

OF BUILDINGS, STATUES, ART, AND SPERM: THE RIGHT TO DESTROY AND THE DUTY TO PRESERVE

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INTRODUCTION

Markets require some sort of property rights, including transferability. Without transferable property rights market relations cannot get off the ground. Moreover, markets assume that these rights refer to some resource, some thing that is the object of the market relationship. In this sense property is, as some commentators recently have argued,¹ about things. Saying that property is about things doesn't tell us very much, though. It tells us nothing about the sorts of things that are the object of property rights, and it gives no indication whether property rights are uniform and fixed regardless of the sort of thing involved. Things are not all of a piece; pencils are not Picassos. There is no good reason to think that the law of property should treat all things alike. Modularity can take us only so far. Property law does and should make distinctions regarding the rights that owners have or don't have and the extent of those rights depending upon the sorts of things they own.

This Article investigates distinctions that property law does draw or should draw with respect to the right to destroy. That right has important implications for the market because the consequence of full exercise of the right, i.e., destruction of the thing, is complete and irrevocable removal of an asset from future market transactions. Where the asset in-

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¹ See Henry Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (2012).

volved is of a fungible sort, a pencil, for example, there is little cause for concern about this loss. The losses about which we worry, however, are those involving non-fungible items, pearls of great price.² Such losses include historic buildings and important works of art. Disputes involving the right to destroy have ranged farther, though. Among the most contentious and sensitive of these are disputes over the disposition of human reproductive material. These controversies too have implications for the market, as human sperm and eggs may be sold and bought under certain conditions.

Despite its importance, the right to destroy is one of the least discussed twigs in the proverbial bundle of rights constituting ownership. A recent article by Lior Strahilevitz analyzes the right in detail.³ Other than his article, only an earlier article by Edward McCaffery,⁴ and 1999 book by the late Joseph Sax, *Playing Darts with a Rembrandt*,⁵ have discussed the right to destroy within the past several decades. McCaffery's essay takes the position that most courts have adopted,⁶ rejecting the claim that owners have the right to destroy that which they own. McCaffery regards such a right as "an embarrassment in Anglo-American law."⁷ This appears to be the conventional wisdom, with the recent edition of Black's Law Dictionary excluding the right to destroy from the incidents of ownership included in its definition of ownership.⁸ More recently, however, Lior Strahilevitz has provided a powerful defense of the right to destroy. Strahilevitz bases his argument substantially on expressive values implicated in an owner's preference to destroy an object that he owns.⁹ Sax's book opposes a right to destroy with respect to works that have cultural significance.¹⁰

This Article analyzes the right to destroy from the perspective of the human flourishing theory that I have been developing over the past several years.¹¹ I will discuss four controversies in which the related questions whether owners have a right to destroy what they own and whether

² Cf. *Matthew* 13:45–46.

³ Lior Jacob Strahilevitz, *The Right to Destroy*, 114 *YALE L.J.* 781 (2005).

⁴ Edward J. McCaffery, *Must We Have the Right to Waste?*, in *NEW ESSAY IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 76 (Stephen R. Munzer ed., 2001).

⁵ JOSEPH L. SAX, *PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES* (1999).

⁶ See, e.g., *J.C. & Assocs. v. D.C. Bd. of Appeals & Review*, 778 A.2d 296 (D.C. 2001); *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210 (Mo. Ct. App. 1975); *Meksras Estate*, 63 Pa. D. & C.2d 371 (Ct. Com. PL. Phila. Cty. 1974).

⁷ McCaffery, *supra* note 4, at 81.

⁸ *Ownership*, BLACK'S LAW DICTIONARY (7th ed. 1999).

⁹ Strahilevitz, *supra* note 3, at 823.

¹⁰ SAX, *supra* note 5, at 17–18.

¹¹ See, e.g., Gregory S. Alexander, *Property's Ends: The Publicness of Private Law Values*, 99 *IOWA L. REV.* 1257 (2014); Gregory S. Alexander, *The Social Obligation Norm in American Property Law*, 94 *CORNELL L. REV.* 745 (2009) [hereinafter Alexander, *Social Obligation*].

they have obligations to preserve their property. The settings that I will examine, albeit briefly, are historic preservation, artists' destruction of their own work, removal of public statues, and destruction of frozen sperm. My aim is to show how the human flourishing theory provides an illuminating framework for analyzing what is at stake in disputes over an owner's asserted right to destroy something that he owns. Hopefully, this framework will provide a more satisfying, analytically and morally, means of resolving such disputes. To set the stage for these case studies, I begin with a brief summary of Lior Strahilevitz's argument in support of the right to destroy.

I. THE CASE FOR THE RIGHT TO DESTROY

As Professor Strahilevitz correctly observes, the right to destroy, which in past years had been widely assumed to be among the features of ownership,¹² today no longer enjoys much recognition. Under Roman law the *jus abutendi*—the right to destroy—was important as marking the outermost boundary of an owner's rights.¹³ If an owner could destroy his own property, he could do most anything short of that extreme action that he pleased. So also Blackstone, though hostile to wasteful destruction,¹⁴ seemed to think that under the common law it was permissible for a property owner to burn down his own house.¹⁵

Things have changed. Lior Strahilevitz states that “[b]ased on a reading of recent judicial opinions, it appears that the conventional wisdom has turned against permitting a property owner to destroy valuable property.”¹⁶ An illustrative case that he discusses is *Eyerman v. Mercantile Trust Co.*¹⁷ In that case Louise Woodruff Johnston's will directed her executor to have the testator's house destroyed, the land sold, and the proceeds distributed to the residue of her estate.¹⁸ The beneficiaries of Johnston's will apparently had no objection, but the neighbors did. The house was attractive, and shortly after Johnston's death, they sought to

gation Norm]; Gregory S. Alexander, *Ownership and Obligation: The Human Flourishing Theory of Property*, 43 HONG KONG L.J. 451 (2013).

¹² See Strahilevitz, *supra* note 3, at 787–91. Strahilevitz points out that between the sixth and seventh editions of *Black's Law Dictionary*, the editors of that well-known volume dropped the right to destroy from their listing of the rights associated with ownership. *Id.* at 783.

¹³ See *id.* at 787.

¹⁴ See WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 220 (Thomas A. Green ed., University of Chicago Press 1979) (1765–69).

¹⁵ See *id.* at 221–22.

¹⁶ Strahilevitz, *supra* note 3, at 796.

¹⁷ 524 S.W.2d 210 (Mo. Ct. App. 1975). *Eyerman* is also discussed in Adam J. Hirsch, *Bequests for Purposes: A Unified Approach*, 56 WASH. & LEE L. REV. 33, 69–84 (1999).

¹⁸ *Eyerman*, 524 S.W.2d at 211.

enjoin the estate for carrying out Johnston's will, arguing that razing the house would hurt their own property values.¹⁹

The court held that the will provision directing destruction of Johnston's house was unenforceable on public policy grounds.²⁰ The court stated, "Destruction of the house harms the neighbors, detrimentally affects the community, causes monetary loss in excess of \$39,000.00 to the estate, and is without benefit to the dead woman."²¹ The court regarded such destruction intolerable in a "well-ordered society."²² It saw no justification for carrying out the testator's directions: "No reason, good or bad, is suggested by the will or record for the eccentric condition. . . . To allow an executor to exercise such power stemming from apparent whim and caprice of the testatrix contravenes public policy."²³

Strahilevitz suggests that *Eyerman* contains within it "many of the pertinent threads in the right-to-destroy debate."²⁴ It begins to open up, he further suggests, the question of institutional competence that is the core of the matter.²⁵ Ordinarily, American property law leaves to the property owner decisions about how best to use her property, but there are two exceptions. The first is negative externalities: we remove the owner's right to control when the uses she desires create negative externalities. Second, we do not permit owners who lack the capacity to make rational choices to decide how her land should be used. There is a whiff of the second factor in the *Eyerman* court's discussion of the testator's will as "eccentric," but the court's main focus is on the first factor, negative externalities. This is true for most of the home destruction cases as well.²⁶ Courts focus on considerations of neighborhood property value, local tax base, and harm to estate beneficiaries, all of which weigh, in the courts' view, against destruction.²⁷

Strahilevitz argues that protecting the right to destroy provides both tangible and intangible benefits. The tangible benefits are that destruction can enhance social welfare in several ways, such as protecting privacy, creating open spaces, and encouraging innovation and creativity.²⁸ He argues that historic preservation laws risk locking in place land uses that are economically inefficient.²⁹ He further argues that such laws may create incentives that are, from a social welfare perspective, perverse: "Re-

¹⁹ *Id.*

²⁰ *Id.* at 213.

²¹ *Id.* at 214.

²² *Id.* at 217.

²³ *Id.* at 214.

²⁴ Strahilevitz, *supra* note 3, at 797.

²⁵ *Id.*

²⁶ *See id.* at 797–98.

²⁷ *See id.*

²⁸ *Id.* at 786.

²⁹ *Id.* at 853.

quiring the preservation of great buildings may ensure that some beautiful and potentially influential designs never get built.”³⁰ We will consider arguments for the right to destroy that track efficiency and social welfare lines such as these a little later.

It is the intangible benefits that Strahilevitz identifies that are particularly original. He makes a case for the right to destroy that is based on expressive values.³¹ From the American colonists’ act of dumping tea into Boston Harbor to the Taliban’s destruction of the Buddhas of Bamiyan, for example, acts of destruction sometimes express deeply felt values, and in some cases, such acts trigger First Amendment interests.³² Moving from these obvious examples to examples of a more quotidian stripe, such as Lady Churchill’s desire to destroy the portrait painted of her husband, Winston Churchill,³³ Strahilevitz contends “that expressive motivations help explain otherwise puzzling destructive acts and situates the right to destroy within First Amendment law.”³⁴

Elaborating on this First Amendment connection, Strahilevitz distinguishes between two readings of the First Amendment: a “collectivist” reading and an “individual-autonomy” reading.³⁵ A collectivist reading permits regulation of destructive acts.³⁶ Strahilevitz observes that destroying a unique piece of property is akin to heckling a speaker in the sense that neither contributes to a healthy public discussion or points toward the truth.³⁷ The individual-autonomy view has difficulties justifying restrictions on property-destructive acts that have expressive content.³⁸ So, Strahilevitz notes, from this perspective, the destruction of the Buddhas of Bamiyan is completely uncontroversial.³⁹ Strahilevitz finds the individual-autonomy perspective more persuasive. He concludes that “[r]ational people usually do not destroy valuable property intentionally. So, where the government witnesses a rational person destroying her valuable property, it should presume that the destructive act furthers expres-

³⁰ *Id.* at 820. Strahilevitz gives as an example Daniel Burnham’s famous “Great White City” designed and constructed for the 1893 Chicago World’s Columbian Exposition. *Id.* Of course, it was well-understood at the time that Burnham’s model buildings, which were made out of plaster of Paris, were never intended to be permanent. *Id.*

³¹ *Id.* at 823.

³² *See, e.g.,* R.A.V. v. City of St. Paul, 505 U.S. 377, 380 (1992) (invalidating on First Amendment grounds local ordinance barring display of a burning cross “which one knows or has reasonable grounds to know arouses anger, alarm, or resentment on the basis of race, color, creed, religion, or gender”).

³³ Strahilevitz, *supra* note 3, at 826.

³⁴ *Id.* at 823.

³⁵ *Id.* at 827–30.

³⁶ *Id.* at 827.

³⁷ *See id.*

³⁸ *Id.* at 829.

³⁹ *See id.*

sive objectives.”⁴⁰ Strahilevitz acknowledges that this presumption is not absolute and that expressive interests must be balanced against substantial economic and social welfare interests, but from his point of view deference to the owner’s desire to destroy should be the starting point.⁴¹

Returning to destruction of historic buildings, as in cases like *Eyerman*, Strahilevitz considers the case for the right to destroy to be strong for both expressive and social welfare reasons.⁴² The right is not absolute, however, largely because of social welfare considerations.⁴³ We need to investigate these social welfare concerns in greater detail because they dominate the debate over historic preservation. What I want to suggest is that social welfare, although clearly relevant and important to evaluating petitions to preserve buildings claimed to have significant historic value, does not capture all of the relevant values at stake. Strahilevitz, as we have seen, has pointed out another important value, namely, the expressive content of assertions of the right to destroy some artifact.⁴⁴ But even that value does not exhaust what is really involved in such disputes. Social welfare, expressive interests, and other values are all aspects of human flourishing, the real foundation of such claims. The following section discusses the connection between historic preservation and human flourishing in further detail. This discussion will help set the stage for our later discussion of other aspects of the right to destroy.

II. HISTORIC PRESERVATION AND HUMAN FLOURISHING

Historic preservation is a contentious topic, and it nicely frames the right to destroy problem. Opponents of historic preservation sometimes appeal directly to the need for what they perceive as creative destruction and, with it, the owner’s right to destroy. A notable example is Edward Glaeser’s 2011 book, *Triumph of the City*.⁴⁵ Glaeser argues that dense collections of creative people stimulate breakthrough innovations in various endeavors, particularly in advanced economies based on information technology.⁴⁶ He expresses concern that such creative possibilities are lost or minimized by land use regulations.⁴⁷ His basic argument is that historic preservation protects too many buildings, gives too much power

⁴⁰ *Id.* at 853.

⁴¹ *Id.* at 853–54.

⁴² *See id.* at 796–98, 822.

⁴³ *See id.* at 822.

⁴⁴ *Id.* at 823–25.

⁴⁵ EDWARD GLAESER, *TRIUMPH OF THE CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER, AND HAPPIER* (2011).

⁴⁶ *See id.* at 47–49.

⁴⁷ *See id.* at 260–64.

to neighbors to prevent vertical development, the construction of which could provide more affordable housing.⁴⁸

In a co-authored paper, Glaeser refined his views following an empirical study of the economic impact of New York City's historic preservation districts.⁴⁹ The study found that construction activity fell in historic districts following designation.⁵⁰ Moreover, properties just outside the boundaries of such districts increased in value after designation.⁵¹ This apparently was due to the positive spillover effects of historic designation.⁵² The authors further found that designation raised property values within historic districts, but only in the lower-valued boroughs outside of Manhattan.⁵³ The broader effects of designation on property values were increases occurring only in districts where the foregone option to redevelop was relatively low.⁵⁴ The impacts were also more positive in districts that were more aesthetically appealing.⁵⁵

These data importantly tell us that the effects of historic districting in densely-populated urban areas such as New York City are, precisely as the study's subtitle indicates, heterogeneous and that broad generalization are impossible. This means that were we to adopt a welfarist perspective on historic preservation, we would not be warranted in making any assertions about the welfare effects of historic districting in urban areas except about specific housing markets given specific housing conditions. This hesitancy also seems warranted by the conclusions of earlier research and surveys of the economic effects of preservation. One survey concludes, for example, that the field is not thoroughly studied, "nor is there much agreement on answers to basic pragmatic and policy questions."⁵⁶ Welfarism, it seems, sheds some but not enough light on historic preservation.

We are able to see why social welfare alone does not entirely illuminate the values that inhere in demands to preserve certain buildings as special in ways that affect the integrity and health of their culture and the contrary assertions of those who view such preservation as inhibiting innovation and creativity within the same culture. The nature of these

⁴⁸ *Id.*

⁴⁹ Vicki Been, Ingrid Gould, & Michael Gedal, et al., *Preserving History or Restricting Development? The Heterogeneous Effects of Historic Districts on Local Housing Markets in New York City*, 92 J. URB. ECON. 16 (2016).

⁵⁰ *Id.* at 17.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Randal Mason, *Economics and Historic Preservation: A Guide and Review of the Literature*, BROOKINGS INST. 1 (Sept. 2005), <http://citeseerx.ist.psu.edu/viewdoc/download?jsessionid=1F5894BE99161D6F4FA02098ECB2D3C9?doi=10.1.1.506.784&rep=rep1&type=pdf>.

claims is such that their animus extends beyond social welfare, at least if we define that term in strictly economic or market terms. One obvious good that proponents commonly associate with historic preservation is historical memory. Buildings such as the Fraunces Tavern in lower Manhattan and Monticello are tangible reminders to members of our political community of what our history has been and where. They express (drawing here on Strahilevitz's expressive values theme) certain fundamental values that underlay our political community. Peter Byrne tells us that "[h]istoric districts . . . offer a narrative connection with the past."⁵⁷ Such buildings, he suggests, convey meaning about the past and "exemplify or embody a historical narrative that people in the present value."⁵⁸

Critics have challenged this historical justification for preservation of historically significant structures and places. Again, Lior Strahilevitz has taken the lead.⁵⁹ He argues that the value of authentic history over fake history is only marginal.⁶⁰ He points to the so-called "River of Blood" monument located on Trump National Golf Club as an example of fake history.⁶¹ The monument states that during the Civil War a battle occurred on that spot, and that "[m]any great American soldiers, both of the North and South, died and [on that] spot. . . . The casualties were so great that the river would turn red and thus became known as 'The River of Blood.'⁶² The problem with the monument is that its claim is completely bogus. The nearest battle during the war occurred some eleven miles away, and the River of Blood story was contrived.⁶³ Strahilevitz uses this example to ask whether authentic history is superior to such fake history in terms of educating the public, and his answer is "not by much."⁶⁴ As he states, "When society presents authentic historic facts to present generations, especially in a manner tied to historical markers in physical space, it often does so in a manner that is so selective, so simplified, or so beholden to contemporary preferences that its value over contrived history appears to be marginal."⁶⁵ The upshot, the cash value, if you will, of this claim is that, for Strahilevitz, it is questionable whether,

⁵⁷ J. Peter Byrne, *Historic Preservation and Its Cultured Despisers: Reflections on the Contemporary Role of Preservation Law in Urban Development*, 19 GEO. MASON L. REV. 665, 678 (2012).

⁵⁸ *Id.* at 679.

⁵⁹ Lior Strahilevitz, *Historic Preservation and Its Even Less Authentic Alternative* (Coase-Sandor Inst. for Law & Econ., Working Paper No. 777, 2016), http://chicagounbound.uChicago.edu/cgi/viewcontent.cgi?article=2459&context=law_and_economics.

⁶⁰ *Id.* at 1–2.

⁶¹ *Id.*

⁶² *Id.* at 1.

⁶³ *Id.*

⁶⁴ *Id.* at 1–2.

⁶⁵ *Id.* at 2.

as is now generally accepted, there is a strong state interest to compel the preservation of historic property.⁶⁶

There are several points to make about this line of questioning regarding the benefits of historic preservation. The first concerns the value comparison between authentic and fake history. This is a false comparison, at best, unhelpful. Whether the preservation of authentic historic structures is one matter that we can surely debate, but it adds little to the discussion to draw a comparison between such history and contrived history and ask whether one is superior to the other and, if so, by how much. There may be a false trade-off here because some examples of fake history may play a legitimate and valuable role in reminding a society of important moments in its past. The fact that they do so, if indeed they do, does not necessarily mean, however, that structures or places associated with fake history merit preservation should the owner later wish to change or destroy the site. Authenticity matters to historic preservation, but it is hardly the only important criterion in the preservation calculus.

The more fundamental reason why the comparison is unhelpful is that it really does not address the underlying objections that critics like Strahilevitz have against historic preservation. One of those objections is a claim of arbitrariness about the selection of what gets preserved.⁶⁷ The arbitrariness of the historic preservation process results from several factors. One factor is the subjectivity of societal judgments that are the basis of political choices between what gets preserved and what gets destroyed.⁶⁸ Strahilevitz states the argument this way: “To preservationists, soaring and expensive structures that are used and beloved by elites ought to be preserved, even if they become economically obsolete in their present form. But modest structures in overwhelmingly minority neighborhoods ought to be bulldozed in the name of progress.”⁶⁹ Working here is a concern that the choices between what gets preserved and what doesn’t both reflect and deeply implicate issues of class, race, and ethnicity. Historic preservation decisions are made through a political process, and political choices are often skewed in favored of the wealthy and privileged members of the community. Another factor contributing to arbitrariness, closely related, is that what gets selected for preservation reflects only contemporary preferences rather than timeless and objective considerations.⁷⁰ Those preferences then bind later generations, the members of which may have very different preferences. The irreducibly subjective nature of the endeavor means that the value of preserved

⁶⁶ *Id.*

⁶⁷ *Id.* at 10.

⁶⁸ *Id.* at 18.

⁶⁹ *Id.*

⁷⁰ *Id.* at 2.

structures will inevitably vary both from group to group and from generation to generation. There is, in the view of such critics, simply no stability in the matter.

Strahilevitz raises another concern that needs to be taken very seriously. He worries about the exclusionary effects of historic preservation, especially among minority communities.⁷¹ There is surely something to this concern. Strahilevitz refers to a study by Professor Stephen Clowney of Lexington, Kentucky.⁷² Clowney's study shows how municipal and powerful private participants in that city created monuments and public parks that glorified historical white figures and ignored the role played by prominent African-Americans.⁷³ It is the broader claims about the causal relation between historic preservation and racial exclusion that are questionable. Strahilevitz compares historic preservation with fake history projects such as The Villages, a retirement and nearly all-white residential community in Florida,⁷⁴ and argues that historic preservation, no less than the fake history perpetrated in places like The Villages, has racially exclusionary effects: "Both historic preservation and the kind of uniformly scripted narrative on display in The Villages aim for an aesthetic homogeneity that may engender demographic homogeneity by design. When the buildings all look alike the people living in those buildings tend to look alike too."⁷⁵ Is this true? Is it the case that the racial and ethnic composition of architecturally homogenous or similar neighborhoods are or tend to be uniform? I have no data one way or the other on this question, but one can surely think of anecdotal evidence to the contrary. Queens, New York, for example, is one of the most racially and ethnically diverse regions on Earth, but there are neighborhoods in Queens, as there are throughout New York City, in which the residential structures are highly homogenous. Yet, Strahilevitz and others are right to be concerned about the gentrification effects that can and sometimes do result from preservation, especially after designation of wholesale historic zones. Gentrification has often had deeply troubling exclusionary consequences, and preservation policymakers need to be highly sensitive to the possibility of such effects.

More generally, it surely is the case that there are flaws in the preservation process. There is perhaps an excessive amount of preservation of structures in our cities, although it is hard to know objectively what is the optimal amount. And doubtless some preservation decisions are the result of well-funded and well-organized groups acting out of self-inter-

⁷¹ *Id.* at 19.

⁷² *Id.* at 12.

⁷³ See Stephen Clowney, *Landscape Fairness: Removing Discrimination from the Built Environment*, 2013 UTAH L. REV. 1, 8, 10, 13–14 (2013).

⁷⁴ See Strahilevitz, *Historic Preservation*, *supra* note 59, at 2–9.

⁷⁵ *Id.* at 20.

est rather than in the public interest. But I reject the notion that there is simply no neutral or objective basis for judgments about historic or aesthetic choices. The New York City Landmark Preservation Commission had ample objective grounds for landmarking Grand Central Terminal, and it was, objectively speaking, a travesty that the original Penn Central Station was torn down in the interest of a small and unrepresentative group of power-brokers' opinions about progress.

We have still to consider historic preservation from the perspective of human flourishing. More specifically, what obligations, if any, to preserve historic or otherwise culturally significant structures do private owners of such places owe to members of their communities, given that the basis of such obligations is to contribute, in ways appropriate to the owners, to the flourishing of such community members' lives and to their own?

An initial, and very important, point to make in approaching these questions is one to which I alluded in Chapter 2:⁷⁶ that each of us owes an obligation to our communities to support the institutions, associations, and infrastructure that in turn support the special sort of culture in which we live, the type of culture within which each person is able to experience life-defining freedom and to create his or her own personal identity.⁷⁷ This is part of the obligation to support the social networks and structures that enable us to develop those human capabilities that make human flourishing possible. Some practical applications of this obligation are easy to identify. They are obligations that we usually associate with citizenship; for example, payment of taxes used to build roads, bridges, airports, and other common aspects of public infrastructure. Other obligations are ones that we do directly tie with property ownership. An obvious example is local property taxes, which pay for public education.

At this point it is worth considering an objection that economists commonly make: taxes are one thing; restrictions on private ownership are another. Economists argue that as mechanisms for redistributing wealth, taxes are much more efficient than private law rules.⁷⁸ For the time being, I will remain agnostic on the merits of the objection itself, i.e., the relative efficiency of taxation versus private law as a means of effecting wealth redistribution, for wealth redistribution is not what is at stake here. What is at stake is the scope of ownership—the parameters, if you will, of the concept of private ownership itself. Private law recognizes certain limits on the range of actions that owners are free to under-

⁷⁶ See Alexander, *Social Obligation Norm*, *supra* note 11, at 758.

⁷⁷ *Id.*

⁷⁸ See, e.g., Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667 (1994).

take with respect to their assets. The law of nuisance is the obvious example of this. These limits are not externally imposed by the state or other actors. Rather, as I argued in Chapter 2, they are internal to the very concept of ownership. What private law does is to recognize and clarify these limits. It does so with greater or lesser precision, depending upon a variety of factors, including the character of the owner's use, the effects of the owner's use on his community and the character and extent of those effects, and so on. The limitations to freedom to use, possess, and transfer privately-owned assets that private law defines are not, at their core, redistributive rules, although they may have distributive consequences. They are, rather, boundary-defining norms, sculpting norms, if you will, that is, norms that sculpt the contours of private ownership itself. Courts tease these contours out of the concept of ownership itself through a process of giving that concept the best interpretation they can based on past understandings of ownership, both judicial and lay, and their understandings of the value foundations of private ownership. This is why it is wrong to suppose that when courts announce restrictions on what an owner may do with her property, they engage in a process of importing certain external norms which they then use as the basis for imposing restrictions on how owners use their property.

Returning to our obligation to support the institutions, associations, and infrastructure that in turn support the special sort of capability-nurturing culture in which we live, what does this mean for the owners of historic or architecturally significant buildings? To begin with, let us assume for the time being that we can agree that some privately-owned building or structure is authentically historic or architecturally significant. In real preservation disputes, there sometimes are legitimate questions about whether this is the case, so let us just put that matter aside for the moment. Does the owner's obligation to support his community's infrastructure entail an obligation to preserve that structure or building in view of the claim that the reason for the obligation to support the community's infrastructure is just the fact that at least some elements of a community's infrastructure are necessary to maintain the sort of capability-nurturing culture in which the owner lives?

The answer to that question depends in substantial part on whether we consider historic or architecturally significant buildings necessary to preserve the kind of culture that I have been describing, i.e., one that facilitates the development of the capabilities necessary for human flourishing. Stated more directly, what are the purposes of historic preservation after all? In an especially valuable article, Carol Rose grouped the public functions of historic preservation into three broad categories: in-

spiration, aesthetics, and community building.⁷⁹ Of these, Rose persuasively argued, “the chief function . . . is to strengthen local community ties and community organization.”⁸⁰ Rose refers to this function as community-building, but it is just as much a matter of community *identity*. The claim is that certain physical structures can directly affect a community’s understanding of its own identity.

Identity here has both a cultural and a political dimension. The connection between political identity and physical structures is easy to see if we consider famous monuments such as the Lincoln Memorial in Washington, D.C., or buildings such as Independence Hall, in Philadelphia. It is also evident, however, in private-owned structures such as Ebenezer Baptist Church, in Atlanta. It is no accident that repeatedly throughout history, repressive regimes have sought to erase the historical memories of past political practices that nurtured the capabilities necessary for robust free citizenship.⁸¹ Not infrequently, part of the regime’s effort at erasure has involved destruction of architectural landmarks. Hitler planned to transform Berlin, to pick only one extreme example, through a massive project involving tearing down traditional buildings associated with the Hohenzollern dynasty, which he despised, and erecting new buildings and monuments designed by his favorite architect, Albert Speer, all of which reflected Nazi ideology.⁸² He planned to rename this newly Nazified city “Germania.”⁸³ Rose points out that “the Parisian architects of the French Revolution understood very well that the logic of revolution meant the destruction of the cathedrals, those sirens of a loathed ecclesiasticism.”⁸⁴ As Rose states, “[V]isual surroundings work a political effect on our consciousness.”⁸⁵

The connections among structure, capabilities, and culture are strong as well. When we speak of building and maintaining a community’s identity, a large part of what we have in mind is its culture. In Chapter 3, I discussed the various sorts of communities that are relevant for purposes of considering the essential capabilities that property owners require to lead fulfilling lives. Each of those various sorts of communities, despite their differences, have their distinctive cultures that form a major part of their identities. From neighborhoods to national communities, we can and do glean distinctive cultural characteristics of and differ-

⁷⁹ Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 479–80 (1981).

⁸⁰ *Id.* at 479.

⁸¹ Alexander, *Social Obligation Norm*, *supra* note 11, at 795.

⁸² VOLKER ULLRICH, HITLER: ASCENT 1889–1939, 601–07, 690 (2016).

⁸³ *See id.*; *see also* ROBERT R. TAYLOR, THE WORD IN STONE: THE ROLE OF ARCHITECTURE IN THE NATIONAL SOCIALIST IDEOLOGY (1974).

⁸⁴ Rose, *supra* note 79, at 485.

⁸⁵ *Id.* at 483.

ences between various geographic communities. Physical structures are very much a part of what constitutes these distinctive community cultures. Buildings are part of what defines the sense and feel of a place, whether we are talking about a street, a city, or a nation. For New Yorkers, the Upper West Side of Manhattan “feels” different from Queens. Paris “feels” different from Los Angeles. The architectures of these places are very different from each other and so are their respective cultures. Residents often come to identify with these places, and the architecture enables such self-identification. Place, including its structures, contributes to a person’s sense of self. Even in a highly mobile society, it means something to a person that she lives Tulsa, Oklahoma, rather than Boston, and it means something to her that she lives in this neighborhood rather than that. Architecture plays an important role in creating this sense of meaning.

Architecture—structures—contributes to the development of our essential capabilities in another way. In Chapter 1, I argued, following Charles Taylor’s lead,⁸⁶ that we can develop as free and autonomous individuals only within cultures of a certain kind. Those cultures include communities of a certain kind, the very communities upon which we are dependent for the development of our essential capabilities. Particular places and particular buildings sometimes embody the life of such communities and are essential to its continuing ability to thrive. Such buildings are part and parcel of the cultural life of these thriving liberal communities such that the ability of these communities to enable capabilities development quite literally requires the preservation of those buildings. What, for example, would Atlanta’s Sweet Auburn neighborhood be like if Ebenezer Baptist Church were destroyed and replaced by a Hilton Garden Inn? It is hard to imagine that it would remain the same rich, vibrant community. Historic preservation exists as a matter of a community’s knowledge and understanding about its own self-identity.

What should be said on the owner’s behalf? What capability-related considerations might one recognize in support of an owner’s right to destroy her privately-owned structure, however historically or architecturally significant that structure may be? Expectations are often said to loom large here. Private owners argue that it is unfair to deny their right to destroy or to redesign a building that was not landmarked at the time they purchased it. This is an important point, one that should be taken seriously, including under a human flourishing theory. Expectations certainly figure in the evaluation of capabilities and flourishing. Security, a capability without which an individual cannot hope to live as full and

⁸⁶ See Charles Taylor, *Atomism*, in *PHILOSOPHICAL PAPERS: PHILOSOPHY AND THE HUMAN SCIENCES*, 187, 207 (1985).

rich a life as possible, depends to a considerable extent on the protection that expectations receive at least to some extent.

The real questions, of course, are not whether expectations are relevant, for they clearly are as a general matter, but when, under what circumstances, and how much. Private law does not protect every subjective expectation that an individual has, nor should it. To pick one example, imagine that I am the sole child of my widowed and very wealthy mother. I may expect that upon her death I will inherit her estate, either through her will or under intestate succession. Children often have such expectations, but sometimes those expectations are dashed when the parent dies with a valid will that leaves the entire estate to a charity. This is perfectly legal, however disappointing and perhaps unfair to the child. Our legal system confers a wide degree of freedom of testamentary disposition to parents, and as a matter of policy, the law does not protect the subjective expectations of expectant heirs.

The law of takings is much concerned with protection of expectations of a certain level, and there is a rich literature on just what that level should be.⁸⁷ The seminal case on protecting owner expectations under the Fifth Amendment takings clause is, of course, the famous *Penn Central* case.⁸⁸ In that case the New York City Landmark Commission had previously designated Grand Central Terminal, which Penn Central then owned, as a historical landmark because of the building's incomparable nineteenth-century *beaux-arts* façade.⁸⁹ Penn Central wanted to erect a multi-story commercial structure atop Grand Central and submitted two proposed plans to the Commission, both which it rejected.⁹⁰ In the Commission's view, both proposed structures would have done serious damage to unique aspects of Grand Central.⁹¹ The owner then went to court, claiming that the Commission's denial of its plans to develop the airspace above Grand Central Terminal amounted to an unconstitutional taking of property.⁹²

The Court upheld the Commission's actions. It announced a three-prong test for determining when regulatory actions "go too far."⁹³ Whether a governmental action that formally is a regulation is *de facto* a taking depends on (1) the character of the government action (was the

⁸⁷ See, e.g., Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Daniel R. Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 WASH. U.J. URB. & CONTEMP. L. 3 (1987); Steven J. Eagle, *The Rise and Rise of "Investment-Backed Expectations"*, 32 URB. LAW. 437 (2000).

⁸⁸ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

⁸⁹ *Id.* at 115.

⁹⁰ *Id.* at 116–17.

⁹¹ *Id.* at 117–18.

⁹² *Id.* at 119.

⁹³ *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

government intrusion of the owner's property direct or indirect?); (2) the extent to which the regulation interferes with what the Court called "distinct investment-backed expectations"⁹⁴; and (3) the resulting diminution in the value of the owner's property.⁹⁵ The combined effect of these three factors is a focus on the owner's expectations; specifically, whether and to what extent the regulation has interfered with the owner's settled and reasonable expectations. Takings law appears to protect owner expectations only to the extent that those expectations are both investment-backed and reasonable.⁹⁶

What would this mean in the context of an owner's asserted right to destroy a structure that is historically significant or architecturally unique? In *Penn Central* itself, it meant that Penn Central's expectations were not investment-backed because it had not invested any money in the development project.⁹⁷ The Court's subsequent use of this factor has been somewhat unclear, but some considerations have emerged as highly relevant to the calculus. One such consideration is whether the governmental regulation affects one or many strands in the proverbial bundle of rights that constitutes private ownership. If it adversely affects a reasonable investment-backed expectation as to only one strand, no taking will be found.⁹⁸ That was precisely the case in *Penn Central*. The owner was still able to earn a reasonable return on its investment. Moreover, the designation of the Terminal as a historic landmark may have made it an even bigger tourist draw, generating more revenue for Penn Central. Given all of these circumstances, it is hard to see any essential capabilities that were jeopardized by the agency's denial of the owner's asserted right.

Take a very different case, however. Suppose a historic preservation agency has preserved a privately-owned 19th century mansion that is both historically and architecturally significant but in a state of great disrepair. The mansion has been vacant for a number of years, and the owner had planned to demolish it in order to build a new apartment complex on the same site. A local preservation agency, having determined that the mansion is historically and architecturally significant, ruled it must be preserved. The owner has established that the preservation cost greatly exceeds the market value of the mansion and that he cannot afford the cost of maintaining the mansion. The building has, literally, neg-

⁹⁴ *Penn Cent.*, 438 U.S. at 124.

⁹⁵ *Id.* at 124–25, 131.

⁹⁶ *See* *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

⁹⁷ *See Penn Cent.*, 438 U.S. at 130.

⁹⁸ *See* *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); Robert M. Washburn, "Reasonable Investment-Backed Expectations" As a Factor in Defining Property Interest, 49 WASH. U. J. URB. & CONTEMP. L. 63, 68 (1996).

ative value.⁹⁹ This case surely pushes a good thing too far. Historic preservation cannot justify depriving an owner of the ability to develop or maintain basic human capability needs, including economic security in a literal sense. In my hypothetical, and the case on which it was based,¹⁰⁰ preservation at the owner's expense risked driving the owner into bankruptcy.

An important point needs to be made here concerning the identity of the owner. The reality is that in many preservation disputes the buildings in question have corporate rather than individual ownership. Corporate ownership makes the human flourishing calculus more complicated, but it does not render considerations of human flourishing irrelevant. Corporations are constituted by and of individuals, and for many shareholders how well their lives go depend in no small part on the well-being of the firms in which they are invested. It would be a great mistake to ignore the capability considerations of firms simply because of their corporate identity.

The case that I posed in which preservation would seriously jeopardize important capability interests of the owner illustrates the basic point that here, as elsewhere, the owner's well-being and capability needs, no less than those of members of his various communities, count.¹⁰¹ Joseph Sax struck a similar note in summary fashion: "If [private] ownership alone is not self-evidently decisive [as he had argued it should not be], neither is it obviously irrelevant."¹⁰² The human flourishing account is not one-sided. Far to the contrary, it takes into consideration the capability needs of owners, as members of various communities, as well as the needs of other community members. It does consider, however, that owners of historically significant buildings may have obliga-

⁹⁹ These facts are based on a famous case from the German Federal Constitutional Court. In the Rheinland-Palatine Monument Protection case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 2, 1999, 100 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 226 (Ger.), the German Court held that the state either had to allow the owner to destroy the mansion and develop the site or to expropriate it. The local monument protection statute, which required the owner to maintain the building at his own expense in the public interest, without taking into account the owner's interest was, under the circumstances, in violation of the German constitutional commitment to property under the Basic Law. *Id.*

¹⁰⁰ *Id.* A somewhat similar situation occurred in *People ex rel. Marbro Corp. v. Ramsey*, 171 N.E.2d 246 (Ill. App. Ct. 1960). The court granted an owner a demolition permit where the costs of repairing and maintaining a historically significant building were high and the owner would still have lost money even if the building had been renovated at the public's expense. *Id.* at 247-48.

¹⁰¹ One of the strangest aspects of the Monument Protection Act, challenged in the decision of the German Constitutional Court, was that it specifically provided that the owner's interests do not matter and that only the public interest was to be taken into account. As the Constitutional Court recognized, such an approach to historic preservation simply cannot be reconciled with a constitutional property regime that purports to protect private property rights.

¹⁰² See SAX, *supra* note 5, at 52.

tions that extend beyond those of someone who owns one of the hundreds of nearly identical 7-Elevens that are spread across the nation.

Collectively, these obligations constitute what Chief Justice Rehnquist in his dissenting opinion in *Penn Central* called “an affirmative duty to preserve.”¹⁰³ Chief Justice Rehnquist regarded this duty as something that was new and unprecedented, but it was nothing of the kind. To be sure, affirmative obligations of ownership are not common, but they do exist. Tenants may owe affirmative duties to landlords to avoid waste. Cities require property owners to shovel sidewalks in front of their buildings and in some cases shovel abutting sidewalks as well.¹⁰⁴ From this perspective, the affirmative duty to preserve is not unprecedented.

The final point to be made here about historic preservation is that the abstract duty to preserve is one matter, but the application of that duty is something quite different. One suspects that much of the objection to historic preservation concerns the latter rather than the former. There may be too much of a good thing here. What is historic or architecturally significant are contentious questions about which reasonable differences can exist. Given that fact and given the fact that a decision to landmark a building may result in substantial costs for an owner, it is especially important that the process for making preservation decisions be highly democratic and that the decision-makers be judicious when deciding which structures to landmark. Not every old building is worth preserving simply by dint of its age. The operative term is “significant,” and the meaning of that term turns on the sorts of considerations that I explored previously, including the relationship between the structure and the community’s self-identity, its cultural life, and its political memory. What does the community’s future flourishing require? To what extent does the building in question contribute to the capabilities that are necessary for the community to flourish? Would a decision to preserve the building sacrifice any of the owner’s essential capabilities such that his own opportunity to lead an objectively well-lived life would be seriously jeopardized? These are the sorts of questions that a serious investigation into significance requires.

III. DESTRUCTION OF ART

Some of the most notorious controversies implicating the right to destroy have involved art. One example is the Rockefeller family decision to destroy a mural that Diego Rivera had painted for them after

¹⁰³ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 140–41, 146 (1978) (Rehnquist, C.J., dissenting).

¹⁰⁴ See Larissa Katz, *Governing Through Owners: How and Why Formal Private Property Rights Enhance State Power*, 160 U. PA. L. REV. 2029, 2031–32 (2012).

Rivera had refused to remove Lenin's image from the painting.¹⁰⁵ Another is the story of Lady Churchill's destruction of an unflattering portrait of her late husband, Sir Winston Churchill, which Parliament had commissioned and Britain's most distinguished portraitist, Graham Sutherland, had painted.¹⁰⁶ Art owners may wish to destroy their art for any number of reasons. The Rockefellers objected to the political message which they attached to the Rivera mural, while Lady Churchill simply thought the painting of Sir Winston downright ugly and unflattering. Are there good reasons to restrict the rights of owners such as these or others from destroying art which they own? What I wish to show here is how the human flourishing account may help elucidate the stakes involved in the decision whether to permit or restrict the art owner's right to destroy.

As cases like the Diego Rivera mural and the Churchill portrait illustrate, destruction of art in various contexts raise different considerations. Sax once observed that "the central history of art destruction is a history of iconoclasm."¹⁰⁷ Iconoclasm was involved in both the Diego Rivera and Churchill disputes, but with iconoclasts in different roles. In the Diego Rivera mural matter, the iconoclast was Nelson Rockefeller, the patron whose family commissioned the very work they wished to destroy. Their motive was not caprice or whimsy. This was a clear example of what Lior Strahilevitz calls expressive values¹⁰⁸ motivating destruction. The Rockefellers, lifelong Republicans, were concerned that they might be associated with the political message implicit in Diego Rivera's mural, complete with its nod to V.I. Lenin. By contrast, the iconoclast Lady Churchill had no such political motive. Her objection was purely personal and aesthetic. Here there was no risk of the patron being tainted by some odious political message of the artist. The objection was just that Lady Churchill wanted to eliminate all traces of her late husband's unflattering (in her view) portrait, rather like a person today does with an unflattering selfie on his or her cell phone.

The Rockefellers were accused of being "cultural vandals,"¹⁰⁹ but were they? Sax argued that they were only insofar as the community has concluded that its interest in preserving the work of a great artist is more important than its concern with promoting the patron's political agenda.¹¹⁰ Sax traced that conclusion back to the reaction against the excesses of the French Revolution, when iconoclasts proposed destroying, as unrevolutionary, all Latin inscriptions on public monuments.¹¹¹ In

¹⁰⁵ See SAX, *supra* note 5, at 13–16.

¹⁰⁶ See *id.* at 37–42.

¹⁰⁷ *Id.* at 16.

¹⁰⁸ See Strahilevitz, *supra* note 3, at 824–30.

¹⁰⁹ See SAX, *supra* note 5, at 17.

¹¹⁰ See *id.* at 17–18

¹¹¹ *Id.*

response, abbé Henri Grégoire premised his argument that the monuments of the ancient régime should not be destroyed on the ability to see art of the work of genius over time.¹¹² Sax points out that this was a thoroughly modern and secular idea, conceiving great works of art over time “as a fundamental element of the community’s human capital, and as part of its collective entitlement.”¹¹³ Sax summarized his thesis this way: “Art remains long after its (unwanted) message, or the owner’s political . . . sensibilities, have been relegated to history’s attic. That is the essence of the case against a patron’s claimed entitlement to destroy.”¹¹⁴

However compelling Sax’s thesis appears to be—and on its face, it does seem compelling—there is more to it than that. Let us return to the Churchill portrait. Is Sax’s argument so compelling in that case? Unless we are going to see political messages in every work of art, it is hard to see how Sax’s thesis has much relevance to Lady Churchill’s reasons for wishing to destroy her late husband’s portrait. The existence of a political or other message in which the public has a legitimate interest (aside from sheer gossip) is one factor that qualifies the force of Sax’s thesis. Another is time. Sax emphasized that the genius of the art may be revealed through history rather than immediately. True enough, but that creates a quandary. How are we to know which works by which artists will history reveal as the works of genius? As it happens, I am an amateur painter. Suppose I paint a darkly abstract painting that I name “Tweet of Trump.” I give this work to one of my colleagues as a birthday gift. My colleague, not recognizing the painting as the work of genius it is, wishes to just take it to the city garbage dump without my knowing. Should my colleague be free to do so, or should he be prohibited from destroying the painting because in the fullness of time the work may come to be seen as a masterpiece? If he is not free to destroy the work, then in effect no owner of any work of art is free to destroy it. Are there compelling reasons for adopting such an extreme position?

Viewing the matter through the lens of human flourishing considerations helps clarify what is at stake. Sax spoke of “the community’s human capital,” but we can translate that into human capability terms. Much of what was said earlier in connection with historic preservation applies to art. I said earlier that each of us owes an obligation to our communities to support the institutions, associations, and infrastructure that in turn support the special sort of culture in which we live, the type of culture within which each person is able to experience life-defining freedom and to create his or her own personal identity. I also said that the obligation to support this culture enables the development, both for

¹¹² *Id.* at 18.

¹¹³ *Id.*

¹¹⁴ *Id.* at 20.

members of our communities and for ourselves, of those human capabilities that make human flourishing possible. The obligation to preserve historically significant buildings was one instance of this broader obligation. The obligation not to destroy art is another. Great art contributes to a rich and robust liberal cultural life, the very kind of cultural life that is a necessary background condition for a well-lived life, one of self-definition and participation in a humane social environment.

But the obligation regarding art must be nuanced and carefully limited to circumstances where necessary capabilities are genuinely at stake. Decisions about what those circumstances are will, of course, be contestable and require identifying relevant differences to discern whose capabilities are at stake and to what extent. The Rockefeller/Rivera and Churchill cases, for example, are different in respects that bear upon the capabilities involved. The most apparent factual difference is the publicness of Diego Rivera's mural compared with a very private and personal portrait of Sir Winston. That difference bears directly upon the relative contributions of the two works to the cultural life of the two communities most intimately affected. Rivera's mural was to be publicly displayed in the RCA building, as it was then called, in Rockefeller Center in New York City. Public art has become an important source enrichment of the cultural fund of communities throughout the United States over the past few decades. Works ranging from the Chicago Picasso to wall art have added greatly to our public cultural endowment. Not only items of aesthetic appreciation, they are also icons of community self-identity and even location.

Public art has also become, not surprisingly, the locus of great contention. A situation that has become familiar in cities throughout the country is that a city or a firm commissions an artist to provide an artwork, commonly a sculpture, for a particular public space, but upon its unveiling, the public reaction is loud and negative. The public demands its removal.¹¹⁵ Here the tables are turned from the Rockefeller/Rivera controversy and from what they typically are when the right to destroy is asserted. The public, not the artist or the patron, is the party demanding destruction or removal (in the artist's view, relocation *is* destruction¹¹⁶). Should a work of art be foisted on an unwilling public? A plausible argument can be made for an affirmative answer. There have been cases in which the public's initial hostility has over time turned around and developed into acceptance and even affection for a work of public art. The

¹¹⁵ See generally ERIKA DOSS, *SPIRIT POLES AND FLYING PIGS: PUBLIC ART AND CULTURAL DEMOCRACY IN AMERICAN COMMUNITIES* (1995).

¹¹⁶ See SAX, *supra* note 5, at 27.

Chicago Picasso is only one example.¹¹⁷ The change in public perception can be understood in terms of Sax's point about the role of time in the eventual perception of pieces of art as the works of genius. But time does not always work this magic; sometimes the public continues to detest a work of public art no matter how much time has passed since its first appearance. Are there compelling capability-related reasons favoring the artist's or the patron's right to compel the piece's indefinite public display? Other than an abstract autonomy right, no capabilities, at least none that are essential to human flourishing, of the patron appear to be at stake here. The artist perhaps has greater flourishing-related concerns that are worthy of attention, notably her reputation. If the piece is removed in response to a strongly negative public reaction, the artist may worry that removal will seriously jeopardize her reputation as a successful artist both within the artistic community and the broader community. That seems to be a legitimate concern, but it misses the mark. Whether or not the piece is removed, the damage to reputation has already occurred, so that removal will have only marginal effect. The only possible response that the artist may make is that if the public reaction does change over time, à la the Chicago Picasso, the artist's reputation will be restored. So the calculus of capabilities is fraught with uncertainty as to both the artist and the public. Perhaps in the face of this uncertainty, which results from the effect of time, one prudent solution might be to leave the work in place for a set period of time at the end of which the relevant public body might hold a public hearing to decide whether or not the piece should remain or be removed. That would allow for a possible change of public perception without permanently foisting a work of public art on an unwilling public.¹¹⁸

What, then, about Lady Churchill's right to destroy the portrait of her late husband? Is there a significant public stake involved? Stated differently, does the community—here most immediately, the British public—have any essential capabilities at stake in the preservation or destruction of Sir Winston's portrait? Sax argued that the public had an important interest at stake.¹¹⁹ In his view, destruction diminishes the public record of an important historical figure: "Posterity is denied an

¹¹⁷ See *id.* at 31–32. I am a native Chicagoan, and I remember well the public response when the Picasso sculpture first appeared on the plaza in front of City Hall (now called Daley Plaza). The overwhelming reaction was negative and derisive and strongly so. Today, Chicagoans not only accept the piece but are proud of it. They consider it an important part of what constitutes their city's identity.

¹¹⁸ This, in fact, was the solution that the city of Carlsbad, California, used to resolve a controversy involving a large work of public art by New York artist Andrea Blum. See SAX, *supra* note 5, at 29–30. The city kept Blum's sculpture in place for a period of seventy-eight months at the end of which it held a public hearing. *Id.* Carlsbad voters voted overwhelmingly in favor of complete removal, and that is just what the city did. *Id.*

¹¹⁹ See *id.* at 36–42.

opportunity to see one version of a leading figure on the world stage as he really was, or at least as he was seen by a major portrait painter.”¹²⁰ He further analogized destruction of such a portrait to suppression of an unfavorable biography.¹²¹

Art, like writing, expresses ideas. The question is at what point have those ideas become available to relevant public communities such that the removal of those ideas or denial of their availability to the community weakens the community’s essential public culture. The legal definition of publication for copyright purposes is helpful here because it illuminates what it means to make the expression of ideas available to communities. In the context of copyright law, publication is defined as the distribution of copies of a work (or offering to do so) to the public by sale, lease, rental, or lending. Notably, a display of a work does not constitute publication. Suppose I write an unfavorable biography of Trump, offer it for publication to Farrar Strauss & Giroux, and they accept. However, before the book’s appearance on the market, Trump’s lawyers go to court, seeking to suppress publication, arguing that it contains “fake news.” If Trump succeeds, serious damage has been inflicted upon the national community’s public culture, and the vital capability of its citizens to decide for themselves whether what the book contains is credible or fake, a capability that is a political manifestation of the more basic capability of self-definition, has been seriously undermined. This is precisely why such efforts at suppression rarely, if ever, succeed.

Compare that with the case of the Churchill portrait. One can certainly imagine a situation involving a work of art that is comparable to my Trump biography, but the Churchill portrait is not that case. The portraitist, Graham Sutherland, did not publish or offer to publish the portrait. Parliament commissioned Sutherland to paint it as a gift to Churchill on his eightieth birthday.¹²² There was a presentation ceremony at Westminster Hall, but in copyright terms that was not a publication, i.e., it did not constitute making the portrait as an expression of ideas available to the public. An expression of ideas though it may have been, nevertheless, it was never intended to be made available to the public. True, it might have become available to the public years later when both Sir Winston and Lady Churchill had died and ownership of the portrait had passed to their successors. The Churchill heirs might have decided to donate it to the National Portrait Gallery in London. Perhaps not, though. They might have regarded it exactly as their ancestors had and wished to destroy it or at least to keep it hidden from the public. If any of the Churchills destroy the painting, in what sense is

¹²⁰ *Id.* at 35.

¹²¹ *Id.*

¹²² *Id.* at 37.

there injury to the community's public culture? What, if any, specific capability of members of his communities is undermined?

Sax argued that "much would be lost if we were deprived of such works."¹²³ The harm to the public that Sax sees is that it undermines the public's "strong interest in knowing as much as possible about one who played as large a role on the world stage as Churchill did."¹²⁴ The public has, to be sure, a capability interest in having full access to all relevant information about such persons as Churchill, but the operative word here is relevant. The public did not have access to President Reagan following his retirement when he was suffering from the ravages of Alzheimer's disease, and properly so. It simply wasn't relevant to us. It was a strictly private matter within the Reagan family; it wasn't any of our business. By the same token, it is difficult to see why it was relevant to the British public to see Sir Winston suffering from the ravages of age. That does not seem to be the sort of information that bears upon the very legitimate public interest in whatever aspects of his life remain connected with his role upon the world stage.

On the other side, if Churchill's right to destroy is denied, will any human capability essential to his living a full and well-lived life be undermined? The capability that seems most immediately implicated is self-definition, considered as a matter of personal autonomy. If the idea of self-definition is that it is a capacity that a person needs to develop into a fully free person, then presumably self-definition requires self-awareness and self-honesty. A person who has fundamentally deluded himself about the kind of person he is cannot be said to be free in any rich sense of the term. He is a prisoner of his own delusions. A truly free person is one who is aware of and acknowledges his weaknesses as well as strengths. He may not like them, but he does not hide from them. From this perspective, perhaps recognition of Churchill's right to destroy frustrates rather than nurtures this important capability in the sense that the portrait compels Sir Winston to face the reality of who and what he now is as an eighty-year old man who is no longer in the prime of his life. Faced with that reality, he may come to accept it and become more truly free.

There is something to be said for that perspective. Still, it seems at best paternalistic, at worst cruel. Why not let Sir Winston choose to think of himself as he wishes? What great harm is done if he wishes to think of himself, at an advanced age, as he once was? It is telling that he would have preferred to have been painted in his robes as a Knight of the Garter, but the Parliamentary committee wanted a portrait of him as a mem-

¹²³ *Id.* at 41.

¹²⁴ *Id.*

ber of the House of Commons as it had known him.¹²⁵ The art critic for the *New York Times* wrote that the portraitist, Graham Sutherland, “is a man who sets down exactly what he sees, and what he saw in this instance was an indisputably great human being, the savior of his nation, who had been struck down by illness and would never be the same again.”¹²⁶ Even the portraitist himself was sympathetic to Churchill’s reaction, stating that “only those totally without physical vanity, educated in painting, or with exceptionally good manners, can disguise their shock or even revulsion when confronted for the first time with a reasonable truthful painted image of themselves; there is a quilted atmosphere of silence; as when it snows.”¹²⁷

Recognition of the right to destroy a work of art in the Churchill case would not necessary commit us to conceding that all other owners of art must be granted the same right. The Churchill case is reasonably distinguishable from other situations in which we might wish to conclude that art owners have an obligation to preserve the art they own because of human flourishing-related reasons. As I have already indicated, it is distinguishable from cases like the Rockefeller/Rivera dispute where what is involved is public art. The very publicness of the art means that there are important capability-related concerns of members of the community that would be deprived of the benefits of the art were it destroyed. It is also broadly distinguishable from the vast majority of cases in which the owner of the work is not also its subject. Lest we worry that recognizing Lady Churchill’s right to burn her late husband’s painting will set a precedent for any eccentric owner of a Picasso, a Chagall, or a Rubens is free to chop his painting into pieces, the Churchill case is a highly unusual one in which the subject of the painting is the owner himself and the painting was intended as a private gift to that subject.

In the more typical situation in which the right to destroy artwork is at issue—where the owner has no relationship to the work other than being the current owner—the default rule should be that *jus abutendi* is not recognized. The community’s capabilities at stake, notably the very existence of the cultural life upon which it depends and in turn individual members of the community depend for their own development as genuinely free and self-defining moral agents, fit with the owner’s own capabilities in a way that the lives of community members and the owners go maximally well if the art is not destroyed, whatever the owner’s expressed preference may be. Recall from the discussion in Chapter 1 that human flourishing, unlike welfare, is an objective concept that does not

¹²⁵ See *id.* at 40.

¹²⁶ John Russell, *Critic’s Notebook: The Art of Finding a Met President*, N.Y. TIMES, Jan. 16, 1978, at C25.

¹²⁷ THE TIMES, Jan. 15, 1978, at 4.

depend strictly on subjective preferences. Even taking into account Lior Strahilevitz's idea that where the owner of some work of art wishes to destroy it there are expressive values at stake, there are other considerations that we need to take seriously if we wish the owner to flourish in any sense beyond his immediately expressed desire. People sometimes act rashly and later regret their actions. People sometimes change their preferences. Circumstances sometimes change in such a way that what had seemed to be a rational action at one time no longer appears that way. All of these and more are well-known pathologies in human rationality. The human flourishing explanation of why the owner's well-being is, objectively, maximized goes beyond the now-familiar critiques of the rational actor, however. It rests on the observation that the owner, as a member of the same community whose well-being requires preservation of, say, a controversial photograph of a crucifix dipped in urine,¹²⁸ requires development of the same essential capabilities as all other members of his community. Those capabilities can only develop within the kind of society in which there is such a thing as cultural, including artistic, experimentation and controversy. This is precisely the reason behind the First Amendment's protection of artistic expression from state suppression. No individual, any more than the state, should have the power to suppress the cultural innovation that is required for the kind of free and liberal society that is an indispensable foundation for the development of such essential human capabilities as self-definition and practical reasoning. The individual owner of Serrano's photograph¹²⁹ who is deeply offended for religious reasons is free to sell it, lease it, gift it, or otherwise dispose of it short of destruction. He is also free to hide it from the public, should he think that no one should view the photograph. The right that he lacks is to destroy it, denying it from the community for all time.

Of course, as a practical matter, regardless of the legal rule, private owners may still destroy a work secretly. There is no feasible way to prevent a determined owner from doing so. But what if an owner bequeaths a work of art to a family member with instructions to destroy it. Must or even may the family member, who is now the owner, comply

¹²⁸ The reference is, of course, to the highly controversial 1989 photograph known as "Piss Christ" by Andres Serrano. See Amanda Holpuch, *Andres Serrano's controversial Piss Christ goes on view in New York*, THE GUARDIAN (Sept. 28, 2012), <https://www.theguardian.com/artanddesign/2012/sep/28/andres-serrano-piss-christ-new-york>. Imagine that a devout Catholic owned the photograph and wished to destroy it, which he viewed as deeply offensive to his Christian values. In such a case the owner's desire certainly is not irrational, and it is unlikely that his preference would change over time. Expressive values do loom large here. This is precisely the sort of case in which it is especially important to see the owner as a member of the same broader community whose well-being depends upon preservation of important art.

¹²⁹ See SAX, *supra* note 5, at 40.

with those instructions? Or what if he does not bequeath it to anyone but simply orders its destruction upon his death. Should his testamentary instructions be followed? This is an important question because most of the litigated right to destroy cases occur in just this context.¹³⁰ As Lior Strahilevitz correctly points out, “As a general matter, the law recoils at the idea of allowing the dead hand to destroy property.”¹³¹ Here is how two co-authors articulated the common justification for the law’s restriction on testamentary destruction: “[D]uring life a person personally suffers the economic consequences, which is a deterrent to foolish decisions ordering property destroyed. . . . Ordering property destroyed after death imposes no economic consequences upon the testator, who is dead”¹³² This argument is open to the response that it fails to taken into account the testator’s opportunity cost in ordering the destruction of his property after death, i.e., the foregone opportunity to sell the right to the asset upon his death, the value of which grows as he ages.¹³³ Whatever we think about these two positions, there still remains the question of the community’s capability needs. Everything that I said previously regarding the way in which art contributes to the kind of culture that is necessary for humans to flourish applies here. Of course, at this point the owner is no longer with us and no longer a member of his former communities, so it is not his opportunity to flourish with which we are concerned. But he was a member of communities, and his obligation to them continues to the extent that he owned at death an asset that contributed significantly to that cultural life. Think of the obligation as something like a debt that is accrued but unpaid at death. If I owed the state accrued but unpaid taxes at my death, my death does not expunge the obligation; my estate must pay the taxes after I die. By the same token, the owner’s obligation to his communities is one that persists beyond his death insofar as he is not free to destroy the asset that is the subject of the obligation. He cannot simply cut off his communities from the basis of their ability to flourish after he dies any more than he could while he was alive.

There is a final scenario to consider—an artist who wishes to destroy a work he considers unworthy of preservation. Sax gives the example of Georges Rouault who, in the presence of a photographer, threw over 300 of his own paintings into a furnace.¹³⁴ They were all unfinished and unsigned, and he destroyed them in the fear that he would not have the time required to finish them. Or to illustrate another possible reason

¹³⁰ See Strahilevitz, *supra* note 3, at 838.

¹³¹ *Id.*

¹³² JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 22–23 (3d ed. 1984).

¹³³ See Strahilevitz, *supra* note 3, at 840–41.

¹³⁴ SAX, *supra* note 5, at 43.

for artistic destruction, suppose Picasso intended to destroy some twenty paintings he had done earlier in his career because he thought they were no good and might harm his reputation if they were publicly viewed. If one of Picasso's children sought to enjoin him from destroying the paintings, who should prevail? Should artists be given the power to determine who gets to see their work? Sax argued yes on the ground that an "artist should be entitled to decide how the world will remember him or her."¹³⁵ Strahilevitz agrees with Sax, although for other reasons. He argues, first, that the artist is in the best position to know which of his works is of inferior quality and so should not form part of his legacy. He also argues that if the artist is denied the right to destroy his works, we are compelling him to speak when he would have preferred to remain silent. This, Strahilevitz suggests, is particularly problematic in cases of works such as "Piss Christ," which are likely to be highly controversial.¹³⁶

Strahilevitz's reasons seem quite compelling, but I want to augment them with capability-related reasons why an artist should have the right to destroy his own works. In the earlier discussion of the Churchill portrait, I suggested that in that case the capability most immediately implicated was self-definition, considered as a matter of personal autonomy. For similar reasons self-definition is also involved where an artist wishes to control which of his works constitute his life's *oeuvre*. Our work and its products do not define who we are as persons, but they form a major part of the tableau of memory that we leave behind. Especially for artists, our surviving works constitute expressions of ourselves, often very deeply so, into indefinitely multiple futures. It is hardly uncommon for people to take secrets to the grave with them. The desire to maintain such postmortem secrets is not solely a matter of personal privacy, although it is partly that. Motivated by reasons of vanity, a need to avoid hurting others, or a consideration that something they did in the distant past no longer conforms with the kind of person they later became, people have many understandable reasons for not exposing every self-perceived wart or blemish to future generations. Such blemishes may include some of their unpublished or unfinished works. An artist may say to himself, with complete honesty, "This [painting/sculpture/other work] is not me." Control over which of his works survive him is quite literally a matter of self-definition, a capability that includes but is much more complex than privacy alone.

Closely related to self-definition, another capability involved in the artist's wish to control which of his works survive him is self-expression. Art is quite literally an artist's expression with the outside world, his means of speaking to others. Painters not uncommonly reuse canvasses,

¹³⁵ *Id.* at 200.

¹³⁶ See Strahilevitz, *supra* note 3, at 833–34.

painting over old works as if saying “I don’t mean to say that.” The canvas wasn’t released, the word wasn’t published. An artist may wish to have one or more of his works destroyed for the same self-expressive reasons: the work constitutes a statement that he ultimately wishes not to express, for reasons of regret, changes in his personality, concern for the feelings of others, and other reasons. Autonomy, if it is to have any robust meaning, must mean that a person can control what she expresses and, equally important, what she does not express. Members of a person’s communities cannot compel a person to speak an unwanted (to that person) statement and still claim to support her self-development as an autonomous agent. That holds true after a person’s death as well as during her life. If she is to experience freedom during her life in a deeply meaningful sense, she must feel secure that her control over her expressions will survive her death.

IV. KNOCKING GENERAL LEE OFF HIS HIGH HORSE: REMOVAL OF PUBLIC STATUES

It is not a great leap from disputes over destruction of public art such as the Diego Rivera mural to the recent controversy concerning removal of public statues commemorating personages from the Confederacy such as Robert E. Lee and Nathan Bedford Forrest.¹³⁷ The issues in the two situations are different, of course, but there is a thread that connects them. The substance of that thread is the right to destroy, or at least to remove from public display. The human flourishing theory may shed some light on that debate as well as the debate over destruction of art.

Consider the case of the statue of General Robert E. Lee in Charlottesville, Virginia. The statue dates from 1917, when Paul Goodloe McIntire commissioned it from artist Henry Shrady. McIntire wanted a public setting for the statue, so he bought a city block of land, demolished existing structures on it, and created a formal landscaped square that he named Lee Park. When Shrady died before completing work on the statue, McIntire hired another artist to finish the job. McIntire donated the statue and the park to the city of Charlottesville.¹³⁸

Calls for removal of the Lee statue date at least to 2016, perhaps even earlier. In that year, Charlottesville’s vice-mayor publicly called on the Charlottesville City Council to remove the statue and to rename the park.¹³⁹ Following much discussion and debate, in February 2017, Char-

¹³⁷ See *Confederate Monuments Are Coming Down Across the United States: Here’s a List*, N.Y. TIMES (Aug. 28, 2017), <https://www.nytimes.com/interactive/2017/08/16/us/confederate-monuments-removed.html>.

¹³⁸ See *Robert Edward Lee (sculpture)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Robert_Edward_Lee_\(sculpture\)](https://en.wikipedia.org/wiki/Robert_Edward_Lee_(sculpture)) (last visited Dec. 31, 2017).

¹³⁹ *Id.*

lottesville's five-member City Council voted three votes to two to remove the Lee statue and, unanimously, to rename Lee Park to Emancipation Park. A number of plaintiffs, including the original donor's descendants, filed suit to block removal of the Lee statue, and on May 2, 2017, a lower court issued a temporary injunction barring removal for six months pending the court's decision on the merits.¹⁴⁰ On May 13, 2017, white supremacist Richard B. Spencer led a torch-lit rally in Emancipation Park in protest of the Charlottesville town council's decision to remove and sell the statue. On July 8, 2017, the Ku Klux Klan held a rally in Charlottesville protesting the city's plan to remove the statue. The Klansmen were met by counter-protesters, and police used tear gas to disperse the crowd. Finally, on August 12, 2017, during the Unite the Right rally, clashes broke out between supporters of the statue, who marched under neo-Nazi flags and shouted slogans including "Jews will not replace us," and counter protesters. During the rally, one counter-protester was killed and several others injured in a car-ramming attack.¹⁴¹

Although the events surrounding the Lee statue in Charlottesville have been the most violent to date, protests have erupted in other Southern cities that have announced plans to remove public statues of Confederate Army figures, including Nathan Bedford Forrest, Confederate general and leader of the Ku Klux Klan.¹⁴² These disputes are not entirely unlike the dispute between Diego Rivera and the Rockefeller family over removal of Rivera's mural. There are differences, of course, violence being one of them, but there are important structural similarities that make them worth comparing.

Aside from violence, one key difference in the two situations is that unlike the Rivera mural, the statues are publicly owned. Typically, as in the case of the Lee statue in Charlottesville, they were privately donated to a city for public display in a park. The difference is important because it means that no private interests are involved, unless we take into account the interests of heirs or successors of the original donor. From a legal perspective, whether their interests count depends upon the terms of the original gift. If the donor imposed conditions or other restrictions, the breach might terminate the gift and cause the statue to revert to the donor's successors. Under those circumstances the successors arguably have a legal interest worthy of recognition. Perhaps they have a moral interest as well, but as I shall argue, that interest is slight when compared

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² See Liliana Segura, *Forrest the Butcher: Memphis Wants to Remove a Statue Honoring First Grand Wizard of the KKK*, THE INTERCEPT (Sept. 2, 2017), <https://theintercept.com/2017/09/02/memphis-wants-to-remove-statue-honoring-kkk-grand-wizard-nathan-bedford-forrest>.

with other interests at stake. At any rate, it is the moral question in which I am interested, not the legal issue.

What capabilities are at stake in these statue disputes? The party whose interests and capabilities are most obviously at stake is the community of Charlottesville. Actually, it is unhelpful to speak of “the party” or “the community,” especially in this context, for both terms are ambiguous and hide the real divisions of opinions that exist among residents of the city of Charlottesville and, wider still, the surrounding county of Albemarle. In discussing interests and capabilities at stake, one needs to be sensitive to these differences. At the same time, however, it must be said that among the legitimate interests and capabilities that are *not* at stake are those of outside groups and individuals who came to Charlottesville precisely for the purpose of expressing, many through violence, messages of racial and religious hate, racial superiority and domination, and separation. They were messages that were entirely anathema to the animating principles of the United States and its fundamental legal documents. To be sure, a small minority of those who protested removal of the Lee statue were there to express a different message, one less malignant if still misinformed and misdirected.

Before examining the interests of these two sides of the protesters, consider first what is at stake for the other residents of Charlottesville and its environs, those who supported the decision to remove the statue. As in the Rivera case, the publicness of the statue means that this community has capabilities very much at stake in the decision, specifically maintaining and nurturing the existence of a certain cultural life upon which the community depends. Such a culture is necessary for the individual members of the community to develop as free and self-defining moral agents. In the Lee statue case, those capabilities interests support removal. This is not a case of historic preservation. The statue itself is not especially old, nor is it architecturally significant. It is easily duplicated without any sense of loss of authenticity. The real question is whether its message is one that is worthy of sustained public dissemination. One message that it conveys is honoring the memory of Robert E. Lee, General of the Army of Northern Virginia during the Civil War. What shall we say about that memory as a *public* political memory? The facts, not opinions, are these: Robert E. Lee was a slave owner.¹⁴³ Is that fact sufficient reason to disqualify publicly honoring his memory? Supporters of the statue point out, correctly, that if it is, then there is much other public memorabilia that needs to be removed. Statues and portraits of George Washington, Thomas Jefferson, James Madison, and other wealthy Southern Founding Fathers all would have to be removed from

¹⁴³ See Jacey Fortin, *What Robert E. Lee Wrote to The Times About Slavery in 1858*, N.Y. TIMES (Aug. 18, 2017), <https://www.nytimes.com/2017/08/18/us/robert-e-lee-slaves.html>.

public display. Perhaps bridges, schools, colleges, and other institutions and items of infrastructure will have to be renamed. Would removal of General Lee's statue mandate all this change? The answer, I think, is pretty clearly no. Although Washington, Jefferson, and others were slaver owners, the important and distinguishing fact is that they fought to create rather than to destroy the Republic. Stated bluntly, they were patriots; Lee and others were traitors. No one would think it appropriate to erect for public display a statue of Benedict Arnold. Why are Lee and other Confederate generals any different?

More fundamentally, from a moral perspective, there is the fact that Lee fought to defend a system of human enslavement. During the Charlottesville debates, some apologists for Lee defended him as "an honorable man."¹⁴⁴ Whatever Lee's personal views on slavery may have been,¹⁴⁵ the hard fact is that he fought—and fought fiercely—to preserve that system. He owned slaves himself and never spoke publicly against slavery.

I said earlier that members of the Charlottesville community require a certain kind of cultural life for their well-being. That cultural life has a broadly social and public aspect. Indeed, culture itself is inherently social. The very existence of Charlottesville as a thriving community, and with community, the well-being of the individual residents, depends upon a rich public expression of values that unite both them with each other and with the broader political community of which they are a part. The Lee statue is anathema to those values. There is simply no getting around the fact that the Lee statue signifies events in our history that legally, constitutionally, and morally do and should reject. Those events begin with rupture of the Republic, but they extend to other events, including the cruel facts of slavery, which the federal Republic repudiated in 1863.¹⁴⁶

That said, there is a Southern culture, and there is a Southern historical memory. Part of Charlottesville's community desires to keep the Lee statue in place is to maintain and honor that culture and that memory. Keeping a culture and the historical memory that is part of that culture

¹⁴⁴ See, e.g., Editorial, *About John Kelly's Racist History Lesson*, N.Y. TIMES, Nov. 2, 2017, at A26.

¹⁴⁵ In a long letter expressing his views on slavery, Lee did describe slavery as a "moral evil." In the same letter, however, Lee defended the system as necessary, even beneficial to slaves. "The blacks are immeasurably better off here than in Africa, morally, socially, and physically," Lee wrote. "The painful discipline they are undergoing is necessary for their instruction as a race, and, I hope, will prepare and lead them to better things." J.W. JONES, *THE LIFE AND LETTERS OF ROBERT E. LEE* 83 (1906). Further, he wrote, "I think it, however, a greater evil to the white than to the colored race. And while my feelings are strongly interested in behalf of the latter, my sympathies are stronger for the former." *Id.*

¹⁴⁶ *Slavery abolished in America*, HISTORY, <http://www.history.com/this-day-in-history/slavery-abolished-in-america> (last visited Dec. 31, 2017).

alive and vibrant are important aspects of the capability-development process, and that is just as true in the South as elsewhere. But there are different ways of keeping a culture and its history alive, and not all of them may be morally acceptable. Doubtless there are some Southerners who would like to keep alive the memory of the Old South and the Confederacy by donning white robes and hoods and parading with torches. Some of these might even wish to go farther in reenacting to unspeakable acts in which their progenitors engaged a century ago. Such acts would keep a historical memory of a culture alive, but obviously we cannot permit just any acts to keep a historical memory alive. Some acts are simply intolerable, even if not intended to harm anyone. In the case of the Lee statue, what may have been an innocently intended attempt to honor the South and preserve its memory was misguided and misinformed. Again, Lee was a traitor to the Republic and a defender of a social and political system based on the enslavement of African captives and their descendants. Public honor of his name or his memory is no more morally acceptable than a public statue of Heinrich Himmler in Berlin would be. Nowhere in Germany are there any traces of public honor of the leaders of the Third Reich, and neither should there be of any of the leaders of the Confederacy. The history of the Confederacy must be preserved, of course, but that is an entirely different matter from public honor of its leaders. There are appropriate places to preserve and display the physical reminders of that history, such as museums, but public parks, streets, and similar public spaces are not among them. The distinction is between memory of a history and public honor.

V. DISPOSITION OF HUMAN REPRODUCTION MATERIAL

Perhaps the greatest controversy involving the right to destroy in recent years has involved disposition of human procreative material—frozen sperm, eggs, embryos, and preembryos. On the question whether an individual has the right to destroy this material, the courts have been strongly in agreement in affirming the right.

One context in which the question has appeared is divorce. A well-known case involved a married couple who, following unsuccessful attempts to conceive a child naturally, tried in vitro fertilization. Some of the ova removed from the wife and fertilized by the husband's sperm were implanted in the wife's uterus. The remaining fertilized embryos were frozen cryogenically for possible subsequent implantation. These efforts at conception failed, and the couple divorced.¹⁴⁷

The couple, the Davises, disagreed about the disposition of the remaining frozen embryos. Mary Sue wanted to donate them to a childless

¹⁴⁷ Davis v. Davis, 842 S.W.2d 588, 591–92 (Tenn. 1992).

couple, but Junior wanted them destroyed.¹⁴⁸ The trial court awarded the embryos to Mary Sue. Viewing the embryos as human beings, the court concluded that the decision must be based on the best interests of the children, which in this case meant attempting to bring them to term.¹⁴⁹ The court of appeal reversed, concluding that Junior had a constitutional right not to become a parent against his will.¹⁵⁰ The Tennessee Supreme Court, in *Davis v. Davis*, unanimously ruled in favor of Junior.¹⁵¹ His interest prevailed, the court reasoned, because “[o]rdinarily the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by [other] means.”¹⁵² This result and its reasoning are consistent with the decisional law in other jurisdictions.¹⁵³

The question regarding whether there is a right to destroy human reproduction material also occurs in the postmortem context. For example, in one controversial case, *Hecht v. Superior Court*,¹⁵⁴ a decedent, William Kane, had deposited fifteen vials of his frozen sperm in a cryobank with instructions that upon his death the cryobank should either continue to store the sperm or release it to Kane’s executor upon the executor’s direction. At the same time, Kane executed a will bequeathing “all right, title, and interest that he may have in any specimens of his sperm stored with any sperm bank or similar facility for storage to [Kane’s girlfriend] Deborah Ellen Hecht.”¹⁵⁵ Shortly thereafter, Kane committed suicide, and Hecht claimed the frozen sperm.¹⁵⁶ His surviving children from a prior marriage, both adults, argued that the probate court should order the sperm destroyed, contending that the court should prevent the birth of a child who would never know its father and prevent further emotional stress on Kane’s family members.¹⁵⁷ Their real concern, perhaps, was the possibility of an additional heir who could claim a portion of Kane’s \$1 million estate. The trial court ordered the frozen sperm destroyed, but the California Court of Appeal vacated the order.¹⁵⁸ It held, first, that Kane had an interest in the sperm that was “in the nature of ownership.”¹⁵⁹ It further held that the trial court could not prop-

¹⁴⁸ *Id.* at 590.

¹⁴⁹ *Id.* at 589.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 604.

¹⁵² *Id.*

¹⁵³ *See, e.g., J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001); *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000).

¹⁵⁴ 20 Cal. Rptr. 2d 275, 276 (Cal. Ct. App. 1993).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 277.

¹⁵⁷ *Id.* at 279.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 281.

erly order that the frozen sperm be destroyed at the behest of Kane's adult children.¹⁶⁰ Quoting from the *Davis* opinion, the court stated, "[N]o . . . person or entity has an interest sufficient to permit interference with the gamete-providers' decision . . . because no else bears the consequences of these decisions in the way that the gamete-providers do."¹⁶¹

In a variation on *Hecht*, a California appellate court has more recently ruled that where a husband's sperm were held by a fertility medical center under a contract, to which the wife expressed assent, expressly giving the husband sole decision-making authority over the sperm and further directing the medical center to destroy the sperm samples in the event of his death, the terms of the contract controlled. In *Estate of Kievernagel*,¹⁶² the contract with the fertility center provided that the sperm sample was Joseph's sole and separate property and that he retained all authority to control its disposition. Following his accidental death, his widow, Iris, sought to compel the fertility clinic to release the sperm, and Joseph's surviving parents sought to block release.¹⁶³ The probate court found that the question turned on the decedent's intent regarding use of his sperm, concluding that the contract evidenced the intent of both Iris and Joseph that the sperm be discarded upon his death.¹⁶⁴

On appeal, Iris argued that the court should not follow the decision in *Hecht* because that decision ignored the fundamental right of a donee spouse to procreate. Instead, Iris suggested, the court should apply the approach of the Tennessee court in *Davis*, balancing the interest of the deceased donor against that of the surviving spouse.¹⁶⁵ The California court of appeal affirmed the lower court's decision. It first agreed with the *Hecht* court that gametic material is a unique type of property and not governed by the general laws governing transfer of personal property upon death.¹⁶⁶ The court also followed *Hecht*'s lead in stating that the person who provided the gametic material had at his death an interest "in the nature of ownership" sufficient to give him decision-making authority as to the use of the gametic material for reproduction.¹⁶⁷ Hence, it concluded, "the disposition of the frozen sperm is governed by the intent of the deceased donor."¹⁶⁸ *Davis*'s balancing approach did not apply here because, unlike in *Davis* where the material in question was a preembryo

¹⁶⁰ *Id.* at 291.

¹⁶¹ *Id.* at 289 (quoting *Davis v. Davis*, 842 S.W.2d 588, 602 (Tenn. 1992)).

¹⁶² *In re Estate of Kievernagel*, 83 Cal. Rptr. 3d 311, 312 (Cal. Ct. App. 2008).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 313.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 316.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 313.

rather than sperm, here there was only one gamete-provider—Joseph.¹⁶⁹ Hence, only he had decisional authority, and only his intent controlled.¹⁷⁰

Cases like *Hecht* and *Kievernagel*, in which frozen sperm alone rather than pre-embryos are involved, seem relatively easier to resolve. In such cases there is only one gamete-provider, and that person has essential human capabilities at stake. The court in *Kievernagel* touched upon these capabilities in saying:

In this case, there is only one gamete-provider. The material at issue is Joseph's sperm, not a preembryo. Only Joseph had "an interest, in the nature of ownership, to the extent that he had decisionmaking authority as to the use of his sperm for reproduction." (*Hecht*, . . . 20 Cal.Rptr.2d 275.). The disposition of Joseph's frozen sperm does not implicate Iris's right to procreative autonomy.¹⁷¹

Procreative autonomy is among the most intimate aspects of personal autonomy. The decision whether or not to have a child and the related decisions when to have a child, whether or not to parent the child, and how to parent a child, are among the deeply personal decisions that an individual makes over the entire course of a lifetime. They profoundly affect how one's life goes and affect one's well-being in the most intimate sort of way. Personal autonomy requires that an individual is capable of exercising self-direction through practical reasoning. This means that he must be in a position that enables him to imagine future possible life plans and to choose which among those possibilities will enable his life to go maximally well, defined not solely in terms of subjective preference-satisfaction, but through realization of objective values including love, friendship, personal dignity, and self-worth. Control over one's procreative capacity is directly connected to the fulfillment of all of these and other values that collectively constitute what it means objectively to live a well-lived life.

To be sure, Joseph, as the sole gamete-provider, did not live in a vacuum. Other people were affected by his decision regarding the disposition of his frozen sperm. The court in *Kievernagel* seemed wrong in suggesting otherwise as it did in stating, "The disposition of Joseph's frozen sperm does not implicate Iris's right to procreative autonomy."¹⁷² The court took that view because there was no indication that Iris could not have gotten pregnant with another man's sperm.¹⁷³ Still, it is not as

¹⁶⁹ *Id.* at 317.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 318.

¹⁷² *Id.*

¹⁷³ *Id.*

though Iris was a completely disinterested party in the disposition of his sperm. Joseph was Iris's husband, and it would be entirely plausible that she wanted to have *his* child using *his* sperm. The disposition of Joseph's sperm did affect her life, and we have to take that fact into account. What needs to be said is not that Iris, having provided no gamete, has no interest in the matter or relevant capabilities at stake, but instead that procreative autonomy and, more fundamentally, personal autonomy, play out differently for Joseph and Iris. Autonomy and self-definition are at stake for both Joseph and Iris, but they do not mean the same thing for the two parties. For Joseph, this was a zero-sum situation: he either did or did not control his future as a parent. If his expressed wishes were respected, he would not be a parent, period. If those wishes were not respected, quite possibly, even likely, he would have become a parent under circumstances where he would have been completely unable to enjoy any of the benefits of parenthood. Such was not Iris's situation. Here the court was right in observing that the destruction of Joseph's sperm did not necessarily deprive her of the opportunity to experience parenthood, only parenthood with Joseph's child. Seeing how personal autonomy and self-direction have qualitatively different meanings for the two individuals in this sense, it becomes clearer that the well-being of a person who is the sole gamete-provider is so deeply and profoundly affected by the disposition of his sperm (or ova, as the case may be) that it would be an acute mistake to deny him control over such disposition.

One might wish to challenge what I have just said on the basis of the facts of *Kievernagel*. Pointing out that the contract that Joseph and Iris signed that gave Joseph the authority to dispose of his sperm unilaterally only upon his death, one might insist that Joseph's well-being during his life is not really affected by the disposition of his sperm after his death. Contrary to what the court in *Kievernagel* said, Iris, not Joseph, is the one whose autonomy is implicated by the decision how to dispose of the sperm. There are several responses to this challenge. One is the obvious point that the facts might be otherwise in a different case. The agreement with the cryobank might give the gamete-provider unilateral authority over the disposition of the reproductive material during life as well as after death, and for various reasons the gamete-provider might change his mind and wish to withdraw and destroy the material during his life. Second, and more directly, even taking the circumstances of *Kievernagel* itself, Joseph's well-being is still deeply at stake in the question whether to recognize his right to destroy the sperm after his death. There is a matter of security here, not in a physical but a psychological sense. Consequences would result from a decision not to destroy Joseph's cryo-preserved sperm after his death but rather to permit his late wife to use it to enable her own pregnancy. One concern that Joseph

might have is that if Iris had a child using his sperm, a portion of his estate would have to be set aside for that child, reducing the shares of his living adult children. The law in this area is woefully unclear. In many (most?) states, statutes do not address the question of the inheritance rights of children conceived through assisted reproduction. The best law in this general area is the Uniform Probate Code, enacted in less than half the states. Section 2-120 creates, for inheritance purposes, a parent-child relationship between the husband of the child's birth mother "if the husband provided the sperm that the birth mother used *during his lifetime* for assisted reproduction."¹⁷⁴ Subsection k goes on to provide that if an individual is a parent of a child of assisted reproduction who is conceived after that person's death, the child is treated as in gestation at the person's death, and therefore entitled to inherit from his estate as a legal heir, only under two circumstances: (1) if the child was "in utero not later than 36 months after the individual's death", or (2) if the child was "born not later than 45 months after the individual's death."¹⁷⁵ The basic point of these provisions is to place a time limit on how long the sperm donor/husband's estate is kept open to the possibility that additional biological children may be added to his estate following his death.

Someone in Joseph's financial position, who had enough wealth to pay for cryo-preservation, would likely have left a will. Such a will might well have made a disposition to a class such as "my children" or "my descendant," and the question would arise whether the after-born child, conceived using Joseph's sperm, would be included in such a class of beneficiaries. Once again, the law is unclear in most states. The Uniform Probate Code adopts the same approach as it does in cases of intestate estates, i.e., a fixed period for closing the class. It provides that if a child of assisted reproduction is conceived posthumously and the distribution date is the deceased parent's death, the child "is treated as living on the distribution date if the child lives 120 hours after birth and was in utero not later than 36 months after the deceased parent's death or born not later than 45 months after the deceased parent's death."¹⁷⁶ So, if Joseph had a will bequeathing a sum of money outside to his "children," the distribution date would be his death, and a child later conceived with his sperm would receive a portion of that sum only if that child survived by five days and met either of the stated fixed time limits. If not, the child would be excluded from the class gift. Of course, Joseph could relieve his concern over this issue entirely by simply defining the class to exclude any and all posthumously conceived children.

¹⁷⁴ UNIF. PROBATE CODE § 2-120(d) (amended 2010) (emphasis added).

¹⁷⁵ *Id.* at § 2-120(k).

¹⁷⁶ *Id.* § 2-705(g)(2).

Aside from these estate planning concerns, Joseph may have deeper anxieties. If Iris uses his sperm successfully to give birth to a child, Joseph will become the biological father of a child whom he will never know. The knowledge of that possibility might cause him considerable anxiety, even emotional pain, over the potential loss of knowing, bonding with, and raising his own child. Not everyone feels this way, of course; some are very happy at the thought of leaving behind their biological children even though they may never know the child. But others find such a thought quite painful and would prefer to be relieved of any such possibility.¹⁷⁷ That may have been part or even all of the motivation behind the term that Joseph chose in his contract in *Kievernagel* providing that upon his death the sperm was to be discarded rather than donated to his wife.¹⁷⁸ The assumption that his expressly stated contractual term would be honored and enforced may have been the requisite source of emotional security and support that he needed to commit himself to preserve his sperm in the first place. Given all of these possible consequences, it seems quite clear that Joseph's well-being was not only very much at stake in the question whether to recognize his right to destroy the sperm after his death, but primarily so.

The harder case is *Davis v. Davis*, where both partners rather than just one were the gamete-providers. Recall that in that case, the two parties were now divorced and disagreed about the proper disposition of preserved pre-embryos that had been created with Junior's sperm and Mary Sue's ova. He wanted them discarded, but she wanted to donate them to a childless couple. Unlike the couple in *Kievernagel*, the parties did not sign an agreement at the time of in vitro fertilization.

Both parties have real and substantial interests that involve their essential capabilities. Everything that I said earlier regarding the capabilities at stake for Joseph in *Kievernagel* applies equally as to Junior. Privacy, personal security in multiple senses, and self-definition of himself as a person and as a parent are all very much involved in his ability to control the disposition of his own sperm. His situation did differ from Joseph's to the extent that his ex-wife, Mary Sue, did not plan to use his sperm to become pregnant herself. But there still remained the open question whether he was to father a child whom he might never know. There are good reasons why the law recognizes a privacy right to avoid procreating. Mary Sue, as the other gamete-donor, also had a personal interest, although perhaps not as strong as if her plan had been to use her

¹⁷⁷ The court in *Davis* discussed this problem in some detail. See *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992). The sperm donor in that case had experienced substantial emotional pain earlier in his life as a result of separation from his birth mother at an early age and for that reason he adamantly opposed permitting his sperm to be used to conceive a child with whom he would have no contact. *Id.*

¹⁷⁸ *In re Estate of Kievernagel*, 83 Cal. Rptr. 3d 311, 312 (Cal. Ct. App. 2008).

ex-husband's sperm to become pregnant herself. The court in *Davis* suggested that the case would have been closer "if Mary Sue Davis were seeking to use the preembryos herself, but only if she could not achieve parenthood by any other reasonable means."¹⁷⁹

Lior Strahilevitz properly points to what he calls "the libertarian tone" of these opinions.¹⁸⁰ Nowhere do the courts discuss any concerns other than those of the immediate parties—the gamete-donors and their spouses. Strahilevitz suggests that in a case like *Davis*, "society had a powerful interest in permitting the embryos' transfer to a couple that was otherwise unable to conceive."¹⁸¹ Nevertheless, in these cases the appellate courts make no mention of any interest that the community might have.¹⁸² This is both odd and unfortunate, for members of communities do certainly have legitimate interests in the disposition of the sperm and the pre-embryos. The most obvious interest is enabling couples who are otherwise unable to conceive children of their own to have children. This was the interest that Mary Sue Davis, as a kind of surrogate for childless couples, raised, but the court did not consider the interest of those couples or the broader public's possible interest in facilitating conception. Important capabilities are involved in those interests. For many couples, the ability to have children directly affects their self-definition and self-identification. To be sure, adoption is an alternative, but some couples consider that their fulfillment, both individually and as a couple, can only come through carrying a child to birth. More broadly, society has its own capabilities at stake. A society's procreative policies immediately affect its very self-preservation. To take an extreme example, one thinks of the one-child policy instituted by the state in the People's Republic of China, beginning in 1979 and gradually phased out beginning in 2015.¹⁸³ Whatever one's opinion regarding the wisdom or morality of that policy, it was a measure undertaken in the interest of what the government judged China's self-preservation required.

The Chinese one-child policy is illuminating for a different reason, however. It brings into focus the question whether we really want to prioritize society's interests over that of the individual gamete-donor on a matter so deeply personal as procreation and parenthood. The question is not whether society's interests should be taken into account. Society's interests and its capabilities do need to be taken into account, for they certainly affect human flourishing. The real question is what is the best

¹⁷⁹ *Davis*, 842 S.W.2d at 604.

¹⁸⁰ See Strahilevitz, *supra* note 3, at 837.

¹⁸¹ *Id.* at 836.

¹⁸² *Id.* at 837.

¹⁸³ Vasudevan Sridharan, *China formally abolishes decades-old one child policy*, IB-TIMES (Dec. 27, 2015), <http://www.ibtimes.co.uk/china-formally-abolishes-decades-old-one-child-policy-1535006>.

fit between those interests and the interests of the gamete-donor(s) who is immediately involved. This is not a matter of weighing the interests against each other because all of the affected interests involve values that resist weighting. This is why I have framed the question in terms of asking what is the best fit. This is closely related to what Charles Taylor calls “complementarity.”¹⁸⁴ We ask how the interests and the affected capabilities of society and the gamete-donor interact with each other such that we might be able to discern an understanding of what human flourishing means in this situation and what it requires. Our perception of society’s capability needs might be, for example, that the current birth rate optimizes its resources and, more fundamentally, that adoption is now a means to achieving parenthood that is not only available to couples who are unable to conceive of children themselves, but is widely practiced and has become a mainstream social practice. Some couples may not consider it a perfect substitute for having their own biological children, but that choice is not one that is available here. The alternative to adoption in this situation is conceiving a child with the use of another man’s sperm, and along a spectrum whose poles are, on the one hand, biological birth using procreative material from both partners, and, on the other, adoption (in which neither parent contributes genetic material), that alternative immediately moves us some distance away from the couple’s preferred pole toward the opposite pole—adoption. The point is that the decision to recognize the gamete-donor’s right to control the disposition of his procreative material does not entail a substantial sacrifice in the what needs and what capabilities of couples who potentially would use the material for conception—or to society as a whole—can realistically be met in this situation.

Unlike couples who are potential users of the genetic material, for the gamete-holder this is a zero-sum situation concerning his interests, concerns, and capabilities. Those interests and capabilities either will or will not be realized in full depending on whether we recognize his right to control the disposition of his sperm. And, as I have already discussed, those interests are essential to his ability to experience a life well-lived. His emotional and psychological well-being would be directly and substantially jeopardized were he not in control of his status as a parent. This is precisely why the law regards procreative autonomy a matter meriting particularly strong legal protection. It lies at the very core of what it means to be able to define oneself, one’s identity, and one’s own life plan.

Viewing the interests and the affected capabilities of society and the gamete-donor this way, it becomes possible to discern what human flourish-

¹⁸⁴ See Taylor, *supra* note 86.

ishing means in this situation and what it requires. The relationship between the interests and capabilities of society and the gamete-donor here is less one of conflict than one in which from an objective viewpoint, deference is due. Taking into account how deeply a person's capability to define the very meaning of himself, his identity and the course of his life depends on control of his procreative ability and taking into account the asymmetrical positions of the two sides with respect to alternatives available to them, human flourishing objectively requires that one side's interests defer to the other. The fit between the interests of society and other couples who are potential users of the procreative materials and the interests of the gamete-donor is actually complementary rather than directly in conflict.

CONCLUSION

Courts tend to frame right-to-destroy disputes in terms of a conflict between respecting individual autonomy and avoiding social waste. That framing unduly obscures what is involved in these cases. Autonomy is a rich value that requires discerned investigation, and social waste masks the existence of community capabilities of legitimate concern. A human flourishing perspective illuminates these multiple values and capabilities. Conflicts involving the right to destroy resist neat categorical solutions, but that does not mean that they cannot be resolved rationally or even with a relatively high degree of predictability, as I have tried to show in this Article.