

ARTICLE

ABANDONMENT AND ADVERSE POSSESSION

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ABSTRACT

The number of vacant properties nationwide jumped by 4.5 million between 2000 and 2010, an increase of 44%, due to a variety of factors, such as the financial crisis and natural disasters. Vacant properties create a vicious cycle of negative externalities: abandoned property breeds blight and crime, thereby further depressing the economy, which leads to more abandoned property. Solving the problem of abandonment is a top priority for municipal leaders, but effective means of putting abandoned property in the hands of a private owner are hard to come by. Cities have experimented with a variety of solutions ranging from eminent domain to land banks to enticing owners to return to their abandoned property through grant money.

This Article proposes an alternative solution for abandoned property: adverse possession with a reformed possession requirement. This Article argues that the traditional application of the possessory requirement for adverse possession should be modified when the true owner has vacated his property. In this instance, actual possession

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should be unnecessary; instead, a notice of intent to possess should be sufficient to acquire abandoned property through adverse possession. By altering the doctrine in this manner, adverse possession can be an efficient solution for private parties to acquire ownership of abandoned properties while still offering a temporal safety net to protect true owners. Furthermore, expanding possession in this manner allows the doctrine to serve as a tool for market discovery that encourages adverse possessors and true owners to transfer ownership through voluntary bilateral transactions.

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I. INTRODUCTION

In the last decade, abandonment of real property has emerged as an important issue for scholars and policy makers.¹ The number of vacant properties nationwide jumped by 4.5 million between 2000 and 2010, an increase of 44%.² Numerous events led to this dramatic increase. The mortgage foreclosure crisis left in its wake thousands of abandoned properties. Areas like Chicago saw a notable uptick in their number of abandoned properties when thousands of homes went financially underwater.³ Collapsing industries created crumbling neighborhoods. Youngstown, Ohio, once a capital of the domestic steel industry, now has approximately 22,000 empty properties and roughly one-third of the population it had when the steel industry was at its peak.⁴ Detroit's economic woes and population loss have led to a similar surge in empty estates. The City of Detroit estimates that at least 78,000 structures within its municipal limits are abandoned.⁵

Economic depression is not the only trigger for the dramatically increasing abandonment seen in the last few years. Natural disasters, such as Hurricanes Katrina and Sandy, led to

1. See, e.g., Robert Hockett, *Paying Paul and Robbing No One: An Eminent Domain Solution for Underwater Mortgage Debt*, 19 CURRENT ISSUES ECON. & FIN., no. 5, 2013, at 2, 4 (discussing the use of eminent domain on abandoned properties); Eduardo M. Peñalver, *The Illusory Right to Abandon*, 109 MICH. L. REV. 191, 200 (2010) (discussing the right to abandon real property); Lior Jacob Strahilevitz, *The Right to Abandon*, 158 U. PA. L. REV. 355, 361 (2010) (discussing same).

2. ALAN MALLACH, BROOKINGS METRO. POLICY PROGRAM, LAYING THE GROUNDWORK FOR CHANGE: DEMOLITION, URBAN STRATEGY, AND POLICY REFORM 6 (2012).

3. Meribah Knight & Bridget O'Shea, *Foreclosures Leave Pockets of Neglect and Decay*, N.Y. TIMES, Oct. 28, 2011, at A21A; see U.S. CONFERENCE OF MAYORS, IMPACT OF THE MORTGAGE FORECLOSURE CRISIS ON VACANT AND ABANDONED PROPERTIES IN CITIES: A 77-CITY SURVEY 5 (2010).

4. Timothy Williams, *For Shrinking Cities, Destruction Is a Path to Renewal*, N.Y. TIMES, Nov. 12, 2013, at A15. In the 1930s, Youngstown had a population of 170,002. Justin Vellucci, *Extreme Makeover: City Edition*, PITTSBURGH TRIB. REV. (Jan. 21, 2007), http://triblive.com/x/pittsburghtrib/news/regional/s_489560.html#axzz3U8jop2ce. As of July 1, 2013, Youngstown had a population of 65,184. *State & County QuickFacts*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045214/00> (search "Youngstown City, Ohio"; then follow "Set" hyperlink).

5. Mike Wilkinson et al., *Charting the Path from Rock Bottom*, DETROIT FREE PRESS, Feb. 2, 2014, at A16. Some city officials estimate that the number of abandoned properties is closer to 90,000. Monica Davey, *A Picture of Detroit Ruin, Street by Forlorn Street*, N.Y. TIMES, Feb. 18, 2014, at A1 [hereinafter Davey, *Detroit Ruin*]. The American Institute of Architects wrote in 2008 that more than 40 out of Detroit's 139 square miles were vacant. AM. INST. OF ARCHITECTS, LEANER, GREENER DETROIT 43 (2008). In 2014, the Obama Administration recommended that the City of Detroit tear down approximately 40,000 dilapidated buildings to help rid the city of blight. Monica Davey, *Detroit Urged to Tear Down 40,000 Buildings*, N.Y. TIMES, May 28, 2014, at A1.

the same results. Almost a decade after Hurricane Katrina, New Orleans remains home to approximately 43,000 abandoned buildings.⁶

Vacant properties create a vicious cycle of negative externalities: abandoned property breeds blight and crime, thereby further depressing the economy, which leads to more abandoned property.⁷ Accordingly, solving the problem of abandonment is a top priority for municipal leaders. Effective remedies, however, are hard to come by. One answer is for the state to use its eminent domain power and take the abandoned property. Scholars such as Robert Hockett champion this approach for remedying the abandonment that arose from the mortgage foreclosure crisis.⁸ While eminent domain is perhaps the most traditional government solution to abandoned property, and may work in certain instances, many governments are financially incapable of utilizing this tool.⁹ To engage in a taking, the state must pay the true owner just compensation for the property, which is beyond the means of some municipalities, particularly in cases of mass abandonment where staggering losses in population have severely depleted the local tax base.¹⁰ Moreover, even if the government can acquire the abandoned property, developing that property to put it back into commerce is not without cost. Tearing down abandoned structures costs approximately \$9,000 per house.¹¹ For some cities, those costs are simply too great.¹²

6. Jesse Hardman, *Abandoned but Not Uninhabited: The Blighted Homes of New Orleans*, TIME (June 6, 2011), <http://content.time.com/time/nation/article/0,8599,2075008,00.html>.

7. In 2008, Tom Cochran, the Executive Director and CEO of the U.S. Conference of Mayors, wrote that vacant properties “are a drain on city budgets. They detract from the quality of life, as well as the economic opportunities, of those living around them. They are an impediment to individual neighborhood redevelopment and, ultimately, to achievement of city-wide economic development goals.” Tom Cochran, *Foreword* to U.S. CONFERENCE OF MAYORS, VACANT AND ABANDONED PROPERTIES: SURVEY AND BEST PRACTICES 1 (2008).

8. Hockett, *supra* note 1, at 4; Robert Hockett & John Vlahoplus, *A Federalist Blessing in Disguise: From National Inaction to Local Action on Underwater Mortgages*, 7 HARV. L. & POL'Y REV. 253, 266–69 (2013); Robert Hockett, *Accidental Suicide Pacts and Creditor Collective Action Problems: The Mortgage Mess, the Deadweight Loss, and How to Get the Value Back*, 98 CORNELL L. REV. ONLINE 55, 69–71 (2013), <http://cornelllawreview.org/files/2013/05/Hockettfinal.pdf>; Shaila Dewan, *More Cities Consider Eminent Domain to Halt Foreclosures*, N.Y. TIMES, Nov. 16, 2013, at B4 (discussing how Hockett has been a chief architect of this strategy).

9. Hockett, *supra* note 1, at 4.

10. Further, to the extent a city is insolvent, like Detroit, eminent domain is not a financially viable option.

11. Williams, *supra* note 4; Phillip Morgan, *To Remove Blighted Houses, Temple Terrace Seeks to Tighten Code*, TAMPA BAY TIMES (Oct. 9, 2013), <http://www.tampabay.com/news/localgovernment/to-remove-blighted-houses-temple-terrace-seeks-to-tighten-code/2146267>.

For other cities, the barrier to action may be political instead of economic. Razed neighborhoods lead to reapportionment at every level of government. Convincing city council members and state legislators to support a plan that effectively removes them from office may be an unattainable goal.¹³

The democratic process can further create barriers. In November 2014, 60% of Louisiana voters rejected a state constitutional amendment that would have allowed for the sale of property abandoned following Hurricane Katrina for \$100 per lot.¹⁴ Voters disagreed with the legislature's plan to essentially donate the abandoned properties. The effect of the no vote, though, was that the abandoned properties remained abandoned.¹⁵

12. See, e.g., Claudia Vargas, *Phila. Can't Afford to Raze Nearly 600 Dangerous Buildings*, PHILLY.COM (Mar. 17, 2014), http://articles.philly.com/2014-03-17/news/48269260_1_lamp-demolition-properties. Outside of its takings power, governments may try to remedy abandoned property by foreclosing on the property and selling it through a tax sale. Tax sales might be an efficient way to remedy some abandoned property, but there are difficulties here, too. A precursor to a tax sale, there must be a tax lien; to the extent the property is free from a tax lien, there can be no tax sale. Also, there are administrative costs associated with tax sales. While those costs are generally small, the more abandoned property at issue, the greater the administrative costs. Finally, tax sales work only when there is a buyer. If no one purchases the abandoned property, the problem of the abandoned property remains unsolved. For a discussion of tax sales, see James J. Kelly, Jr., *A Continuum In Remedies: Reconnecting Vacant Houses to the Market*, 33 ST. LOUIS U. PUB. L. REV. 109, 135–38 (2013).

13. Political problems can run deeper than reapportionment. For example, Hurricane Katrina created great devastation throughout southern Louisiana. One neighborhood particularly hard hit in New Orleans was the Lower Ninth Ward, a neighborhood with an African-American population greater than 98%. Conversations of what to do with the largely abandoned Lower Ninth Ward naturally include an element of race, but that inclusion became a conversation stopper for many politicians. See Brian Thevenot, *Race, Class on Everyone's Mind*, TIMES-PICAYUNE, Oct. 2, 2005, at A-4 (discussing differing opinions of residents returning to New Orleans on how to rebuild the city); Jarvis DeBerry, *Don't Give the Bigots a Reason to Gloat*, TIMES-PICAYUNE (Feb. 13, 2011), http://www.nola.com/opinions/index.ssf/2011/02/dont_give_the_bigots_a_reason.html (discussing the development of low income housing on minorities); Stephanie Grace, *Blight, Displacement and Recovery in New Orleans*, TIMES-PICAYUNE (Aug. 8, 2010), http://www.nola.com/opinions/index.ssf/2010/08/blight_displacement_and_recove.html (discussing a mayoral speech concerning racial protests to blight remedies); see also Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734, 778 (2008) (discussing how race can be a “conversation stopper” for politicians when racial polarization is present).

14. *Official Election Results for Nov. 4, 2014*, LA. SECRETARY ST., http://staticresults.sos.la.gov/11042014/11042014_Statewide.html; see Richard A. Webster, *Proposed Amendment 13: Plan for NORA to Sell \$100 Lower 9th Ward Lots on Nov. 4 Ballot*, TIMES-PICAYUNE (Oct. 17, 2014), http://www.nola.com/politics/index.ssf/2014/10/proposed_amendment_lower_9th_w.html (describing proposed amendment).

15. To put abandoned and blighted properties back into commerce, New Orleans has become more vigilant in its use of public auctions to sell off tax delinquent properties and put them back into commerce. Jeff Adelson, *New Orleans Starts Process to Auction*

Some cities are trying to move past such financial and political obstacles with novel approaches to curbing abandonment. Philadelphia has experimented with using land banks, which allow a quasi-governmental entity to take title to abandoned properties with the goal of putting those properties back into commerce.¹⁶ Youngstown now requires the registration of all vacant properties with a \$100 annual charge.¹⁷ Youngstown also forces lenders who want to foreclose on abandoned properties to post a \$10,000 bond, which will be used to demolish the structures should the lenders fail to properly maintain the property.¹⁸

Other jurisdictions focus more on preventing the original abandonment. Many cities have taken advantage of the federal Home Affordable Modification Program, which provides incentives to banks to modify mortgages and allow true owners to remain in their homes.¹⁹ Illinois extended protective measures through the end of 2015 that prevent lenders from selling a defaulting true owner's home if the true owner has applied for loan modification under the federal program.²⁰ Some jurisdictions concentrate on attracting the true owner back to his abandoned property. For example, with the assistance of the federal government, Louisiana has administered billions of dollars in grant money to residents to help rebuild their houses that were damaged by Hurricanes Katrina and Rita.²¹

Beyond these state solutions, the market should presumably respond and reallocate vacant properties. But in many cases of abandonment—and particularly when there is mass abandonment like in New Orleans, Detroit, and Youngstown—the market faces

1,800 Tax-Delinquent Properties, NEW ORLEANS ADVOC. (Mar. 6, 2015), <http://www.theneworleansadvocate.com/features/books/11769779-171/new-orleans-starts-process-to>.

16. Jon Hurdle, *Philadelphia Raises Stakes with Plan to Reverse Blight*, N.Y. TIMES, Sept. 23, 2013, at A14; see also Frank S. Alexander, *Louisiana Land Reform in the Storms' Aftermath*, 53 LOY. L. REV. 727, 736 (2007) (discussing Louisiana's approach to land banks); Julie A. Tappendorf & Brent O. Denzin, *Turning Vacant Properties into Community Assets Through Land Banking*, 43 URB. LAW. 801, 804–06 (2011).

17. YOUNGSTOWN, OHIO, CITY ORDINANCE § 546.14 (2014), available at http://www.cityofyoungstownoh.org/city_hall/charter/charter.aspx.

18. *Id.*

19. See, e.g., Andrew Martin, *For the Jobless, Little U.S. Help on Foreclosure*, N.Y. TIMES, June 5, 2011, at A1.

20. Press Release, Ill. Gov't News Network, Governor Quinn Signs Legislation to Protect Struggling Homeowners (Dec. 26, 2013), available at <http://www3.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=2&RecNum=11810>.

21. THE ROAD HOME, <https://www.road2la.org/> (last visited Feb. 1, 2014); Richard Rainey, *Road Home Policy Changes Could Free More Aid for Louisiana Homeowners*, TIMES-PICAYUNE (May 15, 2013), http://www.nola.com/politics/index.ssf/2013/05/road_home_policy_changes_could.html.

insurmountable obstacles. Potential buyers must determine the identity of the true owners who have abandoned their properties. Far from perfect, recording systems that are not always easily accessible make such identification difficult. Even when a potential buyer accurately determines the true owner's identity, the buyer must also locate the true owner in order to engage in a transaction. Locating the true owner may be virtually impossible once the true owner has vacated his property.²²

The seeming intractability of abandoned real property has also spurred scholarly attention. Lior Strahilevitz and Eduardo Peñalver have debated the merits of the traditional common law rule that real property cannot be abandoned.²³ Strahilevitz argues that when there is a positive market value for the to-be abandoned property, the true owner should be able to file a notice of abandonment and abandon his property.²⁴ Peñalver is not as quick to give up on the common law rule against abandonment; instead, Peñalver highlights land's scarcity and the lasting impacts of land-use decisions like abandonment.²⁵

While the scholastic discussion regarding what the normative rule for abandoning real property should be continues, the reality for city officials is that abandonment—perhaps not in the legal sense, but certainly in a practical sense—occurs with rising frequency.²⁶ The question that must be answered is how to ameliorate this problem: How can abandoned real properties be brought back into commerce and the cycle of negative externalities associated with such properties ended?

This Article proposes an alternative solution for abandoned property: adverse possession with a reformed possession

22. To the extent that abandoned property is subject to a mortgage, the most likely private actor would be the bank that held the mortgage. The bank could foreclose upon the property, though the problems for foreclosing banks are akin to those of tax sales: there must be a mortgage on which the bank can foreclose, the administrative costs of foreclosing upon a large number of properties are high, and there must be a buyer at the foreclosure sale.

23. See Peñalver, *supra* note 1, at 199–200; Strahilevitz, *supra* note 1, at 360–61. It is black letter law in the common law that real property cannot be abandoned, meaning that a true owner cannot unilaterally and nondestructively rid himself of his ownership. See *id.* at 360 (defining abandonment).

24. Strahilevitz, *supra* note 1, at 418–19.

25. Peñalver, *supra* note 1, at 216–17.

26. This Article adopts Strahilevitz's definition of abandonment: "[A] unilateral, nondestructive means of ridding oneself of ownership." Strahilevitz, *supra* note 1, at 360. A key attribute of Strahilevitz's notion of abandonment "is that the abandoning owner can 'change her mind' and reclaim the abandoned resource so long as she does so before another person claims it." *Id.* at 361. The task of this Article is to determine when an adverse possessor may claim the abandoned property such that the true owner loses his ownership.

requirement. This is not the first time adverse possession has been brought up as a solution to abandonment; members of the Pennsylvania legislature proposed legislation in 2013 that alters adverse possession as a solution to the severe abandonment issues the state faces.²⁷ The proposed Pennsylvania solution, however, modifies the state's adverse possession statute by shortening the time the adverse possessor is required to possess the property.²⁸ Scholars have similarly recognized the difficulty that time plays in efficiently using the doctrine as a mechanism to encourage private parties to take property.²⁹

Instead of focusing on time, however, this Article concentrates on the possession aspect of the doctrine.³⁰ This Article argues that the traditional application of the possessory requirement for the adverse possession doctrine should be modified when the true owner has left his property. In such an instance, actual possession should be unnecessary and a notice of intent to possess should be sufficient.

The problem with requiring actual possession of abandoned property is three-fold. The high cost and risk of adversely possessing empty property—costs which are particularly great when there is mass abandonment—decrease the number of potential adverse possessors, thereby reducing the usefulness of the doctrine. Moreover, requiring possession creates the potential for wasteful possession, which simply replaces the problem of abandonment with the problem of waste. Finally, actual possession when the owner is absent does little to achieve the primary purpose that possession was originally intended to

27. See H.B. 1808, 2013–2014 Gen. Assemb., Reg. Sess. (Pa. 2013). One of the stated purposes of the proposal is to help remedy abandoned and blighted properties. *Proposed Law Would Prevent Blight and Abandonment by Clearing Title for Responsible Owners*, HOUSING ALLIANCE PA. (Jan. 10, 2014), <http://www.housingalliancepa.org/node/1563> [hereinafter *Proposed Law*]. The bill passed the Pennsylvania House by a vote of 183 to 13, but was never taken up by the Pennsylvania Senate. PA. HOUSE OF REPRESENTATIVES, HOUSE ROLL CALL FOR H.B. 1808 (2014), available at http://www.legis.state.pa.us/CFDOCS/Legis/RC/Public/rc_view_action2.cfm?sess_yr=2013&sess_ind=0&rc_body=H&rc_nbr=1083.

28. The proposed Pennsylvania legislation shortens the time period the adverse possessor is required to possess the property from twenty-one years to ten years, and offers certain additional protective measures for the true owner. Pa. H.B. 1808; *Proposed Law*, *supra* note 27.

29. See, e.g., Strahilevitz, *supra* note 1, at 416; Peñalver, *supra* note 1, at 210; Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 542, 553–57 (2009).

30. Some scholars have discussed the problem of possession generally. See, e.g., Carol Nicole Brown & Serena M. Williams, *Rethinking Adverse Possession: An Essay on Ownership and Possession*, 60 SYRACUSE L. REV. 583, 585 (2010) (discussing how possession is generally so problematic as to warrant the end of adverse possession); John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 840 (1994) (discussing the negative implications possession has for wild lands).

serve, that is to alert the true owner of a competing claim on his land.

If the modern concept of possession was relaxed, then adverse possession could be used as an effective tool in the fight to get empty properties back into commerce while still offering a temporal safety net to protect true owners. Furthermore, expanding possession to include notice allows the doctrine to achieve multiple market benefits. A notice-only system turns adverse possession into a tool for market discovery that encourages adverse possessors and true owners to engage in bilateral transactions.³¹ Once this adverse possessor-true owner market is discovered, there is also the possibility of creating a secondary market for individuals to trade future interests in land to be acquired through adverse possession.

Part II of this Article summarizes the doctrine of adverse possession, noting both the substantive and procedural elements of the doctrine, as well as its underlying purpose. Part III then focuses on the possession element of the doctrine. First, it demonstrates how the current concept of possession poses problems when the true owner is absent. Second, it proposes a relaxed version of possession that would allow the adverse possessor to give notice of her intent to possess. In doing so, Part III explains how this revised idea of possession would operate and what benefits it would create. Part IV addresses potential obstacles and objections to an expanded form of possession. Finally, the Article concludes by questioning whether there are other factual scenarios in which the black letter law concerning adverse possession should also be reconsidered.

II. DOCTRINE OF ADVERSE POSSESSION

Adverse possession operates on the principle that possession of property over time can lead to its ownership.³² This basic idea has existed since Roman law.³³ The Twelve Tables provided that title by *usucapio* could be granted to someone who possessed immovable property for as little as two years.³⁴ When Justinian's Institutes were first promulgated in 533 A.D., immovable

31. As described in more detail below, market discovery as used in this Article refers to the identification to the adverse possessor and true owner of the opportunity for the true owner to profitably transfer his property to the adverse possessor. *See infra* Part III.C.2.b.

32. Eduardo M. Peñalver, *Property's Memories*, 80 *FORDHAM L. REV.* 1071, 1076 (2011).

33. Brown & Williams, *supra* note 30, at 584.

34. BARRY NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* 105 (1962); *see also* 2 WILLIAM BLACKSTONE, *COMMENTARIES* *264 n.f. (discussing the Roman doctrine of *usucapio*).

property could be acquired by its possession for ten years if the true owner was present and failed to take any action against the possessor, or twenty years if the true owner was not present.³⁵

While possession of real property impacted rights under early English common law, possession did not transfer title as it did in Roman law. Instead, under English law, possession by someone other than the true owner precluded the true owner from recovering his possession.³⁶ The Statute of Westminster I in 1275 restricted a party trying to prove title from using evidence dating before particular prior events.³⁷ By 1540, English law stated that the true owner could not bring an action to put him back in possession of his property if the true owner had been out of possession for thirty or more years.³⁸

These early English statutes serve as the foundation for the doctrine of adverse possession as recognized today in the United States.³⁹ The current understanding of adverse possession combines the English preclusion of recovering possession with the practical title-transferring consequence set forth in Roman law.⁴⁰ Thus, adverse possession serves a mechanism by which a true owner loses the ability to recover his possession from an adverse possessor,⁴¹ thereby divesting the true owner of legal title to his property and vesting that title in the adverse possessor.⁴²

A. *Elements*

For an adverse possessor to divest the true owner of legal title to real property,⁴³ the adverse possessor must be in

35. J. INST. 2.6.

36. Limitation Act, 1623, 21 Jac. 1, c. 16, § 1.

37. Statute of Westminster I, 1275, 3 Edw. 1, c. 39; see 16 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 91.01[1] (Michael Allan Wolf ed., 2007).

38. Limitations of Real and Possessory Actions, 1540, 32 Hen. 8, c. 2, § 3; see POWELL, *supra* note 37.

39. Limitations of Real and Possessory Actions, 1540, 32 Hen. 8, c. 2, § 3; Peñalver, *supra* note 32, at 1076–77; William F. Walsh, *Title by Adverse Possession*, 16 N.Y.U. L.Q. REV. 532, 532 (1939).

40. See Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667, 675–76 (1986); see also *J&M Land Co. v. First Union Nat'l Bank*, 766 A.2d 1110, 1117–18 (N.J. 2001) (discussing the difference in barring the true owners from exercising his rights and granting the adverse possessor new rights).

41. *E.g.*, *Moore v. Stills*, 307 S.W.3d 71, 77 (Ky. 2010); *Cole Coe & Coe v. Irvine*, 6 Hill 634, 636 (N.Y. Sup. Ct. 1844).

42. *E.g.*, *Peters v. Smuggler-Durant Mining Corp.*, 930 P.2d 575, 580 (Colo. 1997); *Ehle v. Prosser*, 197 N.W.2d 458, 463 (Minn. 1972); *Crain v. Peterman*, 98 S.W. 600, 601 (Mo. 1906).

43. Adverse possession can also apply to personal property. *Henderson v. First Nat'l Bank of Dewitt*, 494 S.W.2d 452, 459 (Ark. 1973); *Lightfoot v. Davis*, 91 N.E. 582, 583 (N.Y. 1910). Because this Article focuses on the application of adverse possession to

possession of the property for the requisite time period. Accordingly, the elements of adverse possession may be grouped into two categories: first, what act(s) the adverse possessor must perform and second, how long the adverse possessor must perform those act(s). Some jurisdictions expressly or implicitly also require that the adverse possessor have a particular mental state while possessing the property.

1. *The Requisite Acts.* At its core, the existing doctrine of adverse possession requires the adverse possessor to possess the property of another as an owner would possess it. While jurisdictions in the United States use a variety of terms to describe the possession the adverse possessor must maintain,⁴⁴ the possession must generally be actual, open and notorious, continuous, and hostile.⁴⁵

Actual possession requires that the possessor physically possess the property and have an intent to maintain control of that land.⁴⁶ The possessor must exercise his dominion and control over the property such that there are visible signs of the possessor's occupation.⁴⁷ The manner of possession sufficient to constitute actual possession generally must be commensurate with the manner of possession a true owner would normally exercise over that property.⁴⁸ Thus, what

abandoned real property, the rules for adverse possession discussed herein are limited to those concerning real property.

44. See, e.g., ARIZ. REV. STAT. ANN. §§ 12-523, -525 (2003) (requiring peaceable possession); *Walter v. Jones*, 154 N.E.2d 250, 252 (Ill. 1958) (requiring open possession); *Yatczak v. Cloon*, 22 N.W.2d 112, 114 (Mich. 1946) (requiring open possession); *Pittman v. Hendricks*, 399 S.W.3d 918, 920 n.5 (Mo. Ct. App. 2013) (requiring hostile, actual, open and notorious, exclusive, and continuous possession); *Galchi v. Garabedian*, 961 N.Y.S.2d 588, 588 (App. Div. 2013) (requiring hostile possession); *Adams Creek Assocs. v. Davis*, 746 S.E.2d 1, 7 (N.C. Ct. App. 2013) (requiring uninterrupted possession); *Bilby v. Wire*, 77 N.W.2d 882, 890 (N.D. 1956) (requiring actual possession); *Spurlock v. Pemberton*, No. 13CA1, 2013 WL 5230725, at *3 (Ohio Ct. App. 2013) (requiring adverse use); *DiPippo v. Sperling*, 63 A.3d 503, 508 (R.I. 2013) (requiring hostile use); *Wilson v. Braden*, 49 S.E. 409, 411–12 (W. Va. 1904) (requiring continuous possession).

45. JESSE DUKEMINIER ET AL., PROPERTY 124 & n.12 (6th ed. 2006).

46. See *Murphy v. Holman*, 289 S.W.3d 234, 238 (Mo. Ct. App. 2009) (demonstrating continuous physical possession); *New Covenant Worship Ctr. v. Wright*, 601 S.E.2d 245, 251 (N.C. Ct. App. 2004) (showing a failed adverse possession due to a lack of actual possession); Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2424 (2001) (citing *Ewing's Lessee v. Burnet*, 36 U.S. 41, 52 (1837); *Brumagim v. Bradshaw*, 39 Cal. 24 (1870)) (stating that an adverse possessor "must establish intent to maintain physical occupancy and control of the land in question").

47. *Page v. Jones*, 198 S.E. 63, 67 (Ga. 1938); *Stinchcomb v. Realty Mortg. Co.*, 188 A. 790, 793 (Md. 1937).

48. *Schuler v. Oldervik*, 143 P.3d 1197, 1203 (Colo. App. 2006). Thus, one court found that title to a driveway transferred when an adverse possessor maintained the driveway by mowing the driveway, placing gravel in the driveway, and constructing a garage that could be accessed only by using the driveway. *Trokey v. R.D.P. Dev. Grp.*,

constitutes actual possession differs depending upon the type of property at issue.⁴⁹ Acquiring title to remote, undeveloped land traditionally requires a lesser degree of possessory acts than are required to acquire title to residential property in a bustling city.⁵⁰ Merely grazing cattle may be a sufficient act of possession on land that has no practical use other than the grazing of animals,⁵¹ but to establish adverse possession over land located in a residential neighborhood, acts necessary for actual possession may include constructing a concrete walkway, laying down decorative bricks, or planting shrubbery.⁵²

Possession sufficient to establish a claim of adverse possession must also be open and notorious.⁵³ Open and notorious possession refers to possession that is apparent and visible, as opposed to possession that is hidden.⁵⁴ The standard courts apply in determining whether possession is open and notorious is that the possession must have created a reasonable opportunity for the landowner to be put on notice of the adverse claim.⁵⁵ Accordingly, courts have stated that when land is more hidden from public view, such as wild, undeveloped land buried in the hills or woods, the “actions one takes in an effort to be open and notorious and put a reasonable property owner on notice that an adversarial claim of ownership is being made may

L.L.C., 401 S.W.3d 516, 528 (Mo. Ct. App. 2013). Actual possession occurred because the activities performed were commensurate with the activities of a true owner. Similarly, a Colorado court held that title to a parcel of land transferred when the adverse possessors parked their cars on the parcel of land, used the garage on the parcel of land, let their children play on the parcel of land, and stored fuel oil in an underground tank on the parcel of land. *Smith v. Hayden*, 772 P.2d 47, 53–54 (Colo. 1989).

49. *Ludban v. Burtch*, 951 N.E.2d 846, 852 (Ind. Ct. App. 2011) (citing *Daisy Farm Ltd. P'ship v. Morrolf*, 915 N.E.2d 480, 488 (Ind. Ct. App. 2009)); *Trokey*, 401 S.W.3d at 525; *Nennemann v. Rebuck*, 496 N.W.2d 467, 471 (Neb. 1993).

50. *See Dumproff v. Driskill*, 376 S.W.3d 680, 688–89 (Mo. Ct. App. 2012).

51. *Quarles v. Arcega*, 841 P.2d 550, 561 (N.M. Ct. App. 1992); *see also Nennemann*, 496 N.W.2d at 471 (holding that farming and ejecting trespassers off of river bottom farmland is sufficient for actual possession).

52. *Gaglioti v. Schneider*, 707 N.Y.S.2d 239, 239–40 (App. Div. 2000).

53. *Schroeder v. Proctor*, 280 S.W.3d 724, 727 (Mo. Ct. App. 2009); *Williams v. Frymire*, 186 S.W.3d 912, 920 (Mo. Ct. App. 2006); *Nickell v. Southview Homeowners Ass'n*, 271 P.3d 973, 978 (Wash. Ct. App. 2012).

54. *See Thompson v. Pioche*, 44 Cal. 508, 511 (1872) (rejecting a claim of adverse possession because the possessor's possession was hidden). In discussing whether actions such as building a fence, constructing a road, and installing a culvert were sufficient to establish open and notorious possession, one court stated that the adverse possessor “could not have been more open, hostile and notorious in his use of [the property].” *Nally v. Cissell*, No. 2010-CA-001570-MR, 2011 WL 3654490, at *1, *3 (Ky. Ct. App. 2011) (unpublished opinion) (quoting trial court opinion).

55. *Cheek v. Wainwright*, 269 S.E.2d 443, 445 (Ga. 1980); *Snowball Corp. v. Pope*, 580 N.E.2d 733, 735 (Ind. Ct. App. 1991); *Blagbrough Family Realty Trust v. A & T Forest Prods., Inc.* 917 A.2d 1221, 1227 (N.H. 2007); *Chaplin v. Sanders*, 676 P.2d 431, 437 (Wash. 1984).

need to be above and beyond those necessary to meet that element” for other, more easily visible property.⁵⁶

Possession also must be continuous.⁵⁷ Continuous possession requires that the adverse possessor exercise acts of possession over the property throughout the entire requisite time period.⁵⁸ Possession is not continuous when there is sporadic cultivation of the land and random activities performed on the land.⁵⁹ Such breaks in the possessor’s activities stop the running of the clock.⁶⁰ That said, to have continuous possession, the possessor himself need not physically be on the property for the entirety of the prescribed time period; courts review whether adverse possession is continuous by comparing it to the continuity of possession that would be taken by a true owner.⁶¹

Finally, possession must be hostile.⁶² Hostile possession occurs when the possessor occupies the land without the consent of the true owner.⁶³ When the true owner grants the adverse possessor permission to possess the land at issue, possession is not hostile.⁶⁴ Similarly, if the possessor performs an act

56. *Luttrell v. Stokes*, 77 S.W.3d 745, 749 (Mo. Ct. App. 2002).

57. *Striefel v. Charles-Keyt-Leaman P’ship*, 733 A.2d 984, 993 (Me. 1999); *Bowles v. McKeon*, 217 S.W.3d 400, 406 (Mo. Ct. App. 2007).

58. *Courtney v. Ashcraft*, 105 S.W. 106, 107 (Ky. 1907). One court found that possession of an unmarked, uncultivated, and unimproved track of land was continuous when an adverse possessor occasionally and temporarily parked his trailer on the lot, but also stored the supplies for his landscaping business on the property and seasonally burned the brush from the land. *Jones v. Leagan*, 681 S.E.2d 6, 14–15 (S.C. Ct. App. 2009).

59. *Robbins v. Schiff*, 964 N.Y.S.2d 749, 752 (App. Div. 2013).

60. *Elyton Land Co. v. Denny*, 18 So. 561, 564–65 (Ala. 1895); *Romans v. Nadler*, 14 N.W.2d 482, 485–86 (Minn. 1944).

61. *Fritts v. Ericson*, 436 P.2d 582, 584–85 (Ariz. 1968); *Webber v. McAvoy*, 104 A. 513, 514 (Me. 1918); *Ray v. Beacon Hudson Mountain Corp.*, 666 N.E.2d 532, 536 (N.Y. 1996). This interpretation of continuity also leads courts to find that possession of seasonal property such as summer homes is continuous so long as the adverse possessor seasonally occupies the property. *Mahoney v. Heebner*, 178 N.E.2d 26, 27 (Mass. 1961); *Nechtow v. Brown*, 120 N.W.2d 251, 252 (Mich. 1963); *Booten v. Peterson*, 288 P.2d 1084, 1086 (Wash. 1955). Further, courts “consider not only the adverse possessor’s physical presence on the land but also the claimant’s other acts of dominion and control over the premises that would appropriately be undertaken by owners of properties of similar character, condition and location.” *Ray*, 666 N.E.2d at 533. Thus, in determining whether there is sufficient continuous possession of a summer cottage, courts will examine not only whether the property was occupied during the summer months, but also the activities taken by the possessor outside of the summer months to repel others from the property. *Id.* at 536.

62. *Koonce v. Mitchell*, 19 S.W.3d 603, 605 (Ark. 2000); *Mulle v. McCauley*, 927 A.2d 921, 928–30 (Conn. App. Ct. 2007); *Pastorino v. City of Detroit*, 148 N.W. 231, 233 (Mich. 1914); *Lynch v. Lynch*, 115 S.E.2d 301, 304–05 (S.C. 1960).

63. *Acampora v. Pearson*, 899 A.2d 459, 467 (R.I. 2006).

64. *Glover v. Glover*, 92 P.3d 387, 392 (Alaska 2004); *Strubberg v. Roethemeyer*, 941 S.W.2d 557, 560–61 (Mo. Ct. App. 1997).

recognizing that someone holds a better title to the property, such as offering to buy the property, the possessor can defeat his own claim of hostile possession.⁶⁵

Some jurisdictions have additional requirements to acquire title via adverse possession. In multiple jurisdictions, the adverse possessor must pay property taxes on the property he is claiming title to by adverse possession.⁶⁶ Some jurisdictions require that the adverse possessor have color of title to acquire property via adverse possession.⁶⁷

Ultimately, these possessory requirements can be summarized by asking whether the adverse possessor has acted like a true owner.⁶⁸ This sentiment is expressly stated in courts' individual tests for whether the possessor has been in actual possession, continuous possession, and so forth, of the property,⁶⁹ but, as Carol Rose argues, the notion pervades all possession law.⁷⁰ An adverse possessor's use of the property makes up a central element of the adverse possession claim, Rose states, because legal possession means acting like an owner.⁷¹ While true ownership generally trumps possession, Rose notes that adverse possession is one of the exceptional instances when *acting* like the true owner can defeat the *actual* true owner.⁷²

An adverse possessor must act like an owner in her actual, open and notorious, continuous, and hostile possession because her possession should be sufficient to assure that the true owner has been provided with sufficient notice of the acts of the adverse

65. Mann v. LaSalle Nat'l Bank, 562 N.E.2d 1033, 1037 (Ill. App. Ct. 1990); Myers v. Beam, 713 A.2d 61, 62 (Pa. 1998); Cahill v. Morrow, 11 A.3d 82, 90 (R.I. 2011).

66. See, e.g., ARK. CODE ANN. § 18-11-106(a)(1)(A) (2003); N.D. CENT. CODE § 47-06-03 (2014); Ernie v. Trinity Lutheran Church, 336 P.2d 525, 528 (Cal. 1959); Baxter v. Craney, 16 P.3d 263, 267-68 (Idaho 2000); Potts v. Vokits, 692 P.2d 1304, 1306 (Nev. 1985).

67. See, e.g., Burns v. Stewart, 382 S.W.3d 699, 704 (Ark. Ct. App. 2011); Hannah v. Kenny, 83 S.E.2d 1, 5 (Ga. 1954); City of Rio Rancho v. Amrep Sw. Inc., 260 P.3d 414, 421 (N.M. 2011).

68. Huber v. Cardiff, 928 N.E.2d 742, 744 (Ohio Ct. App. 2009) ("The ultimate test for adverse possession is the exercise of dominion over land consistent with actions that a true owner would take."); Stake, *supra* note 46, at 2423-24 (noting acting as a true owner as a key element of adverse possession).

69. See Schuler v. Oldervik, 143 P.3d 1197, 1203 (Colo. App. 2006) (holding that actual possession is possession like an owner); Striefel v. Charles-Keyt-Leaman P'ship, 733 A.2d 984, 993 (Me. 1999) (holding that continuous possession is possession like an owner).

70. Carol M. Rose, *The Law Is Nine-Tenths of Possession: An Adage Turned on Its Head*, in LAW AND ECONOMICS OF POSSESSION (Yun-chien Chang ed., forthcoming Apr. 2015).

71. *Id.*

72. *Id.*

possessor.⁷³ Possession must be “so notorious as to warrant the inference that the owner ought to have known that a stranger was asserting dominion over his land.”⁷⁴ In possessing property as a true owner would possess the property, the adverse possessor theoretically achieves the purpose of possession, namely, to put the true owner on notice of the adverse possessor’s competing claim.⁷⁵

2. *The Requisite Time.* Adverse possessors must not only possess property to gain title to that property; adverse possessors must also possess the property for the requisite time period.⁷⁶ Jurisdictions have established different time frames for adverse possession, ranging from two years,⁷⁷ to five years,⁷⁸ to ten years,⁷⁹ to fifteen years,⁸⁰ to eighteen years,⁸¹ to twenty-one years,⁸² to thirty years.⁸³ In many jurisdictions, the requisite period of possession depends on a variety of factors, such as whether the adverse

73. Nielsen v. Gibson, 100 Cal. Rptr. 3d 335, 341 (Ct. App. 2009); Johnson v. Black, 469 So. 2d 88, 91 (Miss. 1985); Jamail v. Gene Naumann Real Estate, 680 S.W.2d 621, 626 (Tex. App.—Austin 1984, writ ref’d n.r.e.).

74. Beaver v. Vandall, 547 N.E.2d 802, 804 (Ind. 1989); accord Warfield v. Lindell, 38 Mo. 561, 580 (1866); Wanha v. Long, 587 N.W.2d 531, 539–40 (Neb. 1998); Jones v. Leagan, 681 S.E.2d 6, 13 (S.C. Ct. App. 2009). New York law codifies this sentiment by describing the requisite possession as when “there have been acts sufficiently open to put a reasonably diligent owner on notice.” N.Y. REAL PROP. ACTS. LAW § 522 (McKinney 2009).

75. Whether this objective is achieved when the property is abandoned is questionable. *Infra* Part III.A.2.

76. In order to achieve the requisite period of possession, the adverse possessor need not possess the property himself the entire time—he may tack on the time of his predecessor(s), provided that there is privity and there have been no interruption or abandonment of the property between the possession of the adverse possessor and his predecessor(s). See Sorensen v. Costa, 196 P.2d 900, 906–07 (Cal. 1948) (discussing privity); Du Val v. Miller, 300 P.2d 416, 419 (Or. 1956) (discussing interruption). Privity traditionally exists if the ancestor possessor and adverse possessor are decedents and heirs, sellers and purchasers, donors and donees, life tenants and remaindermen, and other similar situations. See, e.g., Big Blaine Oil & Gas Co. v. Yates, 206 S.W. 2, 4 (Ky. 1918) (donors and donees); Freed v. Cloverlea Citizens Ass’n, 228 A.2d 421, 430 (Md. 1967) (quoting Howind v. Scheben, 25 S.W.2d 57, 58 (Ky. 1930)) (sellers and purchasers); Newkirk v. Porter, 74 S.E.2d 235, 238 (N.C. 1953) (decedents and heirs); Hines v. Pointer, 523 S.W.2d 733, 736 (Tex. Civ. App.—Fort Worth 1975, writ ref’d n.r.e.) (life tenants and remaindermen). Privity does not exist between successive squatters. See Jackson v. Leonard, 9 Cow. 653, 654 (N.Y. Sup. Ct. 1824).

77. See, e.g., ARIZ. REV. STAT. ANN. § 12-522 (2003).

78. See, e.g., CAL. CIV. PROC. CODE § 318 (West 2006).

79. See, e.g., N.D. CENT. CODE § 47-06-03 (2014).

80. See, e.g., CONN. GEN. STAT. ANN. § 52-575 (West 2013).

81. See, e.g., COLO. REV. STAT. § 38-41-101 (2013).

82. See, e.g., 42 PA. CONS. STAT. ANN. § 5330 (West 2004).

83. See, e.g., LA. CIV. CODE ANN. art. 3486 (2011). Acquisitive prescription, as referred to in Louisiana Civil Code article 3486, is the civil law analog to adverse possession. Charles Donahue, Jr., *The Civil Law in England*, 84 YALE L.J. 167, 180 (1974) (book review).

possessor has a claim of title⁸⁴ and the faith of the adverse possessor.⁸⁵ The statutory time period begins to run from the time all of the elements of adverse possession are met.⁸⁶

3. *The Questionable Faith.* Many jurisdictions make no reference to the requisite mental state of the adverse possessor, and traditional common law doctrine does not require any particular mental state.⁸⁷ Reflecting this sentiment, one court stated that “[w]ith respect to the adverse possession counterclaim, attention should be centered on the [claimant’s] activities on the land, in distinction to his belief or state of mind about the matter.”⁸⁸ Supporting such outcomes, scholars like Joseph Singer have argued that “[a]dding states of mind to laws allocating property rights muddies the waters” because it replaces an objective test of whether the adverse possessor possessed the property with a more subjective test of what the adverse possessor thought while possessing the property.⁸⁹ Singer argues that such subjectivity increases costs and decreases predictability in property rights, both negative results.⁹⁰

84. Compare ARIZ. REV. STAT. ANN. § 12-522 (2003) (establishing a two-year period of possession for property claimed by possession alone), with § 12-523 (establishing a three-year period of possession for property claimed under color of title).

85. Compare LA. CIV. CODE ANN. art. 3486 (2011) (establishing a thirty-year requirement for possession when the possessor is in bad faith), with art. 3475 (establishing a ten-year requirement for possession when the possessor is in good faith).

86. It is frequently noted that adverse possession commences when entry is made. *E.g.*, 3 AM. JUR. 2D *Adverse Possession* § 14 (2013). While entry is frequently made at the same time all of the elements of adverse possession have been achieved, that is not always the case. In the situation where possession began permissively and then was converted to adverse, the adverse possession clock does not begin to run until the possession is considered adverse. For example, in *Auto Gobbler Parts, Inc. v. Serpico*, a landlord-tenant relationship terminated under New York law when the tenant stopped paying the landlord rent for ten years. *Auto Gobbler Parts, Inc. v. Serpico*, 927 N.Y.S.2d 78, 79 (App. Div. 2013). Then, the tenant proceeded to remain on the property for an additional ten years. *Id.* The court held that the clock for acquiring a fee simple by adverse possession started to run once the tenant’s possession became hostile, which occurred after the landlord-tenant relationship terminated. *Id.* Accordingly, the correct statement of law is that adverse possession commences when all of the elements of adverse possession are met.

87. See, *e.g.*, *Ehle v. Prosser*, 197 N.W.2d 458, 462 (Minn. 1972); DUKEMINIER ET AL., *supra* note 45, at 126 (citing ROBERT MEGARRY & H.W.R. WADE, *THE LAW OF REAL PROPERTY* 1307 (Charles Harpum ed., 6th ed. 2000)); Daniel J. Sharfstein, *Atrocity, Entitlement, and Personhood in Property*, 98 VA. L. REV. 635, 679 (2012). For an interesting discussion on whether the mental state of the true owner should be considered, see Alexandra B. Klass, *Adverse Possession and Conservation: Expanding Traditional Notions of Use and Possession*, 77 U. COLO. L. REV. 283, 322–23 (2006).

88. *Peck v. Bigelow*, 613 N.E.2d 134, 136 (Mass. App. Ct. 1993).

89. Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369, 1398 (2013).

90. *Id.* at 1398–1400. Costs are increased because requiring a particular mental state requires introduction of testimony regarding who knew the location of the boundary lines,

Be that as it may, some jurisdictions are hesitant to grant title to an adverse possessor who appears to possess in bad faith.⁹¹ “[J]udges and juries have traditionally resisted what could appear to be legally sanctioned theft.”⁹² Judges and juries are not the only ones to have contempt for the bad faith adverse possessor; many scholars share in this disdain. After examining eighteen years of adverse possession cases beginning in 1966, Richard Helmholz concluded that judges and juries “prefer the claims of an honest man over those of a dishonest man.”⁹³ Helmholz determined that the bulk of cases at the time “recognize[d] the relevance of the subjective intent of the possessor in determining whether or not he may validly acquire title by the passage of the statutory period.”⁹⁴ Supporting Helmholz’ findings, Richard Epstein suggested that the “menace” who is the bad faith trespasser be properly deterred and punished by imposing a longer statutory period of possession on him, as compared to his good faith counterpart.⁹⁵ Similarly, Tom Merrill has questioned the lack of a good faith requirement by asking why the doctrine of adverse possession has not “recognize[d] the good faith of the [adverse possessor] as one factor or element to be taken into account in determining the assignment of entitlement?”⁹⁶ Merrill writes, “Why in this area are we treated to the odd spectacle of the law doing virtue while it pays homage to vice?”⁹⁷ To the extent that courts respond affirmatively to the desire of Merrill and others, courts vary in whether that element is added as part of

thereby increasing the cost of adverse possession cases. *See id.* at 1398. Property rights are less predictable because it can be difficult to assess whether judges and juries will find testimony regarding the adverse possessor’s knowledge credible. *See id.*

91. As Singer writes, following one Colorado case where a state judge purposefully encroached on his neighbor’s land in order to acquire title to it by adverse possession, the Colorado legislature passed a statute that requires good faith be proved by clear and convincing evidence. *Id.* at 1397–98.

92. Sharfstein, *supra* note 87, at 679. Thomas Merrill and Henry Smith have made a similar statement: “Courts, nevertheless, seem highly reluctant to strip owners of property in favor of someone who has acted in subjective bad faith in taking it from them.” Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1876 (2007).

93. R.H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331, 356, 358 (1983). *But see* Roger A. Cunningham, *Adverse Possession and Subjective Intent: A Reply to Professor Helmholz*, 64 WASH. U. L.Q. 1, 45–46 (1986) (asserting that the mental state of the adverse possessor is irrelevant).

94. Helmholz, *supra* note 93, at 332.

95. Epstein, *supra* note 40, at 685–89.

96. Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1137 (1985).

97. *Id.*

the hostility requirement⁹⁸ or as an entirely separate requirement.⁹⁹ In fact, one scholar has even proposed that good faith be viewed as an element of actual possession.¹⁰⁰

Though many scholars have aligned themselves on the side of good faith adverse possessors, in recent years some academics have voiced the opinion that if one faith is to be trumpeted, it should be bad faith. Lee Anne Fennell argues that it is the bad faith adverse possessor who efficiently transfers real property because when comparing good faith and bad faith adverse possessors, there is a higher likelihood that the bad faith adverse possessor will place a higher value on the property than the true owner.¹⁰¹ Similarly, scholars have noted that adverse possessors—and, in particular, bad faith adverse possessors—serve an efficient purpose.¹⁰² As Eduardo Peñalver and Sonia Katyal stated, “[W]ith a lackadaisical response by the true owner, the [adverse possession] law achieves a high degree of confidence that the possessor values the property more than its absentee owner.”¹⁰³

B. Procedure

The burden of proving all of the requisite elements in an adverse possession case is on the party who claims title by adverse possession.¹⁰⁴ The adverse possessor must prove that she meets all of the elements of adverse possession, i.e. that she has been in actual, continuous, open and notorious, and hostile possession with the appropriate mental state, if one is required, for the requisite period of time.¹⁰⁵ Adverse possession should be based upon clear evidence, with some states requiring the adverse possessor prove all of the elements of adverse possession

98. See, e.g., *Nutting v. Herman Timber Co.*, 29 Cal. Rptr. 754, 758–59 (Dist. Ct. App. 1963); *Senez v. Collins*, 957 A.2d 1057, 1082 (Md. Ct. Spec. App. 2008). *But see* *Nome 2000 v. Fagerstrom*, 799 P.2d 304, 310 (Alaska 1990) (finding that hostility is an objective factor).

99. See, e.g., *City & Cnty. of Honolulu v. Bennett*, 552 P.2d 1380, 1390 (Haw. 1976); *Whittington v. Cameron*, 52 N.E.2d 134, 136 (Ill. 1943); *Carpenter v. Ruperto*, 315 N.W.2d 782, 785 (Iowa 1982); *In re Estate of Duran*, 66 P.3d 326, 330 (N.M. 2003).

100. Stake, *supra* note 46, at 2429.

101. Lee Anne Fennell, *Efficient Trespass: The Case for “Bad Faith” Adverse Possession*, 100 NW. U. L. REV. 1037, 1072–76 (2006).

102. Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1145–46 (2007).

103. *Id.* at 1146.

104. *Solomon’s Rock Trust v. Davis*, 675 A.2d 506, 509 (Me. 1996); *Moody v. Cates*, 58 So. 3d 1245, 1248 (Miss. Ct. App. 2011).

105. *Trokey v. R.D.P. Dev. Grp., L.L.C.*, 401 S.W.3d 516, 524–25 (Mo. Ct. App. 2013); *Nennemann v. Rebeck*, 496 N.W.2d 467, 470 (Neb. 1993) (citing *Schaneman v. Wright*, 470 N.W.2d 566 (Neb. 1991)).

by clear and convincing evidence¹⁰⁶ and other states requiring a mere preponderance of the evidence.¹⁰⁷

All presumptions traditionally favor the true owner.¹⁰⁸ For example, if the adverse possessor's possession began with the true owner's permission, the true owner retains the presumption that the possession continued in its permissive state and, thus, was not hostile.¹⁰⁹ As one California court stated, "Equity abhors a forfeiture, and all presumptions favor the record owner of the property."¹¹⁰

C. Purpose

Despite substantive requirements that the adverse possessor perform particular acts for the requisite period of time, and procedural mechanisms that force the adverse possessor to prove that she has in fact performed those acts, at first glance, adverse possession gives the impression that the bad guy wins. For many, the adverse possessor appears to play the role of the thief who, through her possession, steals land from the true owner.

To quell this concern that adverse possession allows the villain to become the victor, scholars justify the doctrine by identifying its many interrelated purposes. The most predominant purposes that adverse possession is said to serve are quieting title, extinguishing stale claims, encouraging the development of property, discouraging true owners from sleeping on their rights, and protecting the reliance the adverse possessor has developed in the property.¹¹¹

When Justinian included the idea of *usucapio* in his Institutes, he wrote that *usucapio* was necessary "[t]o prevent uncertainty over title."¹¹² Justinian continued that "where someone dealt with a non-owner in the belief that he was dealing

106. See, e.g., *West v. Brewer*, 579 So. 2d 1261, 1262 (Miss. 1991); *Flannery v. Stump*, 786 A.2d 255, 258 (Pa. Super. Ct. 2001), *appeal denied*, 803 A.2d 735 (Pa. 2002); *Jones v. Leagan*, 681 S.E.2d 6, 11 (S.C. Ct. App. 2009).

107. See, e.g., *Potlatch Corp. v. Richardson*, 647 S.W.2d 438, 439 (Ark. 1983); *Hardt v. Eskam*, 352 N.W.2d 583, 585 (Neb. 1984).

108. E.g., *Woodhouse v. McKee*, 879 A.2d 486, 493 (Conn. App. Ct. 2005); *Allie v. Russo*, 276 N.W.2d 730, 735 (Wis. 1979); *Peter H. & Barbara J. Steuck Living Trust v. Easley*, 785 N.W.2d 631, 640 (Wis. Ct. App. 2010).

109. *Weis v. Kozak*, 410 N.W.2d 903, 906 (Minn. Ct. App. 1987); *Crites v. Koch*, 741 P.2d 1005, 1009–10 (Wash. Ct. App. 1987).

110. *Marriage v. Keener*, 31 Cal. Rptr. 2d 511, 515 (Ct. App. 1994) (citation omitted).

111. While these are the commonly given rationales for adverse possession, some scholars, such as Jeffrey Stake, remain unconvinced that these reasons really support having the doctrine of adverse possession. See Stake, *supra* note 46, at 2434–55 (listing and refuting a variety of theories for why adverse possession exists).

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with an owner, and obtained something in good faith by purchase or gift or on some other legally sufficient basis, he should become owner by usucapion, i.e. possession over time.”¹¹³

Similar arguments have been raised with regards to adverse possession. It is argued that adverse possession’s “great purpose is automatically to quiet all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing.”¹¹⁴ In a more descriptive explanation of why quieting title is an important goal of adverse possession, Merrill writes that without adverse possession

[t]itle examiners would have to trace every deed back to its source; ancient easements, unextinguished spousal rights, grants of future interests, unreleased mortgages or liens could well be discovered; these interests would have to be traced to present-day successors; and releases of these interests would then have to be secured. If the buyer always purchased subject to such claims, no matter how old they might be, he would have to go through a complicated process of fact-gathering and negotiating in order to obtain clear title to the property. The “nuisance” value of these claims could easily lead to holding out or other rent-seeking behavior that would make the process of obtaining clear title even more burdensome.¹¹⁵

Explanations as to why adverse possession’s title-quieting qualities are valuable are, at their base, founded on the belief that over time, evidence with regards to possession may be lost.¹¹⁶ To use Merrill’s term, this “common-sensical” notion is the foundation for a related purpose of adverse possession: to take away the difficulty in proving stale claims.¹¹⁷ “As time passes, witnesses die, memories fade, and evidence gets lost or destroyed. The statute of limitations recognizes this problem by adopting a conclusive presumption against attempting to prove claims after a certain period of time has elapsed.”¹¹⁸

Allowing for outdated claims is problematic in many areas of the law, but it is particularly so in the context of real property. In order to keep land in commerce, there is a societal desire to have

113. *Id.*

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

115. Merrill, *supra* note 96, at 1129.

116. *Id.* at 1128.

117. *Id.*; see also Robert C. Ellickson, *Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights*, 64 WASH. U. L.Q. 723, 725–34 (1986); William C. Marra, *Adverse Possession, Takings, and the State*, 89 U. DET. MERCY L. REV. 1, 4 (2011).

118. Merrill, *supra* note 96, at 1128.

certainty in ownership.¹¹⁹ Adverse possession reflects this want by, after a period of time, placing less emphasis on ensuring the correct person is declared the owner of land and instead placing more emphasis on ensuring there is legal certainty in who is the owner of the land.¹²⁰

Establishing legal certainty in the owner of a tract of land helps keep property in commerce. The goal of keeping property in commerce highlights the third objective of adverse possession, that is, to encourage the development of property. Some scholars argue that the adverse possessor discourages wasteful uses of land,¹²¹ noting that adverse possession “plainly penalizes the most severely inattentive nonuse: nonuse that sits idly by while another person invests substantial effort in the improvement or alteration of the property.”¹²² As Ben Depoorter writes, adverse possession promotes smart development by “promot[ing] economic efficiency by protecting society’s interest in encouraging careful contracting, reducing land title conflicts, [and] rewarding productive uses of scarce resources.”¹²³

While Depoorter puts a positive spin on adverse possession’s promotion of development, other scholars offer a negative view of this goal. In critiquing the doctrine of adverse possession, John Sprankling writes that adverse possession “encourages and legitimates economic exploitation.”¹²⁴ Be the development exploitative or efficient, scholars like both Sprankling and Depoorter view development as a primary purpose of the doctrine.

By promoting the development of property, adverse possession dissuades true owners from sleeping on their rights.¹²⁵ Whereas the first three goals advance (or at least claim to advance) a societal benefit, discouraging sleeping landowners paints adverse possession as a means of punishment. As Merrill

119. See, e.g., Epstein, *supra* note 40, at 670; Patty Gerstenblith, *The Adverse Possession of Personal Property*, 37 BUFF. L. REV. 119, 131 (1989); Lee Hargrave, *Ruminations on the Revision of the Louisiana Law of Acquisitive Prescription and Possession*, 73 TUL. L. REV. 1197, 1205 (1999).

120. Ballantine, *supra* note 114, at 136; Marra, *supra* note 117, at 3–4.

121. See Thomas W. Merrill, *The Property Strategy*, 160 U. PA. L. REV. 2061, 2080 (2012).

122. Oskar Liivak & Eduardo M. Peñalver, *The Right Not to Use in Property and Patent Law*, 98 CORNELL L. REV. 1437, 1462 (2013).

123. Ben Depoorter, *Fair Trespass*, 111 COLUM. L. REV. 1090, 1113 (2011).

124. Sprankling, *supra* note 30, at 816. Sprankling specifically argues against the application of adverse possession to wild lands because of the doctrine’s antipreservation effects, all of which, he states, are caused by the development ideology that underlies the doctrine of adverse possession. *Id.*

125. JAMES BARR AMES, *The Nature of Ownership*, in LECTURES ON LEGAL HISTORY AND MISCELLANEOUS LEGAL ESSAYS 197 (Harvard Univ. Press 1913); Merrill, *supra* note 96, at 1130.

writes, “[T]he shift in entitlement acts as a penalty to deter [true owners] from ignoring their property or otherwise engaging in poor custodial practices.”¹²⁶

Taking this doctrinal defense one step further, some scholars demonize the true owner because the true owner is committing the “morally wrong” act of allowing the adverse possessor to become dependent on an interest in land and then ripping that interest out of the adverse possessor’s hands.¹²⁷ Joseph Singer writes,

The [adverse] possessor has come to expect continued access to the property, and the true owner has fed those expectations by her actions (or her failure to act). It is morally wrong for the true owner to allow a relationship of dependence to be established and then to cut off the dependent party. The legal steps necessary to protect the true owner’s interests are relatively clear, so she could have protected her own property interests if she had wanted to do so.¹²⁸

As Singer argues, among the reasons true owners should be discouraged from sleeping on their rights is because the adverse possessor has come to rely on his perceived interest in the property.¹²⁹ Thus, adverse possession also serves as a means of protecting the adverse possessor’s interest.¹³⁰ Oliver Wendell Holmes advanced this theory when he stated, “A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it.”¹³¹ Similarly, it has been commented that “[a]dverse possession gives rise to personal identification with property as a result of the long time horizons involved, and also from the fact that it essentially requires successful claimants to ‘have enjoyed and used’ the land ‘as [their] own.’”¹³²

III. RELAXING POSSESSION

The classic case of adverse possession involves the adverse possessor unwittingly encroaching upon the true owner’s

126. Merrill, *supra* note 96, at 1130.

127. Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 667 (1988).

128. *Id.* (footnote omitted).

129. *Id.*

130. POWELL, *supra* note 37, § 91.01[02]; O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897); Thomas J. Miceli & C.F. Sirmans, *An Economic Theory of Adverse Possession*, 15 INT’L REV. L. & ECON. 161, 161 (1995); Sharfstein, *supra* note 87, at 679–81 (discussing personhood and adverse possession).

131. Holmes, *supra* note 130, at 477.

132. Sharfstein, *supra* note 87, at 680 (alteration in original).

property by a few feet. Years later, a successor-in-title of the true owner surveys the property, discovers the encroachment, and wants the property back. Litigation on the issue of adverse possession ensues.

In this garden-variety case, the traditional requirements for adverse possession may function properly, achieving the aforementioned purposes.¹³³ However, when the true owner is absent—and particularly when there is mass abandonment—requiring possession imposes an unnecessary impediment. The problems with possession could be resolved by relaxing the possession requirement to allow mere notice of intent to possess instead.

A. *Problem with Possession*

When the true owner has abandoned his property, requiring possession to transfer ownership via adverse possession presents three problems: it decreases the number of potential adverse possessors by increasing the cost of adverse possession, it encourages the wasteful use of adversely possessed land, and it fails to put the true owner on notice of a competing claim.

1. *Increasing Costs.* Economic theory provides that as the price of an item increases, the quantity of the item demanded will decrease. Requiring actual, continuous possession is a cost placed on the adverse possessor for her acquiring title to abandoned property. Having a high cost to acquire vacant property means that fewer adverse possessors will enter the marketplace. If the cost of acquiring property via adverse possession is too high, it follows that no adverse possessor will take the necessary steps to acquire ownership via adverse possession.

Possession may be a relatively low cost in the garden-variety case of adverse possession. The adverse possessor usually possesses the property by mowing and fencing in an extra few feet of property. This is a negligible cost to the adverse possessor. But in the context of abandoned property, and particularly when there are large swaths of empty properties as in the case of mass abandonment, the adverse possessor likely will not be the encroaching neighbor. Instead, the adverse possessor will be an outsider who has moved on to the property for the sole purpose of possessing it. In these cases, the costs of possession to the adverse possessor

133. See *supra* Part II.C (discussing purposes of adverse possession).

are higher because it is more expensive for the adverse possessor to act as the owner and protect her possession.

In his economic analysis of time and adverse possession, Robert Ellickson asserts that among the costs to adverse possessors are the costs of preying, that is, the costs associated with enhancing the prospect of a successful expropriation, and the costs of anxiety, which includes both the “levels of anxiety before the limitation period lapses, and stretching out the nailbiting period.”¹³⁴ Ellickson examines these and other costs to determine the optimal length of time that should be required for adverse possession.¹³⁵ In doing so, Ellickson determines that for the adverse possessor, her costs make a lazy U-shape, whereby they are initially high and then decrease dramatically after the first few years, and then slowly begin to creep back up.¹³⁶

A similar analysis may be performed based on the location of the property the adverse possessor is possessing. In the garden-variety case, the preying costs of the adverse possessor are relatively low. It costs very little for an adverse possessor to mow or fence in an extra few feet of property when that extra few feet is next door. When the property is located further away, the costs of acting like an owner begin to rise. It is more expensive to possess an abandoned house in downtown Detroit as an owner would possess it than it is to mow five feet of neighboring property.

The anxiety costs similarly rise depending on the location of the property. The garden-variety adverse possessor is unlikely to experience much, if any, “nailbiting” while fencing in an extra few feet of her neighbor’s property. The adverse possessor may not even be aware of her encroachment, and to the extent she is knowingly possessing her neighbor’s land, the adverse possessor has little to lose if, through the true owner’s monitoring, the true owner discovers the encroachment.¹³⁷ The investment by the garden-variety adverse possessor is relatively minimal, particularly when compared to that of the adverse possessor who moves into the Lower Ninth Ward of New Orleans to possess an abandoned house. In the latter case, the anxiety for the adverse possessor is likely to be much higher.

Thus, when examining adverse possession based on the location of the property, the costs to the adverse possessor make

134. Ellickson, *supra* note 117, at 728–29 (emphasis omitted).

135. *Id.* at 726.

136. *Id.* at 729.

137. The biggest cost to the garden-variety adverse possessor may be having an angry neighbor on her hands.

an upside down lazy L-shape with distance from the adverse possessor's property serving as the x-axis and costs to the adverse possessor serving as the y-axis. The costs to adversely possess any property other than property next door exponentially rise for the adverse possessor. These costs, however, quickly flatten out as the costs to possess property five miles away from the adverse possessor are not likely to be dramatically higher than the costs to possess property ten miles away from the adverse possessor.

One fact that further increases the cost to the adverse possessor is the number of abandoned properties. If there is mass abandonment such that the adverse possessor is possessing empty property within an abandoned neighborhood, the possessory costs may be particularly high given that such abandoned and blighted neighborhoods traditionally carry with them an increase in crime.¹³⁸ Moreover, revitalization of vacant neighborhoods requires that multiple tracts of land are improved, not just one tract of land. If an individual adverse possessor possesses multiple properties, the cost of possession will also increase.

Regardless of whether it is a situation of mass abandonment or a singular instance of an abandoned property, as the cost of the possession increases, so too does the risk taken on by the adverse possessor. During the period of possession, the adverse possessor has no guarantee that she will eventually acquire title to the property.¹³⁹ If adverse possession is used as one method of curing abandoned property, the adverse possessor should be encouraged to possess the abandoned property, yet the costs and risk involved decrease the likelihood that anyone will serve as an adverse possessor for these types of properties.

2. *Lacking Notice.* Possession is further problematic for abandoned property as possession does not achieve the central purpose it was designed to serve, namely to provide the true owner with notice of the adverse possessor's claim.¹⁴⁰ In the garden-variety case, actual possession should achieve this goal as the present true owner has the opportunity to be aware of the adverse possessor's encroachment.¹⁴¹ An absentee owner, on the

138. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-93, MORTGAGE FORECLOSURES: ADDITIONAL MORTGAGE SERVICER ACTIONS COULD HELP REDUCE THE FREQUENCY AND IMPACT OF ABANDONED FORECLOSURES 32 (2010).

139. Bell, *supra* note 29, at 557.

140. See *supra* notes 73–75 and accompanying text (stating that the purpose of possession is to put the true owner on notice of a competing claim).

141. As Liivak and Peñalver note, adverse possession “plainly penalizes the most severely inattentive nonuse: nonuse that sits idly by while another person invests

other hand, is unlikely to receive notice of an adverse possessor's claim. Moreover, when there are empty neighborhoods, actual possession is even less likely to result in the true owner having notice of the adverse possession. In these cases, not only is the true owner absent, but the true owner's neighbors who might alert him of the adverse possession are also not present.¹⁴²

3. *Encouraging Waste.* Finally, the possession element of adverse possession can encourage waste. Waste in this context refers both to the creation of an excess cost to the true owner in recovering his property from the adverse possessor, and to the generation of lost profits for the adverse possessor because she is unable to gain ownership of the property.¹⁴³ Fennell notes this consequence for all instances of adverse possession. She writes, "Unsuccessful attempts at adverse possession generate a deadweight loss—the possessor has undertaken a losing proposition, the [true] owner has incurred costs to rebuff him, and no one is any better off for the interaction."¹⁴⁴

Expanding upon Fennell's observation, adverse possession creates waste every time the adverse possessor is removed from the property prior to acquiring title. Assume there is a ten-year adverse possession statute, and an adverse possessor occupies the land for nine years by harvesting crops, mowing, and building structures on the land. After nine years, the true owner realizes adverse possession is occurring and takes the appropriate measures to successfully remove the adverse possessor. At this point, waste has occurred for both the adverse possessor and the true owner. The adverse possessor has exercised acts of possession in developing the property without

substantial effort in the improvement or alteration of the property." Liivak & Peñalver, *supra* note 122, at 1462.

142. That the true owner who abandons his property fails to receive notice of the adverse possession may seem of little concern. To the extent adverse possession encourages the development of property and discourages true owners from sleeping on their rights, the law arguably should reward adverse possessors who make use of an absent true owner's property. Be that as it may, the fact remains that the original point of requiring possession was to put the true owner on notice, an objective that is not achieved when the true owner is absent. *See* Merrill, *supra* note 96, at 1142.

143. A similar, and comparative, observation has been made with regards to new market entrants. "The private costs of negative expected value entry thus translate into deadweight loss to society from the unrecoverable resources these [new] entrants waste on their failed attempts." Avishalom Tor, *The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Policy*, 101 MICH. L. REV. 482, 543 (2002).

144. Fennell, *supra* note 101, at 1088. Liivak and Peñalver discuss how the right to not use property is limited to the extent that nonuse may cause harm. Liivak & Peñalver, *supra* note 122, at 1465. In the case of adverse possession, the harm of not using property is the "tacit inducement [of the adverse possessor] to waste time or effort using or appropriating unused and apparently unwanted property." *Id.*

gaining ownership to that property and has no right to recover any value for the labor she has exercised in developing the property.¹⁴⁵ Moreover, in many jurisdictions, the adverse possessor has no ownership of the improvements she has placed on the true owner's land and no right to recover the value of those improvements.¹⁴⁶ For the true owner, he has expended unrecoverable resources to remove, be it judicially or extra-judicially, the adverse possessor from the property. The true owner potentially has also obtained ownership of crops and structures that he may not desire.¹⁴⁷ The outcome is wasteful because the relative property rights between the adverse possessor and true owner have changed, while the overall wealth of the parties has not increased. In fact, the relative wealth of the parties has most likely decreased.¹⁴⁸

Theoretically, adverse possession should not produce waste for the true owner because a true owner will only remove an adverse possessor if the true owner's value of the property being adversely possessed exceeds the cost of removing the adverse possessor. Even if that calculus has merit in the garden-variety case of adverse possession,¹⁴⁹ in the context of abandonment, the

145. See *Busch v. Fisher*, 50 N.W. 788, 790–91 (Mich. 1891) (finding that there is “no injustice” in holding that an adverse possessor, “however innocent,” loses his expended labor).

146. See, e.g., *Austrian Motors, Ltd. v. Travelers Ins. Co.*, 275 S.E.2d 702, 705 (Ga. Ct. App. 1980) (finding that an innocent trespasser could retain ownership only of the improvements that could be readily detached without injury to the underlying thing).

147. Lee Anne Fennell has recently examined this notion of accession as a form of forced ownership. See generally Lee Anne Fennell, *Forcings*, 114 COLUM. L. REV. 1297 (2014).

148. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 73–75 (7th ed. 2007) (discussing the idea of waste). The creation of such waste is not merely academic; the wasteful effects of adverse possession can be seen in jurisprudence. In *Van Valkenburgh v. Lutz*, the adverse possessor took a number of actions, including building a small shed as well as a garage encroachment that extended a few inches on to the true owner's property. *Van Valkenburgh v. Lutz*, 106 N.E.2d 28, 29–30 (N.Y. 1952). Though the encroachments had been on the true owner's property for the requisite time period, the New York court held that all of the statutory requirements had not been met because the adverse possessor had not possessed the property “under a claim of title.” *Id.* at 30. Therefore, the *Van Valkenburgh* court granted the true owner's prayer for relief, including demanding the removal of the adverse possessor's encroachments. *Id.* Ultimately, however, after further litigation and a procedural error made on the part of the attorney for the true owner, the adverse possessor was not forced to take down the encroachments. *DUKEMINIER ET AL.*, *supra* note 45, at 123.

149. It is questionable as to whether such rational behavior can be assumed on the part of the true owner as it seems unlikely that the true owner could accurately calculate both his value of the land being adversely possessed and the expected cost to legally remove the adverse possessor from that land. Furthermore, even if a true owner could discern the values necessary to make a rational decision, pure rational thought seems less likely when an adverse possessor is taking the true owner's land; the desire to protect one's property is as old as time.

true owner is likely incapable of weighing his costs. Because the true owner lacks notice, he is less likely to know that there is an adverse claimant on his property such that he can weigh his costs. Additionally, when there is a situation of mass abandonment, like in Youngstown, the true owner cannot reasonably predict what the future will hold for his neighborhood or city. Economies may resurge and neighborhoods may be rebuilt—or they may not. A true owner cannot forecast the future and thus is incapable of appropriately calculating the true value of his property, which makes him unable to determine whether removal of the adverse possessor would be wasteful.

All of these problems with possession arise when there is abandoned property, though the degree to which they arise differs. For example, if one tract of land in the middle of suburbia is abandoned, the cost of a neighbor adversely possessing that land is much less than if an entire neighborhood is abandoned on the outskirts of a city. Regardless of the varying degrees to which these problems arise, they all are present when there is abandoned real property.

B. *Private Takings*

Given the aforementioned problems, adverse possession as currently constructed does not easily serve the goal of remedying abandonment, particularly when abandonment is as prevalent as it is in many cities today. With some slight modification, however, the doctrine could be converted into a tool for private takings that would help in the fight against abandoned property.

In his work on private takings, Abraham Bell argues that “takings carried out by nongovernmental actors,” or private takings, are a necessary and preferable remedy to overcoming market problems.¹⁵⁰ Bell asserts that the use of eminent domain—the traditional government solution to abandoned property¹⁵¹—is not efficient because governments do not always act as wealth-maximizing individuals.¹⁵² Instead, Bell argues that “the government’s decisionmaking process is likely influenced by . . . the effect of that decision on the government’s budget, rather than on the public welfare as a whole.”¹⁵³ Many

150. Bell, *supra* note 29, at 519, 521.

151. *Id.* at 519; *see, e.g.*, *Berman v. Parker*, 348 U.S. 26, 33 (1954); *David Jeffrey Co. v. City of Milwaukee*, 66 N.W.2d 362, 377 (Wis. 1954).

152. Bell, *supra* note 29, at 537–38. Bell further argues that even when governments do operate as wealth maximizers, the compensation scheme for eminent domain assures the true owner will receive fair market value, but that does not necessarily equate with the true owner’s actual value of the property. *Id.*

153. *Id.* at 537.

governments' current reaction to abandoned property provides support for Bell's theory: despite the negative externalities associated with leaving property abandoned, the budgets of many cities preclude officials from exercising their power of eminent domain.¹⁵⁴

Given the difficulties sometimes found with efficiently exercising eminent domain, Bell argues that private takings should be permitted when "(1) the taker is the preferred owner of the property rights (for reasons of justice or efficiency); and (2) strategic difficulties block the efficient or just transfer of property rights in the market place."¹⁵⁵ Bell's two-part normative test allowing private takings is met when properties are abandoned. First, having *someone* occupy the property is superior to having *no one* occupy the property. Second, governments and private actors face great difficulty in transferring empty properties through traditional means.

While abandonment is a situation in which private takings may be necessary, Bell observes two flaws with generally using adverse possession as a form of private takings.¹⁵⁶ First, Bell notes that adverse possession has an "unusual" form of just compensation because the true owner receives no compensation.¹⁵⁷ The only payment owed by the adverse possessor is her time; she owes no monetary payment to the true owner.¹⁵⁸

Bell's second and greater concern is of a temporal nature. During the time of possession, "the possessor has no property rights and may be ejected at the owner's will."¹⁵⁹ It is not until after the statutory time period has passed that the adverse possessor gains anything. Thus, currently "adverse possession

154. See *supra* notes 10–12 and accompanying text.

155. Bell, *supra* note 29, at 558. Private takings are defined by Bell as "takings carried out by nongovernmental actors." *Id.* at 519.

156. *Id.* at 553–57.

157. *Id.* at 557.

158. *Id.* Bell's critique of the lack of payment is interesting as he also notes that eminent domain is inefficient because "[c]ompensation in takings law is generally made according to the property's market value, rather than its value to its current owner." *Id.* at 537. Thus, government may value the property more than the market (and ultimately pay on the market value for the property), but the government's value may be less than the true owner's value of the property such that the end outcome is not efficient. *Id.* at 538. Following Bell's argument out to its logical end, a more efficient system would require that the taker pay the owner the owner's value of the property. For adverse possession, if the true owner fails to take action to remove the adverse possessor, it is at least arguable that the true owner values the property less than the cost of removing the adverse possessor. In such a situation, the adverse possessor should pay the true owner nothing to reach an efficient outcome.

159. *Id.* at 557.

diverges from the normal course of takings: the acquirer must wait an extended period before being awarded title, and the owner of the taken property enjoys no compensation.”¹⁶⁰

C. Adverse Possession as a Private Taking

Despite Bell’s concerns, he does acknowledge that adverse possession could be refashioned into a private takings mechanism.¹⁶¹ Refashioning adverse possession as a private taking would allow individuals to acquire vacant land and put it back into commerce. Bell’s predominant concern, and the concern of others like Strahilevitz and Peñalver—that adverse possession takes too long to transfer title¹⁶²—could be addressed by shortening the time period for adverse possession in the cases where the true owner is absent. Such a solution is reflected in the recently introduced Pennsylvania legislation that seeks to lessen the temporal requirements for adverse possession in an effort to utilize the doctrine to ameliorate abandoned property.¹⁶³

Even if legislation like that in Pennsylvania successfully reduces the time period for adverse possession, the aforementioned possessory problems remain. The cost for adverse possession would still keep possible adverse possessors out of the market, the possibility for waste would remain, and the true owner would be even less likely to be alerted to the adverse possession. In order to rectify these issues, the entire concept of possession must be rethought when the true owner has turned his back on his property.

As the possessory element is a problem—and perhaps the central problem—for using adverse possession, requiring possession must be rethought. The simplest solution is to relax the possessory requirement such that the mere intent to possess would be sufficient to commence the running of the adverse possession clock. Possession sufficient to transfer title via adverse possession need not be actual or physical. Instead, the possessory requirement could be satisfied by the adverse possessor simply having the *intent* to physically and actually possess the property in question.

160. *Id.*

161. *Id.* at 556.

162. *See, e.g., id.* at 557; Strahilevitz, *supra* note 1, at 416; Peñalver, *supra* note 1, at 210; Peñalver & Katyal, *supra* note 102, at 1171.

163. *See* H.B. 1808, 2013–2014 Gen. Assemb., Reg. Sess. (Pa. 2013) (allowing for adverse possession to transfer ownership after ten years of possession); *see also Proposed Law, supra* note 27 (stating abandoned and blighted property as the reason behind H.B. 1808).

1. *Mechanics.* To discern whether an expanded notion of possession that allows the mere intent to possess without requiring actual, physical possession has merit, the mechanics of such a system must be explored. The first question to answer is what the adverse possessor must do to commence the running of the clock. The second question, then, is what the true owner must do to stop the running of the clock.

a. *Notice Required by Adverse Possessor.* Under an expanded form of possession, the adverse possessor could provide notice to the true owner of her intent to possess the property in question. That notice would be sufficient to commence the clock running for the adverse possessor to acquire title to the property. The adverse possessor would never have to take actual, physical possession; she would merely need to notify the true owner of her intent to possess. Actual possession would be replaced by notice. While some minimum level of notice is constitutionally required,¹⁶⁴ notice requirements could be established on a jurisdiction-by-jurisdiction basis, depending on the concerns plaguing that particular jurisdiction. A jurisdiction more concerned about protecting the true owner might have heightened notice requirements, while a jurisdiction more focused on ridding the community of abandoned properties might have less notice requirements.¹⁶⁵

Depending upon the level of notice desired, notice could be given in a variety of methods. If the jurisdiction had a sophisticated public records system, the adverse possessor could record her intent to possess the property and the public records system would notify the true owner of a competing, recorded claim to the property. Recording such an intent would create a system similar to England's Land Registration Act of 2002.¹⁶⁶ Under schedule 6 of the Land Registration Act, "[a] person may apply to the registrar to be registered as the proprietor of a registered estate in land if he has been in adverse possession of the estate for the period of ten years ending on the date of the application."¹⁶⁷ The English system operates as an *ex post* manner of declaring an adverse possessor the owner of land after the statutory clock has run. Such a registration system, however, could be converted into an *ex ante* system whereby the adverse

164. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983). For a discussion of the constitutional requirements for notice, see *infra* note 165.

165. See *infra* Part IV.A (discussing procedural mechanisms, including notice requirements, for curbing abuse of an expanded form of adverse possession).

166. See Land Registration Act, 2002, c. 9.

167. Land Registration Act, 2002, c. 9, § 97, sch. 6.

possessor declares her intent to possess, and that declaration commences the running of the statutory clock.¹⁶⁸ Using a recordation system works only if the recordation system has the capacity to notify the true owner. While such a sophisticated recordation system may exist in the future, it currently is not the norm throughout the United States.

Regardless of the recordation system, technology might help in providing notice. Jurisdictions could with some ease create an online clearinghouse for areas with high levels of abandoned properties. In a city like Detroit, where abandoned properties are increasing, a website might be constructed and maintained by the government that would allow individuals to register their notice of intent online.¹⁶⁹ All of the notices could be publicly available such that regardless of where the true owner was located, he could easily determine whether claims were being made on his property and respond.¹⁷⁰ Such an online registration system would overcome the notice problems that plague private parties from engaging in more traditional bilateral transactions. Instead of tracking down the physical location of the true owner, the adverse possessor could post online her intent to possess.

Jurisdictions might also require that individuals other than the true owner receive notice. If the mortgage records indicate a mortgage on the property, the adverse possessor might be required to give notice to the holder of the mortgage, too. When the true owner is behind on his mortgage such that the mortgage holder can begin foreclosure proceedings, receiving notice from a desiring adverse possessor may encourage the mortgage holder to

168. None of the methods of notice described herein create a *Mennonite* issue. Under *Mennonite*, before a proceeding can adversely affect real property, any party of interest must be given “[n]otice by mail or other means as certain to ensure actual notice” provided that the “name and address [of the party] are reasonably ascertainable.” *Mennonite*, 462 U.S. at 800. Subsequent jurisprudence has held that extraordinary efforts to discover the name and address of affected parties are not required. *Congregation Yetev Lev D'Satmar, Inc. v. Cnty. of Sullivan*, 452 N.E.2d 1207, 1212 (N.Y. 1983). Reasonable efforts include checking the tax and property records. *Id.* In the case of the absent true owner, mailing a notice of intent to the address provided in the tax and property records should be sufficient to meet *Mennonite* notice. However, the address provided will likely be the address of the property the adverse possessor intends to possess. Thus, any additional notice requirements will be above and beyond what is constitutionally required.

169. The Detroit Blight Authority is currently amid a campaign to electronically record information on all abandoned and blighted properties so that it can have the necessary data to make recommendations as to how to solve the problem of mass abandonment and blight. Davey, *Detroit Ruin*, *supra* note 5.

170. The adverse possessor could also simply provide notice to the true owner of her intent in writing by mailing the intent to the address of the abandoned property. If the true owner had changed his mailing address, the mail would eventually make it to him.

engage in those proceedings because the mortgage holder is now aware of a potential buyer.

Requiring only notice would solve the aforementioned problems for the current application of adverse possession.¹⁷¹ Starting the clock running upon the adverse possessor's declaration of her intent to possess the property would relieve the adverse possessor from exerting—and potentially wasting—her labor, as she would not have to actually, openly and notoriously, continuously, and hostilely possess the property for the requisite time period. Similarly it would decrease the cost for adversely possessing property, thereby increasing the market of adverse possessors.

Having a notice-only requirement also achieves the objectives that possession was intended to achieve, namely, placing the true owner on notice of a competing claim to the property.¹⁷² In fact, a notice-only requirement may do an even better job at achieving this objective in the context of abandoned property. Though actual, physical possession may have been the most efficient and effective means of giving the true owner notice of a competing claim during Roman times and as English common law was developing, the world has since changed. As society's mobility continues to increase in the age of globalization, true owners are less likely to live on the property—or all of the properties—they own. Providing notice to the true owner is more likely to give the true owner *actual* notice of the adverse possessor's claim than physical possession provides. It provides what Rose refers to as a “signal” of the preferences of the adverse possessor so that the true owner can adequately respond.¹⁷³

b. Response by True Owner. Once the adverse possessor signals her desires by providing notice to the true owner, the true owner must be given an opportunity to respond. To ensure fairness, the ease in the true owner's response—and particularly his response to stop the running of the adverse possession clock—must be as easy as (if not easier than) the adverse possessor's

171. See *supra* Part III.A.

172. See *supra* Part II.A.1.

173. Rose frequently discusses actions in property law as sending signals of preferences. See Carol M. Rose, *From H₂O to CO₂: Lessons of Water Rights for Carbon Trading*, 50 ARIZ. L. REV. 91, 100 (2008) (discussing how the requirements for appropriation act as signals to the outside world); Carol M. Rose, *Introduction: Property and Language, or, the Ghost of the Fifth Panel*, 18 YALE J.L. & HUMAN. (SPECIAL ISSUE) 1, 9 (2006) (discussing how signals in property law make property an “expressive enterprise”); Carol M. Rose, *The Moral Subject of Property*, 48 WM. & MARY L. REV. 1897, 1899 (2007) (discussing the signals of ownership).

ability to declare her intent to possess the property. Thus, the response the true owner must send back should be of equal or lesser dignity than the notice given by the adverse possessor. For example, if the adverse possessor must give written notice, then the true owner might have to give a written or oral response. As with the notice given by the adverse possessor, the form of the response may be determined based on a jurisdiction's competing desires to rid the community of abandoned property and protect the true owner.

The form of the true owner's response aside, substantively, the true owner has three options upon receipt of notice from the adverse possessor: (1) to inform the adverse possessor that he opposes the adverse possessor's intent to possess, (2) to inform the adverse possessor that he accepts the adverse possessor's intent to possess, or (3) to not respond.

If the first response is selected, then the adverse possessor's efforts to claim title via adverse possession to the property in question are thwarted, and they would be thwarted without the adverse possessor exerting any labor on the property, thereby avoiding the waste of the adverse possessor's labor. Similarly, the true owner would not waste his labor in taking the necessary legal actions to remove the adverse possessor.

If the second response is selected, the adverse possessor could begin actually possessing the property in question with more certainty that her labor will not ultimately be for naught. Litigation would be avoided as both parties agree the adverse possessor can have the property, thereby cutting down on the creation of waste. Moreover, a wise adverse possessor would likely enter into an agreement with the true owner regarding the property, which would result in either a donation of the property to the adverse possessor or, even more likely, the sale of the property to the adverse possessor. Allowing for a notice of intent to serve as possession in the context of abandoned properties would mean that adverse possession could serve as a tool for market discovery.¹⁷⁴

If the third response—or lack of response—is selected, then the adverse possessor begins accruing time towards taking the property via adverse possession without engaging in the physical occupation of the land and risking the possibility of her labor or improvements being wasted. Upon the running of the statute of limitations for adverse possession, the adverse possessor would gain title to the property without risking any waste. If the true owner were to bring an action against the adverse possessor, so

174. See *infra* Part III.C.2.b.

long as the requirements for notifying the true owner of the adverse possessor's intent were clearly delineated in a statute, there would be a lower likelihood of having inconsistent results.

2. *Benefits.* Expanding possession in this manner essentially creates a system based on the doctrine of adverse possession whereby the adverse possessor gives the true owner notice of the adverse possessor's intent to take the true owner's property, and if the true owner fails to respond, a private taking automatically occurs. The true owner has the option of stopping the private taking or converting the private taking into a sale, but if the true owner does nothing, in time the adverse possessor will acquire the property.

Using adverse possession in this manner removes the transfer of abandoned property out of the public sector and rules like eminent domain, and into the private sector. It is an easier transfer than the traditional bilateral transfer because it effectively operates as an offer that, unless the true owner takes action, will become accepted in a matter of time, albeit a traditionally long time.¹⁷⁵ Thus, the problems associated with bilateral transfers—the difficulties in identifying and locating the true owner¹⁷⁶—are not as prevalent with an expanded form of notice, particularly if an online registration system to provide notice is created. True owners who opt to abandon their property then bear the burden of checking the online registration system to determine if and when notice of an intent to possess is given and respond accordingly.

Such a system has the benefit of achieving the desired goals of the adverse possession without the negative consequences. Moreover, and perhaps more importantly, the expanded

175. A similar solution was proposed with regards to orphan works and copyright. The Copyright Office has proposed that if a user makes a reasonably diligent search for the holder of the copyright, and no holder emerges, the user may use the copyrighted material. Similarly, if the true owner of real property fails to take action against the adverse possessor who expresses her intent to possess the property, the adverse possessor acquires the property in question. While the orphan works proposal did not transfer ownership of the copyright, giving the user the right to use the copyrighted material achieves a similar goal. The orphan works proposal also differed from the adverse possession solution proposed herein because for orphan works, if the holder of the copyright eventually appeared, the holder may have some limited remedies including reasonable compensation. While this orphan works proposal was contemplated twice by Congress in 2006 and 2008, legislation on the topic was ultimately tabled and has not been taken up again. For a discussion of the orphan works proposal, see Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 81–84 (2007); Robert Kirk Walker, *Negotiating the Unknown: A Compulsory Licensing Solution to the Orphan Works Problem*, 35 CARDOZO L. REV. 983, 995–98 (2014).

176. See *supra* note 22 and accompanying text.

possession creates two markets that should allow for more efficient transfers of abandoned real property.

a. Traditional Benefits. Even if allowing for an expanded idea of possession cuts down on the aforementioned problems created by possession, it must also be evaluated to determine if the expanded idea of possession allows the doctrine to achieve its existing objectives.¹⁷⁷

The expanded notion of possession does nothing to alter the doctrine's ability to quiet title or extinguish stale claims. When an adverse possessor acquires property via the expanded form of adverse possession, she will be quieting title on the property. After the statutory period of time, the true owner would no longer be able to bring his claim against the adverse possessor, so stale claims would be prevented.

The expanded system would continue to discourage true owners from sleeping on their rights, and perhaps would be even more successful in this endeavor as a true owner would be incentivized to respond to the notice of the adverse possessor in order to quickly defeat her claim. The true owner would also be more likely to actually know of the adverse possessor's claim, thereby actually achieving an original goal of adverse possession, namely to put the true owner on notice of a competing claim.

The expanded form of possession also helps curb Holmes' primary concern that after a period of time of possession, the possessor "takes root" in the property.¹⁷⁸ If the expanded form of adverse possession is utilized, a rational adverse possessor will never invest in the property until she knows that the property will become hers. Thus, the adverse possessor who merely provides notice will not have laid down roots in the property until she is confident she will be able to acquire title to the property.

An expanded form of adverse possession will not only promote economic development but it will promote smarter economic development. Smart economic development is a particularly important goal when there are entire neighborhoods that are empty.

Adverse possessors would be able to acquire title without first performing acts on that property, thereby cutting down on unnecessary development and, in turn, smarter development. That the current form of adverse possession produces unnecessary development is a critique made by John

177. See *supra* Part II.C (discussion of existing objectives).

178. Holmes, *supra* note 130, at 477.

Sprankling.¹⁷⁹ Sprankling argues that adverse possession does not provide adequate constructive notice to the true owner, so adverse possessors may be possessing—and thereby developing—lands that were never intended to be developed, like wild lands.¹⁸⁰ For lands like wild lands, overdevelopment is even more problematic given that the adverse possessor of wild lands must generally perform fewer acts on the property based on the type of property it is.¹⁸¹ Sprankling's answer to this problem is to not allow adverse possession on wild lands.¹⁸²

The specific wild lands issue raised by Sprankling is unlikely to occur when there is mass abandonment; the abandoned properties are more likely to be residential properties. Regardless, Sprankling's general objection that adverse possession promotes development for the sake of development is an issue for abandoned property, and particularly for mass abandoned property. Be it neighborhoods devastated by environmental disasters or areas of a city decimated by a struggling local economy, the re-development of these abandoned properties must be smart given the scarcity of land. The push for smart growth, be it through zoning ordinances and building restrictions, is strong today.¹⁸³ Adverse possession does nothing to promote smart growth. The doctrine promotes the person who uses the property the *most*; it does not necessarily promote the person who uses the land the *best*. Fennell makes this point when she states that there is a

lack of any positive correlation between ignorance about the trespass and the social value of the trespass. There is no reason to think that people who are making *honest* mistakes are necessarily also making *efficient* mistakes. When an obviously innocent [trespasser] builds her garage over [owner]'s property line, it would be absurd to suggest that [trespasser]'s ignorance of the true location of the property line establishes that she is acting efficiently.¹⁸⁴

179. Sprankling, *supra* note 30, at 840, 858.

180. *Id.* at 858.

181. *Id.* at 827–37; *see supra* Part II.A (discussion on actual possession for rule that the type of actual possession is related to the type of land).

182. Sprankling, *supra* note 30, at 864.

183. *See generally* John M. Armentano, *Zoning and Land Use Planning*, 30 REAL EST. L.J. 77 (2001); Timothy J. Dowling, *Reflections on Urban Sprawl, Smart Growth, and the Fifth Amendment*, 148 U. PA. L. REV. 873 (2000); David Schleicher, *City Unplanning*, 122 YALE L.J. 1670 (2013) (discussing the increasing impact of zoning regulations on local land use); Bernard H. Siegan, *Smart Growth and Other Infirmities of Land Use Controls*, 38 SAN DIEGO L. REV. 693 (2001).

184. Fennell, *supra* note 101, at 1066–67.

While Fennell speaks in terms of efficiency, and equates the best use of the land as the highest social value use of the land, her point rings true in the context of wanting the best or smartest possession rewarded. Whatever the best use of a particular tract of land may be—and this is obviously a highly subjective question—adverse possession as understood today does not necessarily encourage that best use. An expanded form of possession would allow for deliberation instead of demanding action on the part of the adverse possessor, which should lead to better land use decisions.

b. Market Benefits: Market Discovery and Secondary Market Creation. Expanding possession when there are empty properties also has two market benefits. First, it allows adverse possession to serve as a tool for market discovery. Second, it creates a secondary market for vacant properties acquired via adverse possession.

The traditional doctrine of adverse possession cannot easily identify for the adverse possessor and true owner that there is the opportunity for the true owner to transfer his property to the adverse possessor for a profit because under the traditional application of the doctrine, the true owner likely is unaware of the encroachment by the adverse possessor. The true owner does not realize that there is someone else who—knowingly or unknowingly—has an interest in his land. Thus, adverse possession as currently applied does not promote market discovery. Moreover, when the adverse possessor is unknowingly possessing the property, the adverse possessor is similarly unaware that she has an interest in the true owner's land. In order for the true owner and adverse possessor to discover the market that exists between them—i.e. there is a product that one of them (the true owner) possesses and the other (the adverse possessor) desires such that the product could be profitably transferred—at least one, and preferably both, of the players must be aware of the product at issue, the product being the property being adversely possessed.

Expanding possession when there is abandoned property allows adverse possession to be a tool for market discovery because the true owner is more likely to know of the adverse possessor's desires. Once the true owner is aware of the desires of the adverse possessor, the true owner can choose to sell the property to the adverse possessor or give the property to her by simply allowing the adverse possession to occur. Regardless of the decision of the true owner, the expanded form of possession has allowed the marketplace between the true owner and

adverse possessor to be discovered, and allowed it to be discovered at a relatively low cost and without creating the potential for waste.

Expanding possession also allows for the creation of a secondary market. If an adverse possessor declares her intent to possess abandoned property, and the true owner either responds by allowing the adverse possessor to take the property or fails to respond (and thus the adverse possessor begins accruing time), the adverse possessor can sell her interest in the adversely possessed land before she acquires actual ownership of the property. The value of that interest will change depending upon when the sale occurs. The earlier in the process, and so the further from realizing the actual ownership, the price should be lower as there is more speculation in whether the true owner will insert himself and prevent the transfer of ownership. Later in the process when there is less speculation, the cost of the interest may be higher.

Depending upon who is the adverse possessor, the intent of the adverse possessor may even be to auction off the interest in the adversely possessed land. Following a period of mass abandonment, an adverse possessor might attempt to acquire multiple properties using the expanded form of possession for the sole purpose of selling off those properties. In this situation, the true owner is better off because he has the option of deciding whether to sell or give the property to the adverse possessor. The city in which the abandoned property is located is likely better off because the abandoned and blighted property is being remedied by a private party. The adverse possessor is better off because she is acquiring the property and reselling it, presumably for a profit. Without an expanded form of possession, such a secondary market would be more difficult to create as the adverse possessor would have to exert more effort in acquiring the property.¹⁸⁵

185. There may be concerns that such a secondary market is inviting adverse possessors to act like cyber squatters, in that adverse possessors would maliciously acquire abandoned properties. There are a variety of differences between cyber squatters and adverse possessors in this context. First, unlike cyber squatters, there is not necessarily a clear person who ultimately desires the abandoned property. Second, the cost of owning real property may be high depending upon the jurisdiction's level of property tax. Accordingly, adverse possessors do not have the same ability to abuse real property as cyber squatters have to abuse URLs. See Daniel Fisher, *Cybersquatters Rush to Claim Brands in the New GTLD Territories*, FORBES (Feb. 27, 2014, 10:08 AM), <http://www.forbes.com/sites/danielfisher/2014/02/27/cybersquatters-rush-to-claim-brands-in-the-new-gtld-territories/>.

IV. CRITIQUES

While expanding the possessory requirement associated with adverse possession may achieve the desired goals of the doctrine with fewer costs and greater benefits, there are understandable concerns with such a relaxed version of possession.

A. *Abuse*

1. *Abuse by Adverse Possessor.* Bell recognizes abuse as a potential concern for all private takings, noting that there must be a “likelihood of strategic barriers blocking efficient transfers,” otherwise any private takings doctrine would (or could) encourage abuse.¹⁸⁶ As stated at the outset, abandoned property poses strategic barriers to traditional transfers; it is ripe for a private taking under Bell’s analysis.

To prevent abuse, Bell asserts that “the law must clearly define the circumstances in which such takings will be permitted.”¹⁸⁷ One way to prevent abuse by the adverse possessor is in the implementation of the doctrine. When legislatures craft statutes to modify adverse possession, the legislatures could restrict the application of the relaxed possession to particular locations in the area facing high levels of abandonment, such as particular neighborhoods in Detroit or Chicago.¹⁸⁸ Or a legislature could apply the relaxed possessory requirement to properties abandoned after a certain date or event, like Hurricane Katrina. Depending upon the circumstances leading to the abandonment, a state legislature could “clearly define the circumstances” for implementation as to prevent abuse.¹⁸⁹

Legislation may also incorporate a variety of procedural aspects that help curb abuse by the adverse possessor. The ease by which a true owner is allowed to stop the adverse possessor from taking the property lessens the threat of abuse. Jurisdictions could heighten the notice requirements, thereby making it more difficult to adversely possess the property through the expanded form of possession. Written notice or actual notice could be required. Heightening the notice requirements for the adverse possessor, while maintaining

186. Bell, *supra* note 29, at 558.

187. *Id.*

188. The constitutional amendment that was rejected by Louisiana voters limited the properties available to be sold for \$100 to a particular ward in New Orleans that was devastated by Hurricane Katrina. Webster, *supra* note 14 (describing proposed amendment).

189. Bell, *supra* note 29, at 558.

weaker form requirements for the true owner to stop the adverse possession, would work to curb possible abuse. Similarly, once an adverse possessor is rejected by a true owner, a jurisdiction could prohibit the adverse possessor from trying to acquire that property again through the expanded form of possession for a certain number of years.¹⁹⁰

In proposing to shorten the time period required for adverse possession, members of the Pennsylvania legislature proposed a procedural safeguard for the true owner. Once the adverse possessor has possessed the property for ten years and filed an action to quiet title, the true owner has a one-year period to respond to the adverse possessor's action by filing an action for ejectment.¹⁹¹ If the true owner files an action for ejectment, the adverse possessor's action to quiet title is disposed of and a judgment is rendered in favor of the true owner.¹⁹² A similar safeguard could be applied to an expanded form of possession.

If the type of abuse that jurisdictions fear is who the adverse possessors will be, a variety of steps might be taken. Some jurisdictions might want to ensure the same type of community is present following the transfer of property to the adverse possessors. Such jurisdictions could geographically limit who could acquire property via the expanded form of adverse possession, for example allowing only other residents of the abandoned neighbor to acquire property in this manner.¹⁹³

Some jurisdictions may be concerned that speculative developers will adversely possess property and re-abandon the property should the development be less lucrative than originally planned. If such is a concern, jurisdictions might require that adverse possessors provide a proposal for what they intend to do with the property upon acquiring it.¹⁹⁴

190. If a jurisdiction prohibited the re-trying of taking property via adverse possession, to-be adverse possessors would have to make the initial calculation of whether to attempt to acquire property via the expanded form of possession or through the traditional method.

191. H.B. 1808, 2013–2014 Gen. Assemb., Reg. Sess. § 1(d) (Pa. 2013).

192. Pa. H.B. 1808, § 1(d)(2)(i).

193. Following Hurricane Katrina, St. Bernard Parish created the Lot Next Door Program, which allowed neighboring property owners to purchase abandoned properties. To be eligible to purchase property through the Lot Next Door Program, the purchaser's property must share a common boundary with the lot she is purchasing. See NEW ORLEANS REDEVELOPMENT AUTH., LOT NEXT DOOR 3.0 PROGRAM: POLICIES AND PROCEDURES (2014).

194. This notion is akin to Fennell's idea that adverse possession should have a "documented knowledge" requirement to ensure the adverse possessor places a higher market value on the property than the true owner. Fennell, *supra* note 101, at 1040–41.

Another similar solution that could be employed would require that when posting her intent to possess the property, an adverse possessor also post some bond in case she re-abandons the property.¹⁹⁵

A concern some jurisdictions may have is that the expanded form of possession might create monopoly landowners. To the extent this is an issue, an area might limit the number of properties that one individual could acquire through the modified form of adverse possession.¹⁹⁶

2. *Abuse by True Owner.* A potential critique on the other end of the spectrum is that the expanded form of possession provides the true owner with too much power. If the true owner has any iota of intent of returning to his property, he will simply tell the adverse possessor that she cannot take the property in question. The true owner essentially has veto power over any adverse possessor. Such authority in the hands of the true owner may lead adverse possessors to refrain from using the expanded form of possession. Desiring adverse possessors, to the extent faith is not an issue, may instead simply try to take the land using the traditional notion of the doctrine. The adverse possessor may ultimately prefer using the traditional doctrine over the expanded doctrine, but such a decision requires the adverse possessor to calculate under which version she is more likely to succeed.

When the adverse possessor opts to use the expanded form of possession, she will be taking the risk that the true owner will reject her. Giving the true owner this power is in line with our historic desire to protect true owners. When true owners have been ousted from an area due to economic or natural disasters, but desire to return, giving the true owners a veto over adverse possessors protects true owners in a manner likely desirable by society. Programs like the Road Home program which gave federal grants to individuals who left Louisiana during Hurricane Katrina for the purposes of helping them return and rebuild their homes highlight society's desires to help true owners return.¹⁹⁷ In the proposed Pennsylvania legislation, safety measures to protect the true owner have been included, namely, a one-year period for the true owner to file an action to

195. Much like the legislation in Philadelphia and Youngstown, a bond could protect the jurisdiction from any costs the jurisdiction might occur because of the abandoned property. *See supra* notes 16–17 and accompanying text.

196. The proposed Louisiana constitutional amendment allowed individuals and business to acquire only one lot at the reduced price. *See Webster, supra* note 14.

197. *See THE ROAD HOME, supra* note 21.

eject the adverse possessor after the ten-year period of adverse possession has passed.¹⁹⁸

To the extent a jurisdiction wishes to weaken some of the true owner's authority, the jurisdiction can do so procedurally. A jurisdiction might alter the time it takes for an adverse possessor to acquire ownership of property depending on whether the true owner is engaging in acts that indicate the true owner's intent to retain ownership, such as paying property taxes. For the same reason, a jurisdiction could opt to alter the type of notice required to be given to a true owner, with true owners who indicate an intent to retain ownership receiving actual notice and other true owners receiving only constructive notice.

All of these abuses, both those potentially committed by the adverse possessor and those potentially committed by the true owner, are legitimate concerns, but they are concerns that can and should be addressed on a jurisdiction-by-jurisdiction basis. The worries of New Orleans almost a decade after Hurricane Katrina are different from the concerns of Chicago following the mortgage foreclosure crisis which are different from the apprehensions of Detroit after the decline of the domestic automobile industry. An expanded form of possession can be tailored to address the particular issues of the area.

B. Redistribution

Another related critique is that using adverse possession in this manner is merely a redistribution of wealth, and particularly, a redistribution from the have-nots to the haves.¹⁹⁹ In most cases of abandonment, and particularly those cases of mass abandonment, true owners who abandon their property are individuals who fell victim to the mortgage foreclosure crisis, natural disasters, and economic recession. To the extent that the adverse possessor seeks to profit from others' loss, lessening the possessory requirements for the adverse possessor may seem unjust.

The market discovery benefits of the expanded possessory requirement help to alleviate the potential unjustness. If an adverse possessor physically possesses the true owner's property under the traditional form of the doctrine, once the statutory period has run, the adverse possessor becomes the owner of the property, and the true owner is left empty-handed. With possession expanded, there is an increased likelihood that the

198. H.B. 1808, 2013–2014 Gen. Assemb., Reg. Sess. (Pa. 2013).

199. See Thomas W. Merrill, *Rent Seeking and the Compensation Principle*, 80 NW. U. L. REV. 1561, 1569 (1986) (book review).

true owner will be put on notice of the desires of the adverse possessors.²⁰⁰ This gives rise to the aforementioned market discovery feature of the expanded form of possession. If market discovery occurs and the true owner and adverse possessor are able to enter into a bilateral transaction for the property, the true owner will receive some compensation for his property.

C. Time

Another concern of the expanded form of adverse possession is that the doctrine still takes time—and perhaps a long time—to transfer ownership, as the temporal element of adverse possession remains unaltered. One possible solution to this problem would be to tie the length of time required to the type of notice received by the true owner. Under the current application of adverse possession, jurisdictions may be hesitant to reduce the time of possession for fear of not giving the true owner proper notice. Under the expanded form of possession, jurisdictions could give true owners who receive actual notice a shorter time period to respond than true owners who receive constructive notice. Such a system would be akin to Justinian’s system of *usucapio* which altered the prescriptive period based on the presence of the true owner.²⁰¹

D. Faith

Those who support allowing for adverse possession only when the adverse possessor is in good faith may criticize the expanded form of possession because it would be used by those in bad faith.²⁰² The likely adverse possessor of abandoned property is a squatter who knows the properties are not hers; she is, by definition, in bad faith.

Regardless of whether bad faith should be allowed in the garden-variety type of adverse possession, when there is abandonment, the traditional objections to bad faith possessors have less weight. If the adverse possessor being in bad faith is a “vice,” as Merrill writes,²⁰³ it is also a vice for the true owner to leave his property behind to be taken by blight. When there are empty properties—and particularly a large number of empty properties as in the case of mass abandonment—the equities

200. See *supra* Part III.C.2.b (discussing the market discovery benefits of the expanded form of possession).

201. See J. INST. 2.6.

202. See Merrill, *supra* note 96, at 1125.

203. *Id.* at 1137.

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favor anyone, even the bad faith adverse possessor, taking the property and preventing or removing blight and putting the properties back into commerce.

E. Loss of Doctrine

Given the aforementioned concerns, it is a fair question to ask whether allowing an expanded form of possession will ultimately lead to the end of adverse possession. If true owners are given notice of adverse claims, the doctrine may die, for true owners will either sell their property to the adverse possessor or halt the process all together and deny the adverse possessor the ability to take the property. Adverse possession, as understood today, could become an unused relic of past property law.

This concern begs the question: is that not the best possible result? When the true owner rejects the adverse possessor, the adverse possessor can opt to offer to purchase the property. The true owner may or may not accept the offer, but the market has at least been discovered. Such a discovery may lead to a future sale years down the road if the true owner eventually decides he no longer wants his vacant property.

A true owner who decides to knowingly allow the adverse possession to take place is unlikely to simply give the property to the adverse possessor, but may sell the property to her. In such a case, the ultimate transfer of the property will be done via sale instead of through adverse possession. That result, though, is what the law should encourage. Adverse possession is not a favored method of procuring title.²⁰⁴ To the extent the law can guide parties into bilateral transactions, it should. Expanding possession turns adverse possession into a tool for market discovery which allows the doctrine to encourage transactions of properties that might otherwise sit vacant.

V. CONCLUSION

Abandonment of real property is a real problem. Jurisdictions have developed a wide variety of potential solutions, some solutions better than others. Expanding adverse possession is yet one more possible solution that strives to get abandoned properties back into commerce. It is certainly not the only solution, and perhaps not even the best solution. But when the number of abandoned properties is increasing at such alarming rates, any theory that could reduce empty properties and encourage transactions is worth considering.

204. *Walling v. Przybylo*, 851 N.E.2d 1167, 1170 (N.Y. 2006).

At a more fundamental level, once the imperfect application of adverse possession for abandoned property is recognized, it should be questioned as to whether there are other factual scenarios in which adverse possession, as currently understood, is problematic. Some scholars, like Sprankling, have argued as much in suggesting that particular types of property be removed from the reach of the doctrine. It remains to be seen whether there are other scenarios in which adverse possession does not operate as efficiently and should be altered.