enduring protections for true owners of lost property.

C. *The Presumption Against Abandonment of Personal Property*

If an owner loses personal property, she does not lose her rights to keep ownership. The same is not true of abandoned personal property or chattel. Under the law in every state, a fee simple interest in land cannot be abandoned but chattel may be abandoned,[66] and all discussion in this section is therefore in reference to abandoning chattel. If a court must choose between a decision that deems property lost versus one that determines that property is abandoned, unless the finder overcomes an extreme burden of proof, the court will choose to call the property lost—the consequence being that the true owner maintains her ownership status including the right to keep the property.[67] The law adopts this presumption against abandonment precisely because of the keepings philosophy within the property law system.

Abandoned property involves the renunciation of all claims to the item and requires intentional and voluntary relinquishment, with no intent at the time to reclaim the property at a later point.[68]Courts typically require overwhelming proof, including a showing of unequivocal intent to abandon, before they will proclaim property abandoned.[69] To put this in the terminology of keepings, an owner must purposefully and intentionally part with her rights, including the right to keep the property, before

66 *See id.* at 116. This rule may in fact be considered a situation where the keepings inclination is so strong that the law actually sometimes forces owners to keep things. *See, e.g.*, Pocono Springs Civic Ass'n v. MacKenzie, 667 A.2d 233, 235 (Pa. Super. Ct. 1995) (refusing to recognize myriad attempts to abandon real property on the part of owners because "no authority exists in Pennsylvania that allows for the abandonment of real property when owned in fee simple with perfect title").

67 *See* Foster v. Fidelity Safe Deposit Co., 145 S.W. 139, 142 (Mo. Ct. App. 1912). The court in Foster explained, for example, that

> "normally, men do not voluntarily abandon their money. Therefore, if money be discovered in the highway, or on the ground, or on the floor, it will not be considered as abandoned, nor will it be considered as placed there voluntarily, for that would be unnatural, but as having been lost; that is, casually and unknowingly dropped."

Id.

68 *See* DUKEMINIER ET AL., *supra* note 63, at 117, 137.

69 *See id.* at 117.

abandonment will be recognized. It is not the burden of the owner to prove that she did not abandon. Further in support of this keepings presumption, the burden is actually on the finder to prove that the owner abandoned the property in question before the finder can be awarded ownership as the first finder of now unowned property.[70]

If personal property is truly abandoned, then the owner renounces her keepings rights. In essence, she has said to the world, "I know I can keep this property, but no thanks, I do not want it anymore." The result of such abandonment of property is that the owner loses all rights, forever, and the property will subsequently belong to the first finder.[71] In other words, the first finder of abandoned property has superior rights to that personal property *against the whole world with the exception of no one*.

Unlike the first finder of lost property, the first finder of abandoned property obtains complete ownership of the thing because there are no other legitimate claimants to the property. The owner actually relinquished her claim.[72] When an owner abandons property, the property is returned to the pool of unowned things open to acquisition by anyone and the now-prior owner has no special status vis-à-vis the property.[73] The old owner's claim to the property, once abandoned, is no different from that of everyone else in the world who can compete to become the first finder of it.[74]

The consequence of an abandonment determination is severe—it means that the owner has forever relinquished any and all rights to the property.[75] It is this severity that motivates the

70 *See, e.g.*, Hawkins v. Mahoney, 990 P.2d 776 (Mont. 1999) (declining to award title to party claiming find due in part to failure to prove abandonment).

71 *See id.* at 117.

72 *See Abandonment*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining abandonment as the "relinquishing of a right or interest with the intention of never reclaiming it").

73 *See* Hawkins v. Mahoney, 990 P.2d 776, 779 (Mont. 1999) ("Personal property, upon being abandoned, ceases to be the property of any person, unless and until it is reduced to possession with the intent to acquire title to, or ownership of, it. Such property may, accordingly, be appropriated by anyone . . . ." (quoting 1 C.J.S. *Abandonment* § 12 (1985))).

74 *See id.*

75 *See* Hoelzer v. City of Stanford, Conn, 933 F.2d 1131, 1138 (2d. Cir. 1991). In Hoelzer, the Second Circuit explained:

> Abandonment of property requires a confluence of intention and action by the owner. Accordingly, before possessory rights will be

law's demand for a high level of proof before such a determination will be made. The tough evidentiary burden and presumption against abandonment are based on the presumption that people do not generally intend to abandon their property—*i.e.*, individuals tend to want to keep what they own. Incidental acts from which abandonment could be 'inferred' are regularly insufficient to establish abandonment. The law signals to an individual that, should she wish to abandon property, then she will need to convincingly disabuse us of our belief that she would prefer to keep it. Here, again, the law quietly treats keepings as (presumptively) sacrosanct.

Most things retain some value from which a property owner can receive compensation in some form of exchange. Thus, we presume that most often it would be economically irrational to part with property voluntarily outside of an exchange. At other times, the value the owner places on property may not be the same as the market will pay, but there is still indispensable, albeit idiosyncratic, nonmonetary value to the owner that makes it worth keeping to her. The legal standards reflect an assumption that most individuals do not part with their property without at least getting something in return—and sometimes that they will never part with their property no matter what is offered in return. Because we assume people want to keep their property, we presume that they do not intend to abandon it.

D. *The Strict Elements of Gift Giving for Personal Property and the Unstated Presumption Against Recognizing Gifts*

Although it may seem cynical and Grinch-like, the law adopts a keepings presumption against recognizing gift giving. Though seldom phrased this way, this presumption bears out. The law presumes that people want to keep things that they own, and the law therefore has a rebuttable presumption that people do not

> relinquished, the law demands proof both of an owner's intent to abandon the property and of some affirmative act or omission demonstrating that intention. This well-settled doctrine has long been incorporated in the law of New York: "The abandonment of property is the relinquishing of all title, possession, or claim to or of it-a virtual intentional throwing away of it. It is not presumed. Proof supporting it must be direct or affirmative or reasonably beget the exclusive inference of the throwing away."

Id. (citing United States v. Cowan, 396 F.2d 83, 87 (2d Cir. 1968) (quoting Foulke v. New York Consol. R.R. Co., 228 N.Y. 269, 273 (1920))).

voluntarily part with property—*i.e.* give gifts—for no consideration.

The standards for giving a valid gift are quite high, even if we seldom acknowledge them in everyday life. These standards are likely more often honored in the breach than observed, in large part because disputes seldom arise in relation to the social gifts that we give with love, affection, gratitude, and the like. As litigious as our society has become, there are some things that remain relatively civil and subject to private ordering even when they could be subject to the law courts. Thus, in our sociable world, most everyday gifts are not contested. But when gifts are contested, the recipient of a gift must overcome and disprove the presumptions that a rational owner would want to keep her property. The keepings presumptions at play reflect a disbelief that an owner would willingly part with her property for nothing in return. To be a donor is rare, but to be a keeper is common, or so the law presumes. In his seminal article on gift law, Phillip Mechem identifies the historical "reluctance of courts to sanction the transfer-of ownership of chattels, when the transferee pays no consideration for the chattel, without more cogent evidence of the transaction than mere proof of an intention to make a gift."[76]

Gifts—as distinguished from gratuitous promises and mere expectancies—involve the irrevocable transfer of rights.[77] It is this permanency and dramatic result—like we also see in the case of abandonment—that necessitates a high level of proof.

Although the traditional 'blackletter' articulation of acquisition by gift generally focuses on three elements,[78] I favor the conception of gift as having four elements. The fourth is clearly implied, but the doctrine would be better understood if it were stated explicitly. The three more traditional elements are commonly stated in textbooks and court opinions: (1) intent to give the gift; (2) delivery of the gift; and (3) acceptance of the gift.[79] Of

---

76 Phillip Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses of Action Evidenced by Commercial Interests*, 21 ILL. L. REV. 341, 349 n.21 (1926) (citing H. F. Stone, *Delivery in Gifts of Personal Property*, 20 COLO. L. REV. 196 (1920)).

77 *See* SPRANKLING & COLLETTA, *supra* note 63, at 209.

78 *See* DUKEMINIER ET AL., *supra* note 65, at 189 (setting out the gift elements as intent, delivery, and acceptance); SPRANKLING & COLLETTA, *supra* note 63, at 236 (same).

79 *See* ANDERSON & BOGART, *supra* note 22, at 106.

course, between the claimed donor and purported donee, to the extent either has a claim to the property, their relative rights vis-à-vis each other are established by these three elements. But before these three elements can be reached, there is a threshold matter: there must be *authority* to give a gift.[80] Even if the donor satisfies all other elements of gift, if the donor never owned the property in the first instance, the donee almost never can make a claim to the property against a rightful owner.[81]

The law generally places a high evidentiary burden on one claiming to be the recipient of a gift—at least when it involves a non-familial relationship—to prove that their possession or claim to possession and ownership is valid.[82] Mechem's analysis of the issue is instructive:

> A study of the cases shows clearly enough the fear of judges that gifts will be fraudulently claimed, and clearly enough, too, that those fears are not without foundation. The policy that has led to the Statutes of Frauds and of Wills seems here to demand

80 This principle is a simple extension of the maxim *nemo dat non quod habet*. *See nemo dat non quod habet,* BLACK'S LAW DICTIONARY (10th ed. 2014) ("No one gives what he does not have; no one transfers (a right) that he does not possess . . . no one gives a better title to property than he himself possesses."). Consider also the maxim *nemo plus juris ad alienum transferre potest quam ipse haberet,* meaning "[n]o one can transfer to another a greater right than he himself might have." BLACK'S LAW DICTIONARY 1934 (10th ed. 2014).

81 For instance, one court listed among the requirements "[t]o constitute a valid gift inter vivos . . . the donor's dominion over the property must be such that he has a present right to give it." Cambreleng v. Graham, 29 N.Y.S. 419, 419–20 (N.Y. Sup. Ct. 1894). The court later examined a point when the donor "had not acquired either title or possession at the time when the conversation took place, necessarily that which he said did not amount to a gift or delivery, for a man cannot give what he does not own." *Id.*; *see also* Giove v. Stanko, No. CV86–L–582, 1988 WL 80872, *4 (D. Neb. July 30, 1988) ("Before any such determination [on whether certain actions are or are not 'gifts'] can be reached . . . it is first necessary to determine exactly who initially owned the funds, for, as a general principle, a person cannot give what he does not own."). There are, of course, exceptions to this rule, for example regarding bona fide purchasers (especially in real property law), that are beyond the scope of this Article but that are examined in detail in another recent work by this Author. *See generally* Donald J. Kochan, *Dealing with Dirty Deeds: Matching* Nemo Dat *Preferences with Property Law Pragmatism*, 64 KAN. L. REV. 1 (2015) (studying exceptions to the rule that one can only give as much as one has).

82 *See* Brock v. Brock, 610 S.E.2d 29, 31 (Ga. 2005) ("The burden is on the person claiming the gift to prove all essential elements."); *In re* Marriage of Moncey, 404 S.W.3d 701, 710 (Tex. App. 2013) ("Generally, the burden of proof rests on the person claiming the existence of a gift."). There is too high a risk of fraud by the possessor if the burden were reversed to require one to prove that they did not give something as a gift.

> with added force that some kind of safeguards be set against fraudulent claims of gift.[83]

Thus, to prove intent, the putative donee must generally provide some evidence of some outward expression by the alleged donor of an actual desire to part with his right to keep the property.

The traditional manual, or sometimes termed physical, delivery requirement for the giving of a valid gift is particularly instructive on the keepings concept.[84] While some modern courts find that symbolic or constructive delivery of a gift is, on occasion, acceptable if there is strong enough indicia of intent to give a gift, many courts still hold to the traditional rule that manual delivery is required whenever the item is capable of manual delivery.[85] Manual delivery also helps reinforce our confidence that the purported donor truly intended the gift. As Mechem so aptly describes, "the delivery makes vivid and concrete to the donor the significance of the act he is doing. Anyone can realize the psychological difference between a man's saying he gives something, yet retaining it, and saying he gives it and seeing it pass irrevocably out of his control."[86] Manual delivery creates an environment within which we can assume, from an evidentiary standpoint, that the transfer was very likely intentional. Mechem continues, "The *wrench* of delivery, if the expression be understood and permissible, the little mental twinge at seeing his property pass from his hands into those of another, is an important element to the protection of the donor."[87]

With manual delivery, we can look at the donor's actions and see him voluntarily dispossessing himself of the property and 'handing it over' to another. Mechem explains that an owner "cannot fail to understand—and be understood—when he hands over the property. It gives him a locus penitentiae. It forces upon the most thoughtless and hasty at least a moment's acute consideration of the effects of what he is proposing to do."[88] As an evidentiary matter, this type of requirement serves the dual

83 Mechem, *supra* note 76, at 349–50.

84 *See id.* at 348–49 ("If he hands over the property, he has done an act that will settle many doubts, an act perhaps capable of more than one interpretation, yet readily and naturally susceptible of but one.").

85 *See* DUKEMINIER ET AL., *supra* note 63, at 190.

86 Mechem, *supra* note 76, at 348.

87 *Id.*

88 *Id.*

purposes of helping to prove both intent and delivery.[89]

The standards for proving a gift do not make the purported donee's case easy. Starting with the presumption against gifts, and continuing with strict elements of proof and high evidentiary standards, including rather strict delivery requirements, legally enforceable gift-giving is made rather difficult. When in doubt about the evidence required to meet the elements, courts will find no valid gift.[90] And it is the keepings nature of our system behind that high hurdle.

E. *The Keepings Protections for Owners Against Would-Be Adverse Possessors*

Adverse possession is the law's recognition of a valid and legal, yet nonconsensual transfer of ownership in property, usually real property.[91] In his classic work on adverse possession, Henry Ballantine pinpoints the palpable unease one has with the idea of adverse possession when he posits that "[t]itle by adverse possession sounds, at first blush, like title by theft or robbery, a primitive method of acquiring land without paying for it."[92] Yet adverse possession sanctions these nonconsensual transfers because, despite our typical preference to allow owners to keep what they own, the law must, sometimes, strike a balance along what I term the 'Autonomy-Utility Spectrum.' We neither respect rules based on absolute autonomy nor allow rules based on absolute utility to emerge and dictate our property regime. The governing bodies usually choose some point between the two poles at which to govern. On the utility side, adverse possession allows property to change ownership nonconsensually so that long-time possessors may proceed with using the property with legal protections. However, such transfers may occur only after surmounting extremely strong autonomy-side stopgaps,

89 *See* DUKEMINIER ET AL., *supra* note 63, at 189.

90 In *Pamplin v. Satterfield*, for example, the court explained that:

> [I]ntention to give and delivery of the subject of the gift must clearly appear. Doubts must be resolved against the gift. There is no delivery unless the complete dominion and control of the gift is surrendered by the donor and acquired by the donee. The burden of proving that a gift was made is upon the donee.

Pamplin v. Satterfield, 265 S.W.2d 886, 888 (Tenn. 1954).

91 DUKEMINIER, ET AL., *supra* note 63, at 145

92 Henry W. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 135 (1918).

safeguards, and protections for owners. These protections reflect the keepings principle. Most of these are discussed below.

The elements of adverse possession, often identified by state statute, set a high bar consistent with the keepings principle.[93] Every state has some form of adverse possession, based on the running of the limitations period after which the owner of land can neither bring an action for the recovery of possession under trespass or other doctrines nor take advantage of any self-help remedy to regain possession.[94] The running of the statute of limitations deprives the original owner of the right to exclude, and "[o]nce you have lost the right to exclude, the law concludes that you are no longer the owner and awards title to the trespasser."[95] Up until that point, the law recognizes the owner's right to keep the property, providing plenty of options for preventing loss of ownership and making the transaction costs for indefinitely keeping the property very low.

It is not easy to take property away from the owner. An adverse possessor must make actual entry with exclusive possession, be open and notorious, and act adversely and under a claim of right—all continuously and uninterrupted for a long statutory period of time.[96] The would-be adverse possessor must travel a long and arduous path to successfully win the property. Continuity requires not just the lack of ousting by the owner but also continuous effort by the adverse possessor. The requirement of "open and notorious" possession respects keepings because it requires that the owner have an adequate opportunity to discover the adverse claimant in time to protect and preserve her right to keep the property. The long period of time within which to oust a would-be adverse possessor affords a great amount of leeway and is extremely accommodating to the property owners. The elements of adverse possession favor the owners and in that way, the doctrine is structured around the keepings concept.

An owner need only disrupt one of the elements of adverse possession at any time during the statutory period in order to both

93 *See* DUKEMINIER ET AL., *supra* note 63, at 148–50; ANDERSON & BOGART, *supra* note 22, at 119–20; SPRANKLING & COLLETTA, *supra* note 63, at 99.

94 *See* DUKEMINIER ET AL., *supra* note 63, at 144.

95 ANDERSON & BOGART, *supra* note 22, at 115.

96 *See id.* at 116 (describing the range of years varying across states, where most require 5–15 years with the shortest at 3 years and the longest at 60).

defeat the adverse possessor's claim and to 'reset' the clock.[97] Thus, even if the potential adverse possessor persists in making a claim after the first disruption by the owner, that trespasser's efforts to satisfy the adverse possession elements must successfully begin and sustain themselves all over again. The window of time for the owner to come back and again interrupt any single element reopens as well, so the owner gets a whole new set of years within which she again must only disrupt one element once. And this cycle could go on again and again.

This high burden is also designed to disincentivize those that might want to try to take property from another. A potential adverse possessor may invest years of time and resources in trying to perfect an adverse possession claim only to have the legs of the opportunity swiped with just one act by the owner that ousts the would-be adverse possessor—even if only momentarily. Then, all of the investment the adverse possessor has made is, poof, gone in an instant. For example, an actual owner could bring an ejectment suit 9.5 years after the initial trespass and after the would-be adverse possessor has built a home and improved the landscaping on the property. If the statutory period for sustaining the elements of adverse possession in that jurisdiction is 10 years, the actual owner wins by disrupting the continuity at the eleventh hour with his ejectment suit. The trespasser must leave, and, under the traditional common-law rule, the trespasser usually loses most rights to the improvements made while unlawfully in possession.[98] Given the high cost of perfecting an adverse possession claim, combined with the high risk of losing at some point before the expiration of the statutory period, it is seldom rational to invest in such a speculative trespassing venture.

The difficulty of achieving adverse possession also recognizes the extreme autonomy that we grant most owners, to the point of not only generally accepting non-use, but also establishing that non-use is not abandonment or reason enough alone to reward a would-be adverse possessor or another person who claims that they can utilize the property better.[99] Even in the face of non-use,

97 *See* DUKEMINIER ET AL., *supra* note 63, at 149 n.11.

98 *Id.* at 169.

99 *See* Adams v. Hodgkins, 84 A. 530, 532 (Me. 1912) ("Abandonment necessarily implies nonuser, but nonuser does not create abandonment no matter how long it continues."). As one court explained, "[T]itle is not affected by nonuser, and, unless there is shown against him some adverse possession or loss

the law presumes that people want to keep what they own. If an owner wants to part with her property, she will do so on her own terms and through the other available channels for the voluntary transfer of ownership.

That said, the doctrine does emphasize that owners must exercise some reasonable responsibility—defined rather leniently—if they want to keep their right to keep their property. As Oliver Wendell Holmes explains, if an owner "knows that another is doing acts which on their face show that he is on the way toward establishing [adverse possession], I should argue that in justice to that other," the owner "was bound at his peril to find out whether the other was acting under his permission, to see that he was warned, and, if necessary, stopped."[100]

While the strict elements of adverse possession afford ample opportunity for owners to keep what they own against those making adverse possession-like claims on that property, it is nonetheless opportunity clothed in a legal responsibility, even if it is an easy one to fulfill. One could argue that an owner who loses to an adverse possessor has simply failed to do that little bit that the law says is necessary to keep one's ownership status. Intervening to defeat one of the elements becomes a duty if one wants to remain entitled to the immunity right. It is the responsibility of all owners to take some disruptive action to break the continuity of an adverse possessor's claim, lest they risk that immunity—freedom from the adverse claims of a trespasser—turning into a disability,[101] because once the adverse possessor 'wins,' the owner becomes the one lacking any power to affect the use of the property by the former trespasser, now owner. The 'owner' is disabled from ejecting the trespasser who has successfully exercised a power to take land away from that now-prior owner.[102]

One might initially think that adverse possession doctrine

of title in some of the ways recognized by law, he may rely on the existence of his property with full assurance that, when occasion arises for its use and enjoyment, he will find his rights therein absolute and unimpaired." Welsh v. Taylor, 31 N. E. 896, 899 (N.Y. 1892).

100 Holmes, *supra* note 47, at 477.

101 *See* Hohfeld, *supra* note 9, at 55 (describing the definition of "disability").

102 Once the trespasser has obtained legally recognized ownership, she is no longer a trespasser and the prior owner is no longer the owner. *See id.* (explaining how an immunity can be converted into a disability with the intervention of events that remove the law's protection of an owner).

belies the claim that the law recognizes a type of keepings concept. But this closer look at how adverse possession doctrine is structured illustrates that it is very much centered on the keepings idea. Property takes on a new image when viewed from the opposite end of the doctrine, focusing not on what it takes to acquire property non-consensually from another, but instead on what the owner must do to keep the property and the reasons for the minimal expected effort by the title-holder. Property textbooks and most discussions of adverse possession focus on the pursuit of the adverse possessor's claim rather than the maintenance of the title holder's ownership.[103] Contextually, however, seeing the issue through a keepings lens allows us to focus on how an adverse possessor can be impeded from making a claim to the property and how one can keep her property.

More importantly, the teachings in textbooks and court opinions tend to particularly focus on how difficult and burdensome it is to adversely possess rather than stressing how easy it is for the owner to keep her property in the face of a would-be adverse possessor.[104] If we can re-conceptualize adverse possession, we can show that it is structured to make the property easy to keep rather than focused on making it hard to adversely

103 *See* DUKEMINIER ET AL., *supra* note 63, at 148–50 (describing the elements of adverse possession including how the adverse possessor can "stake out" his claim and describing penalizing the negligent owners as one of its purposes rather than focusing on how the difficulty protects owner's status); ANDERSON & BOGART, *supra* note 22, at 119–20 & 142 (discussing how to acquire through adverse possession and describing it as the process of making an award of property through satisfaction of elements); SPRANKLING & COLETTA, *supra* note 63, at 98–99 (describing how to prove the elements to succeed as an adverse possessor and the rationale for allowing adverse possessors to win).

104 *See, e.g.*, DUKEMINIER ET AL., *supra* note 63, at 148–50 (discussing the long process, multiple elements, and burden of evidentiary proof on the potential adverse possessor that must be satisfied); ANDERSON & BOGART, *supra* note 22, at 119–20 & 142 (describing the elements of adverse possession and the state of mind that are required by different jurisdictions); SPRANKLING & COLETTA, *supra* note 63, at 98–99 (discussing the elements and burdens that the potential adverse processor must satisfy); Edwards v. Estate of Muller, Civ. A. No. 965–K, 1994 WL 728791, at *6 (Del. Ch. Dec. 23, 1994) ("[T]he acquisition of title to land by adverse possession ought not to be easy or quiet or quick. Absent title accruing through satisfaction of all elements of adverse possession, title remains in the original holder of legal title or the heirs or assigns."); Loverkamp v. Loverkamp, 45 N.E.2d 871, 874 (Ill. 1942) ("Adverse possession cannot be made out by inference or by implication. The proof to be established must be clear, positive and unequivocal. All presumptions are in favor of the true owner.").

possess, even though this helps with the keeping. This ordering difference matters because it shows a sense of our priorities. We are not creating a structure that rewards adverse possessors. We are creating a structure that protects owners with some limitations on that protection over time because of other concerns that we value, such as the freshness of evidence in a title dispute or trespass charge.[105]

Adverse possession is very difficult to perfect and places an enormous burden of satisfying multiple elements of proof before an adverse possessor can make a valid claim to another's property. Moreover, the adverse possessor must be "right all of the time" whereas the owner must be right only once in order to defeat the adverse possessor. It is a purposeful imbalance of power favoring the ability for the owner to keep her property. Adverse possession is clearly a keepings rule – particularly in light of the fact that we make it very hard to acquire by adverse possession, we make it very easy for the owner to oust and regain possession and restart the clock, and we give the owner a really long time to do this ousting.

F. *The Statute of Frauds*

Because we believe that individuals prefer to keep their property, we require a high level of proof to establish that they have voluntarily parted with it.[106] Almost any rule that is designed to prevent or correct the fraudulent transfer of property satisfies the definition of a keepings rule. Chief among these in relation to real property is the statute of frauds, a doctrine that holds most contracts for the transfer of interests in real property unenforceable if they are not in writing, and if other formalities are not followed in the written document, such as if the party to be charged has not signed the writing.[107]

The statute of frauds is predicated on the greater comparative reliability of a written promise over an oral one. There are only a few limited exceptions to this general rule, where a transfer document may be found acceptable when other indicia are present to substitute for the fraud-avoidance purposes of the statute and

105 *See* DUKEMINIER ET AL., *supra* note 63, at 145 (discussing issues of aging claims and reasonable time periods to bring action for trespass).

106 *See supra* Section IV.D.

107 *See* SINGER, *supra* note 5, at 506.

otherwise provide substitute confidence in the voluntariness of the transaction.[108]

The law sets high standards that must be met before recognizing a transfer of property from an owner (clothed with the right to keep that property) to another. The statute of frauds is, therefore, primarily an evidentiary standard designed to give the courts a greater certainty of the existence of the transaction in question and the legitimacy of the deal.[109] It is aimed at avoiding fraud in court, but also more basically at preventing the use of dishonest means to take property away from the actual title holder. As such, it provides a very important functional aid for the keeping of property.

* * *

These are but a few of the substantive keepings rules in the law of property. These examples should provide a framework from which others can be identified and examined for their keepings values as well. I encourage readers to approach each new encounter with elements of property law from a fresh perspective, conscious of the possibility that keepings components may be present.

IV. SELECTED INSTITUTIONAL AND STRUCTURAL "KEEPINGS"-FACILITATION DEVICES

The idea of keepings permeates not only the development of substantive law doctrines, but also much of the architecture of the legal system itself. This final Part focuses briefly on the institutional and structural mechanisms for the facilitation of keepings, highlighting the rule of law, neutral third party enforcement, and ancillary institutional arrangements like the recording system—and other methods for the verifiability of ownership—that all help aid in the keeping of property when owners are confronted with conflicts.

In the theoretical state of nature, it is said that man's possessions lack any security because they are always subject to plunder without repercussions.[110] Most theories of the origins of

108 *Id.* at 506–07.

109 *Id.* at 507 ("The statute of frauds is intended to prevent fraudulent claims that a contract existed when it did not by ensuring that adequate evidence exists of an agreement to convey.").

110 *See, e.g.*, HOBBES, *supra* note 28, at 185 ("[D]uring the time men live

governments, or at least liberal governments, rest upon the necessity of achieving a system of law that is superior to operating within a state of nature, where there is little check on self-interest and plunder.[111] We need systems and institutional arrangements that relieve us from chaos and uncertainty, and that secure the ownership of property including the ability to keep property free from aggressors who wish to take it away.[112] Much of this aspect of keepings was discussed in Part IV.A.

In addition, our legal system provides the opportunity to prove ownership in a way that facilitates the keeping of property; it provides a place in the courts to protect keepings rights; and it operates to adjudicate keepings rights on the basis of set and known rules.

Among the first order elements of a legitimate system of government and legal regime is the presence and persistence of the rule of law. The rule of law is defined by the existence of, among other things, (1) clear, known, and understandable laws, rules, and regulations; (2) predictability and certainty of enforcement, application, and the protection of rights and remedies for wrongs; (3) procedural validity and regularity in the establishment of laws, rules, and regulations; (4) fair and equal, non-biased application of the laws, rules, and regulations; and (5) freedom from arbitrary, capricious, or ad hoc decisions that make the law so indeterminate and unestablished as to make predictable compliance impossible.[113]

The rule of law is fundamental to the legal system and to helping individuals keep what they own. So long as individuals follow the rules governing the acquisition and transfer of property, continued ownership is protected. With the rule of law in force, we

without a common Power to keep them all in awe, they are in that condition which is called Warre [sic]; and such a warre [sic], as is of every man, against every man.").

111 *See* EPSTEIN, TAKINGS, *supra* note 26, at 17 ("Within the original framework the rich array of procedural and jurisdictional protections was expected to serve . . . the protection of private property, of 'lives, liberties, and estates' that Locke considered the purpose of government.").

112 *See* NORTH, *supra* note 34, at 121.

113 *See* RONALD A. CASS, THE RULE OF LAW IN AMERICA 1–22 (2001); JOHN RAWLS, A THEORY OF JUSTICE 235–38 (1971) ("A legal system is a coercive order of public rules . . . . When these rules are just they establish a basis for legitimate expectations. . . . [A]ctions which the rules of law require and forbid should be of a kind which [individuals] can reasonably be expected to do and to avoid.").

know that the law should not be applied in an arbitrary or capricious manner and that there should be a basis for protecting the right to keep against both private and public takers.

Of course, hand in hand with the rule of law is the existence of a neutral third-party arbiter of disputes. Keepings rules are effective only when coupled with a neutral system to enforce those rules. If an owner is in a challenge with someone contesting ownership, there is no security or confidence in the owner's ability to prove her claim and retain ownership if the dispute is adjudicated by anything other than a *neutral* state enforcement system.[114] Coinciding with rule of law values, an owner's keepings rights are valueless if that neutral system does not exist. Moreover, those keepings rights are severely diminished in value if she lacks the ability to confidently and accurately predict how the neutral enforcement system will adjudicate disputes. Such predictability is required so that individuals can assess whether and on what terms to make an initial investment or acquisition.

Other institutional mechanisms have also emerged in our system to facilitate keepings. Most notably is the example of real property recording systems, where owners are afforded a place and legal infrastructure to secure proof of ownership and the corresponding package of rights to that ownership, including the right to keep the property. Some type of recording or registration infrastructure for real property is present within the borders of every state in the United States, with some variation as to the form, substance, and process involved.[115]

Recording offices are where owners go to essentially 'stake their claim' to real property and consequently where they ground proof of keepings rights. Together with their recognition in the courts, recording systems act as a neutral, third party means of

114 NORTH, *supra* note 34, at 121 ("Secure property rights will require political and judicial organizations that effectively and impartially enforce contracts across space and time."); NATHAN ROSENBERG & L.E. BIRDZELL, JR., HOW THE WEST GREW RICH: THE ECONOMIC TRANSFORMATION OF THE INDUSTRIAL WORLD 306 (1987) (discussing the role for the government where "[t]he economic sector requires . . . protection from banditry and an orderly way of settling its internal disputes").

115 Gerald Korngold, *Resolving the Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations*, 56 AM. U.L. REV. 1525, 1564 (2007) ("While the recording acts differ among the states in some respects, they share many common models, attributes, and goals.").

verifying titles to property in a manner that is reliable, legitimate and is recognized by both market participants and the state enforcers of those rights. If someone claims they have a right to keep their property, then there is a place to go to see the basis for that claim.

One's keepings rights are only as good as the system to support them; keepings rules, more generally, are only as good as the system willing to apply them. While the engineers of our legal infrastructure may not always expressly acknowledge it, much of what they have built includes, as one of its most critical functions, provisions for the support that is necessary to make keepings a reality.

CONCLUSION

The pervasiveness of keepings rules in the law of property reflects a deep-rooted reverence for ownership and its protection within our society and legal structure. Keepings rules increase the security, stability, certainty, uniformity, predictability, and confidence that contribute to investment in the acquisition and improvement of property and that encourage and facilitate the voluntary exchange of property rights.

The purpose of this Article has been to demonstrate the ubiquity and utility of keepings rules in our legal system by cataloging some of the areas where the law is shaped by, justified by, or directed toward protecting one's ability to keep what she owns (and consequently to prevent others from taking the same). As Hohfeldian immunities, the keepings rules help regulate the relationships between owners of property and others who wish to unlawfully take from them.

We can improve our understanding of the law and enrich our appreciation of the regard it places on property ownership by more consciously and regularly focusing our attention on the background keepings principles that inform legal rules, doctrines, assumptions, presumptions, principles, and guidelines. When judges, legislators, or advocates are faced with an open and undecided or ambiguous legal question or are confronted by a unique set of facts, a consciousness of the pervasiveness of keepings rules and their rationale may guide their deliberations and make the choice of resolution a little bit easier. After all, the historical development of the law has often leaned on the keepings

concept to inform its better judgment. The law contains a quiet but profound preference to let each of us keep what we justly own. By better understanding the pervasiveness of the keepings concept in the development of our laws, we can begin to make that preference more loudly understood, giving this category of rules a proper place in legal analysis alongside our appreciation for rules of acquisition, transfer, takings, and other cornerstones of property law.