

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

*Konstanze von Schütz**

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.

* Private Law Fellow at Yale Law School's Center for the Study of Private Law and SJD candidate at the Faculty of Law, University of Toronto. I wish to thank Jean-Christophe Bédard Rubin, Christopher Campbell-Durufflé, Dave Fagundes, Craig Foye, Bruce Huber, Larissa Katz, John Lovett, Arthur Ripstein, Lionel Smith, and Bianca Waked, the participants of the section on "Private Law" at the 8th Annual Conference of the Younger Comparativists Committee of the American Society of Comparative Law (ASCL-YCC) at McGill University, and of the panel on "Property Institutions" at the Association for Law, Property, and Society (ALPS)'s 10th Annual Meeting at the University of Syracuse, as well as three anonymous reviewers and the editors of the *McGill Law Journal* for their very helpful questions, comments, and suggestions on earlier versions of this article. As it is impossible to abandon my responsibility for any remaining errors and inaccuracies, I continue assuming it for all of them.