

FOUR PROPERTY WRONGS OF SELF-STORAGE LAW

Jeffrey Douglas Jones*

Table of Contents

Introduction: Setting Aside the Constitutional Question

I. The Wild, Wild Lease: Self-Storage Agreements and Default Practices

- A. Owner's Liens
- B. Lien Attachment and Risk of Loss
- C. From Default to Lien Enforcement
- D. Lien Enforcement Transferring Title to Landlord
- E. Lien Enforcement by Public Auction

II. The Property Wrongs of Self-Storage Law

- A. The "Crap" Rule
- B. Tort Law Misfires and the Elimination of Bailments
- C. Ignored Parallels to Residential Landlord-Tenant Reform
- D. Treasure Trove and Self-Storage Treasure Hunters

III. Conclusion: Legal Reform, Voluntariness, and the Property Ethic "Own Less"

* Jeffrey Douglas Jones, Associate Professor of Law, Lewis & Clark Law School; J.D., The University of Michigan Law School-Ann Arbor; Ph.D. Philosophy, The University of Wisconsin-Madison. [Thanks]

Introduction: Setting Aside the Constitutional Question

Self-storage leases are troubling. Under such leases, self-storage facility owners may freely dispose of defaulting tenants' medical and tax records, family ashes, heirlooms, etc. in the same manner as they would treat fungible items such as chairs or a bookshelf. Facility owners are legally entitled to do so through facility-sponsored auctions, most of which are unrestricted by any duty to conduct commercially reasonable sales. Still worse, these legal self-storage practices have generated a clandestine culture of treasure-hunting that often leaves tenants—some of whom default due to medical emergencies, bankruptcy or who are homeless working poor—with little opportunity either to regain good standing or obtain fair market value for their belongings.

Legal suspicion of self-storage leases is not new. In the early 1980s, Professor Paul Brest questioned the constitutionality of state self-storage legislation authorizing the above practices.¹ Professor Brest's argument was that state statutes giving self-storage landlords the power of self-help—that is, the power to take and sell tenant property—was state action subject to the Due Process Clause of the United States Constitution. Brest's reasoning was that the power to take property is an exclusive state power. Without state delegation of this power to self-storage landlords by statute, self-storage landlords would be limited to existing common law remedies for private creditors—mainly, obtaining a money judgment in court. Because state self-storage legislation ceded governmental power to self-storage landlords, and dramatically altered creditor-debtor relations in favor of creditors, such legislation must satisfy constitutional Due Process obligations.

Unfortunately, Professor Brest's article was a reaction to *Flagg Brothers v. Brooks*², a Supreme Court case which held that state self-storage legislation in fact *was not* state action subject to the Due Process Clause of the United States Constitution.³ Although Justice Stevens' dissent prefigured Professor Brest's Due Process argument⁴, Justice Rehnquist's opinion for the majority

¹ Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. Pa. L. Rev. 1296 (1982).

² 436 U.S. 149 (1978).

³ *Id.* at 155-163.

⁴ *Id.* at 168-179.

stands undisturbed.⁵ Unconstitutionality is not the sole, or even the typical, characteristic of bad law, however. More often legal rules are bad as measured against the settled doctrines and policy rationales of the body of law of which the legal rules are supposed expressive. The Constitutional question raised by self-storage statutes concerns creditor-debtor relationships. But self-storage leases also create *landlord-tenant* relationships, and self-storage leases have yet to be measured against the common law of property.

This short article argues that the practices of the self-storage industry with regard to defaulting tenants violate well-established doctrines of U.S. property law. Part I reviews the standard terms of self-storage agreements and the remarkable imbalance of rights and duties between self-storage facility owners and tenants. Part II reveals four fundamental property wrongs occurring in self-storage law. Part III evaluates possible legislative and judicial remedies, but also remedies growing out of a property ethic toward personal accumulation of things.

I. The Wild, Wild Lease: Self-Storage Agreements and Default Practices

The second that Gary Reuter yanks up the green sliding metal door of a self-storage unit, the pack of hunters turns on its dozen flashlights. There are 11 men and one woman, all around retirement age. Most wear canvas jackets or windbreakers, their heads topped with wool caps or wide-brimmed felt Western hats. They hold their industrial Black & Decker LED-beam flashlights over their heads and lean into the dark locker, like spelunkers peering into a cave. They bend to the left and to the right, moving around each other for a better view, taking care not to step over the concrete threshold of the doorway. They stay outside the door because, at 9:45am on this Tuesday in November, the contents of Extra Space Storage unit F27 in Hillsboro still belong to Tia Holland. Reuter begins the spiel he will recite at each of the 15 lockers he will open this morning: "Strictly cash only," he begins. "You've got to have the money right here and now. You've got to leave personal items: photos, tax records, yearbooks, Bibles. Everything is sold as is, where is, how is. You've got 24 hours to clean it out. You must have your own lock. If you do not have a lock, you can buy one from me for \$20." Having your own lock is important. Because in five minutes, this storage unit will no longer

⁵ [Reference Westlaw search].

belong to Holland. It will belong to the highest bidder from the hunters, even if that bid is only \$1.⁶

In the United States, self-storage facilities are now a primary locus of personal property second only to home residences. Here are some striking facts:

- ❖ The U.S. self-storage industry is comprised of more than 52,000 facilities and had total sales in excess of twenty billion dollars in 2008.
- ❖ There is a self-storage space inventory of 20.8 sq.ft. per U.S. household.
- ❖ There is 7.4 sq.ft. of self-storage space for every man, woman and child in the United States. It is physically possible that every American could stand – all at the same time – under the total canopy of self-storage roofing.
- ❖ It took the self-storage industry more than 25 years to build its first billion square feet of space; it added the second billion square feet in just 8 years (1998-2005).
- ❖ During the peak development years (2004-2005) 8,694 new self-storage facilities (approximately 480 million square feet of space were added).
- ❖ At year-end 1984 there were 6,601 facilities with 289.7 million square feet (26.9 million square meters) of rentable self-storage in the U.S. At year end 2008, there are 51,250 “primary” self-storage facilities representing 2.35 billion square feet -- an increase of more than 2.0 billion square feet.
- ❖ Self-storage usage cuts across all economic strata in the United States. By household income, 19 percent earn less than \$20,000, 15 percent earn \$20,000 - \$40,000, 11 percent earn \$30,000 to \$40,000, 10 percent earn \$40,000 to \$50,000, 7 percent earn \$50,000-\$60,000, 11 percent earn \$75,000 - \$100,000, 7 percent earn \$100,000 - \$125,000, and 9 percent \$125,000 or more.

⁶ Aaron Mesh, *Raiders of the Lost Crap*, Willamette Week, December 17, 2008, at __.

❖ Currently, 800 new self-storage facilities open every year.⁷

And, all over the country, people who leased self-storage units are losing their stuff: cars, tools, clothing, family photos and other heirlooms, tax and medical records, bikes, human skulls, TVs and computers, lawn mowers, the cremated remains of family members, furniture, and lots of pornography and dangerous junk.⁸ The losses affect the working homeless⁹, the routine down-and-out¹⁰; even, as in the case of disgraced Illinois Governor Rod Blagojevich,

⁷ All of the bulleted data is from the Self Storage Association Fact Sheet: <http://www.selfstorage.org/ssa/Content/NavigationMenu/AboutSSA/FactSheet/default.htm>

⁸ See Aaron Mesh, *Raiders of the Lost Crap*, Willamette Week, Dec. 17, 2008, at __, <http://wwwweek.com/editorial/3506/11985/>, Jon Mooallem, *The Self-Storage Self*, N.Y. Times Magazine, Sept. 6, 2009, at 24, and National Public Radio's All Things Considered, *Blind Auctions Help Self-Storage Firms Recoup Losses*, May 25, 2009. Newspaper coverage of self-storage dispossession has been widespread. See e.g.; Jessica Heslam, *Late on Payments, Woman Could Lose Belongings in Storage*, Boston Herald, July 2, 2010, at 5; Karin Price Mueller, *Losing a Lifetime of Belongings; Storage Facility Sells Items When Bill Isn't Paid*, Star-Ledger, Oct. 27, 2009, at 51; Paul Sisson, *Finding Bargains in a Dusty Box*, North County Times, Aug. 15, 2009, at __; Kevin DeMarrais, *Buying Blind: Bidding on Items Left in Self-Storage in Boom or Bust*, North Jersey Record, Aug. 6, 2009, at __; Eloise Parker and Paul Grimaldi, *Looking for Hidden Treasures*, Providence Journal-Bulletin, June 18, 2009, at __; Mark Boshnack, *Couple Search for Urn's Owner*, The Daily Star, May 19, 2009, at __; Dan Bernstein, *Their Lives in Storage*, The Press Enterprise, Mar. 28, 2009, at __; Dennis Gamino, *Sold to the Highest Bidder: Someone Else's Storage*, Austin-American Statesman, February 8, 2009, at __; Danielle Williamson, *Urban Treasure Hunting: Bidders Strive to Separate Gold from the Dross as Storage Unit Auctions*, Worcester Telegram & Gazette, Dec. 29, 2008, at __; Beth Quimby, *Your Records for Sale to the Highest Bidder? Files Abandoned in Self-Storage Can be Sold Off Like Office Furniture*, Portland Press Herald, Dec. 26, 2008, at __; Keith Leininger, *Gambling on the Unknown: Trash or Treasure?*, The News Sentinel, Oct. 13, 2008, at __; Jeff Kuneth, *Bidding on Leftovers for a Living*, Orlando Sentinel, Sept. 26, 2008, at __; Kim Hassler, *It's A Great Treasure Hunt*, The Honolulu Advertiser, August 17, 2007, at __; Becky Bartkowski, *Storage-Unit Auction Yields Human Skull in Box*, The Arizona Republic, August 9, 2007, at __; Clayton Collins, *You Store It, You Lock It, You Stop Paying, You Forfeit It*, The Christian Science Monitor, Nov. 2, 2006, at __.

⁹ See Ric Kahn, *Homeless Strain to Keep a Roof Over Their Stuff*, Boston Globe, July 15, 2007, at __. See also Peggy Lowe, *Homeless Man Lives Off Hotel Points From Former Life*, The Orange County Register, Mar. 9, 2010, at __.

¹⁰ See Ricardo Lopez, *The Latest Recession Front: Storage Unit Defaults*, St. Paul Pioneer Press, July 15, 2010, at __; Mediha Fejzagic DiMartino, *Unemployment Rate Leads to Storage Unit Auctions*, Inland Valley Daily Bulletin, June 26, 2009, at __; Arlene Satchell, *An Industry in Flux: Housing, Job Crises Forcing More to Abandon Property Left at Public Storage Units*, Sun-Sentinel, Mar. 8, 2009, at __; Lou Hirsh, *Stored Stuff Getting Left Behind: Owners Who Have Lost Their Homes or Can't Pay the Storage Bills are Walking Away from their Belongings*, The

the rich and infamous.¹¹ Denos Communications, a company that advertises self-storage auctions for some of the largest self-storage companies in the United States, estimates that in California alone \$3,000,000 changes hands at 9,000 self-storage auctions ever year, with auctions occurring at 800 of California's nearly 3000 facilities each and every month.¹²

These property losses occur because every state except Alaska has passed self-storage lien laws.¹³ These laws provide self-storage facility owners with robust lien security interests in any personal property placed in self-storage units.¹⁴ The national structure of self-storage lien laws is not coincidence. The self-storage industry has a powerful national lobby, the Self-Storage Association (or "the SSA"):

The SSA advocates for the self-storage industry at the federal level, at the state level (working with our affiliated state associations), and at the local level when necessary. The Association fights to have state-of-the-art lien laws in place, efficient and streamlined lien notification processes, licensing for offering tenant insurance, and adequate late fees. The SSA fights against the federal government installing self-storage monopolies on military bases, against state and local sales taxes on self-storage rents and for reasonable property taxes. The SSA fights for tax reform that will quickly free up storage space in federal bankruptcy actions, and for reasonable abandoned records management, disposition and other privacy issues.¹⁵

Press Enterprise, Dec. 30, 2008, at __; Waveney Ann Moore, *Abandoned Self-Storage Units Another Sign of the Times*, St. Petersburg Times, July 5, 2008, at __; Delores Flynn, *Bad Economy Fuels Storage Unit Auction Boom*, The Detroit News, June 23, 2008, at __; Bryn Mickle, *Somebody's Losing Their Stuff Everyday: Foreclosure Crisis Boosts Storage Units—and Auctions*, The Flint Journal, May 17, 2008, at __.

¹¹ Jo Napolitano, *Blagojevich's Elvis Statue May be Sold*, Chicago Tribune, July 26, 2010, at __.

¹² See <http://www.storageauctions.com/3.htm> (last accessed October 18, 2010).

¹³ Exhaustive research on self-storage lien laws throughout the United States was conducted by research assistant Christopher Wisdom. For brief summaries of state-by-state self-storage lien laws, see <http://www.storagelaws.net/> and <http://www.selfstorages.com/> (last accessed: _____).

¹⁴ Id.

¹⁵

<http://www.selfstorage.org/ssa/Content/NavigationMenu/Resources/LegislativeRegulatory/default.htm> .

The result, described in the next section, is a largely uniform set of state self-storage laws that grant facility owners broad rights and control over tenant stored property in the event of default, with relatively few protections for tenants themselves.

A. Owner's Liens

Every state except Alaska has a statute that governs property placed in self-service storage facilities.¹⁶ “Self-Service Storage Act” and “Self-Service Facility Storage Act” are common short titles for these statutes.¹⁷ All of the statutes grant owners of self-storage facilities an “owner’s lien” upon all personal property placed within the facilities by tenants. The self-storage owner’s lien provision in nearly every state — 45 of 49 — is boilerplate. Alabama, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, West Virginia, Wisconsin and Wyoming all use the following language [with variant language in parens]:

The owner of a self-service storage facility [and his heirs, executors, administrators, successors, and assigns] have a lien upon all personal property located at a self-service storage facility for rent, labor, or other charges, present or future, in relation to the personal property, and for expenses necessary for its preservation, or expenses reasonably incurred in its sale or other disposition pursuant to this [Act or article or chapter].¹⁸

¹⁶ See *supra*, note 8 and accompanying text.

¹⁷ See e.g. Ala. Code § 8-15-30 (2009), 25 Del. C. § 4901 (2009), W. Va. Code § 38-14-1 (2008), Va. Code Ann. § 55-416 (2009).

¹⁸ Ala. Code § 8-15-30 (2009); A.C.A. § 18-16-402(a) (2008); A.C.A. § 18-16-402 (2008); Cal. Bus. & Prof. Code § 21702 (2008); C.R.S. § 38-21.5-102 (2008); Conn. Gen. Stat. § 42-160 (2008); D.C. Code § 40-403 (2009); 25 Del. C. § 4903 (2009); Fla. Stat. § 83.805 (2009); O.C.G.A. § 10-4-212 (2009); H.R.S. § 507-62 (2009); Idaho Code § 55-2305 (2008); § 770 I.L.C.S. 93/3 (2009); Ind. Code Ann. § 26-3-8-11 (2009); Iowa Code § 578A.3 (2008); K.S.A. § 58-816 (2008); K.R.S. § 359.220 (2009); La. R.S. § 9:4758 (2009); 10 M.R.S. § 1374 (2009); Md. Comm. Law Code § 18-503 (2009); A.L.M. Gen. Laws Ch. 105A § 3 (2009); Minn. Stat. §

Four states — Montana, Texas, Wyoming and Nebraska — have self-storage owner's lien provisions that use different language or other provisions to similar effect. Montana law provides that, "A person who rents storage space to another may sell at public auction the contents of the storage space if the owner of the contents is more than 30 days in default in paying rental fees on the space."¹⁹ Texas self-storage law contains the simple statement, "A lien under this chapter attaches on the date the tenant places the property at the self-service storage facility."²⁰ Wyoming's personal property law provides that, "Any person is entitled to a lien on any goods, chattels, or animals for his reasonable charges for work or services," but excepts that, "A person engaging in self-storage operations whereby members of the public rent space from the person to store goods and chattels and retain control over access to the goods and chattels ...is entitled to a lien under this section."²¹ And in Nebraska, personal property placed in a self-storage facility is governed by that state's Disposition of Personal Property Landlord-Tenant Act.²²

B. Lien Attachment and Risk of Loss

Not all self-storage statutes specify when an owner's lien attaches.²³ The statutes that do address lien attachment provide that the lien attaches when a storage rental agreement is entered into²⁴, the date upon which rent is unpaid and due²⁵, the date personal property is brought to the facility²⁶, the

514-972 (2008); § 415.415(1) R.S. Mo. (2009); Nev. Rev. Stat. Ann. § 108.4753(1) (2009); R.S.A. § 451-C:2 (2009); N.J. Stat. § 2A: 44-189 (2009); N.M. Stat. Ann. § 48-11-5 (2008); NY CLS Lien § 182(6) (2009); N.C. Gen. Stat. § 44A-41 (2009); N.D. Cent. Code § 35-33-02 (2009); O.R.C. Ann. § 5322.02 (2009); 42 Okl. St. § 196A (2009); O.R.S. § 87.687(1) (2007); 73 P.S. § 1904 (2008); R.I. Gen. Laws § 34-42-3 (2009); S.C. Code Ann. § 39-20-30 (2008); S.D. Codified Laws § 44-14-2 (2009); Tenn. Code Ann. § 66-31-104 (2009); Utah Code Ann. § 38-8-2 (2008); 9 V.S.A. § 3904 (2009); Va. Code Ann. § 55-418 (2009); Rev. Code Wash. § 19.150.020 (2009); W. Va. Code § 38-14-3 (2008); Wis. Stat. § 704.90(3)(a) (2008);

¹⁹ Mont. Code Ann. § 70-6-420(1) (2009).

²⁰ Tex. Prop. Code § 59.006 (2009).

²¹ Wyo. Stat. § 29-7-101(a)-(b) (2009).

²² R.R.S. Neb. § 69-2302(1), § 69-2307(2) (2009).

²³ See e.g. D.C. Code § 40-403(a)-(b) (2009); H.R.S. § 507-62 (2009); Md. Comm. Law Code Ann. § 18-503 (2009); Mont. Code Ann. § 70-6-411 (2007); Wyo. Stat. § 29-7-101 (2009).

²⁴ See e.g. Ala. Code § 8-15-33 (2009).

²⁵ See e.g. A.R.S. § 33-1703A (2008).

date the occupant is in default²⁷, or the date specified in a preliminary notice of default.²⁸

Many states self-storage statutes expressly place the risk of loss or damage to stored property wholly on the tenant.²⁹ A few states require landlords to exercise ordinary or reasonable care.³⁰ Statutory allocation of risk is unnecessary, however. Standard self-storage rental agreements invariably place all risk of damage or loss upon tenants.

Consider the self-storage behemoth, *Public Storage*. Public Storage operates over 21,000 locations throughout the United States and Europe with space totaling over a 135 million rentable square feet of storage space.³¹ With over 1 billion dollars in annual revenues, Public Storage is a member of the S & P 500, the Forbes Global 2000 and the company trades on the NY Stock Exchange.³² In the company's own words, "Public Storage is among the largest landlords in the world."³³

By leasing a self-storage unit with Public Storage, "Occupants" (Public Storage's term for lessees) agree that "[t]he total value of all personal

²⁶ See e.g. O.C.G.A. § 10-4-212 (2009).

²⁷ See e.g. Minn. Stat. § 514.972 subd. 2 (2008).

²⁸ See e.g. Rev. Code Wash. § 19.150.060 (2009).

²⁹ The statutes of many states contain the following boilerplate language: "Unless the rental agreement specifically provides otherwise, the exclusive care, custody and control of any and all personal property stored in the leased space shall remain vested in the occupant." [*and the occupant shall bear all risks of loss or damage to such property.*] See e.g. A.C.A. § 18-16-405(b)(1) (2008); D.C. Code § 40-405 (2009); K.S.A. § 58-818 (2008); Va. Code Ann. § 55-420 (2009); Wis. Stat. § 704.90(4) (2008). Some also provide that "the occupant shall bear all risks of loss or damage to such property." See e.g. Ala. Code § 8-15-32 (2009).

³⁰ But see R.S.S. Neb. § 69-2306 (2009) ("The landlord shall exercise reasonable care in storing the property but shall not be liable to the tenant or any other owner for any loss unless such loss is caused by the landlord's intentional or negligent act."); 42 Okl. St. § 194A (2009) ("The duty of care an owner must exercise with respect to personal property located in a self-service storage facility is ordinary care only."); W. Va. Code § 38-14-7(a) (2008) ("The owner shall use reasonable care in maintaining the self-service storage facility for the purposes of storage of personal property and may not offer to sell insurance to the occupant to cover the owner's risk or lack of care.")

³¹ <http://www.publicstorage.com/storage-company-info.aspx>.

³² *Id.*

³³ *Id.*

property stored by Occupant is agreed to be less than Five Thousand Dollars (\$5,000).” An Occupant also “understands that the Premises are not suitable for the storage of heirlooms or other precious, irreplaceable or invaluable personal property, such as rare books, records, or art, objects for which no immediate resale market exists and objects of special or emotional value to the Occupant.”³⁴

Regarding risk of loss or damage to stored property, Public Storage’s standard self-storage lease agreement contains the following exculpatory clauses:

“7. Insurance. ALL PERSONAL PROPERTY IS STORED BY OCCUPANT AT OCCUPANT’S SOLE RISK. INSURANCE IS OCCUPANT’S SOLE RESPONSIBILITY. OCCUPANT UNDERSTANDS THAT OWNER WILL NOT INSURE OCCUPANT’S PERSONAL PROPERTY. OCCUPANT IS OBLIGATED UNDER THE TERMS OF THIS RENTAL AGREEMENT TO INSURE HIS/HER OWN GOODS. To the extent Occupant’s insurance lapses or Occupant does not obtain insurance coverage for the full value of Occupant’s personal property stores in or on the Premises, Occupant agrees Occupant will personally assume all risk of loss. **Owner and Owner’s agents, affiliates, authorized representatives and employees (“Owner’s Agents”) will not be responsible for, and Occupant hereby releases Owner and Owner’s Agents from any responsibility for, any loss, liability, claim, expense, or damage to personal property or injury to persons (“Loss”) that could have been insured against (including, without limitation, any Loss arising from the active or passive acts, omission or negligence of Owner or Owner’s agents) (“the Released Claims”).** Occupant waives any rights to recover against Owner or Owner’s Agents for the Released Claims. **Occupant expressly agrees that the carrier of any insurance obtained by Occupant shall not be subrogated to any claim of Occupant against Owner or Owner’s Agents.** Occupant understands that if Occupant elects to obtain the insurance available at the property, the additional amount for such insurance coverage must be included with the monthly payments as noted above. Further, all payments received will be applied as noted above. The provisions of this paragraph will not limit the rights of Owner and Owner’s Agents under paragraph 8 **Limitation of Owner’s Liability.** By **CLICKING OR PLACING INITIALS HERE** __, Occupant acknowledges that he

³⁴ *Id.*

understands the provisions of this paragraph and agrees to these provisions and that insurance is Occupant's sole responsibility.³⁵

8. Limitation of Owner's Liability; Occupant's Liability. Owner and Owner's agents, affiliates, authorized representatives and employees (collectively called "Owner's Agents") will have no responsibility to Occupant or any other person for any liability, expense, damage to their personal property or injury to them arising out of Owner's active or passive acts, omissions, negligence or conversion unless Owner intentionally and/or in bad faith causes the liability, expense, damage or injury. Occupant agrees that Owner and Owner's Agents' total responsibility for any liability, expense, personal property damage and personal injury will not exceed Five Thousand Dollars (\$5,000). Occupant shall defend Owner and Owner's Agents against and pay for any damage to property, injury to persons, or any other liability or expense incurred because of anything Occupant does or fails to do in the Enclosed Space, the Parking Space, or surrounding areas, unless Owner intentionally and in bad faith causes such damage, injury or other liability or expense. By CLICKING OR PLACING INITIALS HERE __, Occupant acknowledges that he has read, understands and agrees to the provisions of this paragraph."³⁶

Courts routinely enforce such provisions. For example, in *Kane v. U-Haul International, Inc.*, the self-storage landlord failed to notify several tenants of a leak in the facility's roof, resulting in water damage to the tenants' property. The tenants sued and sought damages in excess of the storage value limits provided in the contract.³⁷ The Third Circuit Court of Appeals affirmed the lower court's ruling that the landlord's failure to notify the tenants of the leak did not constitute wanton and willful misconduct which could not be exculpated by the contract.³⁸

In *Lathers, Jr. v. U-Haul Company of Louisiana*, the tenant stored property in a rented self-storage unit but then became delinquent on his payments.³⁹ The landlord exercised lien rights on the unit and replaced the tenant's lock

³⁵ *Id.* at §7.

³⁶ *Id.* at §8.

³⁷ 218 Fed.Appx. 163, 167 (3d Cir. 2007).

³⁸ *Id.* at 169.

³⁹ 875 So.2d 839, 839 (5th Cir. 2004).

with one of its own. The tenant paid the back rent and recovered the unit with all items intact.⁴⁰ When the tenant returned to his unit several weeks later there was a tag on his lock stating that the lock was improperly locked. When the tenant opened the unit he discovered that much of his stored property had been stolen.⁴¹ The tenant sued the landlord in negligence. Using evidence that the landlord was aware of thefts at the facility both before and after the theft of the plaintiff's belongings, the tenant argued that the landlord was aware of a security problem at the facility when tenant entered into the contract.⁴² The Fifth Circuit affirmed the lower court's ruling that the tenant bore all risk.

In *Cochran v. Safeguard Self-Storage, Inc.*, another Fifth Circuit Court of Appeals case, tenants leased a unit from defendant self-storage facility under a lease that provided for the non-liability of the landlord for property stored unless "due to the willful acts of gross negligence of [landlord], his agents, servants, or employees." The lease also excluded all warranties by defendant-landlord and specified that insurance was the tenants' sole obligation.⁴³ The tenants' stored property was later destroyed by a fire caused by faulty electrical wiring located in a junction box that geographically was outside of the tenants' leased units, but was part of the landlord's property.⁴⁴ The tenants sued the landlord in negligence. Prior to the fire, the landlord had observed flickering lights and called in an electrician. The electrician identified two shorts in an electrical outlet, which the electrician fixed. The electrician did not identify any other electrical problems or indicate to the landlord that there was any problem with the building's wiring.⁴⁵ The tenants offered the electrician's visit as evidence that the landlord knew or should have known of a defect in the building's wiring. The Fifth Circuit affirmed the district court's grant of summary judgment to the landlord.⁴⁶

⁴⁰ *Id.* at 839-840.

⁴¹ *Id.* at 840.

⁴² *Id.* at 842.

⁴³ See *Cochran v. Safeguard Self-Storage, Inc.*, 845 So.2d 1128, 1129 (5th Cir. 1997).

⁴⁴ *Id.*

⁴⁵ *Id.* at 1129.

⁴⁶ *Id.* at 1133.

In *Whipper v. McLendon Movers, Inc.*, tenant's stored property was damaged when the water pipes servicing landlord's automatic sprinkler system burst due to cold weather. The tenant sued the landlord. The Court of Appeals of Georgia affirmed the lower court's grant of summary judgment to the landlord, citing a lease provision which provided, "All personal property brought onto the premises by lessee ... shall be at the risk of lessee, and lessor shall not be liable for any loss or damages for any reason whatsoever to said property. It shall be the responsibility of lessee to adequately insure any property brought onto the premises, and lessor shall have no duty whatsoever to carry any insurance on property brought onto the premises by lessee."⁴⁷

Self-storage leases also exculpate landlords from any liability for damage or loss of tenant property caused by the conduct or misconduct of third parties. In *Arruda v. Donham and Dover Investment Properties, Inc.*, plaintiff rented a self-storage unit. A tenant who had leased a unit near to plaintiff's caused a fire within his own unit. The fire spread to plaintiff's unit and destroyed plaintiff's property—two automobiles and other personal property.⁴⁸ Plaintiff-tenant sued defendant-landlord in negligence. The landlord argued that as a matter of law it could not be held liable even if plaintiff's allegations of negligence were found to be true. To support its argument, landlord pointed to lease terms that provided that landlord could not "be held responsible for damage to the plaintiff's property," that "Landlord shall not be liable to any tenant or any other party for any negligent act or omission of landlord," that "Landlord shall not be liable to any tenant or any other party for any negligent act or omission of landlord," that "All property stored within the unit by tenant shall be at tenant's sole risk and expense," that "Landlord shall not be liable to tenant for any loss or damage that may be occasioned by or through the act or omission to act of other tenants on the premises or of any other person," and an addendum to the lease that stated, "[Lessee] understand the provision that states the lessor is not responsible for loss or damage to property in my storage space."⁴⁹ The court agreed with the landlord.⁵⁰

⁴⁷ 372 S.E.2d 820, 820 (Ga. Ct. App. 1988)

⁴⁸ 1994 WL 386092, at *1 (Ct. Sup. Ct. July 11, 1994).

⁴⁹ *Id.* at *3.

⁵⁰ *Id.* at *4.

Cases exist where self-storage landlords are found liable for damage to or loss of tenant property. Usually, liability is established by demonstrating that the landlord violated the express terms of the particular state's Self-Storage Facility Act, such as when a landlord fails to give a defaulting tenant proper notice prior to selling the tenant's property at auction.⁵¹ Tenants rarely succeed on the tort exceptions contained in the exculpatory clauses of self-storage leases. When tenants do succeed on such claims, they confront the storage value limitations provided for in the contracts.⁵²

C. From Default to Lien Enforcement

Upon default, a self-storage facility owner may deny the defaulting tenant access to personal property stored in the leased unit. Some states permit denial of unit access as soon as immediately, or five or ten or days after the date of default, without any notice to defaulting tenants.⁵³ Other states specify a longer period of default before a facility owner may deny unit

⁵¹ See, e.g., *Castetter v. Mr. "B" Storage*, 699 A.2d 1268, 1271-1272 (landlord violated self-storage statute by failing to give proper notice prior to lien sale and by unauthorized entry into tenant's unit); *Cook v. Public Storage, Inc.*, 761 N.W.2d 645, 672 (affirming a jury verdict that landlord violated self-storage statute by failing to meet the notice requirement when mailed notices were returned as undeliverable and by failing to conduct a commercially reasonable sale).

⁵² See, e.g., *Security Self-Storage LLC v. Pauling*, 2010 WL 3170670, at *3 (Ct. App. Tx. August 12, 2010) (affirming lower court opinion holding landlord liable for tenant property disposed of upon landlord's mistaken assumption that tenant had abandoned the property); *Dubey v. Public Storage, Inc.*, 918 N.E.2d, 265, 273-277 (IL Ct. App. 2009) (invalidating storage value limitation contained in lease).

⁵³ See e.g. A.C.A. §§ 18-16-401(1) (2008) and 18-6-405(a) (2008); (stating, without restriction or qualification, that "If an occupant is in default, the operator may deny the occupant access to the leased space." Under A.C.A. § 18-16-401(1) "'Default' means the failure to perform on time any obligation or duty set forth in the rental agreement."); Fla. Stat. § 83.8055 (2009) ("Upon the failure of a tenant to pay the rent when it becomes due, the owner may, without notice, after 5 days from the date rent is due, deny the tenant access to the personal property located in the self-service storage facility or self-contained storage unit. In denying the tenant access to personal property contained in the self-contained storage unit, the owner may proceed without judicial process, if this can be done without breach of the peace, or may proceed by action."); O.C.G.A. § 10-4-213 (2009) (self-storage rental agreement language must include the following language: "UPON OCCUPANT'S DEFAULT, OWNER MAY WITHOUT NOTICE DENY OCCUPANT ACCESS TO THE PERSONAL PROPERTY STORED IN OCCUPANT'S SPACE UNTIL SUCH TIME AS PAYMENT IS RECEIVED. IF ANY MONTHLY INSTALLMENT IS NOT MADE BY THE TENTH OF THE MONTH DUE, OR IF ANY CHECK GIVEN IN PAYMENT IS DISHONORED, THE OCCUPANT IS IN DEFAULT FROM THE DATE PAYMENT WAS DUE.")

access — 14 to 30 days — and then only after a notice of default has been sent to the defaulting tenant's last known address.⁵⁴ After a landlord is authorized to deny unit access due to tenant default, only a few states require facility owners to grant access to essential items such as personal papers, health aids, and/or clothing under a specified dollar value.⁵⁵ The large majority of statutes grant no such privilege to tenants. In most states a defaulting tenant remains exclusively liable for all damage and loss to personal property even after landlord has removed the tenant's lock and placed its own lock on the unit.⁵⁶

In most states a self-storage landlord may not begin a lien enforcement action until the tenant is in noticed default a minimum number of days. The minimum number of days varies by state from as long as 90 days in Montana and New Mexico⁵⁷, to as short as 10 days in Louisiana, New York, North Dakota and Oklahoma⁵⁸, with a cluster of states in the 14-30 day range⁵⁹ and

⁵⁴ See e.g. Cal. Bus. & Prof. Code § 21703 (2008) ("If any part of the rent or other charges due from an occupant remain unpaid for 14 consecutive days, an owner may terminate the right of the occupant to the use of the storage space at a self-service storage facility by sending a notice to the occupant's last known address..."); Code of Ala. § 8-15-34 (2009) ("(1) No enforcement action shall be taken by the owner until the occupant has been default continuously for a period of 30 days. (4) The owner shall have the right to deny the occupant access to the leased space and the owner may enter and/or remove the personal property from the leased space to other suitable storage space pending its sale or other disposition.")

⁵⁵ See e.g. Minn. Stat. § 514.972 subd. 5 (2008) ("The occupant may remove from the self-service storage facility personal papers, health aids, personal clothing of the occupant and the occupant's dependents, and personal property that is necessary for the livelihood of the occupant, that has a market value of less than \$50 per item.")

⁵⁶ See e.g. 42 Okl. St. § 195A (2009) ("The owner of a self-service storage facility shall not be liable for damages sustained by an occupant, if any, alleged to result from action taken by the owner to prevent access to the self-service storage facility after the occupant has committed an act of default pursuant to the rental agreement.").

⁵⁷ Mont. Code Anno. § 70-6-411(1) (2007); N.M. Stat. Ann. § 48-11-7(A)(3) (2008).

⁵⁸ La. R.S. 9:4759(1)(e)-(f) (2009); NY CLS Lien § 182(7) (2009); N.D. Cent. Code § 35-33-05(1)(c)-(d) (2009); see also N.C. Gen. Stat. § 44A-43(a) (2009) (allowing lien enforcement after 15 days of noticed default).

⁵⁹ See e.g. Ala. Code § 8-14-34(1) (2009) (30 days); Cal. Bus. & Prof. Code § 21705(a)-(b) (2008) (14 days); C.R.S. § 38-21.5-103(1)(a) (2008) (30 days); 25 Del. C. § 4904(3)(d)-(e) (2009) (30 days); Fla. Stat. § 83.806(2)(c)-(d) (2009) (14 days); O.C.G.A. § 10-4-213 (2009) (30 days); HRS § 507-65(E) (2009) (30 days); ILCS 94/5, Sec. 4(4)-(5) (2009) (14 days).

another cluster of states in the 45-60 day range.⁶⁰ Wyoming law, however, appears to permit lien enforcement immediately following notification of default to all persons known to claim an interest in the property.⁶¹

Texas is the only state which requires a landlord to obtain a court order prior to lien enforcement.⁶² But California, Nevada, North Carolina have similar process in that a defaulted tenant may file a declaration in opposition to lien sale, which then requires a landlord to file verified complaint to enforce the lien.⁶³ And South Carolina offers a “predistress hearing” only for lease agreements that do not conform to the model provisions provided for in the statute.⁶⁴ The purpose of the predistress hearing “is to protect the occupant’s use and possession of property from arbitrary encroachment and to prevent unfair or mistaken deprivation of property.”⁶⁵ Landlords using lease agreements that conform to South Carolina’s model provisions may begin lien enforcement without judicial intervention after fifty days.⁶⁶

D. Lien Enforcement Transferring Title to Landlord

Lien enforcement is not always in the form of a sale of personal property. A handful of states permit landlords to keep, sell, or destroy the personal property of a defaulted tenant following expiration of the notice period, provided the property has a fair market value below a threshold amount of \$500, \$250 or \$100.⁶⁷

⁶⁰ See e.g. Conn. Gen. Stat. § 42-162 (2008) (60 days); Fla. Stat. § 83.806(2)(c)-(d) (2009) (14 days); Idaho Code § 55-2306(1) (2008) (60 days); K.S.A. § 58-817(a) (2008) (45 days); KRS § 359.230 (2009 (45 days); W. Va. Code § 38-14-5(a)(1) (2008).

⁶¹ See Wyo. Stat. § 29-7-104(b) (2009).

⁶² Tex. Prop. Code § 59.041(a) (2009).

⁶³ Cal. Bus. & Prof. Code §21710 (2008); Nev. Rev. Stat. Ann. § 108.4765 (2009); N.C. Gen. Stat. 44A-43(b)(2)a-b (2009);

⁶⁴ S.C. Code Ann. § 39-20-47 (2008).

⁶⁵ S.C. Code Ann. § 39-20-47(B) (2008).

⁶⁶ S.C. Code Ann. § 39-20-45 (2008)

⁶⁷ See, e.g. R.S.S. Neb. § 69-2304 (2009) (“A notice given pursuant to section 69-2304 shall contain one of the following statements, as appropriate: ... (2) ‘Because this property is believed to be worth less than two hundred fifty dollars, it may be kept, sold, or destroyed without further notice if you fail to reclaim it within the time indicated in this notice.’”); RSA 451-C:7(I) (threshold of below \$500 for owner disposal of defaulted tenant property without further notice or auction); 42 Okla. St. § 197.1 (2009) (adopting a threshold of “no apparent

Oklahoma's self-storage is interesting in that it expressly gives the landowner discretion to determine the fair market value of the defaulting tenant's personal property: "If the occupant abandons or surrenders possession of the self-storage facility and leaves household goods, furnishings, fixtures, or any other personal property in the self-storage facility, the owner may take possession of the property, and if, in the judgment of the owner, the property has no ascertainable or apparent value, the owner may dispose of the property without any duty of accounting or any liability to any party."⁶⁸

In contrast to Oklahoma's trust in a landlord's subjective valuation of a tenant's personal property, West Virginia requires a more objective valuation of a tenant's personal property. It permits landlord destruction of tenant property only if the landlord "can demonstrate by photographs or other images and affidavit of a knowledgeable and credible person that the personal property lacks a value sufficient to cover the reasonable expense of a public auction plus the amount of the self-storage lien."⁶⁹

E. Lien Enforcement by Public Auction

After expiration of the notice period, a landlord who intends lien enforcement by public auction is required to publish an advertisement (typically once a week for two consecutive weeks) of the public sale in a newspaper of general circulation in the city or county where the self-storage facility is located. The uniform content of such ads is the name of the person on whose account the goods are stored, the space or lot number of the occupant, the time, place and manner of the sale, the location of the storage facility. Some but not all states require a brief description of the goods to be sold. Most states provide that the sale may not take place sooner than 15 days after the first publication.⁷⁰ The following print and online ads are typical:

value"); ORS § 87.691(1) (2007) (threshold of "\$100 or less"); Rev. Code Wash. (ARCW) § 19.150.080 (threshold of below \$300).

⁶⁸ 42 Okla. St. § 197.1 (2009).

⁶⁹ W. Va. Code § 38-14-5(a)(1)(B) (2008).

⁷⁰ Alabama's code is typical. See e.g. Code of Ala. 8-15-34(7)(a)-(b) (2009). But Arkansas' code, which requires only one advertisement with no content requirements and permits sale seven days thereafter. See A.C.A. § 18-16-407(2) (2008).

**[RECENT PRINT AND ONLINE EXAMPLES OF AUCTION
ADS WILL BE INSERTED NEAR PUBLICATION DATE]⁷¹**

Interestingly, a small minority of states require that public auction of defaulted tenant's personal property be conducted in a "commercially reasonable manner."⁷² Notwithstanding this cause, the overwhelming majority of states presume that compliance with sale provisions of the state self-storage statute constitutes a commercially reasonable sale. Thus, many state self-storage statutes have a provision such as the following one in Ohio's self-storage statute, which limits a landlord's liability based upon statutory compliance: "If the owner complies with the requirements for sale under this section, the owner's liability to persons who have an interest in the personal property sold is limited to the balance of the proceeds of the sale after the owner has satisfied his lien. The owner is liable for damages caused by the failure to comply with the requirements for sale under this section and is liable for conversion for willful violation of the requirements for sale under this section."⁷³

Limitation of landlord liability based on statutory compliance comports with my earlier observations: that tenants rarely succeed on the tort claim exceptions to self-storage leases; and that landlord liability for damage or loss to tenant property usually turns on demonstration that the landlord violated the express terms of the particular state's Self-Storage Facility Act.⁷⁴ I will have much more to say about this later in the article.

Three final observations complete this overview of the enforcement of self-storage laws against defaulting tenants. First, states vary on whether landlords and their agents are permitted to participate in the self-storage auctions that they control. (And landlords do control them—from "time, place and manner"⁷⁵ to whether a tenant's personal property will be sold

⁷¹ [Ad References].

⁷² Code of Ala. § 8-15-34(13) (2009); Cal. Bus. & Prof. Code § 21707(b) (2008); H.R.S. § 507-66(b) (2009); K.S.A. § 58-817(a)(1) (2008); Minn. Stat. § 336.7-210(a) (2008); Nev. Rev. Stat. Ann. § 108.477(4) (2009); NY CLS Lien § 182(7) (2009); 9 V.S.A. § 3905(5)(D) (2009); Rev. Code Wash. (ARCW) § 19.150.080(1) (2009); Wis. Stat. § 704.90(6)(a)7 (2008).

⁷³ ORC Ann. § 5322.03(M1)-(M-2) (2009); *see also*, e.g. Code of Ala. §§ 13-14 (2009).

⁷⁴ *See* Section I.A., *supra* at 7-12.

⁷⁵ *See e.g.* Code of Ala. § 8-15-34(6)(b) (2009).

“singly, in lots or as a whole,”⁷⁶ whether bids will be “sealed or open,”⁷⁷ and, obviously, the sale prices set for particular things or sets of things.) In Washington, for example, “No employee or owner, or family member of an employee or owner, may acquire, directly or indirectly, the property sold pursuant to [the Act], or personal papers and personal photographs disposed of under [the Act].”⁷⁸ But in Ohio, “An owner may buy at any public sale held pursuant to [the Act].”⁷⁹

Second, there is the matter of proceeds. All state statutes require a landlord who has conducted an auction to use the proceeds to satisfy tenant deficiency and reasonable sale expenses, and, in cases of windfall, to hold the balance for the tenant to claim within a specified time. The time a tenant has to collect the balance of an auction of his or her personal property varies greatly by state from only 30 days in Virginia⁸⁰ to three years in Alabama.⁸¹ After the expiration of period within which a tenant may claim the windfall from a sale of personal property, the proceeds may become the property of the landlord by operation of the self-storage statute⁸², escheat to the county or state⁸³, or be disposed of pursuant to the state’s unclaimed property statute (which often provides a period after which property is deemed abandoned and becomes the property of the possessor—here, again, the landlord).⁸⁴ Arizona and Pennsylvania are unique in requiring such proceeds to go to the Arizona public schools and the Pennsylvania Department of Revenue, respectively.⁸⁵

⁷⁶ See e.g. Code of Ala. § 8-15-34(10) (2009).

⁷⁷ See e.g. Code of Ala. § 8-15-34(10) (2009).

⁷⁸ Rev. Code. Wash. (ARCW) § 19.150.080(4) (2009).

⁷⁹ ORC Ann. § 5322.03(K) (2009).

⁸⁰ Va. Code Ann. § 55-419(E) (2009).

⁸¹ See Code of Ala. § 8-15-34(13) (2009).

⁸² See e.g. Code of Ala. § 8-15-34(13) (2009); C.R.S. § 38-21.5-103(1)(j) (2008); Conn. Gen. Stat. § 42-164(d) (2008); 25 Del. C. § 4904(h) (2009); Fla. Stat. § 83.806(8) (2009); La. R.S. § 9:4759(11) (2009); ORS § 87.691(7) (2007)

⁸³ See e.g. Cal. Bus. & Prof. Code § 21705(D) (2008); H.R.S. § 507-66(b) (2009); Iowa Code § 578A.4(8) (2008); MCLS § 570.525, Sec. 5(14) (2009); Nev. Rev. Stat. § 108.477(5) (2009); R. I. Gen. Laws § 34-42-4(h)(i) (2009);

⁸⁴ See e.g. O.C.G.A. § 10-4-213 (2009); Burns Ind. Code Ann. § 26-3-8-15(c) (2009); K.S.A. § 58-817(d)(2) (2008); § 415.415(3) R.S. Mo. (2009); R.R.S. Neb. § 69-2308 (2009).

⁸⁵ See e.g. A.R.S. § 33-1704(E)(6) (2008); 73 P.S. § 1913 (2008).

Third, and finally, what happens when a landlord attempts to auction the personal property of a defaulted tenant but some or all of the items do not sell? The statutes that address the issue provide in the event that a tenant's personal property does not sell at auction, a landlord may dispose of it.⁸⁶

II. The Property Wrongs of Self-Storage Law

Part I of this article brought to the attention of readers an American cultural development. The development is the massive amounts of personal property stored now in self-storage facilities across the United States.⁸⁷ The sheer volume of personal property now stored in self-storage facilities, measured in facility square footage and consumers of all economic strata⁸⁸, should be sufficient to create a public interest. If a similar amount of *real* property and consumers was at stake, such as with home foreclosures and the mortgage crisis⁸⁹, there would be no doubt that the public interest was implicated.

Two other reasons weigh in favor of scrutinizing state-by-state practices of self-storage industry. First, personal property loss through self-storage default appears to be both a regular occurrence and a boom industry in periods of economic downturn.⁹⁰ Second, at least some readers will agree that some procedures for handling the personal property of defaulted self-storage tenants are worrisome. In particular, the practice of unmonitored, undocumented auctions of tenant property and the freedom of landlords in many states to sell tenant property by whole lot, no matter what the individual value of items, seems suspect.⁹¹ Also, the opportunities for cherry-picking—for landlords to steal valuable tenant personal property prior to conducting public auctions—seem abundant and undetectable.

⁸⁶ See e.g. O.C.G.A. § 10-4-213 (2009); Miss. Code Ann. § 85-7-125(e) (2008); ORC Ann. § 5233.03(N) (2009); S.C. Code Ann. § 39-20-45 (2008).

⁸⁷ See footnote 2, *supra*, and accompanying text.

⁸⁸ See *id.*

⁸⁹ See Jeffrey D. Jones, *Property and Personhood Revisited*, 1 Wake Forest J. Pub. Pol'y __ (forthcoming 2011) (comparing demands for government intervention in the mortgage and home foreclosure crisis to the absence of such demands for intervention into self-storage dispossession and auctions).

⁹⁰ See footnote 3, *supra*, and accompanying text.

⁹¹ See Section on "Lien by Public Auction," *supra*, at __ - __.

This section reveals four property wrongs of self-storage law. First, the contractual allocation of risk and tenant restrictions on what may be stored commonly frustrate the purpose for which people rent self-storage units. Second, self-storage statutes severely limit or wholly eliminate tenant remedies under tort law and the law of bailments, in effect giving self-storage landlords an absolute right of negligence with respect to tenant property. Third, courts have missed that many of the public policy concerns that led to implied warranties in residential tenancies are present with regard to self-storage leases. Fourth, is the clandestine culture of treasure hunting that surrounds self-storage auctions.

A. The “Crap” Rule

U.S. property law carries the doctrinal presumption that all real property is unique in character.⁹² The presumption issues in the remedy of specific performance in cases where a seller of real property seeks to escape from a contract for sale, and renders expectation damages inadequate to make the would-be buyer whole.⁹³ Beyond this transactional presumption, scholars have proposed additional doctrines whose purpose is to account for circumstances where real property is or should be granted special legal protection.⁹⁴ These doctrines fall mainly into two categories. One category marks real property as special according to its connection with individual or group *identity*.⁹⁵ The other category marks real property as special according to its connection with individual or group *welfare*.⁹⁶ Under both categories of theory, the main consequence of marking real property as special in these ways is that such property gains additional security against dispossession.⁹⁷ Such additional security may take the form requiring extraordinary justification for dispossession or additional process guarantees to avoid unjustified dispossession.⁹⁸

92

93

94

95

96

97

98

By contrast, personal property enjoys no presumption of uniqueness in U.S. property law.⁹⁹ But personal property can be special according to its connection with identity or welfare, in just the ways that the above theories recommend of real property.¹⁰⁰ The moral rights of artists in their creations and cultural totems are obvious examples of personal property made legally special according to connection with identity.¹⁰¹ An example of personal property made legally special according to its connection with welfare is the bailment-like duty of residential landlords to safeguard the personal property of holdover tenants.¹⁰² That many items placed in self-storage can have such connections with identity or welfare is patent: family heirlooms, personal records, collectors' items, the meager belongings of homeless individuals, the residue of possessions owned by evicted residential tenants or foreclosed-upon home owners.¹⁰³

Most state self-storage statutes offer no special protection whatsoever for personal property with welfare functions. Indeed, only a couple of state laws require facility owners to grant defaulted tenants access to stored property necessary for personal welfare, e.g., personal records, health aids, or clothing.¹⁰⁴ And self-storage leases routinely require that tenants agree not to store personal property with 'sentimental value'—that is, personal property with identity functions.¹⁰⁵

The lack of special access rights to personal property with welfare functions, and facility owners' broad refusal to store personal property with identity functions, clarifies the business model of the self-storage industry. Its sole product is the storage of *crap*—personal property that tenants neither highly value nor much need—and *only crap*. Tenants who know their rights are foolish to store any personal property with welfare functions, and are in breach of contract for storing personal property with identity functions.

⁹⁹

¹⁰⁰

¹⁰¹

¹⁰²

¹⁰³

¹⁰⁴ See footnote 50 and accompanying text.

¹⁰⁵

At first glance, the service of storing relatively valueless things in exchange for money seems unproblematic. But, here, social reality gets in the way. The tenant duty of storing only low-value personal property is both counter to reasonable tenant expectations and will often prove difficult to comply with. When a person rents a self-storage unit, they do so to store pre-identified things that are personally valued above the monthly costs of storage and associated risks. The contractual duty to store only low-value personal property would, in many cases, require would-be renters to forego self-storage rental altogether or replace preselected storage items of personal value with crap that complies with the self-storage contract limitations. Under many self-storage agreements, tenants would be in breach for storing reasonable and expected items such as family Christmas ornaments or inherited china used only during holidays.¹⁰⁶ A person likely is in breach for storing the balance of what once fit in a large home, but which does not fit in a small apartment.¹⁰⁷ Additionally, the prohibition on storage of much-valued personal property may be unreasonable as applied to the homeless or working poor, to residential evictees, persons in home foreclosure, or individuals who default in relation to bankruptcy, medical emergency or military leave.

The central policy concern raised by what may be called the “crap” rule is not protection of the least well off, however, though that is important. Rather, the central policy concern is two-fold. First, the low-value personal property restrictions imposed upon tenants by self-storage agreements are unreasonable when viewed in light of the reasons for which tenants rent self-storage in the first place. Second, to the extent that some personal property is entitled to special legal protection, such protections may extend to personal property placed in self-storage.

B. Tort Law Misfires and the Elimination of Bailments

An earlier part of the article explained that, either by state law or self-storage lease, self-storage landlords can only be held liable for damage or loss to tenant property under two circumstances: first, intentional or bad faith conduct by a landlord or its agents that causes such damage;¹⁰⁸ second,

¹⁰⁶

¹⁰⁷

¹⁰⁸

violation of the express terms of state's self-storage facility act.¹⁰⁹ As demonstrated by the cases discussed there, these statutory and contractual limitations on common law tort remedies give self-storage landlords a very broad right of negligence with regard to the treatment of tenant property.¹¹⁰

The right of negligence of self-storage landlords would not be absolute, however, without also eliminating the law of bailments. Bailments, a creature of contract and property, arise upon the express or implied delivery of personal property by one party to be held in trust by another party.¹¹¹ The contractual aspect of bailments flows from the fact that bailment duties are premised upon express or implied agreements between the parties.¹¹² The property aspect of bailments flows from the fact that bailment duties depend on the bailee's—the party to whom personal property is delivered—lawful possession and control of the goods.¹¹³ At early common law, the duty of care expected of bailees toward bailor property was “slight, ordinary, or great” depending on whether the bailment itself was for the sole benefit of the bailor, for mutual benefit of bailor and bailee, or for the sole benefit of the bailee.¹¹⁴ However, a duty of reasonable care for all bailments has supplanted the tiered approach.¹¹⁵

The law of bailments differs from the common law of negligence in one crucial respect; one of great significance to self-storage leases and potential landlord duties of care. A party who brings a claim of negligence against another for the loss or damage to personal property has the burden of proving negligent conduct by the latter.¹¹⁶ By contrast, a bailee who loses or damages bailed property *is presumed* negligent, and the bailee must compensate the bailor if unable to rebut the presumption.¹¹⁷

Sometimes by operation of state self-storage law, and always by operation of contract, self-storage leases are deemed never to create

109

110

111

112

113

114

115

116

117

bailments.¹¹⁸ Trade publications of the self-storage industry are full of articles warning facility owners of conduct that may jeopardize these statutory and contractual protections against incurring duties of care toward tenant property.¹¹⁹ The foundational wisdom of these publications is, first, that facility owners require tenants to furnish their own locks¹²⁰, and second that facility owners never enter tenant space or handle tenant property outside of the default process.¹²¹ These practices are meant to ensure that self-storage landlords never appear to have lawful possession or control over tenant property as would give rise to a bailment relationship.¹²²

If industry practice is to avoid lawful possession by foregoing landlord access to or control of tenant space, then the common law of bailments does not apply. Why, in that case, the additional statutory or contractual provisions against bailments? These protections exist to prevent the creation of a bailment *even after* tenant default and exercise of landlord lien rights, when landlords unquestionably have lawful possession and exclusive control of tenant property for purposes of sale at auction. Thus, self-storage landlords eat their cake and have it, too: by state law they are freed from traditional creditor-debtor remedies and authorized to lien stored tenant property to satisfy debt;¹²³ but upon exercising that power, and seizing and selling tenant property, they are spared the common law duty of reasonable care that typically comes with gaining lawful possession of another's property.¹²⁴

C. Ignored Parallels to Residential Landlord-Tenant Reform

“The contract for the storage units clearly was standardized. However, it cannot be said that the Appellants had no opportunity to make any choices. They were provided with the option of purchasing insurance to protect against negligence for an additional fee. The public interest is not affected in light of the fact that the opportunity to elect insurance for an

¹¹⁸

¹¹⁹

¹²⁰

¹²¹

¹²²

¹²³

¹²⁴

additional reasonable fee existed. A contract for self-storage cannot be equated with a residential lease. The prohibition of enforcing exculpatory clauses in residential leases is based on housing shortages, especially affordable housing, the need for which has been recognized by the New Jersey legislature. Additionally, the exculpatory clause and offer of insurance were both clear in the contracts signed by the Appellants. A self-storage contract is more akin to a lease for commercial space. Therefore, we agree with the District Court's determination that no unequal bargaining power existed that would make the exculpatory clause unenforceable."

—J. Fisher, *Kane v. U-Haul Int'l Inc.*, affirming grant of summary judgment to U-Haul International, Inc.¹²⁵

Personal property is everything one owns that is not real property.¹²⁶ Real property admits of a further policy distinction between residential and commercial property.¹²⁷ To designate real property as 'residential' has, in our society, the legal effect of strengthening owners' property rights based upon a variety of public policy considerations, including the need for affordable housing¹²⁸, the importance of shelter to personal welfare¹²⁹, and the special place in the American imagination held by the home.¹³⁰ Likewise, to designate real property as 'commercial' signals to market participants that government has no special interest in the kinds of dealings that occur beyond ordinary above-board contracting.¹³¹

Courts categorically treat self-storage cases as purely commercial disputes.¹³² There is basis for this. Self-storage facilities are commercial enterprises. The real property purchased or leased by facility owners is

¹²⁵ *Kane v. U-Haul Int'l Inc.*, 218 F. App'x. 163, 166 (3d Cir. 2007).

¹²⁶

¹²⁷

¹²⁸

¹²⁹

¹³⁰

¹³¹

¹³²

acquired from still other commercial enterprises. And most important, *no one lives—or is legally permitted to live—in a self-storage unit.*¹³³

This is not the end of the story, however. There are relevant factors that Judge Fisher—and the judiciary generally—has overlooked; facts that likely belie Judge Fisher's claim that self-storage leases involve equal bargaining power, and arguably establish that self-storage leases are better understood as residential rather than commercial in character.

What have the courts missed? Through what lens does self-storage rentals look more like renting apartments to live in rather than offices to work in? The second question is valuable in its own right. For it suggests that self-storage leases might be neither purely commercial nor purely residential as a matter of doctrine, requiring some policy discussions about how to handle them. Now back to the questions. What courts have missed is that emphasis upon the self-storage unit—the external shelter for personal property—is not the only property involved in self-storage leases that might influence what the law should be. There is also the personal property placed within the unit, *which may itself be residential or commercial in character.*

Attending to the character of personal property stored allows a new distinction not yet addressed by courts. The shift in attention distinguishes warehouses (at docks, shipyards, railroads, airlines, industrial farms), which lease space for storage of bulk goods or other commercial products,¹³⁴ from self-storage facilities which lease space for the storage of individual personal property.¹³⁵ Furthermore, warehouses are in the business of storing commercial personal property, typically held in the name of a corporation or other business entity, for the purpose of investment and commercial gain.¹³⁶ By contrast, the property stored at self-storage facilities typically is residential personal property purchased by tenants and held for personal enjoyment as part of a fully functioning home and life.¹³⁷

133

134

135

136

137

And, even though state courts have not recognized this distinction, nearly every state legislature has: by the creation of self-storage facility acts that are separate from its commercial warehousing laws.¹³⁸

A ready objection to the distinction between residential and commercial personal property supposes that personal property placed in self-storage is, by definition, not residential, because such property is not kept at a home residence. But observe how quickly this argument falls apart. Home furniture, tax records, family photographs, heirlooms, etc., do not cease to be residential just because they are stored off-premises when not in use. Said personal property is residential whether it is kept in one's basement, one's garage, or *one's self-storage unit*. Similarly, an individual who sets up a corporation and purchases supplies and products in the corporation's name has purchased commercial personal property, even if that personal property is stored at home and the business run from there.

The error of the foregoing objection is that the *locus* of personal property is no sure-fire indication of its status as residential or commercial. Instead, as with real property, the distinction between residential and commercial property turns on *usage*.¹³⁹ An individual may lease self-storage space in order to store products used in a home mail order business or an illegal meth lab, for example, in which cases the argument that such personal property is residential fails. In these cases the individuals are storing products used for investment and business purposes, much like the railroads, airlines, and industrial farms. We might still conclude that residential personal property placed in self-storage facilities deserves less protection than any property stored at a personal residence, but the basis for differential treatment cannot be because such property is "commercial" in virtue of its storage away from home.

If the distinction between residential and commercial personal property is accepted, it is no longer doctrinally obvious or inevitable that self-storage leases are commercial leases. Rather, an unexplained judicial policy choice has been made with regard to self-storage leases—and probably the wrong one.

¹³⁸

¹³⁹

Even if much personal property placed in self-storage facilities is residential rather than commercial in character, the excerpt from Judge Fisher above suggests that the public interest is not so affected to warrant judicial scrutiny of self-storage agreements. Facts established earlier in this article undercut this claim:

- The boom in the self-storage industry is great evidence of a shortage of space for personal property.¹⁴⁰
- Where the personal property has welfare or identity functions—for example, clothing necessary for work or needed medical devices—the public interest is affected.¹⁴¹
- Particularly in cases where property placed in self-storage is the result of economic hardship, such as divorce, homelessness, illness, etc., there is a public interest in ensuring something like due process. Due process, not in the Constitutional sense bracketed in the introduction, but rather the legal process which the common law of property has long required prior to dispossessing people of what they own.¹⁴²
- Finally, Judge Fisher's suggestion of equal bargaining power between self-storage tenants and landlords is plainly false. Self-storage tenants do not have their own lobby. Self-storage contracts, which place virtually all risk upon tenants, are not negotiable. And insurance—which exists primarily to protect landlords against their own misconduct rather than the tenant's own behavior—addresses little that is askance in self-storage law.¹⁴³

140

141

142

143

D. Treasure Trove and Self-Storage Treasure Hunters

As observed earlier, only a small minority of states expressly requires that public auction of a defaulted tenant's property be conducted in a "commercially reasonable" manner.¹⁴⁴ Most states presume that compliance with the sale provisions of the state self-storage statute constitutes a commercially reasonable sale.¹⁴⁵

Yet, those same statutes permit a defaulted tenant's property to be sold "singly, in lots or as a whole."¹⁴⁶ It is difficult to see how selling a tenant's property as a whole, which is the common practice, is consistent with any duty of commercially reasonable sale that has teeth. Suppose Tenant has defaulted on a self-storage agreement and Landlord has denied Tenant access, seized the unit and scheduled a public auction. Tenant owes \$300 in arrears to recover the unit before auction. Tenant's unit has property with a combined fair market value of \$600, all contained within three sealed boxes. Landlord opts to sale the lot as a whole, under terms similar to the auction described in the introduction to Part I of this article.¹⁴⁷ That is, bidders are not allowed to enter the unit, much less view the particular items inside of the boxes—up close or at all. Instead, bidders are permitted only to shine their flashlights inside the unit, over and between the boxes, and then use their imaginations to determine how much to bid.

Under these auction conditions, no bid is likely to approach the \$600 value of Tenant's property; or even the estimated value if the items inside the boxes were placed on display for individual valuation. But any shortfall in proceeds caused by sale as a shrouded whole harms Tenant. If Landlord would have recouped \$400 by placing the items on display, Tenant would be entitled to proceeds of \$100. If Landlord only recoups \$150 through sale as a whole, Tenant is left owing \$150 instead.

The disturbing manner of self-storage auctions notwithstanding, whether such practices meet the duty of commercially reasonable sales is a matter of contract law, not property law. Where self-storage auctions implicate property law is both surprising and fascinating. The heretofore clandestine

144

145

146

147

culture of self-storage auctions has made prime time with such reality television programs as *Storage Wars*¹⁴⁸ and *Auction Hunters*.¹⁴⁹ Today, there are full-time self-storage auction hunters who spend their days driving statewide from auction to auction, reselling unit property on Ebay and elsewhere, sometimes realizing significant profit.¹⁵⁰

The choice of self-storage landlords to sell defaulted tenant property for such low value has another consequence: the resurrection of treasure hunting, a practice long shunned in the common law of property. At early common law the doctrine of treasure trove was one part of the law of finders.¹⁵¹ Whether a found object may be kept by the finder depends on whether the true owner *lost*, *misaid* or *abandoned* the object.¹⁵² A finder of lost or mislaid property must return the property to the true owner.¹⁵³ A finder of abandoned property becomes the true owner.¹⁵⁴ Treasure trove, reserved for gold, silver or other money equivalents, was an exception to this framework. Under the doctrine of treasure trove, an individual who finds concealed treasure alongside evidence of antiquity (evidence that the true owner is dead or cannot be known) gets to keep it.¹⁵⁵ Treasure trove was an exceptional doctrine because the fact of deliberate concealment is an indication that such property was not abandoned, leaving only options for classification—lost or mislaid—that would require return of found property to the true owner. But the fact that the true owner was unlikely to be alive or found made “finders keepers” the more functional rule.

The doctrine of treasure trove fell into disfavor, however, because it was believed to encourage and to reward trespass:

[We] find the rule with respect to treasure trove to be out of harmony with modern notions of fair play. The common-law rule of treasure trove invites trespassers to roam at large over the property of others with their metal detecting devices and

148

149

150

151

152

153

154

155

to dig wherever such devices tell them property might be found. If the discovery happens to fit the definition of treasure trove, the trespasser may claim it as his own. To paraphrase another court: The mind refuses consent to the proposition that one may go upon the lands of another and dig up and take away anything he discovers there which does not belong to the owner of the land...¹⁵⁶

Self-storage auctions, under cover of the doctrine of bona fide purchasers,¹⁵⁷ are a modern iteration of treasure-hunting. Auction hunters employ flashlights to inspect dark units rather than metal detectors, and ordinary trespass is avoided by remaining outside of the defaulted unit until after sale is complete.¹⁵⁸ But all that was unfair and unwise about treasure trove persists here. The encouragement to invade another's property caused by the doctrine of treasure trove exists in self-storage auctions as hopes of finding something for near to nothing.¹⁵⁹ And although the structure of self-storage auctions is slick enough to avoid the law of trespass, what truly is the rampant conversion of property under common law masquerades as bona fide purchases for value.¹⁶⁰

The bona fide purchaser doctrine also discharges treasure-trove's requirement of antiquity. It is not uncommon for defaulted tenants to seek to recover auctioned personal property with welfare or identity functions shortly after their unit is sold.¹⁶¹ Landlords cannot, and should not, reveal the identity of successful auction hunters.¹⁶² Unlike treasure trove, however, where the true owner probably died long ago, the defaulted tenant whose property is sold may be only days or hours behind the people who now own what used to be theirs. Some auction hunters seek to return property with identity functions to dispossessed tenants.¹⁶³ But random acts of kindness are no substitute for fair law. More important, what of personal property that would have garnered substantial sums on the open market, but which is

¹⁵⁶

¹⁵⁷

¹⁵⁸

¹⁵⁹

¹⁶⁰

¹⁶¹

¹⁶²

¹⁶³

“discovered” at auction where expectations are severely depressed? In such circumstances auction hunters reap a windfall that could have gone against the defaulting tenant’s outstanding debt and auction proceeds.

Self-storage auction hunters play an important role in the self-storage economy. They are garbage men and women who clear out entire units of defaulted tenancies. Auction hunters would be much less efficient, and much less interested, if landlords sought fair market value item-by-item for defaulted tenant property.¹⁶⁴ Furthermore, the auction of much of the crap that sits in self-storage units often would not be worth the time.¹⁶⁵ However, under the law of property, at least, none of these facts is a justification for giving away property of a defaulted tenant under the fiction that someone has paid value for it. This fiction is only possible because the law of self-storage has authorized self-storage landlords to sell by lot or whole unit, rather than to inspect and fairly value the personal property they seize with intent to sell.

III. Conclusion: Legal Reform, Voluntariness, and the Property Ethic “Own Less”

Reforming the practices of self-storage industry is easy enough. Simply reinstitute the common law of negligence and bailments, and make federal a distraint process similar to the ones already present in a few states.

Regarding the valuation of personal property sent to auction, defaulted self-storage tenants should have protections similar to the debtor protections afforded to a defaulted mortgagor when real property is auctioned by the mortgagee at a foreclosure sale. In the real property foreclosure context, many states have taken steps to prevent the low bids that currently plague self-storage auctions. These include: a *statutory right of redemption*, which allows a mortgagor to buy back the property for the price bid at the foreclosure sale for a designated period after foreclosure; *the prohibition on deficiency judgments*, which decreases a mortgagee’s incentive to bid below the fair market value of the property; mortgagor rights to bring *unjust enrichment claims* against mortgagees in cases where a mortgagee buys the property at a low price and resells it within a short period of time

¹⁶⁴

¹⁶⁵

for a windfall; and *judicially supervised sales*, by which courts ensure that the sale price is adequate.¹⁶⁶

These measures would afford personal property placed in self-storage facilities the same protections accorded nearly all other property, real or personal, given over to another for mutual benefit, where ownership is at stake. Alternatively or additionally, the institution of tenant inventories, mandatory insurance, and a checklist disclosure of how few tenant rights exist after depositing personal property, may change the accumulation behavior of would-be renters.

* * *

Whatever readers' thoughts of the foregoing arguments, however wrong the practices of the self-storage industry are from a property perspective, something still does not sit right. Something may grate on the American psyche about helping self-storage tenants. Some readers may feel somehow this all the fault of self-storage tenants and that the common law ought not come to their rescue. After all, what is preventing distressed tenants from gathering up their goods *before* they default? Given much of the crap that is found in self-storage facilities, landlords often prefer this to having to conduct auctions, and the unit is immediately ready to re-lease. And who needs all that stuff anyway? Personal accumulation in America has long since gone too far, some might say. Perhaps these dispossessed tenants are left better off, a bit morally corrected, by the whole affair.

On the subject of self-storage American cultural mores may be at odds with the common law of property. Where the common law of property sees corporate exploitation of a relatively weak consumer population, American cultural mores sees more proof of a gluttonous American population. Criticism of the American penchant for thing-accumulation is rampant.¹⁶⁷

¹⁶⁶ See Joseph Singer, PROPERTY LAW 895-896 (2010).

¹⁶⁷ See e.g. Lisa McLaughlin, *The 100 Thing Challenge*, TIME, June 16, 2008, at 57 (chronicling a movement in the United States for every American to get rid of all but 100 things they own); Lauren Baier Kim, *Do We Need Bigger Homes or Less Stuff?*, WALL ST. J., (January 4, 2008, 1:32 PM), <http://blogs.wsj.com/developments/2008/01/04/do-we-need-bigger-homes-or-less-stuff/>; Nancy Keates, *The Struggle to Contain Ourselves*, WALL ST. J., January 4, 2008, at W1; Russell Belk et al., *Dirty Little Secret: Home Chaos and Professional Organizers*, 10 CONSUMPTION MARKETS & CULTURE 133 (2007) (exploring "the deep meanings of clutter" and visualizing "the issues in disorganization and frustrations of home clutter and chaos as well as the methods and results of [professional] organizers"); Kieran Doherty, *Clean Your*

However, growth of personal property holdings is a characteristic of all affluent societies.¹⁶⁸ More important, self-storage law should not be made into morals legislation, with a design to encourage us to make better property choices with our freedom. Self-storage defaults often already kick when individuals are down. Using law to add moral insult to economic injury seems unduly harsh and would accomplish little.

Closet, Clear Your Mind, Organic Style season 2005, at 35; Nancy Stedman, *20 Minutes to a Clutter-Free House: Quick easy strategies that really work*, PREVENTION (Oct. 2004), at 133; Yarrow, *The Cost of Clutter: A Feng Shui Perspective*, LILIPOH, season 2003, at 29; Molly Ivins, *Too Much Stuff! Our Accumulation Crisis*, UTNE READER issue 1989, at 77.